Between the lines...

VAISH ASSOCIATES ADVOCATES ESTD. 1971

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Key Highlights

I. Delhi High Court: Mere fixation of the place or the seat of arbitration outside India, will not divest the Court of its jurisdiction under Section 9 of the Arbitration and Conciliation Act, unless there is any agreement to the contrary

The Hon'ble High Court of Delhi (**"DHC"**) has in its judgement dated October 23, 2020, in the matter of ***Big Charter Private Limited v. Ezen Aviation Pty. Ltd. and Others [O.M.P. (I) (COMM.) 112/2020]*** (**"Judgement"**), held that an agreement would be required to have a specific stipulation that the parties had agreed to exclude the applicability of Section 9 of the Arbitration and Conciliation Act, 1996 (**"Act"**) to the contract between them, and to disputes arising thereunder, and merely fixing a place of arbitration would not oust the Section 9 jurisdiction of the court in case of international commercial arbitration.

Facts

Big Charter Private Limited (**"Petitioner"**) provides scheduled air operator services under the name "Flybig". The respondent is a private limited company registered in Australia and is engaged in the business and lease of aircrafts and other associated activities (**"Respondent"**). The subject matter of the dispute was an aircraft owned by the Respondent (**"Aircraft"**).

The Petitioner proposed to lease the Aircraft from the Respondent. Prior to issuing the Letter of Intent (**"LOI"**), the Respondent wrote to the Petitioner, acknowledging the desire of the Petitioner to lease the Aircraft with effect from October 1, 2019, for a period of 3 years. Lease rent was fixed at INR 37 lakhs per month plus 5% GST, for the first 18 months, and INR 40 lakhs

per month plus 5% GST, for the remaining 18 months, with an additional payment of maintenance reserves to the Respondent at USD 400 (per flying cycle/ flying hour). The Petitioner covenanted to ensure that the Aircraft was registered with the Directorate General of Civil Aviation (**"DGCA"**). The term of lease was to commence with the delivery of the Aircraft and continue for 36 months. Additionally, the LOI set out various provisions pertaining to payment of lease rent, deposits to be made by the Petitioner and that the final lease agreement would supersede the LOI. The LOI, under its governing law clause, stated that *"This Proposal and the underlying documents for the contemplated transaction shall be governed by the laws of India without regard to conflict of laws principles. Lessee and Lessor agree to submit to the exclusive jurisdiction of the courts located in Singapore with regard to any claim of matter arising under or in connection with this Proposal or the Lease Documentation...".* Subsequently, a lease deed was executed on November 12, 2019 (**"First Lease Deed"**) between the parties, which was superseded by a second lease deed dated December 9, 2019 (**"Lease Deed"**). Among other things, the LOI and subsequently the First Lease Deed and the Lease Deed set out schedules of payment of lease rent and deposits to be made by the Petitioner in tranches and format of the delivery acceptance certificate (**"DAC"**) to be executed for acceptance of the Aircraft (**"Schedules"**). On March 4, 2020, the Petitioner wrote to the Respondent, requiring for confirmation of the final date by which the Aircraft would be delivered. The Respondent alleged delay in delivery due to the delay caused by the Petitioner in painting and design, which the Petitioner argued was the Respondent's duty. The request for handing over of the Aircraft, with all necessary documents, was reiterated, emphasising that Cockpit Door Surveillance System (**"CDSS"**) was required to be installed in the Aircraft, and that the Respondent was also required to provide necessary support towards acquiring of the Certificate of Registration (**"COR"**) and Certificate of Airworthiness (**"COA"**) from the DGCA. The Petitioner stated that if the DGCA were to reject the request for issuance of COA, the Respondent would be required to return to the Petitioner, all amounts paid by it, along with the cost for ferrying the Aircraft. Subsequently, on March 22, 2020, the Petitioner pointed out that during oral discussions, the Respondent had made it clear that it had no intention to deliver the Aircraft to the Petitioner. In the circumstances, the Petitioner called on the Respondent to refund to the Petitioner, an amount of USD 5,30,000, stated to be due from the Respondent. The communication by the Respondent to the Petitioner alleged delay due to the Petitioner, and default in payment of security deposit and advance lease rent, as per the terms of the Lease Deed. It was further alleged that the Petitioner had unilaterally terminated the Lease Deed, thereby obviating the necessity of any termination notice having to be issued by the Respondent. In these circumstances, it was alleged that the Petitioner was liable to pay INR 19,20,460/– to the Respondent. The Petitioner alleged that the Respondent had failed to perform its obligations under the Lease Deed, which included delivery of the Aircraft with a valid COA and reiterated the demand for a refund. Asserting the existence of a clear and undeniable breach by the Respondent of the Lease Deed, the Petitioner moved the DHC under Section 9 of the Act. The Petitioner prayed for:

- a restraint against the Respondent creating any third party interest/right/title on the Aircraft, or from selling, transferring or encumbering the Aircraft in any manner;
- a restraint against the Respondent from taking the Aircraft out of India; and

- a direction to the Respondent to deposit USD 5,30,000 (equivalent to INR 4,01,05,736/–) in an escrow account.

Issue

Whether the DHC has territorial jurisdiction to pass interim relief under Section 9 of the Act when the place of arbitration has been agreed upon as Singapore.

Arguments

Contentions raised by the Petitioner:

The Petitioner argued that the Aircraft was located at Hyderabad. It was required to be registered with the DGCA and operated in accordance with the Aircraft Act, 1934, Aircraft Rules, 1937 and the civil aviation requirements issued by the DGCA. The most efficacious remedy available to the Petitioner was, therefore, by means of recourse to the jurisdiction of the DHC under Section 9 of the Act. Meaningful provisional relief, such as attachment of the defendant's properties, could be granted only by the court within whose territorial jurisdiction the properties were located, and not by a foreign court having jurisdiction over the situs of the arbitral proceedings. Articles 9 and 17J of the UNCITRAL Model also vested jurisdiction in courts outside the seat of arbitration to grant interim relief. Though the exclusive jurisdiction vested with courts at Singapore, it was only with respect to the application of the governing law and adjudication of disputes pertaining to substantive rights and obligations of the parties but not to grant of interim relief even before the constitution of the arbitral tribunal. The jurisdiction of the court was to be determined as per the curial law governing the conduct of the arbitral proceedings, that is, the Singapore International Arbitration Centre (**"SIAC"**) Rules, which permitted parties to approach any judicial authority for interim relief, before the constitution of the arbitral tribunal, and not merely judicial authorities located in Singapore. The courts in Singapore exercised the jurisdiction to secure assets located abroad only if they had in personam jurisdiction over the parties, that is, where the parties had presented themselves before the courts in Singapore. It was also argued that Section 12A of the International Arbitration Act (**"IAA"**) did not apply at the pre-arbitration stage.

