Between the lines...

VAISH ASSOCIATES ADVOCATES ESTD. 1971

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Key Highlights

I. Supreme Court: Non-payment of stamp duty on the commercial contract does not invalidate the arbitration agreement

The Hon'ble Supreme Court (**"SC"**) by way of its judgement dated January 11, 2021 in the matter of ***M/s N.N. Global Mercantile Private Limited v. M/s Indo Unique Flame Limited and Others [Civil Appeal Nos. 3802 – 3803/ 2020 arising out of SLP (Civil) Nos. 13132 – 13133 of 2020)]*** **("Judgement")** laid down that an arbitration agreement embedded in a commercial contract is independent of the substantive agreement, due to which, non-payment of stamp duty on the commercial contract does not render the arbitration agreement unenforceable.

Facts

Indo Unique Flame Limited (**"Respondent No. 1"**) applied for grant of work of beneficiation/washing of coal to the Karnataka Power Corporation Limited (**"KPCL"**) in an open tender and was awarded the work order on September 18, 2015. Subsequently, Respondent No. 1 furnished bank guarantees for INR 29.29 crores in favour of KPCL through its banker, State Bank of India (**"Respondent No. 2"**). Respondent No. 1 subsequently entered into a sub-contract termed as a work order dated September 28, 2015 (**"Work Order"**) with M/s. N.N. Global Mercantile Private Limited (**"Appellant"**), for the transportation of coal from its washery to the stockyard, siding, coal handling and loading into the wagons. As per the Work Order, the Appellant furnished a bank guarantee for INR 3.36 crores on September 30, 2015 in favour of Respondent No. 2. Under the principal contract with KPCL, certain disputes and differences arose with Respondent No. 1, which led to the invocation of the bank guarantee by KPCL on December 6, 2017. Subsequently, Respondent No. 1 invoked bank guarantee furnished by Appellant. This led to the Appellant initiating a suit before the Commercial Court, Nagpur (**"Commercial Court"**) against the Respondent No. 1, Respondent No. 2 and its banker, Union Bank of India , collectively known as "Respondents". The Appellant prayed for a declaration that Respondent No. 1 was not entitled to encash the bank guarantee as the Work Order had not been acted upon. It

was expressly stated that Respondent No. 1 had not allotted any work under the Work Order, nor were any invoices raised, or payments made by it. Consequently, there was no loss suffered which would justify the invocation of the bank guarantee by the Respondent No. 1. The Commercial Court directed *status quo* with regards to enforcing bank guarantee. Respondent No. 1 filed an application under Section 8 *(Power to refer parties to arbitration)* of the Arbitration and Conciliation Act, 1996 (**"Act"**) seeking reference to arbitration, which was rejected by the Commercial Court. Subsequently, Respondent No. 1 filed a writ petition under Articles 226 and 227 of the Constitution of India before the Hon'ble Bombay High Court (**"BHC"**), which in favour of Respondent No. 1, held the arbitration application under Section 8 of the Act to be maintainable. With regards to the unenforceability of the unstamped Work Order, the BHC held that the Appellant could raise the issue before the arbitral tribunal at an appropriate stage. Aggrieved, the Appellant filed a Special Leave Petition before the SC.

Issues

I. Whether an arbitration agreement would be enforceable and acted upon, even if the Work Order is unstamped and unenforceable.

ii. Whether allegation of the fraudulent invocation of the bank guarantee is an arbitrable dispute.

iii. Whether the writ petition before the BHC was maintainable.

Contentions before the Supreme Court

Contentions raised by the Appellant:

The Appellant submitted that application under Section 8 of the Act for reference of disputes to arbitration was not maintainable, since, in light of Section 34 *(Instruments not duly stamped inadmissible in evidence)* of the Maharashtra Stamp Act, 1958 (**"Stamp Act"**) the Work Order being an unstamped document could not be received in evidence for any purpose, or acted upon, unless it is duly stamped. Consequently, the arbitration clause in the unstamped agreement also could not be acted upon or enforced since the arbitration clause would have no existence in law, unless the applicable stamp duty is paid on the Work Order. The Appellant relied upon ***Garware Wall Ropes Limited v. Coastal Marine Constructions and Engineering Limited [(2019) 9 SCC 209]*** **("Garware"),** which held that an arbitration clause in an agreement would not exist when it is not enforceable by law. The BHC had violated Section 34 of the Stamp Act since it enforced a non-existent arbitration clause.

It was submitted that the bank guarantee was furnished to ensure due execution of the Work Order. The Appellants argued that the invocation of the bank guarantee was fraudulent, since the agreement had never been acted upon. There was no invoice raised or payment received under the Work Order. In the absence of any legal liability for payment under the Work Order, the invocation of the bank guarantee was fraudulent.

Contentions raised by the Respondents:

The Respondents submitted that even though the Work Order was unstamped, it would be enforceable after it is duly stamped, for which an opportunity must be given to the Respondents to pay the deficient stamp duty and

penalty determined by the collector. Non-payment of stamp duty would not render the agreement unenforceable and was a curable defect.

Observations of the Supreme Court

Validity of an arbitration agreement in an unstamped agreement:

The SC observed that when parties enter into commercial contracts, they essentially enter into two distinct agreements- the substantive contract and the arbitration agreement. The autonomy of the arbitration agreement is based on the twin concepts of separability and *kompetenz-kompetenz (Arbitrator's ability to determine its own jurisdiction including ruling on anyobjections with respect to the validity or existence of the arbitration agreement)* enshrined in Section 16 *(Competence of arbitral tribunal to rule on its jurisdiction)* of the Act. The doctrine of *kompetenz–kompetenz* aims to minimize judicial intervention at the pre-reference stage. The arbitration agreement is separate and independent from the underlying contract in which it is embedded. An arbitration agreement exists and can be acted upon irrespective of whether the main substantive contract is valid or not. The legislative policy of minimal interference is enshrined in Section 5 *(Extent of judicial intervention)* of the Act, which by a non-obstante clause prohibits judicial intervention except as specified in Part I of the Act. A conjoint reading of Sections 5 and 16 of the Act would indicate that all civil commercial matters, including the issue as to whether the substantive contract was voidable, can be resolved through arbitration.

