Between the lines...

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Key Highlights

I. Supreme Court: Scope of intervention by High Courts in cases of orders passed by the National Company Law Tribunal

In the case of ***Embassy Property Developments (Private) Limited v. State of Karnataka and Others*** *(decided on December 3, 2019),* the Supreme Court of India (**"SC"**) outlined the scope of intervention by High Courts in cases of orders passed by the National Company Law Tribunal (**"NCLT"**).

A set of three appeals had been filed before the SC by a resolution applicant, a corporate debtor through the resolution professional and committee of creditors in respect of the said corporate debtor (collectively, **"Appellants"**), in order to challenge an interim order passed by the division bench of the High Court of Karnataka (**"KHC"**). The said interim order stayed the operation of a direction contained in the order of the NCLT.

Facts

A company by the name of M/s. Udhyaman Investments Private Limited (**"Financial Creditor"**), which was the twelfth respondent in the first appeal, moved an application before the NCLT, Chennai Bench in the capacity of a Financial Creditor against M/s. Tiffins Barytes Asbestos and Paints Limited (**"Corporate Debtor"**). The Corporate Debtor was also the fourth respondent in the first of these three appeals before the SC.

By an order dated March 12, 2018, the NCLT, Chennai Bench admitted the application of the Financial Creditor and ordered the commencement of the Corporate Insolvency Resolution Process (**"CIRP"**) against the Corporate Debtor. Thereafter, an Interim Resolution Professional (**"IRP"**) was appointed and a moratorium came to be imposed in terms of section 14 of the IBC (*moratorium*). At the time, the Corporate Debtor held a mining lease granted by the Government of Karnataka which was set to expire on May 25, 2018 under a particular Lease Deed (**"Lease Deed"**). Due

to violation by the Corporate Debtor of the statutory rules, and terms and conditions of the Lease Deed, a notice of premature termination of the lease was also issued to the Corporate Debtor on August 09, 2017. However, no order towards termination as aforesaid had been passed until the date of initiation of CIRP.

Thereafter, the IRP addressed a letter dated March 14, 2018 to the Chairman of the Monitoring Committee and the Director of Mines and Geology, informing these authorities of the commencement of the CIRP and seeking the benefit of deemed extension beyond March 25, 2018 (*date of expiry of Lease Deed*) and until March 31, 2020 in terms of the Mines and Minerals (Development and Regulation) Act, 1957 (**"MMDR Act"**). Receiving no response, the IRP was constrained to file a Writ Petition no. 23075 of 2019 (**"Writ Petition No. 1"**) before the KHC, wherein it was sought that the Lease Deed should be deemed to be valid until March 31, 2020. During the pendency of the Writ Petition No. 1, the Government of Karnataka passed an order dated September 26, 2018 (**"Government Order"**) rejecting the proposal for deemed extension, on the grounds of contravention of, the terms and conditions of the Lease Deed. In the aftermath of the Government Order as aforesaid, the IRP withdrew the Writ Petition No. 1 and filed Miscellaneous Application no. 632 of 2018 (**"Miscellaneous Application"**) before the NCLT, Chennai Bench, wherein it was prayed that the Government Order should be set aside and that the lease should be deemed valid until March 31, 2020. Further, it was also prayed that supplement lease deeds should be executed in relation thereto.

Thereafter, the NCLT, Chennai Bench set aside the Government Order by an order dated December 11, 2018 (**"Order 1"**) on the ground that the same was in violation of the moratorium declared in terms of section 14 of the IBC. The NCLT, Chennai Bench also directed the Government of Karnataka to execute supplement lease deeds. Aggrieved by Order 1, the Government of Karnataka moved Writ Petition no. 5002 of 2019 before the KHC (**"Writ Petition No. 2"**), whereby the KHC by an order dated March 22, 2019, set aside Order 1. The matter was thereafter remanded back to NCLT, Chennai Bench for a fresh consideration.

Before the NCLT, Chennai Bench, the Government of Karnataka filed statement of objections contending, *interalia,* that NCLT had no jurisdiction to adjudicate disputes arising out of the grant of mining leases under the MMDR Act. However, the NCLT, Chennai Bench overruled the objection of the Government of Karnataka and ordered the execution of supplemental lease deeds by order dated May 03, 2019 (**"Order 2"**). The Government of Karnataka, thereafter, filed Writ Petition no. 41029 of 2019 (**"Writ Petition No. 3"**) against Order 2, before the KHC, wherein, an Interim Order dated September, 2019 (**"Interim Order"**) was passed. The Interim Order ultimately granted a stay of operation of the direction of the NCLT, Chennai Bench. It was against this Interim Order that the resolution applicant, the IRP and the committee of creditors had filed these appeals before the SC.

Issues

1. Whether the KHC ought to interfere under Article 226/227 of the Constitution of India against an order passed by NCLT in a proceeding under the IBC, merely because an alternative remedy was available by way of an appeal to the National Company Law Appellate Tribunal (**"NCLAT"**).

2. Whether the NCLT is competent to enquire into allegations of fraud especially in the nature of the very initiation of CIRP.

Arguments

Contentions raised by the Appellants:

1. Contentions of the resolution applicant:

   An efficacious alternative remedy was available by way of filing of an appeal before the NCLAT under section 61 (*appeals and appellate authority*) of the IBC, and therefore the KHC should not have entertained the Writ Petition No. 3, against an order passed by the NCLT (Order 2). As such, the IRP was concerned with the enabling survival of a corporate debtor as a going concern, and therefore, the IRP had a right to move the NCLT for appropriate reliefs. The only way steps taken by the IRP could be set aside was by taking recourse to the provisions of IBC, that is, by approaching the NCLAT. It was also contended that the remedies provided under the IBC were all pervasive and exclusive.