The Petitioner argued that the Aircraft has not been delivered by the Respondent in accordance with the Lease Deed. Execution of the DAC, in the manner provided in the Schedules, was conditional on delivery of the Aircraft in accordance with the covenants of the Lease Deed. In the absence of the certificate of deregistration, certifying that the Aircraft was no longer registered with any foreign authority, there was no "delivery" of the Aircraft within the meaning of the Lease Deed. Hence, the Petitioner did not execute any DAC, certifying delivery of the Aircraft, either. By not delivering the Aircraft with all requisite documents, the Respondent breached the Lease Deed. Without delivery of the Aircraft in accordance with the covenants of the Lease Deed, no liability to pay rent could be fastened on the Petitioner. Petitioner submitted that the plea of "unilateral termination" of the Lease Deed was a smokescreen created by the Respondent to wriggle out of its obligations under the Lease Deed. The maintenance reserves need not be paid if the Aircraft was not flown, since it was not delivered. Since the Respondent is located outside India, permitting the Respondent to alienate the corpus of the arbitral proceeding, that is, the Aircraft, would render the arbitral proceedings futile. The balance of convenience would be in favour of grant of interim reliefs, as sought in the petition.

Contentions raised by the Respondent:

The primary contention of the Respondent was that the DHC did not have territorial jurisdiction to deal with this petition. The contractual position that emerges is that the Petitioner and Respondent have agreed to subject themselves to the jurisdiction of courts at Singapore, the seat of arbitration is Singapore, and the arbitration proceedings are to be in accordance with the Arbitration Rules of the SIAC. The Respondent argued that since the parties have agreed to submit themselves to the jurisdiction of the courts at Singapore, the DHC is proscribed from entertaining the present matter. The proviso to Section 2(2) of the Act is categorical and unequivocal. It provides that, irrespective of the location of the place of arbitration, Part I of the Act, which includes Section 9 of the Act, would apply to all international commercial arbitrations, subject to an agreement to the contrary. In the instant case, Clause 23.4 of the Lease Deed fixes both the place as well as the seat of arbitration, as Singapore. The arbitration being an international commercial arbitration, the proviso to Section 2(2) of the Act would make Part I of the Act applicable, subject to an agreement to the contrary. The governing law clause of the Lease Deed, that is, Clause 22.1, falls under the category of "agreement to the contrary". Further, the parties reside in Mumbai and Australia, and no cause of action arose in Delhi. The Petitioner is not without a remedy in Singapore as Section 12A of the IAA empowers the court to order interim measures. The Lease Deed was invalid as Clause 32 thereof terminated all prior agreements or understandings pertaining to matters covered by the said Lease Deed.

The Respondent contended that the Schedules to the Lease Deed were not signed and hence the Lease Deed was invalid, and refuted the submission of the Petitioner that there was an implicit agreement to consider the Schedules to the First Lease Deed as part of the Lease Deed. The Respondent alleged that the Petitioner unilaterally terminated the Lease Deed by an e-mail concluding with the words, *"Demand full refund and close".* Delay in securing registration of the Aircraft in India was attributable to the non-completion of import formalities by the Petitioner and delay in delivery of the Aircraft after executing the DAC, was attributable to the Petitioner's insistence that the Respondent comply with conditions, that it was not obligated to perform in terms of the Lease Deed.

Observations of the Delhi High Court

With respect to the Schedules to the Lease Deed not being duly signed, the DHC observed that lack of proper signature was not fatal to the validity of the Lease Deed, on account of the Schedules to the Lease Deed being identical to the Schedules of the First Lease Deed, which were duly signed by the parties. Addressing the primary contention of the Respondent that the DHC does not possess the jurisdiction to hear this matter and is *coram non judice,* the DHC observed that jurisdiction is always a matter of competence, in that want of jurisdiction renders a judicial authority incompetent to adjudicate on a claim. A plea of alternate remedy, on the other hand, involves an element of discretion. Alternate remedy is never a bar to adjudication of the claim, especially in original civil jurisdiction. If the DHC does not have jurisdiction to entertain this petition, it cannot assume such jurisdiction merely because the Petitioner has no other remedy available with it. To understand the issue related to jurisdiction in its entirety, the DHC relied on various case laws.

In ***Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc. [(2012) 9 SCC 552]*** (**"BALCO"**), the Supreme Court held that Part I of the Act is limited in its application to arbitrations taking place in India. It also held that the "seat of the arbitration" was the "centre of gravity" thereof. At the same time, it was clarified that the arbitral proceedings were not required, necessarily, to be conducted at the "seat of arbitration", as the arbitrators were at liberty to hold meetings at different, convenient, locations. The law governing the arbitration was, however, normally the "law of the seat or place where the arbitration is held". The Constitution Bench went on, thereafter, to underscore the importance of the distinction between the "seat" and the "venue" of arbitration, in the context of international commercial arbitration, where it would be quite crucial in the event the arbitration agreement designates a foreign country as the "seat"/"place" of the arbitration and also selects the Act as the curial law or the law governing the arbitration proceedings. It notably held that only if the agreement of the parties is construed to provide for the "seat"/ "place" of arbitration being in India – would Part I of the Act be applicable. If the agreement is held to provide for a "seat"/ "place" outside India, Part I of the Act would be inapplicable to the extent inconsistent with the arbitration law of the seat, even if the agreement purports to provide that the Act shall govern the arbitration proceedings. It was held that the choice of another country as the seat of arbitration inevitably imports an acceptance that the law of that country relating to the conduct and supervision of arbitrations will apply to the proceedings. It would, therefore, follow that if the arbitration agreement is found or held to provide for a seat/place of arbitration outside India, then the provision that the Act would govern the arbitration proceedings, would not make Part I of the Act applicable or enable Indian courts to exercise supervisory jurisdiction over the arbitration or the award. Thus, in BALCO, the Constitution Bench of the Supreme Court held, in unmistakable terms, that Section 2(2) of the Act resulted in complete exclusion of jurisdiction of courts in India, in respect of foreign seated arbitrations, even for the purpose of obtaining interim reliefs, whether at the pre-arbitral stage or otherwise, and also went on to clarify that this position was not affected by Section 2(1)(e) of the Act.

In ***Swastik Gases Private Limited v. Indian Oil Corporation Ltd [(2013) 9 SCC 32],*** the Supreme Court held that non-use of words like "alone", "only", "exclusive" or "exclusive jurisdiction" in the jurisdiction clause is not decisive and does not make any material difference. For construction of jurisdiction clause, the maxim expression *uniusest exclusion alterius* comes into play as there is nothing to indicate to the contrary. This legal maxim means that expression of one is the exclusion of another. By making a provision that the agreement is subject to a particular territorial jurisdiction, the parties have impliedly excluded the jurisdiction of other courts. A clause like this is not hit by Section 23 of the Indian Contract Act, 1872 at all and such clause is neither forbidden by law nor is it against the public policy.

In ***Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited [(2017) 7 SCC 678],*** the Supreme Court endorsed the view that once the seat of arbitration has been fixed, it would be in the nature of an exclusive jurisdiction clause as to the courts which exercise supervisory powers over the arbitration.

