Between the lines...

VAISH ASSOCIATES ADVOCATES ESTD. 1971

NEW DELHI | MUMBAI | BENGALURU

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Key Highlights

I. Delhi HC: If the original contract in entirety is put to an end, the arbitration clause, which is a part of it, also perishes along with it

The Hon'ble High Court of Delhi (**"DHC"**) has in its judgement dated October 22, 2020 (**"Judgement"**) in the matter of ***Sanjiv Prakash v. Seema Kukreja and Others [ARB. Pet. 4/2020],*** held that if the contract is superseded by another, the arbitration clause, being a component/part of the earlier contract, falls with it. In other words, if the original contract in entirety is put to an end, the arbitration clause, which is a part of it, also perishes along with it.

Facts

The Petitioner is the son of Respondent No. 2 (the mother) and Respondent No. 3 (the father), and Respondent No. 1 is his sister, collectively the Petitioner and Respondents are addressed as **"Prakash Family Members/Prakash Family".** Asian Films Laboratories Private Limited was incorporated on December 09, 1971, by the Respondent No. 3 and the entire amount of the paid-up capital was paid by him. He then distributed the shares to the family members. Subsequently, the name of the company was changed to ANI Media Private Limited on March 06, 1997 (**"Company"**). The Petitioner serves as the Managing Director and the Respondent No. 3 serves as the Chairman of the Company. The Company, in the year 1996, engaged in business relationship with Reuters Television Mauritius Limited, now named as Thomson Reuters Corporation Pte. Ltd. (**"Reuters"**). It was stated by the Petitioner that prior to the execution of the agreement with Reuters in 1996, an undated Memorandum of Understanding (**"MoU"**) was entered into between the Prakash Family Members which constituted a special arrangement on succession plan and management scheme between the Prakash Family Members qua the Company.

On April 12, 1996, the Prakash Family Members entered into a Shareholders Agreement (**"SHA"**) and a Share Purchase Agreement (**"SPA"**) with Reuters, by which Reuters acquired 49% shares of the Company from the Prakash Family Members, who subsequently held 51% shareholding in the Company. It was stated by the Petitioner that the MoU was binding on the Prakash Family Members *inter-se,* while SHA was binding as between the Petitioner and the Respondents collectively addressed as **"Prakash Family Shareholders"** and Reuters. It was stated by the Petitioner that subsequently, the terms of the MoU were included in the Articles of Association of the Company on May 14, 1996 (**"Articles of 1996"**) to recognize the special rights that were existing in the MoU. The Articles of 1996 continued to be operative till August 30, 2012, however, later the Company, due to regulatory concerns, adopted Articles of Association which did not reflect the special rights of any of the parties. The Company again adopted the Articles of 1996 on March 26, 2014, before adopting the Articles of Association as existed in the current form in September 2014.

In terms of the dispute between the parties it was stated by the Petitioner that the Respondent No. 3 was desirous of transferring his shares in the Company to the joint shareholding of himself and the Petitioner. In furtherance, on September 16, 2019, the Petitioner by his letter of lodgment to the Company, attached duly stamped and certified share transfer forms and original share certificate pertaining to the 4,28,100 shares. However, the Respondents No. 1 and 2 objected to the said transfer and also indicated a desire to have the shares of the Respondent No. 2 transferred to the joint names of Respondents No. 1 and 2, but the matter was deferred by the Board. On October 5, 2019, Respondent No. 3 moved a circular resolution for transfer of shares in consonance with the MoU. Subsequently a request was made by Respondent No. 2 on October 6, 2019 for transfer of 3,67,500 shares held by her to the joint shareholding of the Respondents No. 1 and 2. Correspondences were exchanged between Respondent No. 3, and Respondent No. 2 that the transfer request had not been properly made since the original stamped share transfer form and the original share certificates had not been lodged by Respondent No. 2. To this, Respondent No. 2 responded that she will produce the original share certificates at the time of transfer. In addition to the above, Respondent No. 3 and the Petitioner also sent e-mails reiterating that the proposal to transfer shares of Respondent No. 2 to the joint shareholding of the Respondents No. 1 and 2 was in breach of the terms of the MoU. To this, Respondent No. 2 responded that the MoU had been superseded. Thereafter, by e-mail dated October 12, 2019, the Respondents No. 1 and 2 assented to the transfer of the shares of the Respondent No.2 to the joint shareholding of the Respondents No. 1 and 2. Respondent No. 3 responded as the Chairman, stating that the circular resolution for the transfer of the shares of the Respondent No. 2 has not been initiated, and that the Company was still awaiting the original share certificates to be lodged in order to initiate the aforesaid transfer. Thereafter, Respondent No. 2 by e-mail dated November 11, 2019 marked to all directors, disputed the validity of the MoU and reiterated her demand of transferring the shares held by her to the joint shareholding of the Respondents No. 1 and 2.

Owing to the dispute arising out of and in relation to the MoU, the Petitioner invoked the arbitration clause as per MoU and issued a notice for invocation of arbitration dated November 23, 2019 (**"Notice of Arbitration"**) to the Respondents. The Respondent No. 3 by e-mail dated November 24, 2019, consented to the arbitrator nominated in

Notice of Arbitration. However, Respondents No. 1 and 2 by their reply dated December 20, 2019 contended that the MoU has allegedly been superseded/invalidated by the SHA executed between Prakash Family Shareholders and Reuters and did not agree to the appointment of the arbitrator. Hence, this petition was filed under Section 11(5) of the Arbitration and Conciliation Act, 1996 (**"1996 Act"**), for appointment of a sole arbitrator under Section 11 of 1996 Act, for the purpose of adjudicating the disputes that have arisen between the parties under the MoU. It is worthy to note that the Respondent No. 3 filed a reply separately stating that the MoU is a valid and binding document as well supporting the stand taken by the Petitioner.

Issue

Whether on the contract/agreement being superseded or extinguished by a subsequent contract/agreement, the arbitration clause, being a component of the superseded contract/agreement stands superseded along with the terms of such superseded contract/agreement.

Arguments

Contentions raised by the Petitioner:

The Petitioner contended that the MoU has not been superseded on the following grounds:

I. SHA and SPA executed was to govern the relationship between Reuters and the Prakash Family Shareholders. The *inter-se* relationship of Prakash Family Members was governed by the MoU. Also, the MoU has not been amended, nor have the parties entered into any other MoU, modifying the terms of the same, and that the Prakash Family Members never acted contrary to the MoU.

ii. The Respondent No. 3, being the Chairman of the Company and a signatory of the MoU, had time and again endorsed the MoU and its validity. Also, Respondents No. 1 and 2 had conceded to the fact that they do not dispute their signature to the MoU.

iii. The MoU was a separate and distinct agreement *vis-à-vis* the SHA and the SPA dated April 12, 1996. Further, the contention that the MoU was superseded by the SHA is *ex-facie* belied as the terms of the MoU were incorporated in the Articles of 1996, after executing SHA, which would not have been incorporated/amended if the MoU had been superseded.

iv. The Prakash Family Members have consciously entered into the MoU. Further, each benefited from the MoU and the partnership with Reuters, therefore were bound, and continued to be bound, *inter-se* by the terms of the MoU. Hence, they are estopped from claiming that the MoU is not valid.

v. The request made by the Respondent No. 2 for transfer of shares held by her to the joint shareholding of Respondents No. 1 and 2 was not in consonance with the terms of the MoU, as the Petitioner would be entitled to the shares of the Respondents No. 1 and 2 as their successor.

vi. The SHA describes itself as an agreement executed between Prakash Family Members (as one group) and Reuters (as another group). Further, the SHA and MoU occupy and operate in different fields and govern completely different sets of rights of the respective parties thereto, and are executed between different sets of parties.