   It was further contended that the KHC was obliged to switch over the hands-off mode in matters of such nature. In any case, the NCLT, Chennai Bench had already approved the resolution plan and anything done by the KHC would tinker with or destroy the resolution plan approved by the NCLT.

2. Contentions of the IRP:

   The whole object of IBC would be defeated if orders of NCLT were to be declared to become amenable to review under Article 226/227 of the Constitution of India. Moreover, the provisions of IBC were given overriding effect over all other statutes by virtue of section 238 *(provisions of the IBC to override other laws)* of the IBC. It was also notable that the Government of Karnataka in Writ Petition No. 2 had taken a stand that dispute relating to refusal to grant deemed extension of the mining lease fell squarely within the jurisdiction of the mining tribunal. After raising a plea that the rejection of the benefit of deemed extension ought to have been challenged by way of revision before the Central Government under the MMDR Act, the Government of Karnataka had agreed to go back to NCLT for raising all contentions. Therefore, it was not open to the Government of Karnataka to question the jurisdiction of the NCLT in the next round of litigation.

   Further, it was notable that the right to deemed extension of lease would come within the purview of the expression 'property' as defined in section 3(27) of the IBC, and as such, it was the duty of the IRP to preserve property of a corporate debtor. Further, the sweep of jurisdiction conferred upon NCLT under section 60(5)(c) *(NCLT shall have jurisdiction to entertain any question of priorities, law or facts under the IBC)* of the IBC, entitled the tribunal to investigate into allegations of fraud, as a result of which, the jurisdiction of the KHC does not arise. Consequently, any recognition by the SC of the jurisdiction of the KHC to interfere with the orders of the NCLT would completely derail the resolution process that was essentially bound to happen within a time frame.

3. Contentions of the committee of creditors:

There was no room for challenging the orders of the NCLT other than in the manner prescribed by the IBC. The IRP was only seeking recognition of the statutory right of deemed extension of lease conferred by the MMDR Act and therefore, the NCLT could not be said to have exercised a jurisdiction not vested in it by law, so as to enable the KHC to invoke jurisdiction under Article 226 of the Constitution of India.

Contentions raised by the Respondents:

If NCLT lacked the inherent jurisdiction in respect of a case, the exercise of jurisdiction by NCLT would certainly be amenable to the jurisdiction of the KHC under Article 226 of the Constitution of India. As such, the jurisdiction of NCLT is confined only to contractual matters inter parties. By contrast, an order passed by a quasi-judicial authority under enactments such as the MMDR Act would directly fall under the realm of public law. Therefore, the NCLT would not have power of judicial review over such orders. On the basis of the decision in ***Barnard and Others v. National Dock Labour Board and Others [1 (1953) 2 WLR 995],*** when an inferior tribunal passes an order which is a nullity, the superior court need not drive a party to the appellate forum stipulated by an act. Therefore, the Government of Karnataka did not have to resort to approaching the NCLAT.

Decision of the Supreme Court

The conflict between the lack of jurisdiction and the wrongful exercise of jurisdiction should be certainly taken into account by High Courts when Article 226 of the Constitution of India is sought to be invoked. This is important as such invocation may ultimately result in bypassing the remedy of appeal to NCLAT.

The mining lease granted to the Corporate Debtor by the Government of Karnataka was issued in accordance with the Mineral Concession Rules, 1960. Therefore, the relationship between the Corporate Debtor and the Government of Karnataka was not only contractual but also statutorily governed. Moreover, the land which formed the subject matter of the Lease Deed, belonged to the Government of Karnataka. In view of the above, it was rightly contended by the Respondent that the decision of Government of Karnataka to refuse the benefit of deemed extension of lease, was in the public law domain. In lieu of the same, the correctness of the decision of the Government of Karnataka could be called into question only in a superior court which was vested with the power of judicial review over administrative action. Clearly, NCLT being a creature of a special statute to discharge specific functions, could not be elevated to the status of a superior court having the power of judicial review over administrative action.

The SC held that the only provision that could help outline the scope of jurisdiction of the NCLT in respect of decisions taken under the MMDR Act was section 60(5) of the IBC. Section 60(5) of the IBC, was recognized to be very broad in its sweep, conferring jurisdiction upon the NCLT in respect of any question of law or fact, arising out of or in relation to insolvency resolution. However, the SC held that any decision taken by a government or statutory authority in relation to a matter which was in the realm of public law, cannot by any stretch of imagination be brought within the fold of the phrase “arising out of or in relation to the insolvency resolution”.

If NCLT has been conferred with the jurisdiction to decide all types of claims to property, of the corporate debtor, section 18(f)(vi) of the IBC would not have made the task of an interim resolution professional in taking control and custody of an asset over which the corporate debtor has ownership rights, subject to the determination of ownership by a court or other authority. Even though section 20(1) of the IBC conferred a duty upon an interim resolution professional to preserve the value of the property of a corporate debtor, the duties of an interim resolution professional are entirely different from what comprises the exact jurisdiction and powers of the NCLT.

