Between the lines...

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Key Highlights

I. High Court of Delhi: An injunction against contractual relations of two parties in absence of law would violate Article 19(5) of The Constitution of India

The High Court of Delhi (**"DHC"**) in the case of ***Inox Leisure Limited v. PVR Limited*** *(decided on May 18, 2020)* held that an injunction seeking interference with the contractual relations of parties, without an explicit law in place, would violate the fundamental rights under Article 19(5) of the Constitution of India (**"Constitution"**).

Facts

Inox Leisure Limited (**"Plaintiff"**) had instituted the suit against PVR Limited (**"Defendant"**) praying for a permanent injunction to restrain the Defendant from attempting to procure and/or attempting to induce a breach/termination of any agreement/ arrangement between the third parties and the Plaintiff in respect of non-functional properties of the Plaintiff across India; a permanent injunction, to restrain the Defendant from entering into any agreement or arrangement with any third party in relation to any non-functional properties across India and recovery of damages.

The Plaintiff's submission was primarily that the Defendant was inducing the third-party developer from breaching contracts already executed with the Plaintiff. It was the Plaintiff's statement that this inducement was being blatantly perpetrated by the Defendant in other locations as well. An important point to note here is that the Plaintiff and third-party developer had entered into a term sheet which had all the essential provisions governing their contractual relationship, while mandating a transaction document to be subsequently executed, although it was a mere formality.

At the time when the Plaintiff had started negotiating with respect to the property, neither the Defendant nor the developer thereof had informed the Plaintiff of any agreement already entered into by the Defendant and the Plaintiff learnt of the same from market sources much later. Immediately after the Plaintiff learnt of the agreement entered into by the developer with respect to the same property, with the Defendant, the developer who had not proceeded with the transaction since the signing of the term sheet with the Plaintiff, informed the Plaintiff that the term sheet stood automatically terminated on account of Plaintiff's failure to execute the main transaction document within the stipulated time. The security deposit of the Plaintiff was returned, and the same was accepted without demur. Thus, for the aforesaid reasons, the Plaintiff instituted a suit against the Defendant in the DHC.

Issue

Whether the present suit with the aforementioned factual matrix is maintainable in law.

Arguments

The Plaintiff submitted that the actions of the Defendant have been in the nature of interfering between the contractual relationship of the Plaintiff and the developer. Interestingly the Plaintiff stated that they along with the Defendant are probably the only two major players in the country, and the Defendant wishes to sabotage the Plaintiff's market capitalisation. It was also submitted that the Defendant is attempting to piggyback on the success of the Plaintiff, and this conduct has resulted in a grave injury to the Plaintiff.

The primary legal submissions of the Plaintiff were:

i) If all the essential terms of a contract are contained in the document which also provides for signing of a further formal agreement, it is not always that without the formal agreement being signed, the document already signed is not enforceable. (Relying on ***Kollipara Sriramulu v. T. Aswatha Narayana [AIR 1968 SC 1028])***

ii) Inducement to breach a contract is recognised as a tort. (Relying on ***Aasia Industrial Technologies Limited v. Ambience Space Sellers Limited [1997 SCC OnLine Bom 681 (DB)]; Zimmerman v. Bank of America [191 Cal. App. 2d 55])***

The primary legal submissions of the Defendant were:

I) No cause of action is stated for other properties as submitted by the Plaintiff, and thereby they do not require any consideration in the present case.

ii) Plaintiff was informed of the lapse of the term sheet upon failure to execute a transaction document, and the security deposit was consequently refunded, and the termination was not impugned. Thus, the contract has ceased to exist and the Plaintiff cannot seek a relief before this court.

iii) The term sheet signed by the Plaintiff was not binding in itself and transaction document had to be executed subsequently to make the agreement binding on the parties.

iv) The relief of injunction claimed in the suit is barred by Sections 41(e) and (j) of the Specific Relief Act, 1963.

v) Injunctive relief cannot be obtained to curtail competition and freedom in a free economy. (Relying on ***Pepsi Foods Limited v. Bharat Coca-Cola Holdings Private Limited [1999 SCC Online Del 530]).***

vi) Agreement to enter into an agreement is not enforceable. (Relying on ***Hansa V. Gandhi v. Deep Shankar Roy [(2013) 12 SCC 776])***

vii) The Plaintiff's suit requires to be dismissed due to non-joinder of a necessary party, that is, the developer. (Relying on ***Mumbai International Airport Private Limited v. Regency Convention Centre and Hotels Private Limited [(2010) 7 SCC 417])***

Observations of the Delhi High Court

Commercial damage if prayers are granted

The DHC rejected the contentions, prayers and submissions of the Plaintiff in toto. It was observed by the DHC that the suit as framed, is directed not only against the Defendant but also against others who have not been impleaded. During the hearing, it emerged that besides the Plaintiff and the Defendant, there are only one or two others carrying on same business but on a much smaller scale than the Plaintiff and the Defendant. The effect of granting injunction as sought against the Defendant, would be that the Defendant even if has entered into agreements with the developer/owner of the Amritsar and Mumbai properties, would be unable to proceed under the said agreements, leaving the developer/owner aforesaid in a lurch with respect to their properties meant for running and operating multiplex cinemas and who will have no option but to accept whatever commercial terms the Plaintiff offers. Such damage is also sought to be inflicted on the owners of other multiplex properties across India, without affording them even an opportunity to be heard.