These judgements were howeverrendered prior to the insertion of the proviso to Section 2(2) of the Act. Section 2(2) of the Act states that, *"This Part shall apply where the place of arbitration is in India:*

Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act." Thus, the said proviso inserted by the Arbitration and Conciliation (Amendment) Act, 2015 stipulates that, unless there is an agreement to the contrary, even if the place of arbitration were outside India, the provisions of Sections 9 *(Interim measures, etc., by court),* 27 *(Court assistance in taking evidence),* 37(1)(a) *(Refusal to refer the parties to arbitration)* and 37(3) *(Second appeal from order passed in an appeal)* of the Act would continue to apply to international commercial arbitration and an arbitral award made or to be made in such place would be enforceable and recognized under Part II of the Act. Thus, the beneficial reach of this proviso is conditioned by the caveat that there should be no "agreement to the contrary". In ***Mankastu Impex Private Limited v. Airvisual Limited [2020 SCC OnLine SC 301],*** the question that arose before the Supreme Court was whether the DHC lacked jurisdiction to entertain the petition filed under Section 11 *(Appointment of arbitrators)* of the Act as the parties have agreed that the seat of arbitration is in Hong Kong. This judgment was made in light of the proviso to Section 2(2) of the Act. The Supreme Court held that if the arbitration agreement is found to have seat of arbitration outside India, then the Indian courts cannot exercise supervisory jurisdiction over the award or pass interim orders. However, since Section 11 of the Act did not come under the ambit of the proviso to Section 2(2) of the Act, it was finally held that the application was not maintainable.

The DHC observed that *de hors* the proviso to Section 2(2) of the Act, there can be little doubt that once the "seat of arbitration" has been fixed as Singapore, courts at Singapore would have exclusive jurisdiction to supervise the arbitral proceedings. However, the proviso to Section 2(2) of the Act, which came into effect on October 23, 2015, changes the goalpost. Effectuating the proviso, Section 9 of the Act would also apply to international commercial arbitration, where the place of arbitration is outside India.

The DHC noted that unlike Sections 11, 34 and 36 of the Act, Section 9 of the Act is available at the pre-arbitration stage, before any arbitral proceedings have commenced, and could be subject to supervision by any judicial forum. It observed that the rationale of the Law Commission behind including Section 9 of the Act in the ambit of the proviso to Section 2(2) of the Act is that, where the assets were located in India and there is a likelihood of dissipation thereof, the party seeking a restraint there against would lack an efficacious remedy if the seat of the arbitration is abroad. Endorsing the views of the Law Commission, the DHC agreed that alternative reliefs in such a situation are likely to be more chimerical than substantial. The DHC endorsed the view that interim injunctive relief should not be granted if it requires an unacceptable degree of supervision in a foreign land. It observed that Section 12A of the IAA would not readily enable the Petitioner to seek interim relief at the pre-arbitral stage from Singapore courts. Section 12A of the IAA does not indicate, expressly or by necessary implication, that it would apply at the pre-arbitral stage.

A Section 9 petitioner is required to demonstrate that, if urgent interim reliefs were not granted, there is a chance of the arbitral proceedings being frustrated, and the award (if any) being rendered futile. A court under Section 9 of the Act is concerned with protecting the corpus of the arbitral dispute, so that the arbitration can take off and fructify.

Once a dispute, amenable to and deserving of resolution by arbitration is found to exist, and the apprehension of dissipation of the assets forming the corpus of the dispute is found to be real and subsisting, or where the circumstances indicate that enforcement of the award as and when delivered would otherwise be hindered, Section 9 of the Act can grant "interim measures of protection".

Decision of the Delhi High Court

The proviso to Section 2(2) of the Act makes Section 9 of the Act applicable even in the case of foreign seated arbitrations, unless there is an "agreement to the contrary". Here, any "agreement to the contrary" would, therefore, have to expressly stipulate that Section 9 of the Act would not apply in that particular case. If such a specific stipulation is absent, the beneficial dispensation contained in the said proviso cannot stand excluded. Mere submission by the parties to the jurisdiction of Singapore courts in the "Governing Law" clause in the Lease Deed, cannot suffice to operate as "agreement to the contrary", excluding the applicability of Section 9 of the Act. The agreement would be required to have a specific stipulation that the parties had agreed to exclude the applicability of Section 9 of the Act to the contract between them, and to disputes arising thereunder. Since there is no such express provision, the argument that the parties had agreed to submit themselves to the jurisdiction of Singapore courts, would not suffice as an "agreement to the contrary".

The Respondent did not deny that the parties had agreed to treat the Schedules to the First Lease Deed, as Schedules to the Lease Deed. Since the Lease Deed was signed by the parties at New Delhi, it could not be justifiably contended by the Respondent that no part of the cause of action arose within the jurisdiction of the DHC and hence, there is no want of jurisdiction in relation to the DHC.

Moreover, it was held that the CDSS was not provided for by the Respondent, which was a pre-requisite for the DAC to be executed and the delivery of the Aircraft, and hence the Respondent was in violation of the Lease Deed. With respect to the contention of liability on the Petitioner to pay maintenance reserves, the DHC held that, as the Aircraft had never been flown, there could be no question of the Petitioner being required to pay any maintenance reserves. Further, the Court did not agree with the contention of unilateral termination of agreement and held that the agreement had not been unilaterally terminated. The petition was disposed of with a direction that the amount of INR 4,30,00,000 shall remain deposited with the Registry of the DHC by the Respondent, in an interest-bearing fixed deposit, pending further orders.

VA View:

The DHC, through its detailed Judgement, has highlighted the law on interim relief in case of International Commercial Arbitration and has laid down an important law that mere submission to exclusive jurisdiction of a foreign court does not oust the jurisdiction of the Indian courts under Section 9 of the Act. While acknowledging the laws laid down by the Supreme Court in various judgements that if the agreement clearly lays down the seat of arbitration, it ousts the jurisdiction of other courts, the DHC highlighted the proviso to Section 2(2) of the Act. The DHC held that fixation of a "place" or the "seat" of arbitration would not, *ipso facto,* divest the DHC of Section 9

jurisdiction. Such divestiture would occur only if there is any "agreement to the contrary". The agreement would be required to have a specific stipulation that the parties had agreed to exclude the applicability of Section 9 of the Act to the contract between them, and to disputes arising thereunder.

Through this Judgement, the DHC has upheld the intent of the Law Commission behind the proviso to Section 2(2) of the Act, that is, courts in the foreign country would not efficaciously be in a position to grant pre-arbitral interim relief to secure assets which may be located in India.

II. Delhi High Court: Once the CIRP process itself comes to an end, an application for avoidance of transactions cannot be adjudicated

The Delhi High Court (**"DHC"**) has in its judgement dated November 26, 2020 (**"Judgement"**), in the matter of ***M/S. Venus Recruiters Private Limited v. Union of India [W.P.(C) 8705/2019 & CM APPL. 36026/2019],*** held that the role of the Resolution Professional (**"RP"**) cannot continue once the resolution plan (**"Plan"**) is approved and the successful resolution applicant takes charge of the corporate debtor (**"Corporate Debtor"**). It was further held that the National Company Law Tribunal (**"NCLT"**) has no jurisdiction to entertain and decide avoidance applications in respect of a Corporate Debtor, which is now under a new management, unless provision is made in the final Plan.