The SC also considered section 25(2)(b) of the IBC, wherein, a resolution professional was duty bound to represent and act on behalf of a corporate debtor with third parties and exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial and arbitration proceedings. The SC held that this would mean that whenever a corporate debtor had to exercise rights in judicial, quasi-judicial proceedings, a resolution professional cannot short circuit that procedure and bring a claim before NCLT by taking advantage of the broad sweep of powers conferred upon the NCLT within section 60(5) of the IBC.

Further, whenever a corporate debtor has to exercise a right that fell outside the purview of IBC, especially in the realm of public law, no bypass can be undertaken by going to the NCLT. The SC held that in the present case, the IRP, clearly understood this legal position. This was mainly because when the Government of Karnataka refused to grant the benefit of deemed extension, the IRP moved Writ Petition No. 1 before the KHC instead of the NCLT, as he understood that such manner of right could not be enforced before the NCLT. Whence after filing of the Writ Petition No. 1, the Government of Karnataka rejected the claim of the IRP, the latter withdrew the Writ Petition No. 1. If the NCLT was not considered by the IRP in the very first instance, to be empowered to issue a declaration of deemed extension of lease, NCLT could not be considered to have power of judicial review over the Government Order.

Further, the SC held that moratorium provided for as per section 14 of the IBC would not have any impact on the right of the Government of Karnataka to refuse extension of lease. Basically, the right to not to be dispossessed under section 14 of the IBC had nothing to do with the rights conferred by a mining lease on a government land. As such, what was prohibited under section 14 of the IBC was only the right not to be dispossessed. It however, did not imply the right to have renewal of a lease. Therefore, section 14 of the IBC may not have an application in cases of rights conferred by way of a mining lease especially on a government land. Thus, NCLT did not have jurisdiction to entertain an application against the Government of Karnataka for a direction to execute supplemental lease deeds for the extension of the mining lease. Consequently, owing to the fact that the NCLT had chosen to exercise a jurisdiction not vested in it in law, the KHC was justified in entertaining the Writ Petition No. 2 on the basis that the NCLT was *coram non judice.*

The SC also analyzed the submission of the Government of Karnataka regarding the fraudulent and collusive manner in which the CIRP was initiated. The Government of Karnataka had submitted that it had chosen to challenge Order 2 before the KHC instead of the NCLAT, as the CIRP was initiated by one of the related parties to the Corporate Debtor. The SC held that it was clear from the provisions of IBC that the NCLT has jurisdiction to enquire into allegation of fraud, and as a corollary, NCLAT would also have jurisdiction. Hence, fraudulent initiation of CIRP cannot be a ground to bypass the alternative remedy of appeal provided in the IBC.

Conclusion

It was held that although NCLT would have jurisdiction to enquire into questions of fraud, the tribunal did not have jurisdiction to adjudicate upon disputes such as those arising under the MMDR Act. This distinction was especially important when the disputes revolved around decisions of statutory or quasi-judicial authorities. Such decisions could be corrected only by way of judicial review of administrative action. Hence, the KHC was justified in entertaining the Writ Petition No. 3, and therefore, it was that the decision of the KHC could not be interfered with.

VA View:

This judgment has undertaken a significant step by defining the precise scope of NCLT's jurisdiction in respect of issues pertaining to public law wherein, corporate debtors are undergoing CIRP. While holding that NCLT and NCLAT have jurisdictional powers to enquire into allegations of fraud in respect of a CIRP and that such remedy cannot be surpassed, the SC has carefully considered the implications of incorporating every issue within the fold of the expression, *"arising out of or in relation to the insolvency resolution".*

Even though the IBC, as such, confers a sweep of jurisdiction on NCLT, it does not automatically imply that every issue would fall under the purview of the NCLT. Clearly, in light of this judgment, disputes revolving around decisions of statutory or quasi-judicial authorities, can be resolved only by judicial review.

The concerned parties hereon shall have to undertake sufficient responsibility towards delineating the nature of the issue at hand, that is, if such issue fell under the realm of public law or not. This will be the first required exercise to be undertaken in order to determine the necessary route of dispute resolution.

II. Supreme Court: State legislature cannot enact law which affects the jurisdiction of the Supreme Court

On December 10, 2019, the constitutional bench of the Supreme Court (**"SC"**) in the case of ***Rajendra Diwan v. Pradeep Kumar Ranibala and Another,*** has held that section 13(2) of the Chhattisgarh Rent Control Act, 2011 (**"Act"**) is unconstitutional. The provision stipulates that an appeal directly to the SC against the order of Rent Control Tribunal, Chhattisgarh, is unconstitutional and against the legislative competence of the State of Chhattisgarh.

Facts

The present case is an appeal to the SC against the order passed by the Rent Control Authority. An application that was filed by the landlord against the tenant under section 12 of the Act. The SC expressed serious concerns about maintainability of the petition due to lack of legislative competence of the state of Chhattisgarh for providing a statutory appeal directly to the SC against the order of Rent Control Authority. As it involved a substantial question of law regarding the interpretation of the constitution, the case was referred to the constitutional bench of the SC.

Issue

Whether section 13(2) of the Act was *ultra vires* the Indian Constitution due to lack of legislative competency of the State Legislature of Chhattisgarh to enact a provision providing for appeal directly to the SC against an order of the Tribunal.