Analyzing the statutory scheme of the Stamp Act, the SC observed that Section 33 *(Examination and impounding of instruments)* of the Stamp Act obligates persons empowered to receive evidence, including arbitrators, to examine the instrument presented and ascertain whether the instrument is duly stamped. If an instrument is not duly stamped the instrument will be impounded. Section 34 of the Stamp Act operates as a statutory bar to an unstamped instrument being admitted in evidence, or being acted upon, for any purpose, by any authority with the power to receive evidence, unless such instrument is duly stamped. The proviso to Section 34 of the Stamp Act states that upon payment of the requisite stamp duty, the instrument may be admitted in evidence.

The SC noted the observations made by a division bench of the SC in ***SMS Tea Estates Private Limited v. M/s. Chandmari Tea Co. Private Limited [(2011) 14 SCC 66]*** **("SMS Tea Estates")** where the issue was whether an arbitration agreement in an unregistered and unstamped lease deed was valid and enforceable, being embedded in such an invalid and unenforceable lease deed. To answer this question the court in SMS Tea Estates looked at the validity and enforceability of the arbitration agreement in an unregistered but compulsorily registrable instrument and an unregistered instrument, not duly stamped. Doing so, the court noted that Section 49 *(Effect of non-registration of documents)* of the Registration Act, 1908 (**"Registration Act"**) stated that if a compulsorily registrable document is not registered, it will not be received as evidence for any transaction related to the immovable property therein except as evidence of any collateral transaction like arbitration which by itself is not required to be effected by the registered instrument. The court held that an arbitration clause is an agreement independent of the other terms of the contract or the instrument. When an instrument or a document affecting immovable property contains an arbitration agreement, it is a collateral term relating to resolution of disputes, unrelated to the transfer or

transaction affecting the immovable property. It is as if two documents—one affecting the immovable property requiring registration and the other relating to dispute resolution which is not compulsorily registerable - are rolled into a single instrument. Therefore, even if a deed of transfer of immovable property is challenged as invalid, the arbitration agreement would remain unaffected. However, it was further held that in case of voidable contracts, invalidity which attaches itself to the main agreement, may also attach itself to the arbitration agreement, if the reasons which make the main agreement voidable, exist in relation to the making of the arbitration agreement also. Taking into consideration Section 35 *(Instruments not duly stamped inadmissible in evidence)* of the Indian Stamp Act, 1899 (**"ISA"**) the court held that unless the stamp duty and penalty due in respect of the instrument is paid, the court cannot act upon the instrument and thereby cannot act upon the arbitration agreement embedded in the instrument. This was because Section 35 of the ISA, unlike Section 49 of the Registration Act, does not contain a proviso enabling the instrument to be used as evidence for a collateral transaction.

The SC noted that before the Arbitration and Conciliation (Amendment) Act, 2015 (**"2015 Amendment"**), the prevailing law was that at the pre-reference stage in an application under Section 11(6) of the Act, the courts could determine certain issues which would preclude the necessity of reference to arbitration. The 2015 Amendment altered this stance, restricting the court to examine only the existence of an arbitration agreement. The issue whether an arbitration clause in an agreement which needs to be stamped but is not, would be enforceable after the introduction of Section 11(6A) of the Act, was considered in the Garware case, where, upholding the SMS Tea Estates judgement, it was held that agreement only becomes a contract if it is enforceable by law, which it cannot until requisite stamp duty is paid. Hence, the court pronounced that an arbitration clause in an agreement would not exist when it is not enforceable by law and on applying the facts, the arbitration clause in the sub-contract would not exist until the sub-contract was duly stamped.

Schedule 1 of the Stamp Act enumerates instruments on which stamp duty is chargeable and an arbitration agreement is not one of them. The SC opined that non-payment of stamp duty on the Work Order did not invalidate the main contract. Since Section 34 of the Stamp Act only rendered the unstamped instrument invalid till the payment of stamp duty, the deficiency would be cured once the requisite stamp duty was paid. On account of the doctrine of separability, an arbitration agreement distinct from the underlying commercial contract would survive independently, would not be rendered invalid, unenforceable or non-existent, even if the substantive contract was not admissible in evidence.

The SC, while analyzing SMS Tea Estates, opined that the law laid down in it regarding the non-arbitrability of unstamped commercial contracts and invalidity of arbitration agreements in case of voidable contracts was incorrect. Arbitration agreement being an independent one between the parties is not chargeable with stamp duty and owing to its stand-alone nature, non-payment of stamp duty on the commercial contract would not invalidate the arbitration clause in it. Criticizing the decision of the court in SMS Tea Estates, the SC decided that the non-payment of stamp duty on the substantive contract would not invalidate even the main contract. It is a deficiency which is curable on the payment of the requisite stamp duty. With respect to the view taken in SMS Tea Estates

regarding voidable contracts, it observed that the allegations made by a party that the substantive contract has been obtained by coercion, fraud, or misrepresentation has to be proved by leading evidence on the issue which could be adjudicated through arbitration.The SC noted that the erroneous view taken in the SMS Tea Estates judgement was subsequently adopted by the court in the Garware judgement. The SC categorically stated that once the independent existence of the arbitration agreement is established, it can be acted upon, irrespective of the alleged invalidity of the commercial contract.

The SC noticed that the Garware judgement was relied upon and affirmed in the recent ***Vidya Drolia and Others. v. Durga Trading Corporation [Civil Appeal No. 2402 of 2019, Special Leave Petition (Civil) Nos. 5605-5606 of 2019 and Special Leave Petition No. 11877 of 2020 (Arising out of Diary No. 40679 of 2019)]*** **("Vidya Drolia")** by a three-judge bench and hence the SC by this Judgement, decided to refer the validity of the Garware judgement to a Constitution Bench of five judges.

Power of impounding:

The SC further dealt with the issue as to who would exercise the power of impounding the instrument under Section 33 read with Section 34 of the Stamp Act, in a case where the substantive contract contains an arbitration agreement, and enlisted three possible scenarios:

1. Consensual appointment of arbitrator by parties under the agreement: The arbitrator is obligated by Section 33 of the ISA or the applicable State Act to impound the instrument and direct the parties to pay the requisite stamp duty and obtain an endorsement from the concerned collector.

2. Failure to make an appointment under agreement, resorting to Section 11 *(Appointment of arbitrators)* of the Act: The High Court or the Supreme Court under Section 11 of the Act would impound the substantive contract directing the parties to cure the defect before the arbitrator / tribunal can adjudicate upon the contract.

3. Application is filed under Section 8 of the Act before a judicial authority for reference of disputes to arbitration: The judicial authority will make the reference to arbitration. However, in the interim, the parties would be directed to have the substantive contract stamped in accordance with the provisions of the relevant stamp act, so that the rights and obligations emanating from the substantive contract can be adjudicated upon.