It was further submitted that, on a comprehensive reading of Sections 5, 11(6A) and 16 of the 1996 Act, and the principle of *'kompetenz-kompetenz' (Arbitrator's ability to determine its own jurisdiction including ruling on any objections with respect to the validity or existence of the arbitration agreement),* the question of the binding nature of the MoU is an issue that needs to be decided by the arbitral tribunal appointed as per the arbitration agreement contained in the MoU. The scope of enquiry under Section 11(6A) of the 1996 Act is only limited to the *prima-facie* question of satisfaction of the court as to the existence of the arbitration agreement and it is the arbitral tribunal which would decide any preliminary issues including the validity, the efficacy and the effect of the MoU. Further, the plea of Respondents No. 1 and 2 that the arbitration clause (Clause 16) under the SHA should have been invoked instead of arbitration clause under the MoU, was rebutted by stating that the tribunal constituted under the MoU would be well within its jurisdiction to decide whether the MoU is valid or has been superseded by the SHA, whereas a tribunal constituted under the SHA, even if it accepts the case of the Petitioner that the MoU is valid, will be without jurisdiction to enforce the same. Further, the Clause 16 under the SHA is intended for disputes between Reuters and the Prakash Family Shareholders and hence provides that the mediation would be between Reuters and Respondent No. 3.

Lastly, it was submitted that the SHA states that Reuters can transfer any of the shares held by it to a company which is a member of the Reuters Group and similarly Prakash Family can transfer any shares held by it to each other, this cannot be construed to mean that the Prakash Family Members cannot have a separate agreement to govern their rights *inter-se.* It was submitted that the SHA and MoU should be construed harmoniously.

Contentions raised by the Respondents No. 1 and 2:

There is no subsisting MoU. Therefore, the appointment of arbitrator under Section 11(5) of the 1996 Act was barred by law, as the Petitioner has relied on an invalid document to invoke arbitration. It was also stated by Respondents No. 1 and 2, without prejudice that no cause of action as per the MoU has accrued in favor of the Petitioner. Not once, the MoU terms were incorporated in the SHA and the Articles of Association. Therefore, the language of the Articles as it then stood, reflected the intention of the parties to be bound by terms set out in the Articles itself, both in respect of dealings *inter-se* Prakash Family and in respect of their dealings with Reuters. With respect to the alleged MoU, even Respondent No. 3 herein had sought opinion on the sanctity of the same way back in 2014, to be informed that the MoU was not a legal document owing to non-bearing of any signatures on the first three pages. The said MoU has no binding effect or legal sanctity as the same had never been shared or placed during any general body or board meeting except on September 17, 2019 hence, the Company did not acknowledge it and it cannot override the provisions of the Articles of Association and the SHA.

The SHA is the only valid and subsisting agreement amongst the Petitioner and the Respondents even with regard to their *inter-se* rights of shareholding in the Company. Further, Clause 28 of the SHA contains an entire agreement clause whereby parties to the SHA agreed that the SHA supersedes any and all prior agreements, explicit/implicit which may have been entered into prior to SHA between the parties, other than the ancillary agreements and the SPA. They also submitted that the SHA contains dispute resolution clause wherein, any dispute including the present dispute can only be arbitrated after following the procedure set forth in Clause 16 of the SHA. It was submitted that arbitration clause of the SHA, that is, Clause 16.2 stated that the seat of arbitration was London, and the proceedings envisaged being an international commercial arbitration, the Hon'ble Supreme Court was the court designate as per Section 11(9) of the 1996 Act, hence this Court did not have jurisdiction under Section 11(5) of the 1996 Act.

It was contended that the legal principle regarding the novation of contract states that an arbitration clause in an agreement cannot survive if the agreement containing the arbitration clause has been superseded/novated by a later agreement. Even if it is presumed that MoU was validly executed between the then shareholders of the Company, the then shareholders put an end to it as if it had never existed and substituted a new SHA for it. By relying on the definition clause in the SHA, it was submitted that Prakash Family Members means each of the Prakash Family Shareholders and shareholder means each of Prakash Family shareholder and Reuters. It was immaterial whether the dispute had been raised qua Reuters or among the other shareholders. The SHA had been executed by all the shareholders of the Prakash Family in their individual capacity and not by one person representing the family or block. The fact contended was that the dispute is between the individual shareholders of the Company with respect to the shares of the Company and not a family dispute as alleged by the Petitioner.

Further, issue of novation/supersession is not a preliminary issue and beyond the jurisdiction of the arbitrator under Section 16 of the 1996 Act as the arbitrator is not empowered to decide upon any issue if the appointment of the arbitrator itself was on the basis of a novated arbitration clause which had become void along with the original contract. Reliance was placed on Section 62 of the Indian Contract Act, 1872 (**"ICA"**) to contend that, when the main agreement is novated, rescinded or altered, it loses its validity and the arbitration agreement becomes void, as the principle is that, if the contract is superseded by another, the arbitration clause, being a component part of the earlier contract, falls with it. It was further submitted that an arbitrator under Section 16 of the 1996 Act, cannot adjudicate upon superseded arbitration agreement. Reliance was placed on the case of ***Garware Wall Ropes Limited v. Coastal Marine Construction and Marine Limited. [2019 (9) SCC 2019].*** As per Section 11(6A) of the Arbitration and Conciliation Amendment Act, 2015, court's scope of inquiry requires to determine the fundamental issue of novation/supersession which is important before declaring any arbitration agreement valid/existing.

Observations of the Delhi High Court

It was observed that the Petitioner may be right in contending that there exists a contemplation of groups, that is, Prakash Family Members and Reuters under the SHA as 'blocks'. However, on reading of the opening paragraph, it was observed that the term 'parties' envisages Prakash Family Shareholders both individually as well as collectively. Therefore, on a conjoint reading of the Clause 28 with the opening paragraph of SHA, it was concluded that, any kind of agreement as per Clause 28, 'between the parties' stood superseded.