Facts

M/s Bhushan Steel Limited, the Corporate Debtor in the instant case, was the subject of Corporate Insolvency Resolution Process (**"CIRP"**) before the NCLT, New Delhi, initiated by the State Bank of India in 2017. When the CIRP was initiated, Mr. Vijay Kumar Iyer was appointed as an interim resolution professional, who was subsequently confirmed as the RP by the Committee of Creditors (**"CoC"**) at its first meeting held on August 24, 2017. The CoC approved the Plan proposed by Tata Steel Limited and the same was filed to seek approval before the NCLT on March 28, 2018. Thereafter, on April 9, 2018, the RP herein also filed an avoidance application, being CA No.284(PB) of 2018, under Section 25(2)(j), Sections 43 to 51 and Section 66 of the Insolvency and Bankruptcy Code, 2016 (**"IBC"**). In the said avoidance application, various transactions were enumerated as suspect transactions with related parties. The following were the suspect transactions allegedly entered into by the Corporate Debtor in the instant case:

i) Potential excess payment of lease rent to Vistrat Real Estate Private Limited;

ii) Preferential credit to various international customers and long outstanding receivables to entities such as Shree Steel Djibouti FZCO and Shree Global Steel FZE;

iii) Excess payments to manpower companies/ contractors; and

iv) Uncontracted payment of interest on advance to Peak Minerals and Mining Private Ltd. for cancelled sale-and-lease back transactions.

M/s Venus Recruiters Private Limited (**"Petitioner"**) is one of the manpower contractors, as listed in suspect transactions in (iii) above. The Corporate Debtor and the RP herein, the successful resolution applicant (Tata Steel Limited) and the Union of India are hereinafter collectively referred to as the **"Respondents"**. Within five weeks of filing the avoidance application, the NCLT approved the Plan, and the avoidance application in relation to the suspect transactions was neither heard nor decided on merits. On May 18, 2018, the Plan was finally closed and the new management took over. On July 24, 2018, the NCLT passed an order in the avoidance application (C.A. No. 284/2018), which was filed prior to the approval of the Plan.

The NCLT's order dated May 15, 2018, approving the Plan, was subsequently upheld by the National Company Law Appellate Tribunal (**"NCLAT"**) by its judgment dated August 10, 2018. However, on October 25, 2018, the NCLT impleaded the Petitioner as a party in CA No. 284(PB)/2018 and issued notice to it. It is the said order impleading and issuing notice to the Petitioner, which was challenged by the Petitioner in the present petition, seeking issuance of a writ declaring the proceedings pending before the NCLT as void and *non-est.*

Issues

I) Whether an application for avoidance of a preferential transaction, though filed prior to the Plan being approved, can be heard and adjudicated by the NCLT, at the instance of the RP, after the approval of the Plan.

ii) Whether a RP can continue to act beyond the approval of the Plan.

iii) Who would get the benefit of an adjudication of the avoidance application after the approval of the Plan.

Arguments

Contentions raised by the Petitioner:

The Petitioner questioned the jurisdiction of the NCLT and submitted that once the CIRP has reached finality, the RP becomes *functus officio,* after which it was no longer entitled to file or pursue any application on behalf of the company. Various provisions of the IBC were referred to, to submit that the RP merely conducts and manages the operations of the Corporate Debtor during the CIRP and not beyond that. As per Section 60 of the IBC, jurisdiction of the NCLT cannot extend beyond the approval of the Plan, and as the NCLT had disposed of all the pending applications by its order on May 15, 2018 making way for the new management to acquire control of the erstwhile Corporate Debtor, at a later stage, the order issuing notice in an application filed prior to the acceptance of the Plan is completely void. It was further submitted that there are strict timelines provided under the IBC. Reliance was placed on the preamble of the IBC which emphasizes its purpose of concluding the insolvency proceedings in a time bound manner. As per the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (**"CIRP Regulations"**), there are specific timelines prescribed for the RP to determine whether any transaction was preferential, undervalued, fraudulent or extortionate and also to file an application before the NCLT, both within the prescribed 180-day period. Accordingly, it was advanced that avoidance of any such transactions ought to be undertaken before conclusion of the CIRP. It was further emphasized that avoidance applications could not be filed by the Corporate Debtor or by the resolution applicant,

but only by the CoC or the RP, prior to the Plan being approved. The difference between a statutory remedy under Sections 43 and 44 of the IBC and a civil remedy was highlighted and it was argued that once the new management comes into control of the Corporate Debtor, post the approval of the Plan, the Corporate Debtor was free to avail of its civil law remedies in respect of any new transaction that the new management is overviewing. The Petitioner explained that once the Plan is approved, the CoC itself is wound up, as all the dues of CoC are paid and a "No Dues Certificate" is submitted, after which no further proceedings can be undertaken by the CoC. Since the CoC assumes the role of the final arbiter of the Plan, if it chooses not to pursue any particular transaction, the RP ought not to be allowed to pursue the same and reopening the resolution process in this manner would have adverse implications.

Contentions raised by the Respondents:

The Respondents protested that despite receiving the notice in the avoidance proceedings in April 2018, the Petitioner approached the DHC only in 2019 and thus it would not be entitled for discretionary jurisdiction to be exercised in its favour. The Respondents highlighted that the intention of the IBC is to delink the CIRP proceedings from avoidance transactions inasmuch as the adjudication of such transactions could take much longer than timelines fixed in the adjudicatory process. It was submitted that after the introduction of Section 26 of the IBC, it is clear that the power of the RP is independent of the CIRP proceedings. The Respondents, with the support of the Discussion Paper on Corporate Liquidation Process along with Draft Regulations published by Insolvency and Bankruptcy Board of India (**"IBBI"**) on April 27, 2019, contended that applications in respect of vulnerable transactions are long drawn due to continuous litigation and it is for this reason that Section 26 of the IBC clarifies that filing of an avoidance application shall not affect the proceedings of the CIRP. Reliance was placed on the decision in ***Committee of Creditors of Essar Steel India Ltd. through Authorised Signatory v. Satish Kumar Gupta [Civil Appeal No. 8766-67 of 2019, dated 15th November, 2019 (SC)],*** wherein the Supreme Court held that, although timelines were important in the CIRP proceedings, the word 'mandatorily' was struck down from Section 12 of the IBC as being violative of Article 19(1)(g) of the Constitution. It was also argued that any order passed by the NCLT under Sections 60 and 61 of the IBC is appealable to the NCLAT, thereby questioning the jurisdiction of the DHC to entertain the instant writ petition on accord of an alternate remedy.

The point raised was that the NCLT could not have disposed of the entire petition, without dealing with the avoidance application and the timelines to adjudicate on the avoidance transactions can in fact be extended. It was contended that a perusal of Regulation 39(4) of the CIRP Regulations along with Form H of the CIRP Regulations clearly shows that the avoidance application could be filed or be pending at the time of submitting the Plan by the RP. It was pointed out that Clause 4.2 of the Report of the Insolvency Law Committee, constituted by the Ministry of Corporate Affairs dated 20th February, 2020 (**"ILC Report"**), opined that an avoidance application may continue even beyond the closure of the resolution proceedings. The Respondents argued that the RP, after arriving at a conclusion that a particular transaction is a preferential transaction, has to approach the NCLT, which can reverse the effect of the transaction and under Section 26 of the IBC there is no fixed time limit for deciding an avoidance application.

Observations of the Delhi High Court

Role of the RP:

While making note of the structure of the CIRP prescribed under the IBC, the DHC held that under Section 31 of the IBC, if the NCLT is satisfied with a Plan, it shall approve the same, making it binding on the Corporate Debtor and its stakeholders and guarantors. After ensuring that the Plan has sufficient provisions for its implementation, the NCLT approves the Plan, pursuant to which the moratorium order under Section 14 of the IBC ceases. The RP forwards all the records relating to the CIRP and the Plan to the IBBI to be recorded on its database, after which the role of the RP comes to an end.

