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I. Supreme Court: RBI's circular banning cryptocurrency set aside on the grounds of proportionality under Article 19(1)(g) of the Constitution of India

The Supreme Court of India in the case of ***Internet and Mobile Association of India v. Reserve Bank of India*** *(decided as per order dated March 04, 2020)* has held that the Reserve Bank of India (**"RBI"**) circular dated April 06, 2018, virtually banning cryptocurrencies and their trade in India, is violative of Article 19(1)(g) of the Constitution of India, 1950 (**"Constitution of India"**)

Facts

Cryptocurrencies and Blockchain technologies are one of the most profound and intelligible innovations of the 21st century, which in the long term have a potential to allow economies to detach themselves from governments, and herald an era of "trust-less" money. Cryptocurrencies although often seen from the myopic standpoint of Bitcoin as a currency or an alternative to money, is in reality a dyson sphere of possibilities. Take for example, Ethereum, another cryptocurrency with the highest market capital after Bitcoin, is a decentralized software platform that enables Smart Contracts and Decentralized Applications (DApps) to be built and run without any downtime, fraud, control, or interference from a third party. The applications on Ethereum are run on its platform-specific cryptographic token, ether. Essentially, the cryptocurrency Ethereum may one day allow a trader sitting in China to automatically purchase a certain amount of goods at price X, when the given price hits the limit price. What separates cryptocurrency from any other market allowing for such trade is that there is no central governing authority whatsoever, thereby eliminating the middleman.

Technology and innovation are major changes that often face opposition and ostracization from the incumbents, which in this case came in the form of RBI circulars dated April 05, 2018 and April 06, 2018 in exercise of the powers conferred by Section 35A read with Section 36(1)(a) and Section 56 of the Banking Regulation Act, 1949 and Section 45JA and 45L of the Reserve Bank of India Act, 1934 (**"RBI Act"**) and Section 10(2) read with Section 18 of the Payment and Settlement Systems Act, 2007, directing the entities regulated by RBI (i) not to deal in virtual currencies nor to provide services for facilitating any person or entity in dealing with or settling virtual currencies; and (ii) to exit the relationship with such persons or entities, if they were already providing such services to them.

The RBI took its first anti-cryptocurrency stance in the year 2013, when they issued a press release cautioning the public about the potential threats of cryptocurrency because of it lacking any authorisation from a central bank or monetary authority. Over the years, RBI and its research divisions had held via various reports that although in its nascent stage, cryptocurrency poses a major threat in terms of risk, volatility, and difficulty in tracking transactions thereby, paving the way for money laundering and illegal activities.

On February 01, 2017, RBI again issued a press release cautioning users, holders and traders of virtual currencies. This was followed by a carte blanche ban via the impugned circulars.

Issues

(i) Whether the RBI circulars dated April 05, 2018 and April 06, 2018 are within the statutory mandate of the RBI.

(ii) Whether the exercise of powers by the RBI amounts to malice and non-application of mind.

(iii) Whether the exercise of powers by the RBI amounts to colourable legislation.

(iv) Whether the RBI circulars dated April 05, 2018 and April 06, 2018 are in violation of Article 19(1)(g) of the Constitution of India.

Arguments of the Petitioner

The arguments of the Petitioner can be summarized as follows:

(i) Virtual currencies are not legal tender but tradable commodities/digital goods, not falling within the regulatory framework of the RBI Act or the Banking Regulation Act, 1949.

(ii) The powers of the RBI cannot be exercised in "public interest" to such an extent as to ban access to cryptocurrencies and exchanges.

(iii) Powers of RBI under the Payments and Settlement Systems Act, 2007 does not apply to cryptocurrency exchanges as their services do not fall within the definition of "payment system" under the said Act.

(iv) Assuming cryptocurrencies were amenable to regulation by the RBI, the circular nonetheless disproportionately impinged on the petitioners' rights.

(v) Many of the developed and developing economies of the world, multinational and international bodies and the courts of various countries have scanned crypto currencies but found nothing pernicious about them.

(vi) Not all cryptocurrencies are anonymous, and if the problem sought to be addressed is anonymity of transactions, the same could have been achieved by resorting to the least invasive option of prohibiting only anonymous cryptocurrencies.

(vii) No study was undertaken by RBI before the impugned measure was taken and hence, the impugned decisions are not even based upon knowledge or expertise.

(viii) A total prohibition, especially through a subordinate legislation such as a directive from RBI, of an activity not declared by law to be unlawful, is violative of Article 19(1)(g) of the Constitution of India.

(ix) Cryptocurrencies do not qualify as money, as they do not fulfill the four characteristics of money namely medium of exchange, unit of account, store of value and constituting a final discharge of debt and since RBI has accepted this position, they have no power to regulate it.

(x) The impugned circular is manifestly arbitrary, based on non-reasonable classification and it imposes disproportionate restrictions.

(xi) A decision to prohibit an article as res extra commercium is a matter of legislative policy and must arise out of an act of legislature and not by a notification issued by an executive authority.