Arguments

Counsel for Rajendra Diwan (**"Appellant"**) argued that section 13(2) of the Act grants SC an appellate jurisdiction which it already had under Article 136 *(special leave to appeal by the SC)* of the Constitution. Further, Article 138(1) of the Constitution provides that the SC shall have such further jurisdiction and powers with respect to any of the matters in the union list, as Parliament may by law confer and Article 138(2) of the Constitution provides that the SC shall have such further jurisdiction and powers with respect to any matter, as Government of India and the government of any state may, by special agreement, confer, provided that Parliament by law provides for exercise of such jurisdiction and powers by the SC. It was argued that section 13(2) of the impugned Act was in consonance with Article 138 read with Article 200 of the Constitution which attempts to curtail the jurisdiction of High Courts subject to the assent of the President. It was submitted that the President acts on the aid and advice of the council of ministers which amounts to an agreement between the state government and Government of India, therefore the said provision was in compliance with Article 138(2) and Article 200 of the Constitution.

Counsel for Pradeep Kumar Ranibala and others (**"Respondent"**) on the other hand, argued that the impugned provision is unconstitutional. This is evident from the bare reading of Entry 77 (*jurisdiction, powers, etc. of the SC)* in List I *(Union List),* Entry 65 *(fees in respect of any of the matters, not including fees taken in any court)* in List II *(State List)* and Entry 46 *(jurisdiction and powers of all courts, except the SC)* of List III *(Concurrent List).* Entry 77 read with Article 146(1) *(officers, expenses, etc. of the SC)* of the Constitution confers exclusive jurisdiction to Parliament to legislate regarding jurisdiction and powers of SC only which is prohibited for state legislature as per Entry 65 in List II and 46 in List III. It was argued that neither the Governor nor the President of India has the power to confer legislative competence on a legislative body contrary to provisions of the Constitution.

The case of ***H.S Yadav v. Shakuntala Devi Parakh [(Civil Appeal No(S). 5153 of 2019],*** *(decided on October 15, 2019)* was also referred to by the Respondent, which struck down section 13(2) of the Rent Control Act as unconstitutional due to lack of legislative power of the state legislature. The SC has been established under Article 124 and its jurisdiction and powers are defined in Article 131 to Article 145 of the Constitution. There is no provision providing for direct appeal to SC from a tribunal order established by law of a state legislature.

Observations of the Supreme Court

It was observed by the SC that when the question of vires of an act is to be considered, the whole act has to be looked upon to decide whether the legislature has a competence to enact such a law. Once it is ascertained affirmatively, the power extends to all the ancillary and incidental matters which are reasonably and logically within the ambit of such area as held in the case of ***United Provisions v. Atika Begum [AIR 1941 FC 16].*** The

impugned section which provided for a direct appeal to the SC was not ancillary or incidental to the powers of State of Chhattisgarh to enact the Act. Evidently, in this instance, the State Legislature had transgressed its legislative powers.

All the entries in the Seventh Schedule have to be interpreted in the widest terms but at the same time harmonized with the other entries. Entry 18 of the State List which enables the state legislature to make laws with respect to landlord tenant relationship, collection of rents, etc. does not allow it to circumvent Entry 64 *(offences against laws)* of the State List and 46 of the Concurrent List which enable the state legislature to enact laws with respect to the jurisdiction and powers of courts, except the SC. The aforesaid entries therefore prohibited the state legislature from exercising jurisdiction in respect of the SC. Neither does Entry 18 of the State List render otiose Entry 77 of the Union List which exclusively confers law making power with respect to jurisdiction of the SC to the Parliament. Section 13(2) of the Act which provides for the direct appeal to the SC is not ancillary or incidental to the powers of State of Chhattisgarh to enact the Act.

Both the state and union derive their powers to make laws under Article 245 of the Constitution and unlike Article 245(2), where union laws made by the Parliament are saved with extraterritorial operation, there is no provision in the Constitution which saves state laws made by the state legislature for the same.

Since the Tribunal under the Act is established under Article 323B *(tribunals for other matters)* of the Constitution, the curtailing of jurisdiction of High Court except under Article 226 and 227 of the Constitution would be saved by Article 323(3)(d) *(law made under clause 1 may exclude jurisdiction of all courts except that of the SC with respect to matters falling within the jurisdiction of tribunals)* of the Constitution. However, Article 323B of the Constitution does not provide state legislature power to expand appellate jurisdiction of the SC.

The SC also analysed the scope of Article 136 of the Constitution which confers a discretionary power on the SC to intervene in appropriate cases which can be exercised in spite of other provisions in the Constitution or any other law, and the statute providing for the conclusiveness of the decision of tribunal does not bar such power of the SC. Exercising such powers, the SC settles only questions of law involving public importance and does not intervene in facts and findings by lower courts. On the contrary, an appeal is the continuation of the original proceedings in which the appellate court is obliged to re-appreciate facts and evidence on record. Section 13(2) of the Act purports to confer a right of statutory appeal to the SC on issues which may not involve serious questions of law, and is clearly beyond the legislative power of the state.

Further, presidential assent makes no effect on the legislative competence to make laws. Moreover, for an agreement between state and the union government, a special agreement is required between them through negotiations and deliberations rather than the assent of the President on the aid and advice of the council of ministers. Subsequently, the Parliament is required to enact a law enabling the SC to exercise jurisdiction pursuant to such agreement. Therefore, in the present case, the provision of special agreement of Article 138(2), as discussed aforesaid, could not apply.

Decision of the Supreme Court

The SC held that it affirms the decision of ***H.S. Yadav v. Shakuntla Devi Parikh*** and further held that section 13(2) of the Chhattisgarh Rent Control Act is ultra vires the Constitution, beyond the scope of power of the state legislature, and therefore null and void.