Application for avoidance transactions:

The IBC contemplates various transactions which could be considered as objectionable or unacceptable and may require to be either reversed or compensated for, in order to maintain the fairness of insolvency or liquidation process to the creditors. As per Section 43 of the IBC, if the RP is of the opinion that any preferential transaction has taken place, by which the Corporate Debtor has given any benefit to a related party two years prior to the insolvency commencement date, or a preference to an unrelated party one year prior to the said date, he can move an application with the NCLT for avoidance of the same. If the NCLT is of the view that the transaction was a preferential transaction, it can pass various types of orders as set out in Section 44 of the IBC, in effect neutralizing the transaction including the reversal of the transaction, sale of any property given under the transaction, and amounts being paid in respect of benefits received. The DHC noted that a related party transaction would be preferential if it has taken place two years before the insolvency commencement date and puts such party in a beneficial position as against other creditors, sureties or guarantors. In case of an unrelated party, the period is one year.

The avoidance application in the instant case was filed after the CoC had approved the Plan and almost at the very end of the submissions on the Plan being heard by the NCLT, which it did not deal with at the time of approving the Plan. The DHC opined that after the approval of the Plan and the new management taking over the Corporate Debtor, no proceedings remain pending before the NCLT, except issues relating to the Plan itself, as permitted under Section 60 of the IBC. Emphasizing that certainty and timeliness is the hallmark of the IBC, the DHC reiterated the views upheld in ***Innoventive Industries Ltd. v. ICICI Bank & Anr. [(2018) 1 SCC 407],*** that one of the important objectives of the IBC is to bring the insolvency law in India under a single unified umbrella with the object of speeding up of the insolvency process. Continuation of the jurisdiction of the NCLT beyond what is permitted under the IBC would be contrary to its very ethos. The DHC observed that after the approval of the Plan, the NCLT cannot exercise jurisdiction in respect of the avoidance application. It reasoned that an avoidance application for any preferential transaction is meant to give some benefit to the creditors of the Corporate Debtor and not to the Corporate Debtor in its new avatar, after the approval of the Plan, as is clear from Section 44 of the IBC.

The DHC noted that while the IBC is bereft of any provision prescribing a time limit to dispose of avoidance applications, the CIRP Regulations clearly stipulate the structure and methodology for dealing with objectionable transactions. Analyzing Sections 43 and 44 of the IBC, it observed that the assessment by the RP of the objectionable transactions including preferential transactions cannot be an unending process. As prescribed by the CIRP Regulations, if the RP concludes that the Corporate Debtor has been subject to preferential transactions, the determination has to be made by the 115th day and application to the NCLT for appropriate relief on or before the 135th day. The DHC observed that the said timelines are prescribed so that the RP includes these details in the resolution plan submitted under Section 30 of the IBC. These details ought to be available before the NCLT at the time of approval of the resolution plan under Section 31 of the IBC. The DHC observed that there is a start line and finish line for the CIRP. Section 23 of the IBC clearly stipulates that the role of the RP is to `manage' the affairs of the Corporate Debtor `during' the resolution process and not thereafter. Prior to the proviso to Section 23 of IBC, the RP's mandate ended with the CIRP, but the proviso merely extended the functions of the RP till the approval of the Plan under Section 31 of the IBC, or appointment of liquidator, and not beyond that. Thus, the continuation of the RP or filing of an application for the purpose of prosecuting an avoidance application as a *`Former RP'* is beyond the contemplation of the IBC. The RP ceases to be one after an order under Section 31 of the IBC is passed. The RP does not have any connection whatsoever with the new management which takes over the erstwhile Corporate Debtor, after the approval of the Plan. Any other interpretation could lead to a situation where an RP could be a *'Former RP'* for years together without any definite end date.

The DHC pointed out that the mandate for the RP, under Section 23 of the IBC, cannot be extended beyond the contemplation in the statute. After the approval of the Plan, the new management takes over, and the manner in which the affairs of the company are to be run is the sole prerogative of the new management. In the statutory scheme, the RP cannot continue to act on behalf of the erstwhile Corporate Debtor under the title of *`Former RP',* in violation of the legislative intention and the statutory prescription. A perusal of Section 30(4) of the IBC also makes it adequately clear that the CIRP period has to be completed within the time period specified under Section 12(3) of the IBC. Thus, the IBC does not contemplate the continuation of the RP beyond the CIRP period. The DHC clarified that the Judgement passed was strictly applicable to resolution processes and not liquidation. It was also observed that once the CIRP comes to an end, Form H of the CIRP Regulations cannot come to the aid of avoidance applications to remain pending beyond the CIRP process. The DHC, upon closely looking at the ILC Report, observed that the successful resolution applicant cannot be permitted to file such avoidance applications, as the same was not factored into the bid. If an avoidance application for preferential transactions is permitted to be adjudicated beyond the period after the Plan is approved, the NCLT would effectively be stepping into the shoes of the new management to decide what is good or bad for the erstwhile Corporate Debtor. Once the Plan is approved and the new management takes over, it is completely up to the new management to decide whether to continue a transaction or agreement or not. Thus, if the CoC or the RP are of the view that there are any transactions which are objectionable in nature, the order in respect thereof would have to be passed prior to the approval of the Plan.

Decision of the Delhi High Court

Allowing the petition, the DHC held that once the CIRP process itself comes to an end, an application for avoidance of transactions cannot be adjudicated. It was held that after the approval of the Plan and the new management taking over the Corporate Debtor, no proceedings remain pending before the NCLT, except issues relating to the Plan itself, as permitted under Section 60 of the IBC. Emphasizing on the lack of jurisdiction of the NCLT, the DHC upheld the maintainability of the instant writ petition and held the argument that avoidance applications relating to preferential and other transactions can survive beyond the conclusion of the CIRP, to be contrary to the scheme of the IBC. It was also held that the RP cannot continue beyond an order under Section 31 of the IBC, as the CIRP comes to an end with a successful Plan having been approved, subject to the Plan stating otherwise. The DHC further held that the RP's role cannot continue once the Plan is approved and the successful resolution applicant takes charge of the Corporate Debtor.

It was decided that Section 26 of the IBC cannot be read in a manner so as to allow an application for avoidance of transactions under Section 25(2)(j) of the IBC to survive after the CIRP process. It was categorically held that the NCLT has no jurisdiction to entertain and decide avoidance applications, in respect of a Corporate Debtor, now under a new management unless provision is made in the final Plan and the parties would have to resort to civil and other remedies in terms of the contract between them. The DHC stated that the RP cannot wear the hat of the *`Former RP'* and pursue an avoidance application in respect of preferential transactions after the hat of the Corporate Debtor has changed and it no longer remains a Corporate Debtor as this would be wholly impermissible in law as the mandate of the RP has come to an end.