The contention of the Petitioner, that the terms of MoU were incorporated in the Articles of 1996 after the execution of the SHA, and hence MoU was not superseded, was observed to not be appealing on basis of the effect of Clause 28 of SHA, by which the MoU stood superseded. The DHC further analysed the implication assuming, if terms *para materia* to MoU had been incorporated in the Articles of 1996, it is only with view to make such terms part of the Articles of 1996 and it does not mean that MoU continued to be valid. It was observed by the DHC that nothing precluded Prakash Family to include a stipulation in the SHA, that the SHA shall not supersede the MoU, as had been specially stated in Clause 28 with regard to ancillary agreements and SPA. The DHC observed that under Section 62 of the ICA, it is trite law, that to attract the theory of novation there should be total substitution of the earlier contract and all the terms of the earlier contract should perish with it.

The judgement of the Supreme Court in ***Union of India v. Kishorilal Gupta [AIR 1959 SC 1362]*** was relied upon by the DHC to determine the issue of validity of the arbitration clause. Following is the relevant portion: *"22. … So too, if the dispute is whether the contract is wholly superseded or not by a new contract between the parties, such a dispute must fall outside the arbitration clause, for, if it is superseded, the arbitration clause falls with it. ….".*

The case of ***Damodar Valley Corporation v. K.K Kar [AIR 1974 SC 158],*** was also relied upon, relevant portion reads as follows: *"7. …..Where, therefore, the dispute between the parties is that the contract itself does not subsist … that dispute cannot be referred to the arbitration as the arbitration clause itself would perish if the averment is found to be valid. As the very jurisdiction of the arbitrator is dependent upon the existence of the arbitration clause under which he is appointed, the parties have no right to invoke a clause which perishes with the contract."* Therefore, referring to the precedents, the DHC observed that the law relating to the effect of novation of contract containing an arbitration agreement/clause is well-settled.

It was observed that, it could not be said that Clause 16 of the SHA was intended only for disputes between Reuters and Prakash Family asa block, as the said clause contemplates dispute between 'shareholders' who have been defined as individual shareholders of both Prakash Family and Reuters.

Decision of the Delhi High Court

The DHC held that, Prakash Family Shareholders having been individually recognized under the SHA as parties, the MoU, an agreement, as relied upon by the Petitioner, which governs the *inter-se* rights and obligations of the Prakash Family Members, stood superseded/novated. The DHC further held that if the contract is superseded by another, the arbitration clause, being a component/part of the earlier contract, falls with it. In other words, if the original contract in entirety is put to an end, the arbitration clause, which is a part of it, also perishes along with it. Hence, the arbitration clause of the MoU, having perished with the MoU, owing to novation, the invocation of arbitration under the MoU was held to be not justified.

In view of the conclusion stated above, the plea of doctrine of *'kompetenz-kompetenz'* and the reliance placed on Section 11(6A) of the 1996 Act were held to be untenable. Hence, it was also held that the petition filed by the Petitioner invoking the MoU for appointment of arbitrator was not maintainable and thereby was dismissed.

VA View:

The DHC in this judgement has highlighted the law on novation of contract, explained the effect of such novation of contract on the arbitration agreement/clause therein and thereby has laid the limits for invocation of arbitration clause. It has been clarified that the arbitration clause even though is independent of the main contract, perishes with it, if such a contract is novated/ superseded by the parties.

Party autonomy plays a major role to invoke and conduct arbitration, therefore, the arbitration agreement being a creation of an agreement may be destroyed by an agreement. If the parties have agreed to novate the contract they cannot be forced to enforce rights/obligations against their intent under the previous contract. Therefore, a party is restrained from invoking arbitration under an invalid contract.

II. Supreme Court: Relief of specific performance of a contract is no longer discretionary after the 2018 amendment of the Specific Relief Act, 1963

The Supreme Court (**"SC")** has in its judgment dated September 18, 2020 in the matter of ***B. Santoshamma & Another v. D. Sarala & Another [Civil Appeal No. 3574 of 2009],*** observed that relief of specific performance of a contract/agreementis no longer discretionary pursuant to the amendment to the Specific Relief Act, 1963 (**"SRA"**) bought about under the Specific Relief (Amendment) Act, 2018 (**"Amendment Act"**).

Facts

Brief facts of the case are that one B. Santoshamma (**"Appellant"**) purchased 300 square yards of land in Survey No. 262, Hayathnagar Village and Taluk in Ranga Reddy District, Andhra Pradesh (**"Suit Property"**), from one Mr. D. Tanesha, under a registered sale deed dated August 20, 1982. After about ten days from the date thereof, the Appellant entered into an oral agreement with one Mr. Pratap Reddy, for sale of 100 square yards out of the Suit Property, for a total consideration of INR 3,000/-, out of which an amount of INR 2,500/- was received as an advance. Simultaneously, possession of the said 100 square yards of the Suit Property was delivered to the said Mr. Pratap Reddy on the date of the said oral agreement. Subsequently, on January 20, 1984, the oral agreement between the Appellant and Mr. Pratap Reddy was reduced into writing, upon payment of the balance consideration of INR 500/- (**"Agreement 1"**) and the Appellant allegedly agreed to execute the sale deed on an auspicious day.

On March 21, 1984, the Appellant entered into another agreement with one Smt. D. Sarala (**"Respondent"**), for sale of the entire Suit Property to the Respondent for a total consideration of INR 75,000/- (**"Agreement 2"**), out of which a sum of INR 40,000/- was paid by the Respondent to the Appellant in the first instance and a sum of INR 5,000/- was paid subsequently, as advance. The Appellant allegedly informed the Respondent about the existence of Agreement 1, receipt of the entire sale consideration thereunder, and delivery of possession of the said 100 square yards of the Suit Property to Mr. Pratap Reddy. The Appellant allegedly requested the Respondent to

incorporate a clause with respect to the existence of Agreement 1 in Agreement 2. However, the Respondent assured the Appellant that she would get Agreement 1 cancelled as her husband knew Mr. Pratap Reddy well and had already spoken to him in this regard, to whom Mr. Pratap Reddy had allegedly assured that there would be no difficulty created by him.

However, upon the Respondent allegedly failing to make payment of INR 30,000/- towards the balance consideration even after expiry of 20 days from the stipulated period under Agreement 2, the Appellant executed a registered deed of conveyance dated May 25, 1984, transferring the said 100 square yards of the Suit Property in favour of Mr. Pratap Reddy (**"Sale Deed"**). The Appellant and her husband and Mr. Pratap Reddy have alleged that the Respondent tried to interfere with Mr. Pratap Reddy's possession of 100 square yards of the Suit Property. On June 20, 1984, the Appellant issued a notice to the Respondent stating that, in view of the existence of Agreement 1, the validity of Agreement 2 was subject to clearance/ no-objection by Mr. Pratap Reddy of the arrangement under Agreement 2. On June 22, 1984, the Appellant's husband, Mr. Darshan Reddy, lodged a complaint with the Station House Officer, Hayathnagar, alleging that the original sale deed, pertaining to sale of the Suit Property in favour of the Appellant, had been stolen from his residence, alongwith other documents. Thereafter, the Respondent filed a suit (O.S. No. 222 of 1984) before the Court of the Principal Subordinate Judge, Rangareddy District (**"Trial Court"**) seeking specific performance of Agreement 2 (**"Suit for Specific Performance"**) claiming delivery of possession of the entire Suit Property from the Appellant.