VA View

Although a perusal of the judgement indicates that the SC has made a rational application of the doctrine of ultra-vires, and struck down a law wherein the state has overstepped its bounds, there are certain noteworthy points that have not been taken into consideration by the SC.

The point made by the Appellant that section 13(2) of the Act does not in reality deal with the powers of the SC is a logical one. The provision only enables an appeal to the SC, and does not in any way circumscribe the wide powers it already has (and given the scope of a special leave petition, it is unlikely that the powers can be increased).

The SC also did not consider the doctrine of "pith and substance" for deciding the constitutionality of the provision and the argument of the Appellant that "rent control" falls squarely within Entry 18 of State List of the Seventh Schedule, is in sync with the doctrine. At best, the infringement upon the union's powers is incidental in nature, as even without the provision in question, the SC would have the power to entertain an appeal from the orders of the Rent Control Tribunal.

The judgement limits the direct runway granted by section 13(2) of the Act to the SC, although it will have no tangible effect on the appeals that emanate from the orders of the Rent Control tribunal, as they will end up going to the SC in the form of a special leave petition.

III. Supreme Court: Difference between inadequacy of reasons in arbitral award and unintelligible awards

The Supreme Court of India (**"SC"**) has vide its judgment dated December18, 2019 (**"Judgment"**), highlighted the difference between inadequacy of reasons in an arbitral award and unintelligible arbitral awards passed under the Arbitration and Conciliation Act, 1996 (**"Act"**).

Facts

DCM Shriram Aqua Foods Limited (**"DCM"**) had entered into a contract (**"Contract"**) with M/s. Crompton Greaves Limited (**"Respondent"**) for the construction of an aquaculture unit by the former. Pursuant to the said Contract, the Respondent, on behalf of DCM, invited tenders for carrying out certain works for construction of ponds, channels, drains and associated works (**"Project"**). M/s. Dyna Technologies Private Limited (**"Appellant"**) gave its proposal, estimate and quotation for carrying out the Contract. Thereafter, a Letter of Intent (**"LOI"**) dated July 25, 1994, was placed by the Respondent. Subsequently, pursuant to Appellant's suggestion, the Contract was

amended by way of LOI dated October 10, 1994. Thereafter, the Respondent issued a work order dated November 15, 1994, (**"Work Order"**) setting out terms and conditions for carrying out the Project. After commencement of the Project, the Respondent on January 5, 1995, instructed the employees of the Appellant to stop the work. The Appellant, thereafter, claimed compensation for premature termination of the Contract and the dispute was ultimately referred to an arbitral tribunal consisting of three arbitrators (**"Tribunal"**). The Appellant made claims on the grounds of: (1) losses due to idle charges; (2) losses due to unproductivity of the men and machineries which could not work due to hindrances; (3) loss of profit as the contract got dissolved; (4) interest on all the claims, that is, (1), (2) and (3); and costs (collectively **"Claims"**).

The sole objection herein, was with reference to claim No. (2), that is, with respect to losses due to unproductivity of the men and machineries (**"Claim"**). The Claim was accepted by the Tribunal, whereupon a sum amounting to INR 27,78,125/- with interest at the rate of 18% per annum was awarded by an award dated April 30, 1998. Aggrieved by the award, an original petition was filed by the Respondent before a single judge of the High Court of Judicature at Madras (**"HC"**), under section 34 of the Act *(application for setting aside arbitral award).* The single judge of the HC upheld the award passed by the Tribunal and observed that the Respondent was liable to reimburse the losses sustained by the Appellant. Aggrieved by the aforesaid verdict, the Respondent appealed before the division bench of the HC. The division bench, by its judgment dated April 27, 2007, partly allowed the aforesaid appeal and set aside the award of the Tribunal relating to the Claim. In doing so, the division bench was of the opinion that the award did not contain sufficient reasons and moreover, certain statements in the award did not provide for any reasons, discussions or conclusion. Upon concluding that the award was deficient due to the lack of reasoning, the division bench noted that compensation could not have been claimed by the Appellant considering the fact that the Work Order had a provision barring the Claim. The division bench also noted that the arbitral proceeding was beyond the competence of the Tribunal. Subsequently, an appeal was filed by the Appellant against the impugned judgment of the division bench, and the judgment was delivered by the SC pursuant thereto.

Issue

Whether the award passed by the Tribunal satisfied the requirements of a reasoned award in accordance with section 31 of the Act, having regard to the nature of issues falling for consideration.

Arguments

Contentions raised by the Appellant:

The Appellant, *inter alia,* contended that the Tribunal had looked into the entire material available on record and had arrived at a finding in reference to the Claim based on the case set up by the parties, taking note of section 73 of the Indian Contract Act, 1872 *(compensation for loss or damage caused by breach of contract)* and relying upon the evidence, including appraisal of the log books as approved by the Respondent. Thereafter, the division bench held that actual losses/ expenses were incurred by the Appellant. In the given circumstances, it was not open for

the division bench in appeal to reappraise and substitute its own view in contravention of the Contract pursuant to which the arbitral dispute was raised. Further, the interference made by the division bench was beyond the scope of section 37 *(appealable orders)* of the Act. It was also contended that the division bench did not hold that the evidence relied upon by the Tribunal was not proper. There was also no challenge to the same in the appeal filed by the Respondent under section 37 of the Act and in fact, only the liability factor was questioned. The Appellant further contended that the Respondents only contention before the single judge of the HC and the Tribunal was that there was no provision under the Contract for granting compensation in respect of loss incurred for unproductive use of machinery and that the Tribunal had exceeded its jurisdiction.