Inappropriate reliefs sought

The DHC observed that the Plaintiff had erred in its prayers and reliefs sought. If according to the Plaintiff, it had a binding lease with the developer/owner of the properties at Amritsar and Mumbai and had not been put into possession of the property, the remedy of the Plaintiff in law was to seek to be put into possession of the property; on the contrary if according to the Plaintiff it did not have a binding agreement or a lease but only an agreement to lease, the remedy of the Plaintiff was to sue for specific performance thereof; yet further, if according to the Plaintiff, the Plaintiff only had a promise from the developer/ owner of the said properties to grant a license to the Plaintiff of the said properties and the developer/owner were in violation thereof, the remedy of the Plaintiff was to claim damages from them.

The DHC considered the candour of the Plaintiff in not raising any objection while taking the refund of the security deposit, signifying termination of the agreement with the developer.

Non-joinder of necessary party

The DHC also remarked that due to the developer not being made a party, it cannot also be determined whether it was the Plaintiff who was in breach/violation of its obligations under the agreement entered into with respect to the

said properties or it was the said developer/owner. Thus, the suit suffered from the blunder of non-joinder of necessary party as well.

Claim of tortious liability

The DHC rejected the Plaintiff's claim of tortious liability on an interesting analogy drawn from precedents. The court while relying upon ***Modicare Limited v. Gautam Bali [2019 SCC OnLine Del 1051]*** had dealt with the issue of ex-employees enticing customers and consultants. A similar argument of interference in contractual relations being a tort was raised and rejected by the DHC. The reasoning behind this is simple, it would be illogical that the law under Section 27 of the Indian Contract Act, 1872 on the one hand would disable a Plaintiff from enforcing a contract where the Defendant had voluntarily agreed not to do something, by going to the extent of declaring such contract void, but on the other hand, enable the same Plaintiff to the same relief under the law of tort.

The DHC observed further that after the coming into force of the Constitution, the restriction if any, on the fundamental right to carry on any trade or business or to practice any profession can be imposed only by making a law, that is, a law prohibiting unlawful interference in business and enticing another to commit breach of existing contractual obligations, and the constitutionality of which law if challenged would be tested on the anvil of Article 19(6) of the Constitution.

In another case of ***Emergent Genetics India Private Limited v. Shailendra Shivam [2011 SCC OnLine Del 318]***, a suit brought by the Plaintiff against its ex-employees/ex-directors for permanent injunction to restrain them from selling similar seeds as the Plaintiff was involved in breeding during the term of employment of the Defendants, and after finding the invention claimed by the Plaintiff to be not falling in the ambit of the Copyright Act, 1957 or Patents Act, 1970 or the Protection of Plant Varieties and Farmers' Rights Act, 2001, denied the injunction and held that *"the danger of enclosing as a monopoly, under the umbrella of trade secret or confidential information, what is clearly commonly shared information and resources, in the absence of a statutory regime is, that the Courts of law would at one fell stroke, not only make policy choices which would impact livelihoods of millions, but would be ordaining, unwittingly, legislation, which cannot be tested for its reasonableness".*

Applying this analogy of employment contracts to the present factual scenario, the DHC observed that the grant of injunction claimed by the Plaintiff on the premise of the actions of the Defendant comprising a tortious act of interference with contractual relations of the Plaintiff, would be in violation of the fundamental right of the Defendant, its promoters and directors to carry on trade and business, without any law having been enacted by the State in this respect in the interest of general public, within the meaning of Article 19(5) of the Constitution.

Decision of the Delhi High Court

The suit was dismissed by the DHC, and a cost of INR 5,00,000 was imposed on the Plaintiff. The reasoning for imposing the cost by the DHC was that the Plaintiff did not have a cause of action, and the remedies sought were barred in law.

VA View:

The present case as described by the DHC, was truly a case of judicial adventurism. The reliefs sought although seem reasonable in the first instance, they are in reality capable of wreaking havoc over commercial relations, specifically in those domains where there are only a few large players in the market. The suit of the Plaintiff was suffering from non-joinder of a necessary party, whose rights would have been directly affected if the reliefs were to be granted. In our view, this alone would have been a ground enough to dismiss the suit.

The DHC has cleared the air around the position of tortious liability in case of inducement of breach of contract, especially in commercial transactions. Although the position in respect of tort and employment contracts had been settled, the analogy was helpful in establishing the principle of grant of injunction in the absence of specific laws.