Whether the fraudulent invocation of the bank guarantee is arbitrable:

In ***A. Ayyasamy v. A. Paramasivam and Others [(2016) 10 SCC 386],*** the court recognized that disputes which are of public nature, cannot be adjudicated by arbitration. Reference to arbitration can be refused in cases where there are very serious allegations of fraud, making it a criminal offence or where allegations of fraud are extremely complicated, necessitating them to be decided only by the civil courts owing to the voluminous evidence. Parties can be referred to arbitration when dispute is between parties inter se and does not affect third parties. Thus, the court in this case laid down a twin test:

(I) does the plea of fraud permeate the entire contract and the agreement of arbitration, rendering it void, or;

(ii) whether the allegations of fraud touch upon the internal affairs of the parties inter se having no implication in the public domain.

The question of arbitrability of fraud was dealt with in ***Avitel Post Studioz Limited and Others v. HSBX PI Holdings (Mauritius Limited) [(2020) SCC OnLine SC 656].*** It was held that the same set of facts may have civil as well as criminal consequences. If it is clear that a civil dispute involves questions of fraud, misrepresentation, etc. which can be the subject matter of a proceeding under Section 17 (Fraud) of the Indian Contract, 1872 (**"Contract Act"**), the mere fact that criminal proceedings can or have been instituted in respect of the same subject matter, would not lead to the conclusion that a dispute which is otherwise arbitrable, ceases to be so.

All civil and commercial disputes can be resolved through arbitration, unless excluded either expressly or impliedly by the statute. Certain categories of disputes are however reserved by the legislature, as a matter of public policy, to be adjudicated by a court of law, since they lie in the realm of public law. Disputes relating to rights *in rem* are not arbitrable whereas those relating to rights *in personam* are amenable to arbitration. The SC acknowledged that certain categories of disputes, *inter alia,* penal offences, bribery, corruption, matrimonial disputes are non-arbitrable. However, the civil aspect of fraud is arbitrable, except when the allegation is that the arbitration agreement itself is vitiated by fraud, or the fraud invalidates the underlying contract, and impeaches the arbitration clause itself. Further, if the substantive contract is expressly declared as void under the Contract Act, due to incompetency of parties, the dispute would be non-arbitrable. The civil aspect of fraud dealt with under Section 17 of the Contract Act, can however be arbitrated. Analyzing the question of whether voidable agreements would be arbitrable or not, the SC observed that in case of voidable agreements, disputes would be arbitrable, since the issue whether the consent was procured by coercion, fraud, or misrepresentation requires to be adjudicated upon by leading cogent evidence, which can very well be decided through arbitration. Earlier precedents had held fraud to be non-arbitrable as it would entail voluminous and extensive evidence and would be too complicated to be decided in arbitration. The SC dismissed this view as archaic but at the same time noted that criminal aspect of fraud, resulting in penal consequences and criminal sanctions could be adjudicated only by a court of law, since it may result in a conviction, which is in the realm of public law.

Maintainability of the writ petition:

With regards to the maintainability of the writ petition, the SC deemed it non-maintainable since Section 37(1)(a) *(Appeal against granting/refusing to grant interim relief)* of the Act provides a statutory remedy to file an appeal against an order refusing to refer the parties to arbitration. The order refusing reference to arbitration passed by the Commercial Court was appealable under Section 37 of the Act and hence the BHC judgement under Articles 226 and 227 of the Constitution was not maintainable.

Decision of the Supreme Court

The SC held that there was no legal impediment to the enforceability of the arbitration agreement, pending payment of stamp duty on the substantive contract. The adjudication of the rights and obligations under the Work

Order or the substantive commercial contract would however not proceed before complying with the mandatory provisions of the Stamp Act. The SC set aside the BHC judgement and held that concerning the bank guarantee, the Appellant could seek interim relief under Section 9 *(Interim Relief)* of the Act. The SC directed the Secretary General of the SC to impound the Work Order and forward it to the concerned collector in Maharashtra for assessment of the stamp duty payable on the said instrument, to be completed within a period of 45 days from the receipt of the same. Once determined, the Appellant was directed to pay the stamp duty to the collector, subject to the revision appeal under Stamp Act. It was decided that the issue of fraud with respect to the invocation of the bank guarantee was arbitrable, since it arose out of disputes between parties *inter se* and was not in the realm of public law.

The SC further held that the conclusion reached in SMS Tea Estates and Garware cases that the non-payment of stamp duty on the commercial contract would invalidate even the arbitration agreement, and render it non-existent in law, and unenforceable, is not the correct position in law. Through this Judgement, the SC overruled SMS Tea Estates, holding that non-payment of stamp duty on the commercial contract would not make the arbitration agreement invalid due to its independence and that allegations of fraud are arbitrable. Since the recent Vidya Drolia judgement affirmed the judgement in Garware, the SC through the Judgement has referred to the Constitution Bench, the issue relating to: *Whether the statutory bar contained in Section 35 of the ISA applicable to instruments chargeable to stamp duty would also render the arbitration agreement contained in such an instrument, which is not chargeable to payment of stamp duty, as being invalid pending payment of stamp duty on the substantive contract?*

VA View:

The instant Judgement throws light on the three-fold issues of (i) the application of the doctrine of separability, (ii) whether an arbitration agreement would be rendered unenforceable if the underlying contract was not duly stamped; and (iii) whether allegations of fraudulent invocation of the bank guarantee furnished under the substantive contract would be an arbitrable dispute.

This Judgement has upheld the principles of separability and *kompetenz-kompetenz,* the two fundamental tenets of arbitration jurisprudence in India. In a pro-arbitration move, the SC has ostensibly clarified that the ground that allegations of fraud cannot be arbitrated is a wholly archaic standpoint, which deserves to be discarded. The SC has also revisited the law on the validity of arbitration agreement in an unstamped document, overruling the findings of SMS Tea Estates. Further clarity on this crucial aspect will be obtained once the Constitution Bench authoritatively confirms whether or not the non-stamping of the underlying instrument will render the arbitration agreement invalid.