By and under a judgment and decree dated March 30, 1994, the Trial Court allowed the Suit for Specific Performance in part, holding that the Respondent was not entitled to seek specific performance in respect of the 100 square yards of the Suit Property covered by the Sale Deed, but entitled to relief of specific performance in respect of the remaining 200 square yards of the Suit Property. Being aggrieved by the aforesaid judgment of the Trial Court, the Appellant filed an appeal before the High Court of Andhra Pradesh (**"HC"**). By and under a judgment and order dated September 7, 2006, the HC, *inter alia,* dismissed the aforesaid appeal filed by the Appellant and confirmed the judgment passed by the Trial Court. Aggrieved by the same, the Appellant filed the present appeal before the SC.

Issue

Whether the Respondent was entitled to seek specific performance of Agreement 2.

Arguments

Contentions raised by the Appellant:

The Appellant, *inter alia,* contended that Agreement 2 between the Appellant and the Respondent was liable to be cancelled as the Respondent had defaulted in making payment of the balance consideration of INR 30,000/- within the period stipulated thereunder. Consequently, the Appellant executed and registered the Sale Deed in favour of Mr. Pratap Reddy. It was further argued that execution of a sale deed in favour of the Respondent was conditional upon cancellation of the Agreement 1. It was further contended that the Respondent, who knew of the pre-

existing Agreement 1, had assured the Appellant that she and her husband had already spoken to Mr. Pratap Reddy to get Agreement 1 cancelled, but failed to do so. Also, Agreement 2 was a composite agreement for sale of 300 square yards of the Suit Property for a lump sum consideration of INR 75,000/-. Since it was not possible to sell 300 square yards of the Suit Property to the Respondent as per the Agreement 2, the said agreement became infructuous and incapable of specific performance and there was no scope for sale of 200 square yards of the Suit Property at a reduced consideration.

Contentions raised by the Respondent:

The Respondent on the other hand contended that she should have been granted specific performance of Agreement 2 in its entirety and the Trial Court should have set aside the purported Sale Deed and directed the Appellant to sell the entire Suit Property to the Respondent. It was further argued that the execution and registration of the Sale Deed in favour of Mr. Pratap Reddy was in any case, subsequent to Agreement 2. Refuting the contention advanced by the Appellant about the lack of readiness and willingness on the part of the Respondent to perform her obligations under Agreement 2, the Respondent argued that the fact that the Respondent had paid INR 40,000/- on the date of execution of Agreement 2 itself, and subsequently a further sum of INR 5,000/- to the Appellant, established her intention to honour the arrangement under Agreement 2. The Respondent further contended that these payments towards part consideration were duly acknowledged by the Appellant. The Respondent also contended that she had offered to pay cash to the Appellant and her husband towards the balance amount of INR 30,000/- on April 30, 1984, and requested them to register the sale deed in her favour, but the Appellant and her husband refused to receive the said amount and instead requested the Respondent to make the said payment by way of a demand draft. However, even though the Respondent got a demand draft of INR 30,000/- made in favour of the Appellant on May 4, 1984, the Appellant declined to accept the same.

Observations of the Supreme Court

The SC observed that the contention of the Appellant, that the Agreement 2 was subject to the condition that the Respondent would get Agreement 1 cancelled, could not be accepted since Agreement 2 did not contain any such condition. The SC noted that it is a well settled principle that the onus of proof lies on the party making the allegation and that the Appellant had failed to establish that Agreement 2 was subject to the pre-condition of the Respondent and/or her husband negotiating with Mr. Pratap Reddy to get Agreement 1 cancelled. The SC further observed that, the concurrent finding of the HC and the Trial Court, that the Respondent had been ready and willing to perform, and had in fact performed her obligations under the Agreement 2, was also unexceptionable since the Respondent had paid INR 40,000/- out of the total consideration of INR 75,000/- on the date of execution of the Agreement 2 itself and had arranged to pay the remaining consideration within 47 days of execution of the said agreement. The SC further noted that it was well settled that time was not of essence to agreements for sale of immovable property, unless the agreement specifically, and expressly incorporated the consequence of cancellation of the agreement, upon failure to comply with a term within the stipulated date.

With respect to specific performance, it was further observed that prior to the SRA being amended under the Amendment Act, the relief of specific performance of an agreement was at all material times, an equitable, discretionary relief, and governed by the provisions of the SRA. Even though the power of the court to direct specific performance of an agreement may have been discretionary, such power could not be arbitrary. The discretion had necessarily to be exercised in accordance with sound and reasonable judicial principles. However, pursuant to the amendment of Section 10 of the SRA on October 1, 2018, the words *"specific performance of any contract may, in the discretion of the court, be enforced"* have been substituted with the words *"specific performance of a contract shall be enforced subject to ...".* Courts are now obliged to enforce the specific performance of a contract, subject to the provisions of sub-section (2) of Section 11, Section 14 and Section 16 of the SRA. Accordingly, grant of relief of specific performance of contracts is no longer subject to the discretion of courts.

The SC observed that an agreement to sell immovable property, generally creates aright in personam and the Respondent had accordingly acquired a legitimate right to enforce specific performance of Agreement 2. The SC also noted that although courts ordinarily enforce contracts in their entirety by passing a decree for specific performance, Section 12 of the SRA carved out exceptions, where courts may direct specific performance of a contract in part. Accordingly, courts may, under Section 12 of the SRA, direct the party in default to perform specifically, so much of its part of the contract, as it can perform, provided the other party pays or has paid the consideration for the whole of the contract, reduced by the consideration for the part which must be left unperformed. In the present case, the Respondent had arranged to tender the full consideration within the time stipulated in the Agreement 2, from the date of its execution. Also, admittedly, a major portion of the full consideration, that is, INR 45,000/- had already been paid by the Respondent to the Appellant and the Respondent had been ready to and had offered to pay the entire balance consideration to the Appellant.

Decision of the Supreme Court

In dismissing the appeal, the SC noted that Section 12 of the SRA was to be construed and interpreted liberally, in a purposive and meaningful manner, to empower the court to direct specific performance by the defaulting party, of so much of the contract, as can be performed, in a case like this. To hold otherwise would permit a party to a contract for sale of land, to deliberately frustrate the entire contract by transferring a part of the suit property and creating third party interests over the same. The SC observed that a contractee who frustrates a contract deliberately by his own wrongful acts cannot be permitted to escape scot free.

The SC further noted that after having entered into Agreement 2 for the sale of 300 square yards of the Suit Property and accepting a major part of the consideration, it did not lie in the mouth of the Appellant to contend that the contract should not have specifically been enforced in part in respect of the balance 200 square yards, which the Appellant still owned. It was also patently obvious that the Appellant did not disclose the existence of any prior agreement with respect to the Suit Property to the Respondent, as Agreement 2 did not bear reference to any such prior agreement.