This judgement further remarks (as an obiter dicta) on the extent of importing principles of English law into the Indian domain, specifically when there is a law in place addressing the issues. In this case, the principles of tort from English law were not allowed to be applied in the factual context, when the law was against Article 19(5) of the Constitution. This also stands as a warning to tread carefully in applying the principles of equity, and colorable prayers cannot be sought in the garb of these principles.

II. Supreme Court: Waiver of right to object jurisdiction of arbitral tribunal after an award has been passed, upon failure to raise such objection during arbitration proceedings

The Supreme Court of India (**"SC"**) by its judgement in the matter of ***Quippo Construction Equipment Limited v. Janardan Nirman Private Limited*** *(decided on April 29, 2020)* set aside the judgement dated February 14, 2019 passed by the Calcutta High Court (**"CHC"**). The SC held that a party was deemed to have waived its right to object the jurisdiction of the arbitral tribunal at a later stage.

Facts

Janardan Nirman Private Limited (**"Respondent Company"**) was engaged in the business of infrastructure development activities and had approached Quippo Construction Equipment Limited (**"Appellant Company"**) to secure certain construction related equipment on rent for carrying out certain works at a site located at Patna, Bihar. Pursuant thereto, the aforesaid companies entered into negotiations, whereupon an agreement was entered into on August 1, 2010.

The Respondent Company, thereafter, approached the Appellant Company to secure several other equipment for its Patna site, on a rental basis. Pursuant to negotiations, the companies entered into an agreement on October 2, 2010. Agreements were also entered into between the Appellant Company and Respondent Company on March 19, 2011 and April 14, 2011 to take on rent several other equipment, to carry out works at the Respondent Company's sites located at Durgapur and Malda, West Bengal, respectively. It is pertinent that agreements dated August 1, 2010, October 2, 2010 and March 19, 2011provided the venue of arbitration proceedings to be at New Delhi. The

agreement dated April 14, 2011 provided that the arbitration was to be at Kolkata. The disputes under all agreements, however, were to be referred to arbitration as per the Construction Industry Arbitration Association (**"CIAA"**) Rules.

Thereafter, sets of construction equipment were delivered to the Respondent Company's site. As per terms and conditions of the agreements, the Respondent Company was required to make payment within seven days from the date of submission of monthly bills failing which it would be liable to pay interest for delayed period. Upon non receipt of payment, the Appellant Company by letter dated January 21, 2012, sought payment of all outstanding dues. In response to the same, the Respondent Company by letter dated February 1, 2012, accepted that every equipment hired by it was as per the terms of the agreements.

As the payments were not forthcoming even after such communication, the Appellant Company gave notice invoking arbitration by a communication dated March 3, 2012. Thereafter, a sole arbitrator was appointed for the purpose of conducting arbitration proceedings at New Delhi. A notice was dispatched to the Respondent Company whereby they were requested to reply and join the arbitration proceedings within fourteen days from the date of receipt of such notice, and/or make payment of an outstanding amount along with interest calculated at the rate of 18% per annum.

A copy of this communication was also dispatched to the CIAA. In its reply dated March 15, 2012, the Respondent Company denied existence of any agreement with the Appellant Company. Additionally, the Respondent Company filed a suit before the Court of Civil Judge, Junior Division at Sealdah (**"Trial Court"**), praying that the agreements entered into between itself and the Appellant Company be declared null and void.

The Respondent Company also sought permanent injunction restraining the Appellant Company from relying on the arbitration clauses contained in the agreements. A restraint order was passed by the Trial Court as a result of which proceedings before the arbitrator were stayed. Thereafter, an application was filed by the Appellant Company before the Trial Court under Section 5 *(extent of judicial intervention)* and Section 8 *(power to refer parties to arbitration where there is an arbitration agreement)* of the Arbitration and Conciliation Act, 1996 (**"1996 Act"**).

By an order dated May 26, 2014, the application preferred by the Appellant Company was allowed and the plaint filed by the Respondent Company was directed to be returned. Pursuant to this, the Respondent Company filed an appeal before the Court of Additional District Judge, Second Court Sealdah, challenging the aforesaid order dated May 26, 2014.

However, as no interim order had been passed by this appellate court, the arbitration proceedings were continued (This appeal later, came to be dismissed on account of non-maintainability by an order dated February 20, 2016. The Respondent Company filed revisions petition before the CHC, which was also dismissed as not being maintainable. A special leave petition was also filed by the Respondent Company before the SC in respect of the aforesaid order, however, the said petition was also dismissed on October 6, 2017).

By an ex-parte award dated March 24, 2015 (**"Award"**) the arbitrator accepted the Appellant Company's claim. The Award passed by the arbitrator covered claims in respect of all four agreements entered into between Appellant Company and Respondent Company. Pursuant to the Award being passed, the Appellant Company filed an application under Section 9 *(interim measures, etc., by court)* of the 1996 Act before the Delhi High Court. This application was later dismissed by the Delhi High Court on January 6, 2007 on the basis that no prima facie case was made out.