Arguments of the Respondent

(I) Virtual currencies do not satisfy the criteria such as store of value, medium of payment and unit of account, required for being acknowledged as currency.

(ii) Virtual currency exchanges do not have any formal or structured mechanism for handling consumer disputes/ grievances.

(iii) Virtual currencies are capable of being used for illegal activities due to their anonymity/pseudo-anonymity.

(iv) Increased use of virtual currencies would eventually erode the monetary stability of the Indian currency and the credit system.

(v) The impugned decision is within the range of wide powers conferred upon RBI under the Banking Regulation Act, 1949, the RBI Actand the Payment and Settlement Systems Act, 2007.

(vi) The impugned decisions are not excessive, confiscatory or disproportionate in as much as RBI has given three months' time to the affected parties to sever their relationships with the banks. This is apart from the repeated cautions issued to the stakeholders by RBI through press releases from the year 2013.

(vii) RBI considered various reports and research over a period of five years thereby evidencing the application of mind.

(viii) The impugned decisions were necessitated because in the opinion of RBI, Virtual Currency (**"VC"**) transactions cannot be termed as a payment system, but only peer-to-peer transactions which do not involve a system provider under the Payments and Settlement Systems Act, 2007.

(ix) KYC norms are ineffective, as the inherent characteristic of anonymity of VCs does not get remedied.

Observations of the Court

The Supreme Court's inquiry into the validity of the circular revolved around two major questions:

(I) First, to see the role historically assigned to a central bank such as RBI, the powers and functions conferred upon and entrusted to RBI and the statutory scheme of all the three enactments, namely, Banking Regulation Act, 1949, the RBI Act and the Payment and Settlement Systems Act, 2007; and

(ii) then to investigate what these virtual currencies really are.

The role of RBI

The Supreme Court observed that as the Preamble of the RBI Act suggests, the object of constitution of RBI was threefold namely (i) regulating the issue of bank notes; (ii) keeping of reserves with a view to securing monetary stability in the country; and (iii) operating the currency and credit system of the country to its advantage.

The object of establishment of RBI is also spelt out in Section 3(1) of the RBI Act. It says that "a bank to be called the Reserve Bank of India shall be constituted for the purpose of taking over the management of the currency from the Central Government and of carrying on the business of banking in accordance with the provisions of this Act".

While examining the ambit of Section 45JA(1) of the RBI Act, the Supreme Court observed that the concerns sought to be addressed by Section 45JA(1) are: (i) public interest; (ii) financial system of the country; (iii) interests of the depositors; and (iv) interests of NBFCs.

A careful scan of the RBI Act in its entirety would show that the operation/regulation of the credit/financial system of the country to its advantage, is a thread that connects all the provisions which confer powers upon the RBI, both to determine policy and to issue directions.

Section 35A of Banking Regulation Act, 1949 empowers RBI to issue directions to banking companies. Such directions are binding on the banking companies. The directions under Section 35A may be issued (i) in public interest; (ii) in the interest of banking policy; (iii) to prevent the affairs of the banking company from being conducted in a manner prejudicial to the interests of the depositors or of the banking company itself; and (iv) to secure the proper management of the banking company.

On the issues of payment systems under the Payments and Settlement Systems Act, 2007 the Supreme Court observed that Section 17 empowers RBI to issue directions to a payment system or a system participant, which, in RBI's opinion is engaging in any act that is likely to result in systemic risk being inadequately controlled or is likely to affect the payment system, the monetary policy or the credit policy of the country.

Finding the identity of Cryptocurrencies/ VCs

It was observed that the difficulty in regulating and defining VCs was that they neither completely fit in the definition of a commodity, nor widely accepted enough to be considered a currency. The Supreme Court dwelled in depth on the origins of cryptocurrency and its purpose. According to an International Monetary Fund Report, it was observed that there are four factors which lie behind the rise of crypto currencies, they are:

(i) the development of block chain technology;

(ii) concerns about conventional money and banking, that arose out of the sub-prime mortgage crisis in 2008 and the unconventional monetary policies/quantitative easing;

(iii) privacy concerns; and

(iv) political views about the role of the Government.

The petitioner and RBI both agreed on one point, which is, VCs do not hold the status of legal tender, but RBI justified its decision of banning them on the grounds that VCs are capable of being used as a medium of exchange.

After examining the definitions given by various committees and countries all over the globe, the Supreme Court observed that there is unanimity of opinion among all the regulators and the governments of various countries that though virtual currencies have not acquired the status of a legal tender, they nevertheless constitute digital representations of value and that they are capable of functioning as: (i) a medium of exchange and/ or; (ii) a unit of account and/or; (iii) a store of value.