II. NCLAT: Neither the committee of creditors has the power to determine, nor the resolution professional has the power to reclassify the status of a creditor from financial creditor to operational creditor

The National Company Law Appellate Tribunal (**"NCLAT"**) has in its judgement dated December 18, 2020 (**"Judgement"**) in the matter of ***Mr Rajnish Jain v. BVN Traders and Others [Company Appeal (Insolvency) No. 519 of 2020],*** held that neither the Committee of Creditors (**"CoC"**) has the power to determine, nor the resolution professional has the power to reclassify, the status of a creditor from a financial creditor to an operational creditor under the Insolvency and Bankruptcy Code, 2016 (**"IBC"**).

Facts

The National Company Law Tribunal, Allahabad (**"NCLT"**), by its order dated January 23, 2020 (**"Impugned Order"**), had rejected the application filed by Mr. Rajnish Jain, the promoter, stakeholder and managing director of suspended board of directors (**"Appellant"**) under Section 60(5) of the IBC and declared M/s BVN Traders (**"Respondent"**), as a financial creditor under Section 5(7) of the IBC and the debt in connection with the loan extended to Jain Manufacturing (India) Private Limited (**"Corporate Debtor"**) as financial debt under Section 5(8)(f) of the IBC.

Previously, Mr Anupam Tiwari (**"Resolution Professional"**) had filed a reply before the NCLT and stated that the Respondent is not a financial creditor. However, by an interim order dated August 19, 2019, the NCLT noted that (i) Manoj Kumar Singh, the Interim Resolution Professional (**"IRP"**) had recognised the claim of the Respondent as a financial creditor; and (ii) the Resolution Professional, on the basis of the advice of two experts and without informing the CoC, had reclassified the status of the Respondent as an operational creditor. Therefore, the Resolution Professional was questioned by NCLT regarding his action to approach the NCLT directly without placing the matter before the CoC.

Purporting to act in view of the order of the NCLT, the Resolution Professional had convened a meeting of CoC. The CoC in its 4thmeeting resolved that the Respondent should be treated as a financial creditor. Subsequently, the NCLT in its Impugned Order observed that the CoC voted in favour of Respondent to be treated as a financial creditor. Further that, the Appellant and Resolution Professional had no locus to challenge the commercial wisdom of CoC. Hence, the NCLT in its Impugned Order relied on the decision of the CoC and declared Respondent as a financial creditor.

Thereafter, the Resolution Professional convened the 7th CoC meeting wherein it was resolved that the Respondent is not a financial creditor. Subsequently, in the 8th CoC meeting it was resolved to eliminate the name of the Respondent from the list of CoC. Thereafter, the Appellant filed the instant appeal to challenge the Impugned Order.

Issues

I. Whether the CoC has the power to determine or the Resolution Professional has the power to re-classify the status of the Respondent as a financial creditor or an operational creditor.

ii. Whether declaration of the Respondent as financial creditorin the Impugned Order based on the majority decision of CoC was valid.

Arguments

Contentions raised by the Appellant:

The NCLT had erred in facts and law. The NCLT in the Impugned Order held that the Respondent is a financial creditor based on the decision of the CoC. The classification of one creditor as operational creditor or financial creditor cannot be determined and voted upon by the CoC. Hence, he had not approached the CoC to vote upon this issue before filing the reply with NCLT.

As per the Insolvency and Bankruptcy Board of India (**"IBBI"**) circular dated March 01, 2019 (**"Circular"**) and Section 25(2)(e) of the IBC, Regulation 13 and Regulation 14 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (**"CIRP Regulations"**), it is the duty of the IRP and Resolution Professional to maintain an updated list of claims including its verification and determination. The Resolution Professional had re-verified the claim submitted in 'Form-C' by the Respondent and on the basis of the opinion of experts received, concluded that the Respondent should be reclassified as an operational creditor.

Contentions raised by the Respondent:

The Respondent, through its partner, had transferred INR 80,00,000/- (Indian Rupees Eighty Lacs) with interest at the rate of 18% per annum to the Corporate Debtor, as a loan for the working capital requirements. The debt was secured against a title deed of an immovable property. On admission of an application filed for initiation of corporate insolvency resolution process (**"CIRP"**) against the Corporate Debtor by the NCLT, an IRP was appointed. Respondent had submitted its claim in 'Form-C' as a financial creditor to the IRP. The IRP had admitted the claim of Respondent as a financial creditor and consequently, included the Respondent's name in the list of CoC.

However, the Appellant in collusion with Resolution Professional and some financial creditors conspired to oust the Respondent from the CoC. Hence, at the instance of the Appellant, the status of the Respondent was reclassified from financial creditor to operational creditor. Further, in defiance of the Impugned Order, the Resolution Professional conducted the 7th and the 8th meeting of CoC with an ulterior motive to oust the Respondent from the CoC. The act of the Resolution Professional is in ignorance of the Impugned Order.

Observations of the NCLAT

Powers of the CoC and the Resolution Professional

The NCLAT noted that IBC is a complete code in itself. Further, the powers and duties of the CoC are specifically laid down. Clauses (a) to (m) of Section 28(1)of the IBC specify the stages where the Resolution Professional had to obtain prior approval from the CoC. The NCLAT observed that the act of the Resolution Professional to refer the matter to CoC to determine whether the claim of Respondent falls in the category of operational debt or financial debt is beyond the subject matters listed under Clauses (a) to (m) of Section 28(1) of the IBC.

The NCLAT further noted that the circular No. I.P./003/2018 by IBBI dated January 03, 2018, provided that a Resolution Professional shall not outsource any of his duties and responsibilities. The NCLAT observed that it was the primary duty of the Resolution Professional to receive, collate and verify claims which could not be further delegated to CoC.

The NCLAT analysed whether the Resolution Professional while under the obligation to maintain an updated list of claims, had the power to reclassify the status of the Respondent from financial creditor to operational creditor. The scope of powers and duties of IRP and Resolution Professional are defined under the provisions of the IBC. The IRP as per Section 18(1)(c) of the IBC constituted the CoC. The NCLAT noted that the IRP had convened the 1st CoC meeting on March 23, 2019 wherein Respondent was included as a member of the CoC and claim admitted by IRP amounted to INR 80 Lacs. Hence, Respondent had a corresponding voting share of 30.6%. The NCLAT noted that undisputedly, the IRP after collation of claims had admitted the claim of Respondent as a financial creditor and debt as a financial debt.

The NCLAT relied upon the precedents of ***M/s. Dynepro Private Limited v. Mr. V. Nagarajan [Company Appeal (Insolvency) No. 229 of 2018],*** wherein it was held that a resolution professional did not have the jurisdiction to decide the claim of one or other creditor or its categorization and ***Swiss Ribbons Private Limited and Another v. Union of India and Others [Writ Petition (Civil) No. 99 of 2018],*** wherein the Hon'ble Supreme Court held that a resolution professional has no adjudicatory power.