In passing its judgement, the SC also held that the Trial Court had fairly reduced the total consideration payable under Agreement 2 by 1/3rd of the agreed amount, in lieu of damages, as 1/3 rd of the area agreed to be sold to the Respondent could not be sold to her.

VA View:

In view of the amended Section 10 of the SRA, the courts no longer have the discretion to grant relief of specific performance and are now obliged to enforce the specific performance of a contract, subject to the provisions of sub-section (2) of Section 11, Section 14 and Section 16 of the SRA. The SC has therefore, in the extant judgement, relied on Section 12 of the SRA, in allowing specific relief in respect of a part of a contract where parties to a contract are unable to perform their obligations under the contract in entirety.

The SC in the present judgment has clarified that courts may, in the circumstances mentioned under Section 12 of the SRA, direct the specific performance of so much of such contract, as can be performed, particularly where the value of the part of the contract left unperformed is small in proportion to the total value of the contract. The above judgment should hopefully act as a deterrent to future immovable property owners who, with malicious intent, avoid fulfilling their obligations under an agreement for sale, by creating third party interests over a portion of the land.

III. Supreme Court: Suit for specific performance filed within limitation could not be dismissed on the sole ground of delay or laches

In the matter of ***Ferrodous Estates Private Limited v. P. Gopirathnam (Dead) and Others [Civil appeal no. 13516 of 2015],*** the Supreme Court of India (**"SC"**) vide its judgement dated October 12, 2020 held that a suit for specific performance filed within limitation could not be dismissed on the sole ground of delay or laches. The appeal had been filed against the judgement of the division bench of the Madras High Court (**"MHC"**). The MHC had decided against specific performance of a sale agreement entered into between the appellant and the respondents herein.

Facts

An agreement to sell dated June 12, 1980 (**"Sale Agreement"**) had been entered into between the appellant (**"Appellant Company"**) and the respondents (**"Respondents"**) in respect of certain property (**"Suit Property"**). In order to complete the sale transaction, the Respondents were to secure, *inter alia,* permissions from the competent authority under the Tamil Nadu Urban Land (Ceiling and Regulation) Act, 1978 **("ULCA").** The Appellant Company was to complete the transaction within six months from the date of the Sale Agreement subject to the Respondents obtaining clearance certificate from the appropriate authorities and giving vacant possession of the Suit Property. However, necessary permissions were not obtained by the Respondents, especially from the competent authority under ULCA. The Appellant Company thereafter, filed a suit for specific

performance on February 24, 1981. The Appellant Company pleaded that it had been always ready and willing to perform its obligations. It was contended that the Respondents had not arranged to get, *inter alia,* permissions from the competent authorities in order to achieve completion of the sale. The Appellant Company believed that the Respondents were attempting to take advantage of the rise in price of landed properties and were trying to alienate the Suit Property to third parties. In the written statement filed by the Respondents, no defence was taken on any plea that ULCA would be infracted if the suit for specific performance would be decreed. The defence relating to the same was later made only in an additional written statement. The decisions taken by the courts at various stages are briefly detailed below.

Issue

Among other issues which were framed in the suit, the primary issue was:

Whether the Appellant Company was not entitled to purchase more than 500 square meters under ULCA and whether the Sale Agreement was void on that account.

Decision of Madras High Court (Single Judge)

By judgement dated March 15, 1991, the MHC held that since the Respondents had not sought permissions under ULCA, they had breached the Sale Agreement. The Appellant Company was, therefore, entitled to get a decree of specific performance. It was noted that there was no term in the Sale Agreement that provided that it was subject to the grant of permissions under ULCA and that in the event of refusal of the same, the Sale Agreement would fail. Even if the said permissions had not been obtained, the Respondents could not refuse sale on such grounds. It was open to the Appellant Company to get a sale of the Suit Property with the risk. The Sale Agreement was true, valid and enforceable and it did not suffer from material alteration. Thereafter, the Respondents were directed to execute the sale deed within a two month period.

Decision of Madras High Court (Full Bench)

First appeal was made to the division bench in respect of the above judgement. The division bench then referred the matter to a full bench in respect of various questions. By judgement dated March 3, 1999, the MHC held that even if a contract by itself may not be illegal, if its enforcement violated any law, the agreement could not be enforced. The ULCA had been enacted to prevent concentration of urban land in the hands of few persons. The prohibition under Section 6 *(transfer of vacant land)* of the ULCA was for transferring of land by a person holding land in excess of the ceiling limits and any such transfer was deemed to be null and void. It was held that the provision contemplated both proposed transfer and completed transfer. Consequently, an agreement of sale was also affected by Section 6 of the ULCA. As far as exemption under ULCA was concerned, such exemption could be applied for only by the vendor. Further, while considering a suit for specific performance, the MHC was concerned with whether the purchaser had come to the court for enforcing the agreement in terms thereof. Asking a vendor to get exemption and then execute the agreement would amount to deviating from the terms of contract and the court could not enforce such a contract. This would mean that the purchaser was not willing to purchase the land

as per the agreement, but only with a deviation, that is, vendor would have to get an exemption and then execute the sale deed. When a transaction could be completed only after obtaining exemption or permission from another authority over which the court had no control, the relief of specific performance was usually not granted.

Decision of Madras High Court (Single Judge)

The matter was referred to the division bench. The division bench then directed the single judge to record a finding on the question as to whether the Suit Property was held by the Respondents in excess of the ceiling limit applicable to them, and as to whether it could have been sold if at all, only with the permission of the authorities under the ULCA. By judgement dated September 30, 2003, the single judge recorded two aspects: (a) Material questions such as whether the Appellant Company was entitled to claim relief of specific performance or not, *inter alia,* could only be decided by the division bench;(b) The Suit Property factually stands as excess lands within the meaning of the ULCA before it came to be repealed by the Tamil Nadu Urban Land (Ceiling & Regulation) Repeal Act, 1999 (**"Repeal Act"**).

Decision of Madras High Court (Division Bench)

By judgement dated January 29, 2007, the division bench reversed the judgment of the single judge. The MHC held that the land transferred would have exceeded the ceiling limit in respect of the Appellant Company. Section 5(3) *(ceiling limit)* of ULCA enabled the person holding land in excess to continue to hold such land because the sanctioned layout was available. However, as far as the proviso to the above section was concerned, it was clear that the person intending to purchase such property should not, in the process, acquire land in excess of his own ceiling limit. In respect of the argument regarding the repeal of the ULCA by the Repeal Act, the division bench held that, it would mean that during the duration of ULCA, the Sale Agreement was not enforceable and could be specifically performed after the repeal. The court would be called upon to enforce the Sale Agreement on the basis of a consideration which was also fixed almost two decades back. Even if it was considered that there were many instances where such cases were pending before courts for a long period, and the court passed a decree for enforcement of contract, such position could not be compared to the present case. As per the decision of the full bench itself, the agreement was held to be contrary to the public policy under Section 23 *(Lawful/unlawful considerations and objects)* of the Indian Contract Act, 1872 and was not enforceable, if not void. To enforce such an agreement after long lapse of time because of the subsequent event, that is, repeal of the ULCA, would not be equitable. The court also considered the submissions, namely, the Appellant Company was prepared to submit INR 1.25 crores towards completing the sale and whereas the Respondent Company submitted that instead of the court enforcing the Sale Agreement, it was prepared to pay the Appellant Company INR 2 crores as damages, since the Sale Agreement itself contemplated damages in case of breach. The court held that in the interest of justice, instead of a decree for specific performance of the Sale Agreement, the Respondents were to pay a sum of INR 2 crores, in discharge of their entire liability. Thereafter, it did not consider the question if the Appellant Company was ready and willing to perform its obligations under the Sale Agreement.