VA View:

Avoidance transactions under the IBC include transactions such as preferential transactions, undervalued transactions, extortionate credit transactions and transactions involving fraudulent and wrongful trading. When the RP or the Liquidator comes across any transaction that can be classified as avoidance transaction, the IBC mandates them to file an avoidance application with the NCLT, seeking appropriate reliefs and directions permissible under the IBC. In the instant case, the question that arose before the DHC pertains to the timeline for disposal of an avoidance application. The DHC has through this Judgement furnished much needed clarity on the fate of pending avoidance applications under Section 43 of the IBC, pursuant to the conclusion of the CIRP.

This Judgement has successfully prescribed a deadline, which has not been expressly stipulated in the IBC or its corresponding regulations, for the speedy disposal of avoidance applications. This case now acts as a precedent for NCLTs throughout the country, highlighting the need to deal with avoidance applications on a priority basis prior to the approval of the Plan. Through the Judgement, the DHC has upheld the integrity of one of the basic tenets of the IBC, that is, insolvency resolution in a time-bound manner.

III. NCLT, Mumbai: The jurisdiction to grant reliefs for recovery of rent from the tenant and the eviction of tenant from the property of the corporate debtor is in the exclusive domain of the civil court

The National Company Law Tribunal, Mumbai (**"NCLT"**) has in its judgement dated October 27, 2020 (**"Judgement"**) in the matter of ***Asset Reconstruction Company (India) Limited v. Precision Fasteners Limited [C.P. (IB) No. 1339/NCLT/MB/2017],*** held that jurisdiction to grant reliefs of recovery of rent from tenant and the eviction of tenant from the property of the corporate debtor lies in the exclusive domain of the civil court, hence, such issues cannot be dealt with by the adjudicating authority (**"Adjudicating Authority"**) as defined under Section 5(1) of the Insolvency and Bankruptcy Code, 2016 (**"IBC"**) by invoking Section 60(5) of the IBC.

Facts

The NCLT, in this Judgement, has considered the following two applications:

I. M.A. No. 1512/2018 (**"Application No.1"**) filed by the Liquidator (**"Applicant"or "Liquidator"**) of Precision Fasteners Limited (**"Corporate Debtor"**) against Siddhi Edibles Private Limited (**"Respondent"**); and

ii. M.A. No. 47/2019 (**"Application No. 2"**) filed by the Respondent against the Liquidator.

Application No.1 was filed by the Liquidator under Section 60(5)(c) of the IBC, wherein the Applicant stated that he had been appointed as the liquidator of the Corporate Debtor by an order dated March 12, 2018. The Corporate Debtor rented out a premise owned by it, that is, the *'office Space No. 19, Ground floor at premise No. 8, Camac Street, Kolkata'* (**"Property"**) to the Respondent. By agreement dated October 07, 1983, (**"Agreement"**), one Mrs. Pushpadevi Jain had assigned all the right, title and interest in respect of the Property in favour of the Corporate Debtor and the Agreement also recorded that the Corporate Debtor had obtained the consent of Shantiniketan Estates Private Limited (**"Developer"**). The Developer had also recognised the ownership, title and interest of the Corporate Debtor for the Property by letter dated October 24, 1986. The promoter of the Corporate Debtor had entered into a leave and license agreement with the Respondent in respect of the Property and copy of it was not traceable. The Applicant by letter dated June 08, 2018 had communicated to the Respondent that the promoters of the Corporate Debtor had confirmed that the leave and license agreement had expired prior to the commencement of the corporate insolvency resolution process of the Corporate Debtor and was not renewed thereafter. The Respondent unilaterally reduced the rent of the Property from INR 26,000/- per month to INR 21,000/- per month from December, 2017. Further, the Respondent paid only INR 18,900/- in the month of June, 2018 and subsequently had stopped paying the rent.

Respondent stated that it was a lawful tenant and bona-fide occupant of the Property and paid rent regularly to the Corporate Debtor. The Respondent submitted that during October, 2016, on the instruction of the Corporate Debtor, the Respondent paid a part of the rent to the Kolkata Municipal Corporation (**"KMC"**), and the Applicant had also stated that the said amount paid to KMC was adjusted towards rent paid by the Respondent. The

Respondent had also enclosed the property tax receipt that had the name of Corporate Debtor as the owner of the Property.

The Applicant stated that he served notice dated April 17, 2018 (**"Eviction Notice-1"**) and notice dated September 12, 2018 (**"Eviction Notice-2"**) to the Respondent but in reply to both eviction notices, the Respondent refused to vacate and handover the possession of the Property.

Therefore, this Application No.1 was filed by the Applicant wherein he sought relief for eviction of, and recovery of outstanding rent from, the Respondent. Further, the Applicant also sought relief to sell, dispose-off and transfer the Property. Application No.2 was filed by the Respondent against the Applicant seeking the relief to set aside and/or quash the Eviction Notice-1 and Eviction Notice-2.

Issues

I. Whether the Adjudicating Authority has the jurisdiction to grant reliefs for recovery of rent from tenant and eviction of tenant from the Property of the Corporate Debtor under Section 60(5) of the IBC.

ii. Whether the Liquidator was right in including the Property under liquidation estate of the Corporate Debtor.

Arguments

Contentions raised by the Applicant:

Applicant contended that unilateral reduction of the rent of the Property by the Respondent was unjustified.

The Applicant brought forth the irony by the Respondent in the correspondences. On one hand, by the letter dated May 14, 2018, the Respondent, in reply to Eviction Notice -1, stated therein that the Respondent paid rent to the Corporate Debtor, paid property tax on behalf of the Corporate Debtor to KMC and name of the Corporate Debtor appeared on the property tax receipt enclosed therewith; the contents of which corroborated that the Corporate Debtor is the owner of the Property, while, on the other hand, by letter dated September 17, 2018 in reply to Eviction Notice– 2, the Respondent challenged the inclusion of the Property in the liquidation estate of the Corporate Debtor and further the Respondent had challenged the title and ownership of the Corporate Debtor to the Property.

As per Section 35 *(Powers and duties of liquidator)* of the IBC, the Applicant was empowered to take into his custody or control of all assets, property, effects, actionable claims of the Corporate Debtor and to take such measures to protect and preserve the assets of the Corporate Debtor as necessary. Applicant relied on Section 36 *(Liquidation estate)* of the IBC and sought a relief that the Respondent be directed to vacate the Property owned by the Corporate Debtor. As per Regulation 44 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, the Applicant is required to liquidate the Corporate Debtor within a time-bound manner and therefore, the Applicant submitted that it is just and necessary that the reliefs sought be granted.

Contentions raised by the Respondent:

Respondent objected to the Eviction Notice–1. Respondent had replied to the letter dated June 08, 2018 of the Liquidator by letter dated June 27, 2018 stating that the Respondent was ready to pay rent to the Liquidator subject to production of document to establish that the Property belonged to the Corporate Debtor.

Even though the Corporate Debtor entered into an agreement for sale with the Developer, ultimately, there was no registered deed of conveyance in favour of the Corporate Debtor from the Developer. The Liquidator had admitted that the ownership of the Property had not been lying with the Corporate Debtor even though Mrs. Pushpadevi Jain had executed the Agreement in favour of the Corporate Debtor, because the Agreement has not been duly registered. The Developer had acknowledged the right of the Corporate Debtor as owner of the Property, though there was no valid registered deed of transfer in favour of the Corporate Debtor. In view of the above, the Property would not come under the liquidation estate as per Section 36(4)(a) of the IBC, as it is an asset owned by a third party which is in possession of the Corporate Debtor.