An important observation made by the Supreme Court on this comparative analysis was that *"It is clear from the above that the governments and money market regulators throughout the world have come to terms with the reality that virtual currencies are capable of being used as real money, but all of them have gone into the denial mode (like the proverbial cat closing its eyes and thinking that there is complete darkness) by claiming that VCs do not have the status of a legal tender, as they are not backed by a central authority. But what an article of merchandise is capable of functioning as, is different from how it is recognized in law to be. It is as much true that VCs are not recognized as legal tender, as it is true that they are capable of performing some or most of the functions of real currency."*

The Supreme Court opined that it is incorrect to state that RBI's role and power can come into play only if something has actually acquired the status of a legal tender, and that for RBI to invoke its power, something should have all the four characteristics or functions of money.

In a landmark decision of the United States District Court of New York in the case of ***United States v. Ulbricht [31F. Supp. 3d 540 (2014)],*** it was held that *"Bitcoins carry value-that is their purpose and function-and act as a medium of exchange. Bitcoins may be exchanged for legal tender, be it US dollars, euros or some other currency".*

In another decision of the same court in the case of ***United States v. Faiella [39F. Supp. 3d 544 (2014)],*** it was held that *"bitcoin clearly qualifies as money or funds under the plain meaning definitions. Bitcoin can be easily purchased in exchange for ordinary currency, acts as a denominator of value and is used to conduct financial transactions."*

Interestingly, several matters before the Commodity Futures Trading Commission held VCs to be "commodities", in relation to public administrative hearings to determine whether the defendant was engaged in violation of the provisions of Commodity Exchange Act.

In a completely different context, the Singapore International Commercial Court ruled in ***B2C2 Limited v. Quoine Pte Limited [(2019) SGHC (I) 3]*** that virtual currency can be considered as property which is capable of being held on trust.

Test of proportionality

With regards to the test of Article 19(1)(g) of the Constitution of India, the Supreme Court observed that in ***Modern Dental College and Research Centre v. State of Madhya Pradesh [(2016) 7 SCC 353)],*** four tests were laid down in respect of the test of proportionality: (i) that the measure is designated for a proper purpose; (ii) that the measures are rationally connected to the fulfillment of the purpose; (iii) that there are no alternative less invasive measures; and (iv) that there is a proper relation between the importance of achieving the aim and the importance of limiting the right.

The affected parties in this case are the VC exchanges that are unable to trade due to ban on banking services. The court heavily relied upon the European Union Parliament's view that it is not necessary to impose a total ban on cryptocurrencies/ VCs related business and the formal finance sector, and regulatory methods can be relied on.

Finally, the Supreme Court observed the following points on the grounds of proportionality:

(i) that RBI has not so far found, in the past 5 years or more, the activities of VC exchanges to have actually impacted adversely, the way the entities regulated by RBI function;

(ii) that the consistent stand taken by RBI up to and including in their reply dated September 04, 2019 is that RBI has not prohibited VCs in the country; and

(iii) that even the Inter-Ministerial Committee constituted on November 02, 2017, which initially recommended a specific legal framework including the introduction of a new law namely, Crypto-token Regulation Bill, 2018 was of the opinion that a ban might be an extreme tool and that the same objectives can be achieved through regulatory measures.

Decision of the Supreme Court

On the basis of analyzing the nature of powers conferred upon the RBI and the treatment of cryptocurrencies in various jurisdictions around the world, the Supreme Court held that if an intangible property can act under certain circumstances as money (even without faking a currency) then RBI can definitely regulate it. Hence, it is not possible to accept the contention of the petitioners that they are carrying on an activity over which RBI has no power statutorily.

The Supreme Court further went on to hold that the RBI has been correct in exercising its powers under the Payments and Settlement Systems Act, 2007 and did not find the RBI guilty of non-application of mind, as it had arrived at a “satisfaction” under Section 35A(1) of the Banking Regulation Act after years of consideration.

The expression “banking policy” is defined in Section 5(ca) to mean any policy specified by RBI: (i) in the interest of the banking system; (ii) in the interest of monetary stability; and (iii) sound economic growth. Public interest permeates all these three areas. Thus, the contention that the exercise of powers by RBI in respect of VCs is a colourable exercise of power and it is vitiated by malice in law was rejected by the Supreme Court.

The Supreme Court also rejected the contention that different VCs require different levels of regulation, as they fall under separate categories and have different levels of anonymity.

On the test of proportionality, the Supreme Court observed that although VCs are not banned till date, the functioning of VC exchanges has been crippled by the impugned circulars, especially when RBI did not find anything wrong with their functioning. Till date, no entity regulated by the RBI has faced any loss or adverse effect directly or indirectly on account of VC exchanges. The impugned circular dated April 06, 2018being the statutory direction was accordingly set aside on the grounds of proportionality.

VA View:

This judgement ushers a new era in the economic and financial domain of India. Cryptocurrencies are not a result of a science experiment gone wrong, or like the internet, was not setup for military purposes. The need for cryptocurrencies arose due to various central banking institutions and middlemen violating the trust of the masses since time immemorial.