The NCLAT rejected the contention of the Appellant that on a comprehensive reading of the Circular, provisions of the IBC read with the CIRP Regulations, verification and determination of claims was required to be carried out by the Resolution Professional, while maintaining an updated list of claims.

The NCLAT noted that, the limited authority the Resolution Professional had, while maintaining or updating the list of claims, included admitting or rejecting further claims and updating the list of creditors accordingly. The NCLAT observed that updating and reviewing of list of claims are two different acts. Further, the Resolution Professional in the name of updating the list of claims, reviewed the claims.

The NCLAT noted that an aggrieved person can challenge either the constitution of CoC or any grievance including rejection, incorrect acceptance of claim or categorisation of creditors before the NCLT. Therefore, the NCLAT

observed that the Resolution Professional and CoC did not have the authority to arbitrarily reclassify the status of a creditor from financial creditor to operational creditor.

Lifting the veil

The NCLAT observed the high headedness and the unbecoming of the Resolution Professional, as to how subsequent to the Impugned Order, the Resolution Professional in 7th CoC meeting interestingly recorded that *"despite the Order passed by Hon'ble NCLT Allahabad the CoC is of the view that they no longer wish to continue M/s BVN Traders in the category of the "Financial Creditor" in the CoC and want to review their decision in this regard."*

Further, the minutes of the 8th CoC meeting reflected that the Resolution Professional had proposed the following resolution for consideration: *"Resolve that the CoC be and is hereby not considering M/s BVN Traders as the Financial Creditors……and approved to elimination of M/s BVS Traders from Committee of Creditors, in the light of Hon'ble NCLT, Allahabad, Order…… as well as with adoption of Reconstituted Committee of Creditors.".* The said resolution was passed with a majority of 69.1% of the vote share. Further, in this meeting, the following second resolution was also passed with 100% vote share: *"It was resolved unanimously that an application of withdrawal of running Corporate Insolvency Resolution Process shall make by the Applicant with approval of 90% voting share … and shall be submitted to 'Resolution Professional."* (**"Second Resolution"**). The NCLAT highlighted the defiance of the Impugned Order by the stakeholders and marked it as strange and dangerous.

The NCLAT observed that the Second Resolution was passed with 100% vote share by a reconstituted CoC, wherein the Respondent's name was eliminated. Therefore, the Respondent could not participate and vote in the CoC meeting. The NCLAT noted that the Respondent had at an earlier instance, before being eliminated from CoC, rejected the proposal of withdrawal of application under Section 12A of the IBC.

The NCLAT observed that every action of the Resolution Professional, from re-classification of status of the Respondent from financial creditor to operational creditor, to elimination of name of Respondent from the CoC, was done with an ulterior motive, in collusion with the Appellant so as to pass a resolution for withdrawal of the application under Section 12A of the IBC, since the Respondent held 30.9% of voting share in the CoC. The Second Resolution could not have materialised without eliminating the Respondent from the CoC. The NCLAT noted that it was necessary to oust the Respondent from CoC so as to pass the Second Resolution with the required percentage of voting share, that is, 90%.

The NCLAT noted that even if Appellant and Resolution Professional succeeded to pass the Second Resolution with 100% of voting share, it was in defiance to the Impugned Order, wherein NCLT had not permitted Resolution Professional to change the status of Respondent from financial creditor to operational creditor.

Correcting the reasoning

The NCLAT observed that the reasoning of NCLT in the Impugned Order was incorrect as the CoC had no jurisdiction to determine the status of a creditor either as financial creditor or operational creditor. The NCLAT further observed that such a decision of the CoC can never be treated as an exercise under its commercial wisdom. It was noted that if the CoC is permitted to determine such subject matter, there would be a serious conflict of interest. The NCLAT noted that determination of a creditor as financial creditor or operational creditor as per the provisions of the IBC is a matter of applying the law to facts. Therefore, such subject matters cannot be decided by casting of votes but have to be adjudicated upon by the NCLT.

The NCLAT observed that the Impugned Order to declare the Respondent as a financial creditor was based upon the decision of the CoC, and was in view of the provisions of the IBC and the fact situation. However, in absence of reasons and the reference made solely to the resolution of CoC, it was mistakenly implied that CoC got emboldened to have the powers to make such decisions in favour or against its own constituents.

The NCLAT analysed the facts and provided the correct reasoning. The NCLAT noted that the loan was advanced to the Appellant against the title deed. The said title deed was in possession of the Respondent and not even a single civil/criminal action had been initiated by Appellant to recover the same. Further, the Appellant had not disputed the amount due. As per Section 5(8) of the IBC, for a debt to be categorized as financial debt, the critical requirement was disbursal of debt against the consideration for the time value of money. As per Section 5(7) of the IBC, only such creditor could be the financial creditor of the Corporate Debtor to whom a financial debt is owed by the Corporate Debtor.

The NCLAT observed that the expression disburse in the provision would refer to the fund transfer made by the Respondent to the Corporate Debtor. Further, in Black's Law Dictionary (9th edition) the expression 'Time Value' has been defined to mean the price associated with the length of time that an investor must wait until an investment matures or the related income is earned. Further, the inflows and outflows are distanced by time and there is a compensation for time value of money. The NCLAT observed that in the transaction between the Appellant and the Respondent, time value of money was unambiguously involved. Therefore, the Respondent was a financial creditor within the meaning of Section 5(7) of the IBC, and the debt in question was a financial debt within the meaning of Section 5(8) of the IBC. The NCLAT observed that the Resolution Professional failed to perform his obligations to adhere to the provisions of the IBC, the CIRP Regulations and the rules.

Decision of the NCLAT

The NCLAT held that all the resolutions passed by the CoC in the 4th, 7th and 8th meetings of the CoC were beyond their jurisdiction, powers and duties. Further, the act of the CoC to sit in appeal over Impugned Order and pass resolutions to the contrary was held to be illegal. It was further held that the Second Resolution passed by the CoC was bad in law since it primarily was based on an illegal reconstitution of CoC.

The Impugned Order to the extent it declared Respondent as financial creditor was upheld. However, the NCLAT set aside the reasoning of the NCLT provided in the Impugned Order. The NCLAT held that the Respondent is a financial creditor based on reasons, findings and directions as recorded in this Judgement.