Meanwhile, the Respondent Company filed a petition under Section 34 of the 1996 Act before the District Judge, Alipore. The Respondent Company reiterated its case about the non-existence of any agreement and claimed, *inter alia,* that Kolkata was the venue of arbitration as per the terms of agreement dated April 14, 2011. This petition was dismissed by the District Judge, Alipore on August 13, 2018 on the point of want of jurisdiction. The Court of District Judge, Alipore noted as far as the point of jurisdiction under Section 34 applications were concerned, the jurisdiction lies where the arbitration award was passed (New Delhi in the instant case) or in the place where the seat of arbitration was agreed by the parties. The Court of District Judge, Alipore further noted the argument of the Respondent Company that as per the agreement dated April 14, 2011, the arbitration was to be conducted at Kolkata.

In response to the Respondent Company's arguments, the Appellant Company argued that there were several agreements between both companies and as far as other agreements were concerned, the place of arbitration mentioned was at New Delhi, and further, the arbitration proceedings were anyway conducted at New Delhi. This dismissal was challenged by the Respondent Company by way of filing of a revision petition before the CHC. The revision petition was dismissed on the points of non-maintainability and availability of a remedy as under Section 37 *(appealable orders)* of the 1996 Act.

Thereafter, the Respondent Company filed a petition under Section 37 of the 1996 Act before the CHC which was allowed vide a judgement dated February 14, 2019. By the said judgement, the order dated August 13, 2018 passed by the Court of District Judge, Alipore was set aside by the CHC. The CHC held that the Respondent Company's case was amenable to the jurisdiction of the Court of District Judge, Alipore.

The Appellant Company had now filed the present appeal before the SC, challenging the judgement dated February 14, 2019 passed by the CHC.

Issues

(I) Whether the Respondent Company had waived its right to raise objection on the grounds of jurisdiction after passing of the Award, on account of not raising any submissions on the point before the arbitrator.

(ii) Whether the place of arbitration would be relevant in a domestic arbitration.

Arguments

Contentions of the Appellant Company:

The Respondent Company had been denying the existence of the agreements entered into with the Appellant Company. It was only after seeing the agreements in original, that the civil courts had accepted the application preferred by the Appellant Company under Sections 5 and 8 of the 1996 Act. The decision rendered by the civil courts had even attained finality with the dismissal of the special leave petition by the SC.

Further, the Respondent Company had chosen not to participate in the arbitration proceedings and that it was only at the stage of preferring an application under Section 34 of the 1996 Act, that the Respondent Company had made a submission, regarding the venue of arbitration.

The Respondent Company had chosen not to raise an objection on the issue of jurisdiction or competence of the arbitrator to proceed with the matter pertaining to the issue of arbitration. In such scenario, the Respondent Company must be taken to have waived any objection. In any case, the arbitrator in the dispute was appointed through the CIAA, which was also the modality under the agreement which provided that Kolkata would be the venue of arbitration.

Contentions of the Respondent Company:

Every arbitration agreement had to be considered independently and if an agreement specified that the venue of arbitration was at Kolkata, party autonomy in that regard should be respected. The Respondent Company relied on the decision of SC in the case of ***Duro Felguera, S.A. v. Gangavaram Port Limited [2 (2017) 9 SCC 729],*** where there were six arbitral agreements and each one of them was subject matter of independent reference to arbitration.

Observations of the Supreme Court

The SC noted that all four agreements entered into between the Respondent Company and Appellant Company provided for arbitration and the Award rendered by the arbitrator was a common award. It was pertinent that at no stage, objections in respect of the jurisdiction were raised by the Respondent Company before the arbitrator. The Respondent Company had let the arbitration proceedings conclude and culminate in an ex-parte Award.

The point of contention was whether the Respondent Company had now waived the right to raise an objection. In the case of ***Narayan Prasad Lohia v. Nikunj Kumar Lohia and Others [3 (2002) 3 SCC 572]*** the SC had considered the amplitude and applicability of Section 4 *(waiver of right to object)* of the 1996 Act. Instead of an odd number of arbitrators, as contemplated under Section 10 *(number of arbitrators)* of the 1996 Act, the parties in this case had agreed to an even number of arbitrators. The objection in this regard, was however, not taken before the arbitrators. The SC had held that because no objections were raised regarding composition of the arbitral tribunal, as provided in Section 16 *(competence of arbitral tribunal to rule on its jurisdiction)* of the 1996 Act, it was deemed that the concerned party had waived its right of objection.

In the case of ***Duro Felguera,*** the submission that for convenience of either side, the original contract was split into five different contracts and as such there ought to be a composite reference to arbitration covering all of the contracts was not accepted. This was because ***Duro Felguera*** stood at an entirely different footing. It was a case of an international commercial arbitration, wherein all five contracts had separate arbitration clauses, and each of those agreements provided that the seat of arbitration was at Hyderabad.