The 2008 mortgage crisis is a stellar example of the misuse of trust reposed in the banking systems, the burden of which was borne by individuals all over the world. This crisis was also the tipping point, and fortunately the technology of our times allowed for the innovation of something so radical, without the limitations, its predecessors had in the past. Any sufficiently advanced technology is indistinguishable from magic. That is truly the case with cryptocurrencies, as the technology and its potential was not completely understood by the RBI, and like most cases in our country, banning was the easier option.

The Supreme Court although rejected most of the contentions of the petitioners, they were able to see through the conundrum of the RBI in banning exchanges but not the trade, without proof of any damage caused to institutions under the domain of the RBI.

The Supreme Court considered an exhaustive list of opinions made by committees of other jurisdictions, and held that there are various regulatory alternatives to banning, which could have been considered by the RBI.

Citizens from a number of failing economies such a Venezuela, Iran, Greece and Sudan have relied on cryptocurrencies, when traditional central banking institutions have gravely failed in their responsibilities. Many countries such as Germany and Japan have welcomed cryptocurrencies and the markets are thriving. It is pertinent to note the ironic stance taken by the Supreme Court by stating that blockchain can be severed from cryptocurrency, and the former can be legal even if the latter is banned. This statement is surprising as the biggest proof of value of blockchain technology today is Bitcoin and Ethereum, the two biggest cryptocurrencies, the latter having a much wider scope than just a medium of exchange.

The volatility argument is another one that often fails to see how our traditional markets are just as susceptible, say for example, the crash of Facebook stock prices after the Cambridge Analytica scandal surfaced and the current market scenario due to Covid-19. Surprisingly cryptocurrencies are running strong in the times of the pandemic, and are proving the antiquated notions wrong.

For the time being, the Supreme Court has taken a progressive approach and protected the market. It is pertinent to note however, that a majority of the overruling argument relies on the fact that till date no law banning cryptocurrencies has been passed, and when the government introduces such a law, the test will be a separate one altogether.

II. Impact of force majeure on commercial contracts in light of the coronavirus outbreak

The novel coronavirus (**"COVID-19"**) has, in some way or the other, affected almost the entire world's population and significantly impacted businesses globally. With Covid-19 being declared a pandemic by the World Health Organisation and its consequential effect on trade and commerce, disputes have and will arise with respect to performance and enforcement of contracts. Under the present circumstances, it would be useful to examine whether the COVID-19 pandemic can be construed as a force majeure event under extant Indian laws and thereby, be used as a defense by a non-performing party to shield it from liabilities arising out of its failure to perform or delay by it in performance of its obligations under a contract.

What is Force Majeure?

The term 'force majeure', literally translates to 'superior force' and has its origins in French civil law. It means extraordinary events, situations or circumstances beyond human control. The concept of force majeure has been defined in Black's Law Dictionary as "an event or effect that can neither be anticipated nor controlled." The 'event' may include natural disasters such as floods, drought, earthquakes as well as uncontrollable events such as war or terror attacks. However, under common law in India, the concept of force majeure is incorporated in the form of the doctrine of frustration under Section 56 of the Indian Contract Act, 1872 (**"Act"**) and contingent contracts under Section 32 of the Act.

The doctrine of frustration present in Section 56 of the Act states that a contract will be frustrated if its fundamental purpose is destroyed or if its performance is rendered impossible because of some intervening or supervening event. If this occurs, the parties to the contract will be discharged from their obligations to perform such contract. Section 32 of the Act provides for the discharge of obligations due to the impossibility of an express contingency. In other words, if the contract expressly provides that performance is contingent on the occurrence of an event, the impossibility of the occurrence of such event would lead to the contract becoming void.

Analysis of the legal position of force majeure

Force majeure comes into effect, when circumstances or events, the occurrence of which are beyond the control of the contracting parties, rendering performance of their contractual obligations impossible. However, it may be pertinent to note that under both Indian and English law, force majeure does not simply mean anything outside the control of the parties to a contract. Its meaning and applicability depend on the particular contract, and the wording used. It is contractual language intended to anticipate unforeseen events and provide for what happens on their occurrence.

Under Indian law, a force majeure clause has to be expressly provided for in contracts, to save the performing party from consequences of anything over which such party has no control. It has to be clearly mentioned in the contract and protection given to the parties will depend upon the language and interpretation of such clause. In general, a force majeure clause is divided into two major parts: the classification of what constitutes a “force majeure event” and the operative provisions which deal with the consequences if there is a force majeure event.

Most contracts today contain detailed provisions/ clauses under which events or circumstances that may be considered as a force majeure event are expressly set out, or alternatively broad categorisations of any occurrence qualifying as a force majeure event are dealt with clearly. In such instances, the occurrence of events falling within the detailed specifics or broad categorisations, would enable a party to keep from performing its obligations under the contract by invoking force majeure.

Burden of proving occurrence of force majeure event

The burden of proving the existence or occurrence of an event which falls within the categorisation of a force majeure event is on the party seeking relief from performance of its obligations under the contract. Such party will generally be required to show that: (a) it was obstructed, hindered or delayed from performing its contractual obligations as a result of the event; (b) such event/ inability to perform was beyond its control; and (c) there were no reasonable steps the party could have taken to avoid such event or consequences.