VA View:

The serious conflict of interest that arose in the facts of the instant case were apparent. Various stakeholders, under the guise of commercial wisdom, tried to act beyond the powers ushered upon them under the IBC. The NCLAT lifted the veil and exposed the ulterior motives behind their acts as it delved into the misdemeanor by the parties. The NCLAT rightly remarked that the defiance by the parties was not only strange but also dangerous. The NCLAT, though upheld the Impugned Order, cautiously corrected the reasoning of the NCLT, wherein it was mistakenly implied that the CoC had the authority to adjudicate upon its own constituents.

By this Judgement, the NCLAT reiterated the position on the limited nature of the specific powers and jurisdiction ushered on the CoC and the Resolution Professional. The NCLAT clarified that during CIRP, after categorization of a claim by the IRP, the Resolution Professional did not have the *suo-moto* power to determine and reclassify the status of the Respondent. The NCLAT also reiterated that as per the definition of financial debt, it is a pre-requisite that the debt must be 'disbursed' against the consideration for the time value of money for it to be considered as a financial debt.

III. Telangana High Court: Natural justice principles to be followed before declaring borrower's account as fraudulent

The Telangana High Court (**"THC"**) by its judgement dated December 10, 2020 in the matter of ***Mr. Rajesh Agarwal v. Reserve Bank of India and Others (Writ Petition No: 19102 of 2019)*** allowed the writ petition filed by a director of a company under Article 226 *(Power of High Courts to issue certain writs)* of the Constitution of India, 1949 (**"Indian Constitution"**) on the grounds, *inter alia,* that principles of natural justice had not been followed in respect of 'Master Directions on Fraud' (**"Master Circular"**) dated July 1, 2016, issued by the Reserve Bank of India (**"RBI"**).

Facts

The petitioner, Rajesh Agarwal, was the chairman and managing director (**"Petitioner"**) of M/s. B.S. Limited (**"Company"**). During 2006-2014, the Company availed loan facility amounting to INR 1406 crores from several banks, many of which banks were respondents in this writ petition (hereafter, **"Respondent banks"**). In 2013, the Madhya Pradesh Power Transmission Company Limited (**"MPPTCL"**) awarded the contract for certain infrastructure work to the Company (**"Works"**). As per MPPTCL, there was delay in execution of Works and shortage of working capital, as a result of which the said contract with the Company was terminated. MPPTCL, thereafter, also encashed bank guarantees of INR 140 crores. Upon contract cancellation and encashment of bank

guarantees, the Company suffered a huge financial blow and could not repay its loan amounts. As per the circular guidelines of the RBI, respondent no.1, all lender banks formed a 'Joint Lenders Forum' (**"JLF"**) with the State Bank of India, respondent no.2, (**"SBI"**) acting as the lead bank.

As per the 'Scheme for Sustainable Structuring of Stressed Assets' announced by the RBI (**"S4A Scheme"**) by way of circular dated June 13, 2016, the JLF, on July 11, 2016 decided to adopt the S4A Scheme and conduct a 'Forensic Audit and Techno-Economic Viability (**"TEV"**). On June 29, 2016, the Company's account was declared by the JLF as non-performing asset. Basis the forensic audit report dated August 29, 2016 (**"First Audit Report"**), the JLF on August 31, 2016, observed that *"there were no irregularities, with regard to fraudulent transactions pointed out in the Forensic Audit Report'.* However, in furtherance to the TEV report dated September 14, 2016, the JLF observed that the Company was ineligible for S4A scheme as there were no minimum prescribed free cash flows by the Company. Therefore, the JLF requested the Company to submit an alternative plan for regularization of its account. The Company thereafter, proposed a 'One-Time Settlement' scheme (**"OTS"**). In February 2018, the OTS was rejected by the JLF. Thereafter, IDBI Bank, respondent no. 9 herein, being one of the member-banks of the JLF, declared the company's account as "Red Flagged Account". Basis a second forensic audit report dated April 06, 2018, (**"Second Audit Report"**), on April 21, 2018, IDBI Bank called for an explanation from the Company. Even though the Company responded that no irregular transactions had taken place in the audit period, IDBI Bank sought further clarifications from the Company to which the latter duly responded. Meanwhile, SBI filed a petition under Section 7 *(initiation of corporate insolvency resolution process by financial creditor)* of the Insolvency and Bankruptcy Code, 2016 before the National Company Law Tribunal, Hyderabad Bench (**"NCLT"**). The NCLT by an order passed on November 01, 2018, admitted the aforesaid application, and appointed a Dr. K.V. Srinivas as 'interim resolution professional' (**"IRP"**). However, when a resolution plan could not assist in revival of the Company, the NCLT by order dated November 04, 2019, directed the winding up of the Company and appointed a liquidator (**"Liquidator"**) in respect thereof. On February 15, 2019, the JLF invoked Clause 2.2 *(classification of frauds)* (1)(g) of the Master Circular, and declared the Company account as 'fraud' (**"JLF Order"**). The 'Fraud Identification Committee' (**"FIC"**) of SBI, on July 31, 2019, also resolved to identify the Company's account as 'fraud' (**"FIC Order"**). It is noteworthy that both aforesaid decisions were taken prior to appointment of Liquidator by the NCLT.

Issues

1. Whether the principles of natural justice, especially *audi alteram partem (giving opportunity of hearing to the other side)* should be read into the Master Circular.
2. Whether the JLF was justified in concluding in its meeting, on February 15, 2019, that the Company is holder of fraudulent account.
3. Whether the FIC was justified in concluding that the Company is a holder of fraudulent account.

Contentions of the Petitioner

As per Clause 8.12 *(penal measures for fraudulent borrowers)* sub clause (1) of the Master Circular, the penal provisions would also affect the Petitioner. Directors would be debarred from availing bank finance from 'Scheduled Commercial Banks', 'Development Financial Institutions', 'Government owned NBFCs', 'Investment Institutions', etc., for a period of five years from the date of full payment of the defrauded amount. Even after the lapse of five years, discretion is given to the financial institutions to decide whether to lend money to the concerned director(s) of a company. Therefore, the Petitioner would perhaps be denied the right to borrow finances for the rest of his life. This would impact the Petitioner's fundamental right to carry on a trade or business and as a corollary, affect his right to life.