The present case was that of an institutional arbitration where CIAA was empowered to and nominate the arbitrator. Notably, it was not as if there were completely different mechanisms for appointment under all four agreements. The only point of distinction was that in one of the agreements, the venue of arbitration was at Kolkata. The "place of arbitration" may have significance in the case of an international commercial arbitration, wherein the place of arbitration would determine the crucial law that would apply. In the instant case, however, the applicable substantive as well as curial law would be the same.

The Respondent Company could have raised submissions that arbitration pertaining to each of the four agreements be considered and dealt with separately. Pertinently, in respect of the agreement where the venue was agreed to be at Kolkata, the Respondent Company could have prayed that the arbitration proceeding be conducted accordingly.

Decision of the Supreme Court

Owing to the fact that the Respondent Company had failed to participate in the arbitration proceedings and had not raised any submission that either the arbitrator did not have jurisdiction or that he had exceeded the scope of authority, the Respondent Company must be deemed to have waived all such objections. Therefore, the Respondent Company was now precluded from raising any objection on the point of the venue of arbitration.

The conclusion, therefore, raised by the Court of District Judge, Alipore was quite correct. The CHC was in error in setting aside the order. Allowing this appeal, SC aside the judgement passed by the CHC and restored the order passed by the Court of District Judge, Alipore.

VA View:

The parties involved in arbitration ought to raise their objections before the arbitral tribunal and cannot raise such objections after passing of the award. The importance of minimalizing interference by the courts in respect of arbitral awards including on the point of jurisdiction is very reflective in this judgement.

The parties in question would not be entertained by courts at a later stage to raise objections, which they had clearly not raised at the time of conduction of arbitration proceedings. Therefore, it is important that parties recognize the essential requirement to raise contentions at an appropriate time.

Further, the SC has clarified the relevance of the place of arbitration in a domestic arbitration. Unlike in the case of an international commercial arbitration, the place of arbitration would not be of relevance in a domestic arbitration as in a domestic arbitration, both substantive and curial law would be the same.

III. High Court of Delhi: Doctrine of frustration under Section 56 of the Indian Contract Act, 1872 is not applicable to lease agreements.

The High Court of Delhi (**"DHC"**) has, by its judgement dated May 21, 2020 (**"Judgement"**), held thatthe doctrine of frustration under Section 56 of the Indian Contract Act, 1872 ("ICA") is inapplicable to lease agreements as it can be applied to only "executory contracts" and not "executed contracts".

Facts

Brief facts of the case are that Ramanand and others (**"Appellants"**) ran a shoe store called 'Baluja' in Khan Market, Delhi, in the tenanted premises leased to them by the landlord, Dr. Girish Soni, through a lease deed executed on February 1, 1975 for a monthly rent ofINR300. In the year 2008, Dr. Girish Soni and another (**"Respondents"**) filed an eviction petition against the Appellants under Section 14(1)(e) of the Delhi Rent Control Act, 1958 (**"DRC Act"**). Initially, leave to defend was granted to the Appellants by the Senior Civil Judge-cum-Rent Controller (**"RC"**) on March 31, 2012. However, by the impugned order dated March 18, 2017, a decree for eviction was passed. The Appellants filed an appeal against the impugned order which was dismissed by the Rent Control Tribunal (**"RCT"**) by an order dated September 18, 2017 on the ground that the same is not maintainable. Hence, the present petition, challenging the eviction order dated March 18,2017, was filed before the DHC.

The petition was first listed before the DHC on September 25, 2017, on which date the single judge had stayed the order of eviction subject to the Appellants paying the Respondents a sum of INR3.5 lakhs per month in advance for each month by the 10th day of the English calendar, with effect from the month of October, 2017.

Following the outbreak of COVID-19, an application for suspension of rent was moved by the Appellants before the DHC, during the lockdown period. The Appellants stand was that due to the lockdown, there has been complete disruption of all business activities, including the business of the Appellants. It was pleaded that the circumstances were force majeure and beyond the control of the Appellants. Thus, it was claimed that the Appellants were entitled to waiver of the monthly payment directed by DHC's order dated September 25, 2017, or at least some partial relief in terms of suspension, postponement or part-payment of the said amount.

Issues

(i) Whether Section 32 of the Indian Contract Act, 1872(**"ICA"**) is applicable to the matter.

(ii) Whether Section 56 of ICA is applicable only to "executory contracts" and not to "executed contracts".

(iii) Whether temporary non-use of the premises would render the lease void.

Arguments

Contentions raised by the Appellants:

The Appellants, *inter alia,* contended that the present application was made by way of abundant caution as the DHC had by its interim order dated September 25, 2017, directed that any default in payment would lead to execution of the eviction decree passed by the RC. The Appellants were however willing to make part payment of

the monthly rent. Alternatively, it was the Appellants prayer that the rent be suspended for at least one month. The Appellants further submitted that since there had been no business during the lockdown period, they should be entitled to some form of remission. They emphasised that some rebate should be given only for the period of the lockdown and that otherwise the Appellants were willing to regularly make the monthly payments.