Typically, a force majeure clause would provide that the party seeking to rely on the force majeure clause must notify the other party, within a specified time frame, of the fact that the force majeure event is hindering its performance. The notice will usually be required to include detailed information about the force majeure event and its impact on the party’s ability to perform its obligations.

Duty to mitigate

The duty to prove that reasonable steps were taken to mitigate the effect of the force majeure event is on the party seeking to enforce the force majeure clause. Even in the absence of an express obligation, for the purpose of obtaining relief, the party will be required to show that it could not mitigate the effects of the force majeure event, in order to demonstrate that the force majeure event obstructed the party from performing its obligations under the contract. The standard of care required however, would vary from case tocase.

Remedies upon invoking force majeure and consequences

Primarily, what is specifically agreed between the parties to a contract is the remedy that follows in case of claim of relief under force majeure. In some cases, it may be termination of contract upon occurrence of the force majeure event while in others, the contract may be suspended till the force majeure event ceases to prevent performance of the contract. Further, some contracts may allow for only certain obligations under the contract to be suspended and not the entire contract.

Analysis of judicial precedents

The general rule to note on enforceability of force majeure is that the courts have no power to absolve a party from the performance of its part of the contract only because its performance has become onerous on account of an unforeseen change or circumstance. Both Sections 32 and 56 of the Act highlight the law on contractual impossibility in India.

In its landmark decision of ***Satyabrata v. Mugneeram [1954 SCR 310],*** the Supreme Court discussed various theories pertaining to the doctrine of frustration and held that the premise upon which the doctrine is based is that of the impossibility of performance of the contract. The Supreme Court observed that Section 56 of the Act lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties derogating from the general idea of party autonomy which is a dominant feature of contracts.

Similarly, in the matter of ***Energy Watchdog and Others v. Central Electricity Regulatory Commission and Others [2017 (4) SCALE 580],*** relating to the interpretation and application of express force majeure clauses in certain Power Purchase Agreements (**"PPA"**), the Supreme Court examined whether the appellant could take recourse to the express force majeure clauses in the PPAs upon the occurrence of an event that partly prevented or hindered the performance of obligations under the PPAs. The Supreme Court observed that force majeure clauses are to be narrowly construed, and that a mere price rise rendering the contract more expensive to perform would not constitute a 'hindrance'.

Relief in the absence of force majeure clause in contracts

Where contracts do not contain a force majeure clause, relief under Section 56 of the Act can be claimed under the 'doctrine of frustration'. Put differently, where contracts do contain a force majeure clause, relief under Section 56 of the Act cannot be claimed.

Force majeure in the light of COVID-19

In the present circumstances, parties to private contracts that have epidemics/ pandemic covered within 'force majeure' related provisions/ clauses would be able to seek suspension in performance of their obligations thereunder.

In a related context, the Ministry of Finance, Government of India, has by an Office Memorandum clarified that disruption of supply chains due to the spread of COVID-19 in China or any other country should be considered as a natural calamity and force majeure clauses in contracts entered into by/ with government departments for supply of goods and services may consequentially be invoked, wherever considered appropriate, by following due procedure.

VA View:

In the backdrop of COVID-19 and its disruptive effect on trade and commerce, it would be prudent for businesses to analyse their contracts to determine whether force majeure related provisions, where expressly provided, can be invoked (by themselves or their counter-parties) and be legally sustainable.

Further, other contractual provisions relating to material adverse change, limitation of liability, dispute resolution and termination may also be revisited to chalk out effective legal strategies in the event of litigation arising from parties seeking to suspend their contracts by invoking force majeure.

Having said that, parties cannot simply claim relief under force majeure provisions due to the COVID-19 outbreak and the consequent government lockdown. In such a scenario, one would have to prove that the discharge of obligations under such contract was not just onerous or inconvenient, but also impossible to perform. Further, in respect of contracts entered into during the continuation of COVID-19, the parties should note that a plea of suspension would not be sustainable on account of the foreseeable risk attached to such contracts, which the parties should have been well aware of at the time of its execution.

III. Delhi High Court lays down law on classification of disputes

The Delhi High Court in ***Shri Chand Construction and Apartments and others v. Tata Capital Housing Finance*** *(decided on March 04, 2020),* held that the use of words "all or certain disputes" in Section 7 (*arbitration agreement*) of the Arbitration and Conciliation Act, 1996 (**"Arbitration Act"**) permits classification of disputes but does not permit classification of claims. It was further held that once the time for filing written statement has been extended then the time for filing the application under Section 8 (*power to refer parties to arbitration where there is an arbitration agreement*) of the Arbitration Act also stands extended.