An appeal was then preferred against the judgement before the SC.

Contentions of the Appellant Company before the SC

On an incorrect application of the judgement of the full bench of the MHC, it would follow that the Sale Agreement was *void ab initio.* This was incorrect, because it was a fact that the Respondents were the ones required to obtain permission under the ULCA, which could have been obtained. Given the fact that a first appeal was in the nature of a rehearing of a suit, on the date that the division bench passed its decree, the ULCA stood repealed, as a result of which none of its provisions could be used in order to hit the Sale Agreement. Further, the division bench's interpretation of Section 5(3) of the ULCA and proviso would only render the main part of the said section redundant. Moreover, the Appellant Company had always been ready and willing to perform its obligations whereas the Respondents were actually in breach. It was open to the four Respondents to have applied for exemption of the Suit Property out of the larger property owned by them, and if that had been done, the Suit Property would have been within the original ceiling limit of the four Respondents, therefore, the suit for specific performance was correctly decreed in the Appellant Company's favour. The fact that the Appellant Company could only purchase within the ceiling limit would not render the Sale Agreement null and *void ab initio,* it would have been instead the risk of the Appellant Company. In any case, the ULCA having been repealed by way of the Repeal Act, by the time the division bench passed its judgment, there was no impediment in decreeing specific performance.

Contentions of the Respondent Company before the SC

The full bench judgment being *res judicata* between the parties, it was not now possible to reopen what was held therein. Further, the division bench was correct in its conclusion that the Sale Agreement being *void ab initio* could not be resuscitated at any point in the future, given the repeal of the ULCA. A suit must be decided on the date the plaint was filed and not on the date of the state of the law when the appellate decree was passed. The SC should not interfere under Article 136 *(special leave to apply by the Supreme Court)* of the Indian Constitution, as the judgment passed by the division bench was equitable – the Appellant Company had been awarded INR 2 crores with interest, which would come to a sum of over INR 3 crores in the present day, despite the fact that specific performance could not be granted of a void agreement.

Observations of the SC

As far as the Sale Agreement was concerned, it was clearly provided therein that the Respondents had to obtain permissions under the ULCA. The full bench judgement itself had recognized that there could be agreements with such clauses, in which case it would become the court's duty to enforce clauses. Therefore, the Sale Agreement could not be said to be hit by the full bench judgement. The single judge had in fact correctly held that it was for the Respondents to apply for exemption under the ULCA, which they had failed to do. Therefore, they had breached the Sale Agreement. The Sale Agreement, therefore, could not be *void ab initio.* The argument of the Respondents in respect of the proposition that the repeal of a statute, which made an agreement void, could not revive such

void agreement, therefore, had no application. Further, it is settled in many judgements of the SC including in ***Chandnee WidyaVati Madden v. Dr. C.L.Katial [AIR 1964 SC 978],*** that if after the grant of the decree of specific performance of the contract, the land and development officer refused to grant permission for sale, the decree-holder may not be in a position to enforce the decree but it could not be held that such a permission is a condition precedent for passing a decree for specific performance of the contract. Furthermore, it is settled law that an appeal is a continuation of a suit, as a result of which a change in law will become applicable on the date of the appellate decree, provided that no vested right is taken away thereby. Further, the respondent's reliance on ***Keshava Madhava Menon v. State of Bombay [1951 SCR 228]*** to buttress the argument that a repealing act could not be retrospectively applied so as to destroy a fundamental right, would not be applicable herein. The judgement in context was distinguishable given the fact that there was no fundamental right involved and that no vested right of the Respondents was affected by the Repeal Act.

Decision of the SC

On the date when the appellate decree was passed, the ULCA having been repealed, would not hinder passing of a decree for specific performance. There was no vested right under the ULCA in respect of the Respondents. Rights, if any, existed in favour of the state government, which has washed its hands off this matter by way of submission of a report to the SC on August 17, 2015. The division bench judgment was also incorrect in stating that: (a) it had taken 27 (twenty seven) years for the court process to decide the specific performance suit; and (b) specific performance being a discretionary relief ought not to be granted. Section 20 of the Specific Relief Act, 1963, (**"SRA"**) prior to its substitution by the Specific Relief (Amendment) Act, 2018 provided that while jurisdiction to decree specific performance was discretionary, it was not arbitrary. Section 20(2) of the SRA listed cases in which the court may properly exercise discretion not to decree specific performance. Significantly, Section 20(2) of the SRA provided for aspects to be adjudged at the time of entering into contract. No pleas relating to such Section 20(2) of the SRA had in fact been made by the Respondents. It was highlighted that in ***Saradamani Kandappan v. S. Rajalakshmi [(2011) 12 SCC 18]*** it was held that given the steep rise in urban land prices it may be incorrect to say that time was not the essence in the performance of contract of sale of immoveable property. There was an urgent need to revisit this position. As far as facts of the present case were concerned, time was definitely the essence of contract. Therefore, a suit for specific performance filed within limitation could not be dismissed on the sole ground of delay or laches (this was however subject to certain exceptions such as default on part of the plaintiff). It had also been previously held by courts that mere escalation of land prices after the date of filing of suit could not be a ground to deny specific performance. Once a suit for specific performance had been filed, any delay as a result of the court process could not be put against a plaintiff in decreeing specific performance. However, it is within the discretion of the court, regard being had to the facts of each case, as to whether some additional amount ought or ought not to be paid by the plaintiff once a decree of specific performance is passed in its favour, even at the appellate stage. The appeal of the Respondents that discretionary jurisdiction under Article 136 of the Indian Constitution should not be exercised given the fact that INR 2 crores plus interest was to be paid almost by way of *solatium* to the Appellant Company, was also rejected. The Respondents had taken up dishonest

pleas and were also held to have been in breach of the Sale Agreement in which they were to obtain permissions under ULCA, which, if not obtained, under the Sale Agreement itself, would not stand in the way of the specific performance of the Sale Agreement. Given the conduct of the Respondents in this case, as contrasted with the conduct of the Appellant Company, which was ready and willing throughout to perform its part of the bargain, the judgement passed by division bench was set aside and the decree passed by the single judge was restored. Further, since the Appellant Company itself had offered to pay a sum of INR 1.25 crores to Respondents, it was directed that such amount be paid within a period of eight weeks from the date of the judgment.