Contentions raised by the Respondent:

The Respondent on the other hand argued that the Claim disallowed by the division bench in the impugned judgment was basically a claim for payment of compensation or damages on account of premature termination of the Contract. It was pertinent that neither the Tribunal nor the HC had considered the terms of the said Contract in appreciating the right of the Appellant to claim compensation for damages and the corresponding liability of the Respondent to settle the Claim. In the present case, the terms of the Contract expressly prohibited any payable compensation if the said Contract were to be terminated on account of termination of the Project. It was also argued that section 34(2)(a)(iv) of the Act clearly envisaged that such an arbitral award could be set aside if the arbitral award dealt with a dispute not contemplated by or not falling within the terms of the submission to arbitration. When there was a specific exclusion/prohibition in the said Contract, it was not open for the Tribunal to travel beyond the terms of the Contract. The Respondent contended that this point had been taken note of by the division bench in its impugned judgment.

Observations of Supreme Court

At the outset, the SC made certain observations on the aspect of jurisdiction of courts under section 34 of the Act and held that section 34 of the Act limited challenges to an award only on the grounds provided under the said section or as per interpretation by various courts. Therefore, arbitral awards should not be interfered with in a casual and cavalier manner unless the perversity of an arbitral award went to the root of the matter without there being a possibility of alterative interpretation which may sustain such an arbitral award. The SC noted that courts should not interfere with an arbitral award merely because an alternative view on facts and interpretation of contract exists. Section 34 of the Act could not be equated to a normal appellate jurisdiction.

It was pertinent that the mandate under section 34 of the Act was to respect the finality of an arbitral award and the party autonomy to get their dispute adjudicated as an alternative forum under the law. The SC also made note of section 31 *(form and contents of arbitral award)* of the Act and Article 31 of the UNCITRAL Model Law on International Commercial Arbitration which elucidated the necessity of providing reasons for an arbitral award. The SC noted that India had adopted a default rule to provide for reasons in an arbitral award unless parties agreed otherwise, that is, Indian law recognized enforcement of a reasonless arbitral award if it had been so agreed by the parties.

The SC also delved into the scope of section 30 *(grounds for setting aside award)* of the Arbitration Act, 1940, that is, predecessor to the Act by referring to the case of ***Raipur Development Authority v. Chokhamal Contractors [AIR 1990 SC 1426].*** Herein, it was held by the SC that the arbitrator or umpire was under no obligation to give reasons in support of the decision reached by him unless he was required to do so under the arbitration agreement or in the deed of submission and it was open to the court to set aside the arbitral award if it found that an error of law had been committed by the arbitrator or umpire on the face of the record, on perusing such reasons. However, the ratio of this case did not find favour of the legislature and accordingly section 31(3) *(form and contents of arbitral award)* was enacted in the Act.

The SC observed that section 31(3) of the Act mandated an arbitral award, which was intelligible and adequate in its reasoning and which, in appropriate cases could be implied by the courts by a fair reading thereof and from the documents referred. However, the aforesaid section did not require an elaborate judgment to be passed by the arbitral tribunal having regard to the aspect of speedy resolution of dispute.

The SC further considered the requirements for a reasoned arbitral award and stipulated the following of the three characteristics for the same: (i) proper; (ii) intelligible; and (iii) adequate. The SC at this juncture referred to section 34(4) of the Act and noted that the legislative intent of the said section was to make an arbitral award enforceable, after giving an opportunity to an arbitral tribunal to undo curable defects attributable to absence of reasoning, or gap in reasoning or otherwise. This could assist in avoidance of a challenge under section 34 (4) of the Act. Therefore, section 34(4) of the Act could not be brushed aside and the HC could not have proceeded further to determine issue on merits.

Accordingly, the SC noted that if the challenge to an arbitral award was based on impropriety or perversity in the reasoning, then it could be challenged on the grounds provided under section 34 of the Act. If the challenge to an arbitral award was based on the ground that the same was unintelligible, the same would be equivalent of providing no reasons at all.

On the aspect of challenge relating to adequacy of reasons, the SC held that a court while exercising jurisdiction under section 34 of the Act should adjudicate the validity of such an arbitral award based on the degree of particularity of reasoning required. The court while adjudicating such an application under section 34 of the Act, must have regard towards the nature of issues falling for consideration. However, the degree of particularity could not be stated in a precise manner as the same would depend on the complexity of the issue.

The SC further noted that even if the court came to a conclusion that there were gaps in the reasoning reached by the arbitral tribunal, the court needs to have regard for the documents submitted by the parties so that arbitral awards with inadequate reasons are not set aside in a casual and cavalier manner. Therefore, the courts are required to be careful while distinguishing between inadequacy of reasons in an arbitral awards and unintelligible arbitral awards.

Whilst, the SC noted that section 34(4) of the Act could not be brushed aside, and the division bench could not have proceeded further to determine the issue on merits, remanding the present case back to the Tribunal for adjudication would not be beneficial as the present case had already taken more than twenty five years for its adjudication.

The SC finally observed that in the instant case, although the Tribunal had dealt with the claims separately under different sub-headings, the award was confusing and had jumbled the contentions, facts and reasoning, without appropriate distinction. The SC held that in spite of its independent application of mind based on the documents relied upon, it could not sustain the award in its existing form as there was a requirement of legal reasoning to supplement the conclusion of the award.