Facts

A suit was filed by Shri Chand Construction and Apartments (**"Plaintiff"**) against Tata Capital Housing Finance (**"Defendant"**). The Plaintiff had sued the Defendant for recovery of damages for loss by the Defendant of the title deeds of the immovable property of the Plaintiff deposited with the Defendant by way of equitable mortgage. The Plaintiff took a loan from the Defendant and deposited as security the title deeds of its immovable property. The agreement specified that the security (title deeds) provided must be returned by the Defendant once the loan was repaid. When the said loan was repaid, the security was not returned. Further, the loan agreement had an arbitration clause, which provided that if at any point in time the Defendant comes under the purview of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (**"SARFAESI Act"**) or Recovery of Debts due to Banks and Financial Institutions Act, 1993 (**"DRT Act"**) the arbitration clause shall "at the option of the Defendant, cease to have any effect".

After the suit was filed and the summons was issued, the Defendant, through an advocate, appeared before the Registrar and informed the Registrar that the Defendant would make an application to refer the dispute to arbitration. The Registrar granted time to the Defendant to make this application and also to file the written statement. As the written statement was not filed by the Defendant, pursuant thereto, the single judge of the Delhi High Court, by an order, closed the Defendant's right to file its written statement. This order, closing the Defendant's right to file the written statement was challenged by the Defendant in an appeal.

The court of appeal extended the time for the Defendant to file its written statement to October 11, 2019. Prior to October 11, 2019, the Defendant filed an application under Section 8 of the Arbitration Act (**"Section 8 Application"**). The Section 8 Application was for the first time listed before the single judge of the Delhi High Court on August 28, 2019, when notice was issued and directions passed to the Plaintiff and Defendant to complete the pleading relating to the Section 8 Application. The Plaintiff, argued that the Defendant was not entitled to seek a reference to the arbitration because of its conduct and on account of the fact that the Defendant preferred an appeal against the order closing the Defendant's right to file its written statement.

Issues

The following issues were examined by the Delhi High Court:

(i) Whether the Defendant had, through its own conduct, waived its right to make an application under Section 8 of the Arbitration Act; and

(ii) Whether the arbitration clause was still valid.

Arguments

The counsel for the Defendant argued that since the agreement in question provided for a dispute resolution clause, the dispute should simply be referred to arbitration.

The Plaintiff's counsel opposed this argument contending that the Defendant, by its conduct, that is, by preferring the appeal, has disentitled itself from applying under Section 8 of the Arbitration Act. The Plaintiff further contended that the Defendant, by filing an appeal against the order closing the Defendant's right to file written statement has opted to proceed with the suit and cannot by means of the Section 8 Application seek to refer the dispute between the Plaintiff and the Defendant to arbitration.

The Plaintiff's counsel further contended that the arguments made by the Defendant's counsel in the appeal proceedings before the division bench unequivocally indicated that the intention of the Defendant was to file its written statement and to proceed with the trial of suit, thereby indicating that the Defendant did not have any intention to refer the dispute between the Plaintiff and the Defendant to arbitration. The Plaintiff's counsel further informed the single judge who was adjudicating the Section 8 Application that the court of appeal (the division bench) had taken note of the Section 8 Application which was pending adjudication and despite taking note of the Section 8 Application, only directed the Defendant to file its written statement by October 11, 2019.

Observations of the Delhi High Court

While deciding the Section 8 Application the learned single judge, observed that Section 8 of the Arbitration Act requires the courts to recognise and give effect to the arbitration agreement. Section 8 of the Arbitration Act mandates a judicial authority to refer the parties to arbitration provided that, a party to the arbitration agreement makes an application to the court, no later than the date of submitting that party's first statement of defence on the substance of the dispute. In simple words, prior to the date of filing the written statement to a suit, the party requesting for the dispute to be referred to arbitration has to make the application under Section 8 of the Arbitration Act.

The Defendant had filed the Section 8 Application before the date of submitting its 'first statement' on the substance of the disputes referred to in the Suit. The single judge further observed that post the 2015 amendment to the Arbitration Act, the only test which the legislature requires is that the application under Section 8 of the Arbitration Act is to be made or a plea under Section 8 of the Arbitration Act is to be taken, prior to the date of submitting one's written statement. The Delhi High Court also inferred that once the division bench (the court of appeal) extended the time period for the Defendant to file its written statement then, the time period for filing the Section 8 Application under the Arbitration Act is also extended. In view thereof, the Delhi High Court did not find any merit in the opposition to the Section 8 Application by the Plaintiff.

With regard to the second issue, as to that is, whether, as on date when the dispute arose between the parties, was there a valid arbitration clause subsisting between the parties? While deciding this issue, the Delhi High Court, sought a confirmation from the Defendant's counsel as to whether the Defendant comes under the purview of SARFAESI Act or DRT Act. The Defendant's counsel informed the Court that at the time of executing the agreement, the Defendant did not come under the purview of the SARFAESI Act and DRT Act but subsequently it did.

The Defendant's counsel argued that, the arbitration clause will cease to have effect only in so far as the claim of the Defendant against the Plaintiff is concerned but will continue to have effect as far as the claims of the Plaintiff against the Defendant is concerned. While deciding the Section 8 Application, the Delhi High Court had to decide as to whether there can there be a valid arbitration clause providing for arbitration of claims of one of the parties and providing for the remedy of the court or any other fora for claims of the other party.