Contentions raised by the Respondents:

The Respondents contended that the Appellants had been enjoying the tenanted premises since 1975 for a paltry sum of INR 300 per month. The Appellants were well off business people who had also purchased a neighbouring shop in Khan Market, Delhi. It was also contended that the amount of INR 3.5 lakhs per month fixed by the DHC was a very meagre amount compared to the prevalent market rate and that the tenanted premises would earn much more than the amount fixed by the DHC.

It was further submitted that *force majeure* does not apply in the present instance as the case falls under the DRC Act. Also, the Respondent needed the place for his own bona fide use as he was a dentist. The Respondents contended further that mere disruption of the business could not exempt the Appellants from making the monthly payments as the Respondents also depended on the income from the tenanted premises.

Observations of the Delhi High Court

The DHC observed that, the relationship between a landlord and tenant can be in multifarious forms. These relations are primarily governed either by contracts or by law. Where there is a contract, whether there is a force majeure clause or any other condition that could permit waiver or suspension of the agreed monthly payment, would be governed by the contractual terms. If, however, there is no contract at all or if there is no specific force majeure clause, then the issues would have to be determined on the basis of the applicable law. In circumstances such as the occurrence of a pandemic, like the current COVID-19 outbreak, the grounds on which the tenants/ lessees or other similarly situated parties could seek waiver or non-payment of the monthly amounts, under contracts which have a force majeure clause would be governed by Section 32 of the ICA.

In passing its judgement, the DHC relied on the judgement of the Supreme Court in the matter of ***Energy Watchdog v. CERC and Others [(2017) 14 SCC 80],*** where it was clearly held that in case the contract itself contains an express or implied term relating to a force majeure condition, the same shall be governed by Section 32 of the ICA. Section 56 of the ICA, which deals with impossibility of performance, would apply in cases where a force majeure event occurs outside the contract. The fundamental principle would be that if the contract contains a clause providing for some sort of waiver or suspension of rent, only then the tenant could claim the same. The force majeure clause in the contract could also be a contingency under Section 32 which may allow the tenant to claim that the contract has become void and surrender the premises. However, if the tenant wishes to retain the premises and there is no clause giving any respite to the tenant, then the rent or the monthly charges would be payable.

The DHC observed that in the absence of a contract or a contractual term which is a *force majeure* clause or a remission clause, the tenant may attempt to invoke the Doctrine of Frustration of contract or 'impossibility of

performance', which however, would not be applicable in the present case in view of the settled legal position provided by the Supreme Court in the case of ***Raja Dhruv Dev Chand v. Raja Harmohinder Singh and Another [AIR 1968 SC 1024],*** where it was held that Section 56 of the ICA does not apply to lease agreements. The Supreme Court drew a distinction between a'completed conveyance' and an 'executory contract' and observed that *"There is a clear distinction between a completed conveyance and an executory contract, and events which discharge a contract do not invalidate a concluded transfer. By its express terms Section 56 of the ICA does not apply to cases in which there is a completed transfer."* The aforesaid judgement laid down unequivocally that a lease is a completed conveyance though it involves monthly payment and hence, Section 56 of the ICA cannot be invoked to claim waiver, suspension or exemption from payment of rent.

The DHC further observed that in the absence of contracts or contractual stipulations, the provisions of the Transfer of Property Act, 1882 (**"TPA"**) would govern tenancies and leases. The doctrine of *force majeure* is recognised in Section 108(B)(e) of the TPA. The same would be applicable only in absence of contractual stipulations and on occurrence of specific circumstances like fire, flood and other similar incidents which would render the property 'substantially and permanently unfit' for the purpose for which it was leased and at the option of the lessee the lease would be then void.

In the judgement of ***Raja Dhruv Dev Chand v. Raja Harmohinder Singh and Another [AIR 1968 SC 1024],*** the Supreme Court observed that *"Where the property leased is not destroyed or substantially and permanently unfit, the lessee cannot avoid the lease because he does not or is unable to use the land for purposes for which it is let to him."* Thus, for a lessee to seek protection under sub-section 108(B)(e) of TPA, there has to be complete destruction of the property, which is permanent in nature due to the force majeure event. Until and unless there is a complete destruction of the property, Section 108(B)(e) of the TPA cannot be invoked. In view of the above settled legal position, temporary non-use of premises due to the lockdown which was announced due to the COVID-19 outbreak cannot be construed as rendering the lease void under Section 108(B)(e) of the TPA. The tenant cannot also avoid payment of rent in view of Section 108(B)(l) of the TPA.