Decision of the Supreme Court

In view of the above, the SC held that the award passed by the Tribunal had been rendered without reasons. The SC held that the aspect of inadequate reasoning in the award and furthermore, basing the award on the approval of the Respondent, was not appropriate, in view of the complex issue involved. Consequently, the SC held that the award was unintelligible and could not be sustained. However, since the litigation had protracted for more than twenty five years, the SC considered it appropriate to direct the Respondent to pay a sum of INR three million to the Appellant in full and final settlement of the Claim, within a period of eight weeks, failing which the Appellant would be entitled to interest at a rate of 12% per annum until payment. The appeal was accordingly disposed of.

VA View:

The SC has, by this judgment, made noteworthy observations on the form and manner of arbitral awards. It is imperative that an arbitral award should be intelligible, reasoned and adequate, in order to avoid the myriad legal conflicts and expenditure of time for the parties to the dispute. Muddled or ambivalent arbitral awards are detrimental to the very purpose of arbitration, which is speedy resolution of disputes. While it may not be necessary for arbitral tribunals to address each and every specific argument set forth by the parties in a convoluted/complex arbitration, the arbitral tribunal not revealing the basis or reasoning for a particular ruling with respect to a major claim can be a valid ground to set aside an arbitral award.

However, the judgment also upholds the intent of the legislature under section 34 of the Act by maintaining that interference by courts in arbitral awards should be limited to the said section. Thereby, the SC also seeks to restrain courts from dismissing an arbitral award merely on the ground of inadequate reasoning.

This verdict is significant in the light of the government declaring its goals of placing India on the global map, as an international hub for speedy and unimpeded settlement of disputes by arbitration.

IV. NCLT: RP can take possession of a corporate debtor's assets which are subject matter of litigation to facilitate the corporate insolvency resolution process

The National Company Law Tribunal, Mumbai Bench (**"NCLT"**) in the case of Pravin Blaggan, in the matter of ***Goa Auto Accessories v. Suresh Saluja*** *(decided on December 12, 2019)* held that a resolution professional (**"RP"**) could take possession of a corporate debtor's assets which were subject matter of litigation, to facilitate the Corporate Insolvency Resolution Process (**"CIRP"**) under the Insolvency and Bankruptcy Code, 2016 (**"IBC"**).

Facts

The case relates to the possession of a property at the Honda Industrial Estate (**"Property"**) by one Mr. Pravin Blaggan (**"Applicant"**), which was in actuality, under the ownership of Goa Auto Accessories (**"Goa Auto"**). The NCLT had, pursuant to an application filed by Goa Auto in the capacity of a corporate applicant under section 10 of the IBC, passed an order dated December 11, 2018 ("Order 1"). Order 1 commenced the CIRP for Goa Auto. Consequently, the NCLT appointed Mr. Suresh Saluja as the IRP for the same.

Thereafter, a miscellaneous application was filed by the Applicant before the NCLT, challenging the direction of the Interim Resolution Professional (**"IRP"**) by letter dated December 21, 2018 (**"Letter"**), wherein the IRP had called upon the Applicant to hand over the possession of the property owned by Goa Auto in view of the commencement of CIRP. The Applicant was called upon to comply with the aforesaid direction with twenty-four hours of the receipt of the said Letter. By way of the Letter, the IRP had also alleged that the Applicant was in illegal occupation of the property. The division bench of the NCLT heard the miscellaneous application and passed an order directing the RP to take possession of the property from the Applicant. However, a dissenting order dismissing the miscellaneous application was passed on August 20, 2019. The matter was then referred to Honourable Suchitra Kanuparthi as the third member to resolve the difference of opinion due to the previous two orders.

Issue

Whether the NCLT could order possession of the property of Goa Auto to facilitate the CIRP and allow the RP to take possession of the same, pending adjudication of suits filed by the Goa Auto and the Applicant.

Arguments

Contentions of the Applicant:

The Applicant submitted that he had not been occupying the Property illegally, and in fact had been occupying the same as per an agreement dated January 28, 1997, which was entered into between Goa Auto and the Applicant (**"Agreement"**). Further, the Applicant submitted that he was an erstwhile employee of Goa Auto and had worked from 1982 to January 1983. Following this period, the Corporate Applicant started his own proprietary entity and carried on business from the shed, of the job work assigned by Goa Auto in respect of components of spare parts of automobiles. It was also submitted by the Applicant that he had filed a special suit for the recovery of monies

from Goa Auto. It was further contended that in view of section 18(1)(f)(vi) *(assets subject to the determination of ownership by a court or authority)* of the IBC the assets which were subject to determination of court/authority, possession of the same could not be sought for by a resolution professional pending adjudication of a suit. Resultantly, in the instant case, pending finalization of the suit in respect of the Property, the RP could not seek possession of the same. Further, the RP only had to fulfill an administrative function as he did not possess any adjudicatory powers to claim possession of the Property.

Contentions of Goa Auto:

It was argued by Goa Auto that while a resolution professional was duty bound to take control and custody of an asset of a corporate applicant, the same was subject to determination of ownership by a court/authority.Given the fact that suits were pending for finalization before the courts in Goa, the possession of the Property could not be sought for by the RP. Goa Auto also relied upon the judgment of the Bombay High Court in ***Tata Steel BSL Limited v. Varsha [2019 3 AIRBOMR 351],*** wherein it was held that merely because a CIRP had been undertaken, a dispute which was recognized as sub judice for which accommodation was made in the resolution plan could not be extinguished.