In deciding this issue, the Delhi High Court referred to Section 7 of the Arbitration Act and particular emphasis was laid on the words "all or certain disputes". The single judge was of the view that the words, "all or certain disputes" mean that the Arbitration Act permit classification of disputes but does not permit classification of claims. Hence, these words, did not allow claims of one of the parties arising in respect of a defined legal relationship to be adjudicated by arbitration and claims of the other party arising in respect of the same legal relationship to be adjudicated by any other mode. The issue of spitting up of claims and causes of action as enshrined in the provisions of the Code of Civil Procedure, 1908 would be contrary to the public policy and if it would be allowed then it would result in multiplicity of proceedings and possibility of conflicting findings.

The single judge further observed that the dispute resolution clause is contained in a Loan Agreement dated April 18, 2017 between the Plaintiff and the Defendant, wherein, the Defendant loaned monies to the Plaintiff and the Plaintiff agreed to repay. Clause 2.4 of the Loan Agreement required the Plaintiff to furnish security and further provided that upon full and final payment by the Plaintiff to the Defendant of all amounts, the Defendant shall release the security in favour of the Plaintiff. It is not in dispute that the Plaintiff have repaid all the dues of the Defendant but the Defendant has been unable to return the security deposited by the Plaintiff with the Defendant and the claim of the Plaintiff in the present suit is only for damages for not so returning the security in the form of title deeds of immovable property of the Plaintiff.

Decision of the Delhi High Court

The Delhi High Court held that the arbitration agreement was not valid due to the Defendant coming under the purview of SARFAESI Act and that the Section 8 application was not maintainable and therefore the Delhi High Court dismissed the Section 8 Application.

VA View

This is an important decision that lays down the law on a procedural issue, especially, if the time is extended for a party to file its written statement then the time to file the Section 8 application under the Arbitration Act is also simultaneously extended. However, pursuant to the 2015 amendment to the Arbitration Act, a plea can also be raised with regards to refer the parties to arbitration.

Further, the words "all or certain disputes" as referred to in Section 7 of the Arbitration Act, mean that the Arbitration Act permit classification of disputes but does not permit classification of claims. Furthermore, the issue of spitting up of claims and causes of action as enshrined in the provisions of the Code of Civil Procedure, 1908 would be contrary to the public policy of India.

IV. NCLAT: Proceedings filed in DRT will not extend the period of limitation under the IBC, 2016

The National Company Law Appellate Tribunal (**"NCLAT"**) in the case of ***Bimalkumar Manubhai Savalia v. Bank of India and Another*** *(decided as per order dated March 05, 2020)* has held that proceedings filed in the Debt Recovery Tribunal (**"DRT"**) under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (**"SARFAESI Act"**) or for recovery of debts due to banks and financial institutions will not extend the period of limitation under the Insolvency and Bankruptcy Code, 2016 (**"IBC"**).

Facts

This matter reached the NCLAT by an appeal filed by the shareholder and director (**"Appellant"**) of the corporate debtor M/s. Radheshyam Agro Products Private Limited (**"RPL"**) against an order dated September 20, 2019 (**"Impugned Order"**) passed by the Ahmedabad bench of the National Company Law Tribunal (**"NCLT"**) regarding an application moved by Bank of India (**"Respondent No. 1"**) under section 7 (*initiation of corporate insolvency resolution process by financial creditor)* of the IBC (**"Application"**). The Application had been filed on August 30, 2018 on the ground that the RPL had defaulted in repayment of a loan facility. This Application had now been admitted by the NCLT against RPL, by way of the Impugned Order.

Issue

One of the issues under consideration was whether the limitation period in respect of Application filed by Respondent No. 1 under the IBC, had been extended due to proceedings pending/ initiated in the DRT under the SARFAESI Act and debts due to banks and financial institutions.

Arguments

Contentions of the Appellant:

It was contended by the Appellant that the NCLT had not taken into consideration the objection that the Application filed was time barred.

Contentions of the Respondent:

Respondent No. 1 submitted that even though the date of default is reflected in the statutory form as November 05, 2014, the Application had been filed before the NCLT on August 30, 2018 and that such filing date was within the limitation period for reasons more detailed below. It was submitted that the Appellant had filed an application under Section 17 (*right to appeal*) of SARFAESI Act wherein, the Appellant had stated that the loan facility availed had not been repaid, which amounted to acknowledgment of debt. Further, RPL had issued a letter dated April 28, 2016 and a second letter on June 01, 2016 in pursuance of a One-time Settlement (**"OTS"**) offer. It was submitted that even though the expression 'without prejudice' was used in the letter dated April 28, 2016, the said expression was not incorporated in the second letter dated June 01, 2016. Therefore, the second letter could also be treated as an acknowledgment of debt by RPL. It was also contended that the guarantor to RPL, had paid INR 1,26,619 and INR 1,28,645 by transferring the said amounts to RPL's account on April 01, 2017, as per the terms of a guarantee deed. Such transfer of money by the guarantor could also be treated as an acknowledgment of debt for the purposes of limitation. Importantly, it was contended that the limitation period had been extended and consequently had started running from the date of the transfer of the aforesaid amounts by the guarantor to

RPL's account (April 01, 2017). Since the Application had been filed on August 30, 2018, the Respondent No. 1's case had clearly fallen within the limitation period.