The DHC also observed that in the absence of a contract or a contractual stipulation, as in the present case, the Appellants may generally seek suspension of rent by invoking the equitable jurisdiction of the court due to temporary non-use of the premises. The question as to whether the suspension of rent ought to be granted or not would depend upon the facts and circumstances of each case. In relation to some contracts which are not classic tenancy or lease agreements, where the premises is occupied and a monthly pre-determined amount is paid purely as 'Rent' or 'Lease amount', the manner in which pandemics, such as COVID–19, can play out would depend upon the nature of the contract. In contracts where there is a profit-sharing arrangement or an arrangement for monthly payment on the basis of sales turnover, the tenant/lessee may be entitled to seek waiver/suspension, strictly in terms of the clause. Such cases would purely be governed by the terms of the contract itself, and the tenant's claim could be that there were no sales and no profits and thus the monthly payment is not liable to be made. Therefore, the entitlement of the client in such a situation is not governed by any overriding force majeure event but by the consequence of the said event, being that there were no sales or profits.

The DHC further observed that the Ministry of Home Affairs, Government of India may have from time to time given protection to some classes of tenants such as migrants, labourers, students, etc. however, without going into the legality and validity of such executive orders, the DHC stated that the present case is not covered by any of such executive orders.

Decision of the Delhi High Court

In disposing off the appeal, the DHC held the view that there is no rent agreement or lease deed between the parties and hence Section 32 of the ICA has no applicability. The case is governed by the provisions of the DRC. Further, Section 56 of the ICA does not apply to tenancies. The Appellants do not urge that the tenancy is void under Section 180(B)(e) of the TPA. The Appellants are also not 'Lessees' as an eviction decree has already been passed against them. Therefore, the Appellants' application for suspension of rent is thus liable to be rejected inasmuch as while invoking the doctrine of suspension of rent on the basis of a force majeure event, it being clear from the submissions made that the Appellants do not intend to surrender the tenanted premises. While holding that suspension of rent is not permissible in these facts, some postponement or relaxation in the schedule of payment can be granted owing to the lockdown.

It was accordingly directed that the Appellants would pay the use and occupation charges for the month of March, 2020 on or before May 30, 2020 and for the months of April, 2020 and May, 2020 by June 25, 2020. From June 2020 onwards, the payment shall be strictly as per the interim order dated September 25, 2017. Subject to these payments being made, the interim order already granted shall continue. If there is any default in payment, the interim order dated September 25, 2017 would be operational. The said interim order was very clear that if there is any non-payment, the decree would be liable to be executed.

VA View:

The DHC's judgement has come at a time when there has been a fair amount of ongoing debate as to what constitutes or would be deemed to be a force majeure event under contracts. In this regard, the DHC has adopted the principles laid down by the Supreme Court in the cases of ***Energy Watchdog v. CERC and Others*** and ***Raja Dhruv Dev Chand v. Raja Harmohinder Singh and Another*** and expressly reiterated that Section 56 of the ICA would not apply to cases in which there has been a completed transfer, thereby excluding lease deeds from its purview. Further, the DHC has also confirmed that lease deeds/ contracts would need to contain a clause providing for some sort of waiver or suspension of rent in cases of certain force majeure events and only then would the tenant be entitled to claim the same.

Although there have been protective orders passed by the Ministry of Home Affairs, Government of India with respect to suspension of rent during the ongoing COVID-19 situation, these were intended specifically for the benefit of migrants, students and other stranded persons occupying rented premises and not as a blanket protection available to all tenants. The present situation should be treated as a wake-up call by stakeholders to ensure that going forward, lease deeds are negotiated so as to include specific provisions dealing with waiver or suspension of rent in force majeure situations, inter alia, including a pandemic.

IV. NCLAT: Balance Sheet entry cannot be treated to be an acknowledgement under Section 18 of the Limitation Act, 1963

The National Company Law Appellate Tribunal (**"NCLAT"**) has, in the case of ***V. Padmakumar v. Stressed Assets Stabilisation Fund and Others*** *(dated March 12, 2020)* held that an entry in balance sheet/ annual return , cannot be treated to be an acknowledgement under Section 18 of the Limitation Act, 1963 (**"Limitation Act"**).

Facts

This question arose for the purpose of filing an application for initiation of the Corporate Insolvency Resolution Process (**"CIRP"**) under the Insolvency and Bankruptcy Code, 2016 (**"Code"**). The case in question was before a three-member bench of the NCLAT. However, the Stressed Asset Stabilisation Fund (**"Respondent"**) relied upon the judgement of the NCLAT in the case of ***Ugro Capital Limited v. Bangalore Dehydration and Drying Equipment Company Private Limited*** *(decided on January 22, 2020)* where it was held that the decreeing of a suit would amount to "committing default" in terms of Section 3(12) of the Code for calculating the limitation period in terms of the Limitation Act, 1963. Since the three-member bench doubted the view expressed in *Ugro Capital,* this matter was referred to a larger five-member bench.

In the instant case, the Industrial Development Bank of India (**"IDBI"**) granted financial assistance of INR 600 lacs by way of at erm loan agreement dated March 02, 2000 to Uthara Fashion Knitwear Limited (**"Corporate Debtor"**) and the loan disbursed was primarily secured by hypothecation of plant and machinery together with certain movable assets and equitable mortgage of properties.