Even if a Liquidator has been appointed by the NCLT, in sum, the Petitioner's fundamental rights were being affected. Therefore, the Petitioner had sufficient *locus standi* right to challenge the JLF Order and FIC Order. Moreover, the Company account was declared as 'fraud' by both the JLF and FIC without giving either the Company, or the Petitioner an opportunity of hearing. The opportunity had been denied to the Petitioner and the Company ostensibly on the ground that the Master Circular does not include the right of hearing in its scope and ambit. Therefore, the Petitioner had a right to challenge the constitutional validity of the Master Circular. Furthermore, the Petitioner had raised seminal constitutional issue with regard to the interpretation and legal validity of the Master Circular. Hence, the writ petition should be allowed.

The Master Circular had statutory force and despite being elaborate, did not provide for an opportunity of hearing to the borrower before declaration of an account as fraudulent. As soon as a borrower is declared as a fraudster, criminal and civil consequences would follow. This would not merely impact the goodwill in the market, but also affect the fundamental and civil rights of a borrower. Further, as per the Master Circular, even third parties are provided with an opportunity of hearing, that is those parties remotely related to the alleged fraud are also provided an opportunity. If the principles of natural justice were not read into the Master Circular, it would bestow the JLF and the FIC with unbridled power.

Dealing with the factual matrix, it was contended that the Second Audit Report and transaction audit report (prepared by IRP) were never furnished to the Petitioner or the Company. As far as IDBI Bank was concerned, it had merely paraphrased the Second Audit Report in its letters to the Company. The Petitioner had therefore been denied a substantive opportunity of hearing both by IDBI Bank and JLF. As far as minutes of the meeting held on February 15, 2019 were concerned, there were three different items on which JLF had sought clarification from the forensic auditor. The JLF was of the opinion that "if no clarification is sought from the Forensic Auditor", the account will be classified as "fraud". However, before actually declaring 'fraud' the JLF should have awaited clarification from the forensic auditor. It was unjustified in declaring the Company's account as 'fraud', until all evidence was available. The FIC had also referred to a report submitted by the IRP, which had never been seen by either the Company or the JLF. The Master Circular was also confusing and vague. Clause 8.12 of the Master Circular states that the procedure for declaring a borrower as a wilful defaulter should be followed. Moreover,

according to the Hon'ble Supreme Court of India (**"SC"**) in the case of ***SBI v. Jah Developers(2019) 6 SCC 787,*** before a borrower can be declared as a 'wilful defaulter', the borrower has to be given an opportunity of hearing by the JLF. Yet, the Master Circular dealing with fraud account denies such an opportunity of hearing to a borrower who may be declared as holder of fraud account. Moreover, in the JLF Order, the JLF has not just declared the Company as holder of a fraud account, but more so has declared the Company as a 'wilful defaulter'. Therefore, even before declaring the Company as a wilful defaulter, an opportunity of hearing had to be given. It could also not rely on any findings of the NCLT, as the JLF decision was taken before NCLT findings.

Contentions of SBI (objections in respect of Petitioner's *locus standi*)

The SBI had approached the NCLT for declaring the Company as insolvent. Since the IRP could not resurrect the Company despite best efforts, the NCLT appointed a Liquidator. As a consequence, the Petitioner no longer had a role to play in the Company's affairs. The Petitioner, therefore, lacked the *locus standi* to challenge the JLF Order and FIC Order, and to challenge the legal validity of the Master Circular. Further, once the Company's account is declared as 'fraud', the civil and criminal consequences will be faced by the Company, and not by the Petitioner. Therefore, the Petitioner was not justified in claiming that his fundamental and civil rights were being adversely affected by the JLF Order and FIC Order.

Contentions of RBI and SBI

In consonance with the goal for expediency of the Master Circular, the JLF had to take decisions at the earliest and report the same to RBI, and to expeditiously initiate the criminal investigation. If decisions weren't taken expeditiously, or not reported to RBI or to the investigating agency, fraudsters would continue their illegal activity and endanger the banking sector. It is in the interest of the public that the decisions be taken without wastage of time. Therefore, the Master Circular did not provide for an opportunity of hearing to a borrower.

The very title of the Master Circular, "Classification and Reporting..." indicated that there are two purposes of the Master Circular, namely (i) to classify an account as 'fraud', and (ii) to report the decision both to the RBI and to the law enforcement agencies. Since the decision and investigation needed to be fast paced, the requirement of principles of natural justice should not be read into the Master Circular. Further, the meeting of the JLF is not an adjudicatory process; it is merely an administrative function. Therefore, the principles of natural justice cannot be read as part and parcel of the procedure to be adopted by the JLF. Moreover, the purpose of reaching the conclusion is only to set the criminal law into motion by reporting the fraud to the investigating agencies. Therefore, there was no legal requirement of giving an opportunity of hearing to the alleged accused. The application of principles of natural justice is also not universal. Indeed, there are circumstances where the said principles can be ignored. Even so, the IDBI brought the Second Audit Report to the notice of the Company byits letter and the Company had also replied to the same. It could not be said that the Company was denied an opportunity of hearing. According to an order passed by the Income Tax Department on November 29, 2017, the department had already noticed that some sham transactions were carried out by the Company. Moreover, in its order dated February 27, 2018, the NCLT had noticed the fact that the Company had huge trade receivables. Yet, it

could not release/recover any of the outstanding trade receivables. Therefore, apparently, the Company had played fraud. Lastly, the FIC has considered the entire material which was placed before it, and had legally concluded that the Company was holder of a 'fraud' account.

Observations of the Telangana High Court

On perusal of Clause 8.12 sub-clauses 1 and 2 of the Master Circular, the THC observed that the Petitioner was well justified in claiming that the JLF Order and FIC Order would adversely affect his civil and fundamental rights, and therefore, he had the right to access justice under Article 226 of the Indian Constitution. Even if the Liquidator had been appointed by the NCLT, it did not pre-empt the Petitioner from challenging the JLF Order, FIC Order and the Master Circular. It was notable that the Liquidator was appointed after the decisions were taken by the JLF and FIC. Therefore, mere appointment of the Liquidator would not dilute the impact of the aforesaid clauses.The THC, whilst referring to a foray of past decisions of the SC, concluded that while interpreting the Master Circular, the principles of natural law would have to be borne in mind. The principles of natural law are applicable to both administrative and quasi-judicial decisions. But while seeing the existence of urgency, the court is required to balance between 'hurry' and 'hearing'. The hearing can be short but substantive, prompt but effective. Merely because the title of the Master Circular is "fraud classification and reporting....", it does not necessarily mean that the function of the JLF and FIC are limited merely to discovery of fraud, and its reporting by the commercial banks. A perusal of Clause 1.3 *(purpose)* of the Master Circular would reveal that the purpose was not just to discover a fraud being committed on a bank, but also to alert the other banks to take necessary safeguards/preventive measures against such parties who may be declared as 'fraudster'. Moreover, the purpose is to initiate the investigation through investigating agencies. The THC rejected the contention that the urgency demanded that principles of natural justice should not be read into the Master Circular. A holistic review of the Master Circular would go to show that a complete elaborate safety system had been prescribed, including system of checks/investigations at different stages of loan's life cycle, triggering of early warning signal, etc. Moreover, evidence to be read against a party needs to be furnished to the party. The party has to be given an opportunity to explain, or to challenge the evidence. Thus, the argument of urgency cannot be accepted for jettisoning the applicability of principles of natural justice.