Observations of NCLAT

The NCLAT referred to the judgment of the Supreme Court in ***B.K. Educational Services Private Limited v. Parag Gupta and Associates [(2019) 11 SCC 633],*** to determine if the Application filed by Respondent No. 1 was within the limitation period. The NCLAT noted that the NCLT had observed that the date of mortgage was November 18, 2010. Further, it was noted that the first OTS offer was made on April 28, 2016 for INR 12 crores. Thereafter the OTS offer was revised to INR 14.56 crores on June 01, 2016. Finally, the credits had come in from the guarantor into the loan account of Respondent No. 1 on March 31, 2017. It was noted by the NCLAT that the OTS was not accepted by Respondent No. 1 therefore, this could not be treated as an acknowledgment of debt under Section 18 (*effect of acknowledgment in writing*) of the Limitation Act, 1963 (**"Limitation Act"**). The contention of Respondent No. 1 that the second letter/ revised OTS offer had not employed the expression 'without prejudice' and therefore, the revised OTS offer should have to be treated as an acknowledgment of debt, was negated by the NCLAT.

The NCLAT reasoned that Article 19 (*effect of payment on account of debt or of interest on legacy*) of the Limitation Act would apply to suits, and not to applications filed under Sections 7and 9 (*application for initiation of corporate insolvency resolution process by operational creditor*) of IBC. Instead, Article 137 (*any other application for which no period of limitation is provided elsewhere in the third division-applications*) of the Limitation Act would apply to applications under Sections 7 and 9 of IBC, as previously held by the Supreme Court. Therefore, the argument that the limitation period would be extended and consequently, counted from April 01, 2017 was negated by NCLAT.

Further, the contention of Respondent No. 1 that the Appellant's application under Section 17 of the SARFAESI Act had admitted to non-repayment of loan facility, was to be counted as an acknowledgment of debt, for the purposes of limitation, was also rejected. The NCLAT perused the grounds of the aforesaid application, and observed that the Appellant had taken objections in the said application on technical grounds. Such technical grounds, inter alia, included non-receipt of notices as required to be served on a borrower under Section 13(2) of the SARFAESI Act. The NCLAT noted that such grounds/ objections could not be presumed to be an acknowledgment of debt by the Appellant.

Decision of NCLAT

The NCLAT referred to its judgment in ***C. Shivkumar Reddy v. Dena Bank and Another [(C.A (AT)(Insolvency) No. 407 of 2019],*** wherein it had considered the judgements of the Supreme Court in ***Jignesh Shah and Another v. Union of India and Another [(2019) SCC OnLine SC 1254], Gaurav Horgovindbhai Dave v. Asset Reconstruction Company (India) Limited and Another [C.A No. 4952 of 2019], and B.K. Educational Services Private Limited v. Parag Gupta and Associates***, where it had held that there was nothing on record to suggest that the corporate debtor or its authorized representative had accepted or acknowledged the debt within three years from default date or from the date the loan account of the corporate debtor had been declared as a 'non-performing asset'.

In the same vein, the NCLAT observed that in the present case, the Appellant or RPL had never issued any acknowledgment within three years from the date of default (November 05, 2014). Therefore, the limitation period was held as not having been extended and the Application filed by the Respondent No. 1 was held to be filed beyond the limitation period. Allowing the present appeal, the NCLAT set aside the Impugned Order, and released RPL from the corporate insolvency resolution process, including any actions of the resolution professional and committee of creditors.

NCLAT was of the view that the proceedings filed in DRT under the SARFAESI Act or for recovery of debts due to banks and financial institutions would not extend the period of limitation since such proceedings are independent. Further, as per Section 238 (*provisions of IBC to override other laws*) of the IBC, the IBC is a complete code and will have an overriding effect on other laws. Therefore, proceedings pending in the DRT, which are initiated either under the SARFAESI Act or for recovery of debts due to banks and financial institutions would not in any way extend the limitation.

VA View:

NCLAT contemplated on the applicability of the Limitation Act, as far as applications under Sections 7 and 9 of the IBC were concerned. In doing so, it held that proceedings before DRT under the SARFAESI Act or for recovery of debts due to banks and financial institutions would not extend the period of limitation under the IBC, as such proceedings were independent. Therefore, such proceedings could not be taken into consideration to extend the period of limitation under IBC.

The NCLAT also referred to the decision of the Supreme Court in ***B.K. Educational Services Private Limited v. Parag Gupta and Associates*** to reason that it was Article 137 of the Limitation Act which would apply to the applications under Sections 7 and 9 of IBC.

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