The loan was classified as a non performing asset on May 29, 2002. In 2003, IDBI filed an application for recovery under Section 19 of the Recovery of Debts and Bankruptcy Act, 1993 (**"RDB Act"**), pursuant to which a recovery certificate was issued on August 31, 2009. The debt was reflected in the Corporate Debtor's balance sheet for the year ending March 31, 2012. Subsequently, the debt was assigned to the Respondent who filed an application under Section 7 of the Code.

Issue

Whether the application filed under Section 7 of the Code was barred by limitation.

Observations of the NCLAT

First, we shall discuss the majority opinion, which was penned by Justice Mukhopadhaya and signed by Justice Bansi Lal, Bhat, Justice Venugopal and Kanthi Narahari, where previously decided cases such as the case of ***Gaurav Hargovindbhai Dave v. Asset Reconstruction Company (India) Limited [(2010) 10 SCC 72)]*** were cited, where it was held that since the default had taken place and as the account was declared NPA on July 21, 2011, the application under Section 7 was barred by limitation and that the Report of the Insolvency Law Committee itself stated that the intent of the Code could not have been to give a new lease of life to debts which are already time-barred.

The judgement in the case of ***V. Hotels Limited v. Asset Reconstruction Company (India) Limited*** *(decided on December 11, 2019)* was further discussed where it was observed that the language of Section 18 of the Limitation Act, 1963, makes it clear that for the purpose of filing a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has to be made in writing duly signed by the party against whom such property or right is claimed.

Further, the case of ***Jignesh Shah and Another v. Union of India and Another*** *(decided on September 25, 2019)* was also cited wherein the Supreme Court held that the date of default is to be taken into consideration for computing the period of limitation of application under Section 7 of the Code.

It was further observed that a suit for recovery of money based upon a cause of action that is within the limitation period can be filed only when there is a default of payment of dues. Even if the decree is passed, the date of default cannot be shifted forward to the date of decree. If the decree is executable within the period of limitation, it cannot be said that there is a default of decree or payment of dues. Therefore, the NCLAT held that mere filing of a suit for recovery or a decree passed by a Court cannot shift forward the date of default for the purpose of computing the period for filing an application under the Code.

The counsel for the Respondent had previously submitted that the application under Section 7 of the Code was not barred by limitation as the company had acknowledged the claim in its audited balance sheet for the financial year 2011-2012 and 2012-2013 onwards. It was counted with the proposition that if balance sheet/ annual return of the corporate debtor amounts to acknowledgement under Section 18 of the Limitation Act, 1963, then in such case, it is to be held that no limitation would be applicable because every year, it is mandatory for all companies to file balance sheet/ annual return.

In the dissent penned by Justice Cheema, it was stated that the dissent was due to the fact that Justice Cheema had reservations regarding part of the judgement where it relates to annual returns/audited balance sheets. It was stated that there are various judgements passed by various High Courts including High Court of Delhi which have dealt with the balance sheet/annual returns of companies and where entries in the same have been treated as "acknowledgement of debt" and even accepted for the purpose of Section 18 of the Limitation Act, 1963.

Precedents such as the Supreme Court's judgement in the case of ***Mahabir Cold Storage v. C.I.T.*** *(dated December 07, 1990)* which held that entries in the books of accounts would amount to an acknowledgement of the liability within the meaning of Section 18 of the Limitation Act were cited. Further, the judgement of ***A.V. Murthy v. B.S. Nagabasavanna*** *(decided on February 02, 2002)* which was relied on by the Supreme Court in the case of ***S. Natarajan v. Sama Dharman*** *(decided on July 15, 2014)* was discussed. In that case, it was held that if the amount borrowed by a party is shown in the balance sheet, it may amount to acknowledgement and the creditor might have a fresh period of limitation from the date on which the acknowledgement was made.

Justice Cheema concluded his dissent by stating he is of the opinion that annual returns/audited balance sheets, one time settlement proposals, proposals to restructure loans, by whatever name called, cannot be simply

ignored as debarred from consideration and in every given matter, it would be a question of applying the facts to the law and vice versa, to see whether or not the specific contents, spell out an acknowledgement under the Limitation Act, 1963.

Decision of the NCLAT

The NCLAT held that entry in the balance sheet/ annual return cannot be treated as an acknowledgement under Section 18 of the Limitation Act, 1963 therefore, the application under Section 7 of the Code was barred by limitation and not maintainable.

VA View:

The dissent by Justice Cheema and the cases cited by him clearly indicate that there may be diverging viewpoints with regards to this question of law. Therefore, the Supreme Court's final ruling in this important issue is awaited so that there can be some clarity regarding the application, extent and scope of Section 18 of the Limitation Act, 1963.

This is especially critical since the judgement may have far-reaching ramifications regarding the extent of the Limitation Act, 1963 and the criteria for debt to be time-barred, which would have many implications including but not limited to implications regarding filing applications relating to Sections 7 and 9 of the Code.

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