VA View:

It was noted that delay in court process, (in this instance the delay prolonged for a period of 27 years) could not be pitted against a plaintiff. This is equitable in the sense, as the SC rightfully pointed out that there were many instances where such cases were pending before courts.

Furthermore, while the MHC expressed its hesitation in enforcing specific performance of an agreement for which consideration was fixed almost two decades ago, the SC pointed out that mere escalation of land prices after the date of filing of the suit, could not be the sole ground for denial of specific performance. This may be read with an important observation of the SC that there was an urgent necessity to revisit the principle that time is not of the essence in case of contracts involving immoveable property. Such reconsideration by the SC is a shift from the normal principle that time is not considered to be an essence of the contract unless an intention can be gathered otherwise by the terms of the contract.

IV. NCLAT: NCLT to decide afresh on Punjab National Bank's insolvency plea against Mittal Corp Limited

The National Company Law Appellate Tribunal (**"NCLAT"**) set aside an order dated December 20, 2019 (**"Impugned Order"**) passed by the National Company Law Tribunal (**"NCLT"**), by way of its judgement dated September 7, 2020 in the case of ***Punjab National Bank v. Mittal Corp Limited (Company Appeal (AT) (Insolvency) No. 260 of 2020).*** The NCLT had rejected the application filed by Punjab National Bank (**"Appellant Bank"**) under Section 7 *(initiation of corporate insolvency resolution process (**"CIRP"**) by financial creditor)* of the Insolvency and Bankruptcy Code, 2016 (**"IBC"**) against Mittal Corp Limited (**"Respondent Company"**). Aggrieved by the Impugned Order, the Appellant Bank had preferred an appeal before the NCLAT under Section 61 *(appeals and appellate authority)* of the IBC. The NCLAT directed the NCLT to decide on the admission of the application under Section 7 of the IBC against the Respondent Company on merits and in an expeditious manner.

Facts

The Appellant Bank was part of a Joint Lenders Forum (**"JLF"**) which had a total exposure of INR 1,077 crores (Indian Rupees One Thousand and Seventy-Seven crores) in respect of amounts due and payable by the Respondent Company, out of which, the erstwhile Oriental Bank of Commerce (now merged with the Appellant

Bank) had a total exposure of approximately INR 245 crores (Indian Rupees Two Hundred and Forty-Five crores). A circular had been issued by the Reserve Bank of India (**"RBI"**) on February 12, 2018 (**"RBI Circular"**), wherein, banks were required to refer cases above INR 2,000 crores (Indian Rupees Two Thousand crores) to NCLT, if the issue was not resolved within 180 (one hundred and eighty) days of default. In ***Dharani Sugars and Chemical Limited v. Union of India and Others (2019) 5 SCC 480*** (**"Dharani Sugars"**), the Supreme Court of India (**"SC"**) had quashed the aforesaid circular. The SC held that the said circular was *'ultra vires'* Section 35 AA *(Power of Central Government to authorize RBI for issuing directions to banking companies to initiate insolvency resolution process)* of the Banking Regulation Act, 1949. The Appellant Bank had filed a Section 7 application under IBC in order to initiate CIRP against the Respondent Company. It was the Respondent Company's contention that the Section 7 application had been filed pursuant to the RBI Circular. However, the RBI Circular could not be made applicable to it, as the total debt payable to the JLF was INR 1,077 crores (Indian Rupees One Thousand and Seventy-Seven crores), which is below the set threshold of INR 2,000 crores (Indian Rupees Two Thousand crores) provided under the RBI Circular. The Respondent Company argued that basis the minutes of meetings of the JLF, it was clear that the Appellant Bank had filed the Section 7 application basis the RBI Circular. By way of the Impugned Order, the NCLT had dismissed the Section 7 application on the ground that the Appellant Bank had filed the application pursuant to the RBI Circular. The Appellant Bank, had thereafter, appealed to the NCLAT.

Contentions of the Appellant Bank

The total outstanding debt payable by the Respondent Company to the erstwhile Oriental Bank of Commerce (which had now been merged with the Appellant Bank) stood approximately at INR 245 crores (Indian Rupees Two Hundred and Forty-Five crores). Further, the total outstanding amount owed by the Respondent Company to its consortium of lenders was around INR 1,077 crores (Indian Rupees One Thousand and Seventy-Seven crores). As such there was existence of 'debt' as provided under Section 3(11) *(definition of debt)* of the IBC. Further, the evidence on record had also established the 'existence of default'. The JLF had decided to classify the account as 'Special Mention Account' in terms of the guidelines issued by the RBI. The JLF had also sanctioned a restructuring package pursuant to which a master restructuring agreement was entered into between the Appellant Bank and the Respondent Company on March 30, 2015. As the Respondent Company had failed to adhere to the financial norms, the 'Strategic Debt Restructuring Scheme' (**"SDR"**) was invoked. As per the SDR, the management change should have been accomplished within 18 (Eighteen) months from the date of reference (June 16, 2016), and the 18 (Eighteen) months had expired on December 17, 2017. On account of failure of the SDR, the Respondent Company's account was eventually classified as a NPA with effect from June 30, 2016. Thereafter, on March 20, 2018, the Appellant Bank had filed an application under Section 7 of the IBC before the NCLT. The NCLT, however, had incorrectly placed reliance upon the decision of the SC in *Dharani Sugars,* as in the instant case, the Section 7 application was not filed pursuant to the RBI Circular. There was nothing in the minutes of the JLF meeting dated February 26, 2018 (as claimed by the Respondent Company) which could indicate that the Section 7 application had been filed by the Appellant Bank pursuant to the RBI Circular. It was submitted that as far as the meeting on February 26, 2018 was concerned, the JLF had only discussed the offers of prospective investors. Further, the JLF had deliberated upon the concern regarding the Bombay High Court (**"BHC"**) giving time only until April 06, 2018 to take a decision regarding the Respondent Company and seeking necessary directions in the company petitions.

This was also deliberated upon in the subsequent meeting on March 13, 2018. In the meetings, the Appellant Bank was only considering the interests of unsecured creditors, when it had proposed filing of the Section 7 application. The Appellant Bank had in fact, filed the Section 7 application only in respect of debts owed by the Respondent Company to the Appellant Bank and not on behalf of the JLF. Furthermore, the Respondent Company never raised a plea before the NCLT that the Section 7 application had been filed pursuant to the RBI Circular. Therefore, the NCLT had incorrectly relied on this point. As per the RBI Circular, the timelines for large accounts to be referred under the IBC was with respect to accounts with an aggregate exposure of INR 2,000 crores (Indian Rupees Two Thousand crores) and above on or after March 1, 2018 (reference date). However, with respect to other accounts with aggregate exposure of the lenders below INR 2,000 crores (Indian Rupees Two Thousand crores) and above INR 100 crores (Indian Rupees One Hundred crores), the RBI intended to announce, over a two-year period, reference date for implementing the resolution plan to ensure calibrated, time bound resolution of all such accounts in default. It was further submitted that the last offer was received on February 22, 2018, that is, after the issuance of the RBI Circular. It was reiterated that the Section 7 application was not made pursuant to the RBI Circular.