The Liquidator issued Eviction Notice – 2 even after having the knowledge that the Property did not come under the liquidation estate. The Respondent, by letter dated September 17, 2018, refused to hand-over the possession of the Property. The Respondent had no information relating to creation of security relating to the Property in favour of any secured creditor of the Corporate Debtor. The Respondent submitted that it is a settled position of law that without legal recourse, a tenant cannot be evicted.

Observations of the NCLT

The NCLT relied on the judgment of the Hon'ble Supreme Court in the case of ***Embassy Property Developments Private Limited v. State of Karnataka and Others [2019 SCC OnLine SC 1542]*** wherein it was held that *"If NCLT has been conferred with jurisdiction to decide all types of claims to property, of the corporate debtor, Section 18(f)(vi) would not have made the task of the interim resolution professional in taking control and custody of an asset over which the corporate debtor has ownership rights, subject to the determination of ownership by a court or other authority. ... Section 25(1) and 25(2)(b) reads as follows: 25. Duties of resolution professional - (1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor (2) For the purposes of Sub-section (1), the resolution professional shall undertake the following actions: (a).... (b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial and arbitration proceedings. This shows that wherever the corporate debtor has to exercise rights in judicial, quasi-judicial proceedings, the resolution professional cannot short-circuit the same and bring a claim before NCLT taking advantage of Section 60(5)".*

The NCLT analysed the applicability of the precedents to the instant matter at hand, that is, whether the above judgments dealing with the powers and duties of resolution professional could be applicable to liquidator.

The NCLT noted that Section 35(1)(k) of the IBC provides that, subject to the directions of the Adjudicating Authority, the liquidator shall have the power to institute or defend any suit, prosecution or other legal proceedings, civil or criminal, in the name of or on behalf of the corporate debtor. Further, the NCLT noted that Section 63 of the IBC provides for *'Civil court not to have jurisdiction'* and Section 231 of the IBC provides for *'Bar of jurisdiction'.* Therefore, the NCLT observed that when the Adjudicating Authority is provided with a specific jurisdiction under the IBC, the civil court has no jurisdiction in respect of those specific matters such as preferential transactions, undervalued transactions, etc. The NCLT further observed that when the provisions of the IBC are read comprehensively, such as Section 18(f)(vi), Section 25(2)(b) and Section 35(1)(k), it can be inferred that the jurisdiction of the Adjudicating Authority does not extend to subjects such as recovery of money, specific performance, eviction proceedings, etc. which were to be dealt with by civil court only.

Further, reference was also made to the judgment of the National Company Law Appellate Tribunal upholding the rejection of resolution plan in the matter of ***K.L Jute Products Private Limited v. Tirupti Jute Industries Limited and Others [Company Appeal (AT)(INS) No. 277 of 2019].*** The relevant portion is as follows: *"Insofar as, the eviction of 2nd Respondent is concerned, the Adjudicating Authority is not empowered to pass an order of eviction and it is for an 'Aggrieved party' to move the appropriate forum for redressal of its grievances in accordance with Law...."*

The NCLT observed that in the guise that the IBC is a complete code in itself, the Adjudicating Authority can neither enlarge nor amplify its jurisdiction.

Decision of the NCLT

The NCLT held that recovery of rent from the tenant and the eviction of tenant from the Property of the Corporate Debtor is in the exclusive domain of the civil court and cannot be dealt with by the Adjudicating Authority under Section 60(5) of the IBC. It was held that the jurisdiction to deal with such matters lies exclusively with the civil court/rent control court only. Hence, the NCLT advised the parties to approach the appropriate jurisdictional civil court for the remedies sought except for sale of the Property.

It was held that, since the Respondent paid rent for the Property, which is an admitted fact, the Liquidator was right in including this Property in the liquidation estate of the Corporate Debtor. Further, it was held that the Liquidator may take steps to register the sale deed for the Property so that there will be a clear title for the Property. Insofar as the sale of the Property by the Liquidator was concerned, the NCLT held that he could do so after taking possession of the Property by due process of law.

VA View:

The NCLT has rightly analyzed the powers of the liquidator and thereby in corollary interpreted the limited scope of the Adjudicating Authority under the IBC. By reading the various provisions of the IBC comprehensively and in view of the legislative intent, this Judgement observed that the power to grant the relief of recovery of rent from tenant and the eviction of tenant from the property of the corporate debtor lies with the appropriate jurisdictional civil court.

It is important to note that a civil court has jurisdiction by virtue of Section 9 of the Code of Civil Procedure, 1908 to try all suits of civil nature excepting suits of which cognizance is either expressly or impliedly barred. However, the Adjudicating Authority under the IBC does not have jurisdiction to all suits since the various professionals working towards the resolution/liquidation of the corporate debtor have the power to approach other appropriate authorities for seeking reliefs. Therefore, the NCLT, through this Judgement, has rightly clarified that the Adjudicating Authority can exercise only such powers within the contours of its jurisdiction, as prescribed by the statute, the law in respect of which, it is called upon to administer.

IV. Supreme Court: Trivial procedural lapses not a ground to nullify SARFAESI proceedings initiated by secured creditor if no substantial prejudice was caused to borrower

The Supreme Court (**"SC"**) has in its judgment dated October 27, 2020 in the matter of ***M/s L&T Housing Finance Limited v. M/s Trishul Developers and Another [Civil Appeal No.3413 OF 2020],*** observed that proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (**"SARFAESI Act"**), initiated by secured creditors, could not be nullified simply on the grounds of technical defects and procedural lapses, unless significant damage was caused to the defaulter.

Facts

M/s L&T Housing Finance Limited (**"Appellant"**), a housing finance company established under the National Housing Bank Act, 1987, is also a notified Financial Institution by the Department of Finance (Central Government). M/s Trishul Developers (**"Respondent"**), is a partnership firm registered under the Partnership Act, 1932, engaged in the real estate construction business. The Respondent had approached the Appellant towards seeking financial assistance and submitted a request by an application dated May 15, 2015, for a term loan of INR 20 Crores (**"Term Loan"**) for the purposes of completion of its housing project, namely, Mittal Palms, Phase-I (**"Project"**).

Pursuant to the above, by a sanction letter dated August 7, 2015 (**"Sanction Letter"**), the Appellant sanctioned a Term Loan facility of INR 20 crores in favour of the Respondent for completion of the said Project. Towards availing the said credit facility, the Respondent executed a Facility Agreement dated August 11, 2015 (**"Facility Agreement"**) along with certain other security documents, thereby mortgaging various immovable properties and creating security interest in favour of the Appellant against the Term Loan. The Sanction Letter had the name of the Appellant, 'L&T Finance (Home Loans)' set out on the top right hand corner of the letterhead, and 'L&T Housing Finance Ltd.' with its address mentioned on the bottom left hand corner.

The Respondent subsequently defaulted on repayment of the Term Loan, following which, the Appellant served a demand notice dated December 16, 2016, on the Respondent to pay the outstanding dues within the stipulated period mentioned in the said demand notice. Since the Respondent failed to make the outstanding payment

within the stipulated period, the Appellant classified the account of the Respondent as a Non Performing Asset (**"NPA"**) on April 15, 2017, and issued a notice of demand dated June 14, 2017, under Section 13(2) of the SARFAESI Act (**"Demand Notice"**), calling upon the Respondent to pay the outstanding dues of INR 16,97,54,851/- as on May 31, 2017, with future interest till actual payment, in terms of the Demand Notice, within sixty days from the date of receipt of the Demand Notice.