Further, there was a notable gap of 4 ½ months between the decision of the JLF and the FIC. Therefore, it could not be said that the decision to declare the Company account as fraud has been taken on an 'urgent' basis. Furthermore, if the requirement of principle of nature justice is not read into the Master Circular, it would suffer from vagueness. For, on the one hand, provisions of the Master Circular, that is, Clause 8.9 *(Lending under Consortium or Multiple Banking Arrangements)* (sub-clauses 4 and 5) *prima facie* seem to deny the opportunity of hearing to the borrower, yet, Clause 8.12.1 of the Master Circular clearly states that the procedure for declaring a borrower as a willful defaulter has to be followed. Therefore, to erase the self-contained contradiction, and to save the Master Circular from the virus of vagueness, the principles of natural justice perforce would have to be read into Clause 8.9 (sub-clauses 4 and 5) of the Master Circular.

Pursuant to the application of the provisions of Master Circular, among other things, both fraudulent borrower and promoter/director(s), and other whole-time director(s) would be debarred from raising funds from banking system for a period of five years. Thus, once branded as 'a fraudster', or 'a fraudulent borrower', or 'holder of a fraud account', the stigma will continue for a considerable time. Such a stigma would, thus, adversely affect the fundamental rights of a promoter/director to carry on a trade or a business, which is guaranteed under Article 19(1)(g) *(to practise any profession, or to carry on any occupation, trade or business)* of the Indian Constitution. Therefore, such a classification would have grave civil consequences for promoter/director of a borrowing company. Further, since right to livelihood is part and parcel of fundamental right to life under Article 21 *(Protection of life and personal liberty)* of the Indian Constitution, the fundamental right can be deprived only by a reasonable procedure established by law. Thus, the Master Circular, as interpreted by the RBI, would be in violation of Article 21. Therefore, to save Clause 8.9 (sub-clauses 4 and 5) of the Master Circular from being declared as unconstitutional, it is essential to read the principles of natural justice into the said clauses. Classification of an account as 'fraud' has devastating impact on the life of a person as civil and criminal consequences would subsequently follow. Presently, unbridled power has been given to the JLF for declaring a person/company as 'a fraudulent borrower'. Such an absolute power could not have been intended by the RBI while promulgating the Master Circular.

Decision of the Telangana High Court

The principles of *audi alteram partem* will have to be incorporated into Clause 8.9 (sub-clauses 4 and 5) of the Master Circular even if the said clauses are silent. Such an interpretation cannot be said to be farfetched. The party should be given a chance to challenge the evidence. Copies of report such as those submitted by IRP were never furnished to the Petitioner or the Company. Even though the IDBI bank report supposedly paraphrased the contents of Second Audit Report, complete copy of the forensic auditor report was never submitted along with the said letter. Many observations/items against the Company were closed not only on the basis of the Second Audit Report, but also on the basis of clarification / information submitted by the Company to the forensic auditor. Yet, the same opportunity to explain to the JLF was not given to the Company, or to the Petitioner. Hence, the JLF Order is legally invalid. Instead of awaiting clarifications from the forensic auditor, in respect of several other items, the JLF simply declared the account to be treated as fraud. But till it had heard from the forensic auditor, one way or the other, it could not have jumped the gun.

As far as the FIC was concerned, it had relied on the report submitted by the IRP. Here again, neither the Company nor the Petitioner had any information or knowledge about a report which was going to be read against them. However, this crucial step which is a part of *audi alteram partem* is conspicuously missing in the present case. It was noted that in respect of several items, the JLF had also decided that “in case no clarification is received from the Forensic Auditor, only then it will treat the account as fraud". Once it has decided to wait till further clarification is submitted, the JLF is not justified in concluding that "the account be treated as fraud". In fact, the JLF was legally required to wait for further clarification, or non-clarification from the forensic auditor.

Thereafter, the court ordered that: (i) the principle of *audi alteram partem,* part of the principles of natural justice, is to be read in Clause 8.9 (sub-clauses 4 and 5) of the Master Circular; (ii) FIC Order and JLF Order be set aside; (iii) JLF is directed to give an opportunity of hearing by furnishing copies of both reports (IRP's Report and Second Auditor Report); (iv) JLF is directed to give an opportunity of personal hearing both to the Petitioner and to the Liquidator before taking any decision on the issue whether the account should be classified as 'fraud' or not; (v) After the JLF has taken its decision, the FIC is directed to pass its resolution whether the decision of the JLF should be confirmed or not; and (vi) said exercise shall be carried out by the JLF within a period of three months from the date of receipt of the certified copy of this judgment. Furthermore, the subsequent exercise by FIC shall be carried out within two months from the date of the decision of the JLF.

VA View:

At the outset, application of Clause 8.9 (sub-clauses 4 and 5) of the Master Circular would deny justice to borrowers. Even if a decision has to be taken expediently, the principles of natural justice could be adopted to ensure that the borrower is given a chance to not only access all materials that have been used against him, but also given a chance to explain his case.

In this instance, the Company did not have precise knowledge about the information that was going to be read against them. In addition to the same, they were also denied a proper chance of explanation. As far as the point of urgency was concerned, it was rightly noted by the court that not even urgency could be substantial argument to jettison the principles of natural justice. Such unilateral decisions would set off grave penal consequences for the borrower, from which, a situation reversal would be very difficult. Any such mechanism and the consequences flowing from it would therefore clearly be a reproach to natural justice. It was apt for the THC to balance foresight and administration of justice in interpreting the object of the Master Circular.

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