Contentions of the Respondent Company

It was submitted that the RBI Circular had been declared as non-est in the eyes of law in ***Dharani Sugars.*** The JLF had approved the restructuring package on March 30, 2015 and a two - year moratorium had been given for payment of term loan instalments. The Respondent Company however incurred losses and had cash flow problems, which was discussed in the JLF meeting held on June 04, 2016. Meanwhile, the JLF had also acquired 51% (fifty-one per cent) stake through conversion of debt. Thereafter, three investors had approached the JLF and submitted their offers. As far as the meeting on February 26, 2018 was concerned, the JLF had considered the offers of these proposed investors and examined the same pursuant to the RBI Circular. In the JLF meeting held on March 13, 2018, the finalization of the offers of change of management was deferred. The lead bank of the JLF had also informed that the BHC had deferred the matter to April 06, 2018 as a last chance and as the finalization of the resolution plan before April 6, 2018 was difficult, the JLF had then taken a decision to file the Section 7 application under the IBC. Therefore, it was clear that the Appellant Bank had initiated the said proceedings pursuant to the RBI Circular. Despite the mandate under the revised framework as per the RBI Circular, no resolution plan had been put in place by the Appellant Bank. Even after the expiry of the period of 18 (eighteen) months from the date of reference, the JLF continued to look for potential investors to take over their 51% (fifty-one per cent) stake, when in fact, the last offer was received on February 22, 2018, subsequent to the RBI Circular. A perusal of the RBI Circular would also make it evident that the RBI Circular was not applicable in cases where a restructuring scheme had been implemented.

Issues

1. Whether the application filed by the Appellant Bank under Section 7 of the IBC was maintainable.
2. Whether the aforesaid application was filed pursuant to the RBI Circular.
3. Whether the ratio of Dharani Sugars was applicable to this case.

Observations of the NCLAT

On February 07, 2019, the Respondent Company filed a writ petition before the SC ***(Mittal Corp Limited v. Reserve Bank of India and Others [WP (Civil) 169 of 2019])*** and the SC, on February 13, 2019, had ordered the parties to maintain their 'status quo'. Further, on April 02, 2019, in ***Dharani Sugars,*** the SC held that the RBI Circular was *'ultra vires'* Section 35 AA of the Banking Regulation Act, 1949. By an order dated April 19, 2019, the above-mentioned writ petition filed by the Respondent Company was disposed with the observation that the NCLT was free to consider whether insolvency proceedings were initiated prior to the RBI Circular. Even though the Appellant Bank formed part of the JLF, the Appellant Bank had filed the Section 7 application only in respect of debts owed by the Respondent Company to the Appellant Bank and not on behalf of the JLF. On a reading of the provisions of the RBI Circular it was clear that the pre-requisite for invocation of the said circular was that there should be an aggregate exposure of INR 2,000 crores (Indian Rupees Two Thousand crores), and in the instant case, the debt amount totaled to INR 1,077 crores (Indian Rupees One Thousand and Seventy-Seven crores). Whereas the total amount claimed solely by the Appellant Bank totaled approximately to INR 245 crores (Indian Rupees Two Hundred and Forty-Five crores). For accounts with an aggregate exposure of the lender below INR 2,000 crores (Indian Rupees Two Thousand crores) and at or above INR 100 crores (Indian Rupees One Hundred crores), the RBI intended to announce, over a two-year period, reference date for implementing the resolution plan to ensure time bound resolution of all accounts in default. However, the documentary evidence did not provide for any such announcement being made by RBI in respect of the subject matter. Moreover, the RBI Circular did not have any application to the present case and as a consequence ***Dharani Sugars*** could also not be made applicable. From ***Dharani Sugars,*** it was clear that the subject matter of the RBI Circular was with respect to debts greater than INR 2,000 crores (Indian Rupees Two Thousand crores). The contention of the Respondent Company that the minutes of the meeting held on February 26, 2018 read together with the minutes of the meeting held on March 13, 2018 established that the Section 7 application was not maintainable as it was pursuant to the RBI Circular, was not tenable. The RBI Circular was not applicable in the present case since the amount claimed as debt due and payable was less than INR 2,000 crores (Indian Rupees Two Thousand crores) and furthermore, the process was initiated by the JLF prior to issuance of the RBI Circular. Merely because the JLF: (a) had discussed investor offers and the revised plan submitted by one of the investors; (b) had examined all proposals in light of the RBI issued guidelines on February 12, 2018; (c) deliberated that finalization of a resolution plan before April 06, 2018, as required by the BHC, was difficult; and (d) had decided to file a Section 7 application under the IBC, it could not be concluded that the application per se was initiated because of the RBI Circular. Furthermore, a mere discussion in the meeting cannot be considered as "substantial evidence" in establishing that the Section 7 application under the IBC was filed pursuant to the RBI Circular. The BHC order reflected that the JLF was given time until April 06, 2018 to complete the process and the same was discussed in the JLF meeting held on March 13, 2018. Appreciating the concern of the BHC and taking into consideration that a time-bound resolution could not be achieved within such a short period of time, a decision was taken by the JLF to file a Section 7 application under the IBC. It is notable that the reply filed by the Respondent Company dated June 6, 2018 did not even mention that the application was filed pursuant to the RBI Circular. It was only in their additional affidavit dated September 17, 2019 that the Respondent Company had contended that the application was filed pursuant to the RBI Circular. When in fact, in their sur-rejoinder filed on July 27, 2018, it was submitted that the application was filed in

violation of the RBI Circular. As the said circular itself was not applicable to the present case, the ratio in ***Dharani Sugars*** case would also not apply.

Decision of the NCLAT

The account in question was declared as NPA in December 2017, with effect from June 2016, after the expiry of 18 (Eighteen) months period under the SDR. Further, the Section 7 application under the IBC was filed before the lapse of the time-period of 180 (One Hundred and Eighty) days (as provided under the RBI Circular), for a default in existence much before the reference date, that is, March 1, 2018. In the absence of cogent evidence that the Appellant Bank had filed the Section 7 application pursuant to the RBI Circular, which at the outset was not even applicable to the facts of the instant case, the NCLT could not have rejected the application on such grounds. The NCLAT further remitted the matter to the NCLT, directing it to consider the Section 7 application on its own merits taking into consideration the records, as expeditiously as possible.

VA View:

It is interesting to note that on two separate instances, the Respondent Company had taken two contradictory positions in respect of the said application. Whilst, in one instance it was claimed that application was filed in violation of the RBI Circular, on a different occasion, they had come to claim that the application was filed pursuant to and in implementation of the RBI Circular.

Regardless of the same, factoring in multiple considerations in respect of the RBI Circular, such as the set threshold amount of INR 2,000 crores, the 180 day time period, including conducting a very careful consideration of the discussions that transpired in the JLF meetings, the NCLAT has rightfully concluded that there was no evidence that the Section 7 application under the IBC had been filed pursuant to the RBI Circular, and therefore, the application required a fresh consideration by the NCLT.

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