Contentions by the Resolution Professional:

The RP submitted that he had filed a reply to the miscellaneous application, wherein he had submitted that by way of the Agreement, Goa Auto had conferred upon the Applicant the right to use the Property for the purpose of setting up a welding, fabrication, milling, drilling and deburring unit in order to carry out the job work for Goa Auto. It was also submitted that certain disputes had arisen between Goa Auto and the Applicant, as the latter had breached certain conditions of the Agreement. In view of the breach, Goa Auto had called upon the Applicant to vacate the Property by notice dated August 22, 2008. In any case, as per clause 7 of the said Agreement, Goa Auto was entitled to ask the Applicant to vacate the Property within one month of such notice. Notably, Goa Auto had also filed a special suit before the Honourble Civil Court at Bicholim, Goa, seeking possession of the Property from the Applicant.

The RP also argued that since the time he was appointed as an IRP, it was his duty to take control and custody of any asset over which Goa Auto had an ownership right, including those which may or may not be in its possession. It was contended that merely because the Applicant was claiming a lien on the Property under the guise of a pending suit before a civil court, the same could not prejudice the right of the RP under the provisions of IBC. Further, no interim order had been passed in respect of such suit.

The RP further submitted that he had a right to claim possession of the Property under section 18(1)(f)(ii) *(assets that may or may not be in possession of the corporate debtor)* of the IBC and that his right to claim possession was not affected under section 18(1)(f)(vi) of IBC. Pertinently, it was pointed out that there was no dispute of ownership in respect of the Property. The bone of contention was with regard to the possession of the Property and right to use the same.

Observations of the NCLT

It was held that the NCLT alone had jurisdiction when it came to applications and proceedings by or against a corporate applicant covered by the IBC. Thus, no other forum has jurisdiction to entertain or dispose of any such applications or proceedings. If it were to be held that a civil court also had jurisdiction, the same would introduce manipulations to frustrate the resolution process.

Through a plain reading of section 60(5)(b) *(NCLT shall have jurisdiction to entertain/ dispose of any claim made by or against the corporate debtor)* of the IBC and section 60(5)(c) *(NCLT shall have jurisdiction to entertain or dispose of any question of priorities, law or facts, arising out of the insolvency resolution or liquidation proceedings)* of the IBC, it was concluded that the IBC empowered the NCLT to entertain the dispute raised in the suit. Further, section 63 *(civil court not to have jurisdiction)* of the IBC, barred the jurisdiction of the civil court in matters pertaining to the National Company Law Appellate Tribunal (**"NCLAT"**). Section 231 *(bar of jurisdiction)* of the IBC also barred the civil court from granting any injunction in respect of any action taken or in pursuance of any order passed by the adjudicating authority under the IBC. Therefore, upon a conjoint reading of the above mentioned provisions of IBC, the jurisdiction of the civil court was excluded when matters fell under the purview of the IBC. It was also noted that the IBC was a self-contained code that conferred supervisory powers on the NCLT with respect to the entire CIRP. The principles of comity would be affected if conflicting orders were passed by a civil court and the NCLT. Ultimately, such a course of action would be detrimental to the conduction of the CIRP.

It was stated that the office of the RP had become *functus officio* upon completion of his tenure, and thereafter, the RP had been appointed as a liquidator. Subsequent to the same, the RP had not taken any steps to amend his status. Subject to the directions of the adjudicating authority under section 35(1)(b)of the IBC a liquidator had the power to take into custody or control all the assets, property effects, and actionable claims of Goa Auto. The NCLT observed that similar provisions also existed under the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002. Importantly, the non-obstante clause under section 238 of the IBC, enabled the IBC to have an overriding effect over anything inconsistent in any other law or instrument.

It was observed that there were two pending suits in question: (i) one filed by Goa Auto seeking, *inter alia,* the possession of the Property and, (ii) the other, filed by the Applicant, claiming for the recovery of monies from Goa Auto. In respect of both aforesaid suits, it was observed that no restraint orders had been passed. Hence, it was held that the RP's claim for possession of the Property before the adjudicating authority in view of CIRP order could be entertained under the provisions of IBC.

In view of the moratorium, even though the suit filed by the Applicant though temporarily stayed, the suit filed for recovery of possession filed by Goa Auto was deemed to continue. Further, the NCLT noted that the RP had filed an application to liquidate Goa Auto under section 31 of the IBC as no resolution plan had been received by him.

Decision of the NCLT

Thus, in view of the overriding power under section 238 of the IBC, the NCLT directed that the RP/ liquidator be allowed to take possession of the Property from the Applicant.

VA View

The NCLT concluded by reiterating that no civil court would have the jurisdiction to entertain any suit or proceeding in a matter over which the NCLT has jurisdiction in accordance with the IBC. Further, the civil suit filed by the Applicant was only for the recovery of monies and would therefore, have a limited bearing on the suit for possession by the RP. Hence, the pendency of civil proceedings did not bar the RP from exercising his duty of taking control and custody of the assets of Goa Auto.

This judgment will go a long way in establishing the rights of an insolvency professional under the IBC, and in clarifying that possession of property that is not under the possession of a corporate debtor but which is owned by the corporate debtor could be taken back by the insolvency professional on behalf of the corporate debtor.

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