Upon receipt of the Demand Notice, the Respondent failed to discharge its liability and instead issued a reply dated August 8, 2017, to the Demand Notice. Consequently, the Appellant filed an application under Section 13(4) read with Section 14 of the SARFAESI Act, before the competent authority towards taking possession of the mortgaged properties and the collateral security of the Respondent. In response, the Respondent filed a securitisation application (No.76/2018) before the Debt Recovery Tribunal (**"DRT"**) under Section 17 of the SARFAESI Act assailing the issuance of the Demand Notice. After hearing both sides, the DRT by its order dated March 23, 2018 (**"DRT Order"**), set aside the Demand Notice on the ground that it had not been validly issued in the name of the Appellant, and instead the name "L&T Finance Ltd." had been mentioned on the Demand Notice. The DRT held that since the Demand Notice was issued by another group entity of the Appellant and not the Appellant itself, who in fact was the secured creditor, and the defect not being curable after issuance of the Demand Notice, the proceedings under Section 13(4) read with Section 14 of the SARFAESI Act were not sustainable. The DRT Order was challenged by the Appellant under an appeal before the Debt Recovery Appellate Tribunal (**"DRAT"**) which, by its order dated April 16, 2019 (**"DRAT Order"**), set aside the order of the DRT. The DRAT Order was subsequently challenged by the Respondent by way of a writ petition filed before the High Court of Karnataka (**"HC"**). The HC, by its order dated June 27, 2019 (**"HC Order"**), set aside the DRAT Order and confirmed the observations of the DRT, following which, the Appellant had preferred the present appeal before the SC, against the said impugned HC Order.

Issue

Whether the Appellant could maintain proceedings under the SARFAESI Act in light of a technical defect in the application.

Arguments

Contentions raised by the Appellant:

The Appellant, *inter alia,* contended that the same letterhead of the Appellant was used right from the beginning of its dealings with the Respondent, including issuance of the Sanction Letter and the Demand Notice, and even in its subsequent correspondences. The Appellant argued that, only at one stage, had it due to oversight, inadvertently applied the seal of "L&T Finance Ltd." and that it was not the case of the Respondent that the same had caused any substantial prejudice to it. In the given circumstances, the mere technical defect noticed in the Demand Notice by the DRT and relied upon in the DRT Order and subsequently confirmed by the HC in the HC Order, should not negate the proceedings which had been initiated by the Appellant in carrying out its obligations and protecting its security interest as contemplated under the provisions of the SARFAESI Act.

Contentions raised by the Respondent:

The Respondent on the other hand contended that when the salient defect had been noticed by the DRT and confirmed by the HC at the very inception of the proceedings being initiated under the SARFAESI Act, all the consequential proceedings initiated in furtherance thereof in the instant case could not be said to be in due compliance of the SARFAESI Act, and once a procedure had been prescribed by law as mandated under the SARFAESI Act, the secured creditor was under an obligation to comply with it, which in the instant case had undisputedly not been followed. The Respondent further contended that in the given circumstances, no error had been committed by the HC under its impugned HC Order, which needed to be rectified by the SC.

Observations of the Supreme Court

The SC observed that from the very inception, when the proposal of taking the Term Loan from the Appellant was furnished by the Respondent by its application dated May 15, 2015 and accepted by the Appellant by the Sanction Letter, the letterhead which was used for the purpose clearly reflected "L&T Finance (Home Loans)" on the top right hand corner of the letterhead, and "L&T Housing Finance Ltd." with its registered office address on the bottom left hand corner, and this had been duly signed by the authorised signatory of the Respondent. Therefore, it manifested from the record that the Respondent, from the initial stage, was aware of the procedure which was being followed by the Appellant in its correspondence while dealing with its customers and that was the same practice being followed by the Appellant when another notice dated December 16, 2016 was served by it at a later stage. The Demand Notice, which in explicit terms indicated the execution of the Facility Agreement between the Appellant and the Respondent and of the default being committed by the Respondent in furtherance thereof, was served on the same pattern of the letterhead which was being ordinarily used by the Appellant in its correspondence with its customers leaving no iota of doubt that it was in reference to the non-fulfilment of the terms and conditions of the Facility Agreement executed between the parties. Even in the reply to the Demand Notice, which was served by the Respondent on August 8, 2017 under Section 13(3A) of the SARFAESI Act, no specific contention was raised with reference to the manner of correspondence between the Appellant and the Respondent and no objection was raised by the Respondent with regard to any defect in the Demand Notice.

It was further observed by the SC that when action had been taken by the competent authority as per the procedure prescribed by law and the person affected has knowledge of it, such action could not be held to be bad in law merely on account of a trivial objection, unless any substantial prejudice is caused on account of the procedural lapse as prescribed under the SARFAESI Act or the rules framed thereunder. The SC further stated that it always depended upon the facts of each case to decipher the nature of the procedural lapse being complained of and the resultant damage, if any, being caused, and there could not be a straitjacket formula which could be uniformly followed in all the transactions.

The SC observed that the objection raised by the Respondent was trivial and technical in nature and the Appellant had complied with the procedure prescribed under the SARFAESI Act. At the same time, the objection raised by the Respondent in the first instance, at the stage of filing of a securitisation application before the DRT under the SARFAESI Act, was a feeble attempt which had persuaded the DRT and the HC to negate the proceedings initiated by the Appellant under the SARFAESI Act. This was unsustainable, more so, since the Respondent was unable to

justify the error in the procedure being followed by the Appellant in initiating proceedings under the SARFAESI Act.

Decision of the Supreme Court

In allowing the instant appeal, the SC held the view that the submission made by the Respondent that the Demand Notice under Section 13(2) of the SARFAESI Act was served by the authorised signatory of "L&T Finance Ltd." which was not the actual secured creditor, was wholly without substance, for the reason that "L&T Finance Ltd." and "L&T Housing Finance Ltd." were the companies who in their correspondence with all their customers used a common letterhead, having the same authorised signatory, and at one stage due to human error by the authorised signatory, the seal of "L&T Finance Ltd." was affixed in place of "L&T Housing Finance Ltd." Moreover, when that there was not any confusion in the case of the Respondent in its knowledge regarding the action being initiated in the instant case, or any substantial prejudice being caused apart from the technical objection in the Demand Notice under Section 13(2) of the SARFAESI Act or in the proceedings in furtherance thereof, no interference by the HC in its limited scope of judicial review was called for. Consequently, the SC was of the view that, the judgement of the HC was unsustainable and deserved to be set aside. Accordingly, HC Order was quashed and set aside.

VA View:

The decision of the SC in the present case should deter loan defaulters from seeking to frustrate and delay recovery proceedings against them by secured creditors on trivial and technical grounds. This decision is supported by the logic that unless serious damage or prejudice has been caused to the defaulter under the proceedings as a result of such procedural lapse, the judiciary should not entertain such applications under Section 17 of the SARFAESI Act.

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