Between the lines...

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Key Highlights

I. Supreme Court: (i) A contract is void if prohibited by a statute under a penalty, even without an express declaration that the contract is void (ii) The condition predicated in Section 31 of the Foreign Exchange Regulation Act, 1973, of obtaining 'previous' general or special permission of the Reserve Bank of India for transfer or disposal of immovable property situated in India by a person, who is not a citizen of India, is mandatory

The Hon'ble Supreme Court ("**SC**") has in its judgment dated February 26, 2021 ("**Judgement**"), delivered by a three judge bench, in the matter of ***Asha John Divianathan v. Vikram Malhotra & Others [CIVIL APPEAL NO. 9546 OF 2010]***, held that a contract is void if prohibited by a statute under a penalty, even without an express declaration that the contract is void. It was further held that the condition predicated in Section 31 of the Foreign Exchange Regulation Act, 1973 ("**FERA**"), of obtaining 'previous' general or special permission of the Reserve Bank of India ("**RBI**") for transfer or disposal of immovable property situated in India by a person, who is not a citizen of India, is mandatory.

Facts

Mrs. F.L. Raitt, a foreigner, was the owner ("**Owner**") of an immovable property bearing No.12 (old No.10A), Magrath Road ("**Property**"). The Owner had executed an agreement of sale dated April 05, 1976, whereunder, the title deed of the Property was delivered in favour of Mr. R. P. David ("**Mr. David**") who was the father of Asha John Divianathan ("**Appellant**") and the husband of Mrs. R.P. David ("**Respondent No.4**"). Subsequently, the Owner gifted a portion of Property admeasuring 12,306 square feet, by a gift deed dated March 11, 1977, and a supplementary gift deed dated April 19, 1980, ("**Gift Deeds**") in favour of Mr. Vikram Malhotra ("**Respondent No.1**") without obtaining previous permission of the RBI under Section 31 of FERA.

Thereafter, the Owner executed a ratificatory agreement dated December 04, 1982 to transfer the Property, admeasuring 35,470 square feet in favour of Mr. David and a formal permission of RBI under Section 31 of FERA

was sought. The RBI granted permission on April 02, 1983. Consequently, a registered sale deed dated April 09, 1983 ("**Sale Deed**") was executed by the Owner in favour of Mr. David. However, subsequently, the Owner filed a suit, on July 30, 1983, for cancellation and setting aside of the Sale Deed. The Owner expired on January 08, 1984, and thereafter, Mrs. Ingrid Greenwood was substituted as her legal representative in the pending suit. The said suit was dismissed by the City Civil and Sessions Judge, Mayo, Bangalore ("**Trial Court**").

Subsequently, Mr. David filed a suit on February 10, 1984, against Respondent No. 1 and sought relief for declaring the Gift Deeds executed as null, void and not binding and consequentially for relief of possession, permanent injunction and mesne profits. The said suit was dismissed by the Trial Court by a judgment and decree dated August 31, 2001. Thereafter, the Appellant along with Respondent No. 4, had filed first appeal before the High Court of Karnataka ("**KHC**") against abovementioned judgement of the Trial Court.

The KHC examined the issue raised by the Appellant on the validity of the Gift Deeds being in violation of Section 31 of FERA. The KHC relied on ***Piara Singh v. Jagtar Singh and Another [AIR 1987 Punjab and Haryana 93]***, and held that lack of RBI's permission under Section 31of FERA did not render the Gift Deeds as void, much less illegal and unenforceable. Accordingly, the first appeal was dismissed by impugned judgment dated October 01, 2009 of KHC.

Issues

1. Whether Section 31 of FERA is mandatory or directory in nature.

2. Whether the Gift Deeds executed in favour of Respondent No. 1, in contravention of Section 31 of FERA, are void or voidable. Further, whether it can be voided, if so, then at whose instance?

Arguments

Contentions raised by the Appellant:

The dispensation specified in Section 31 of FERA is mandatory. Therefore, the Gift Deeds being in violation of Section 31 of FERA, are null and void and unenforceable in law, consequently, not binding on the Appellant and Respondent No. 4. Further, the Appellant stated that this position of law is reinforced by Section 47 (*Contracts in evasion of the Act*) of FERA and that violation of Section 31 of FERA has also been made punishable under Section 50 (*Penalty*) of FERA, in support of this submission, reliance was placed on the ratio of a constitution bench judgment in ***Life Insurance Corporation of India v. Escorts Limited and Others [(1986) 1 SCC 264]*.**

The Appellant contended that the reasons and judgement in Piara Singh (supra) are manifestly wrong since it failed to analyse the true scope and purport of Section 31 of FERA. The Appellant contended that, the entire Property stood validly transferred in favour of Mr. David based on the Sale Deed.

Contentions raised by Respondent No. 1:

The transfer through Gift Deeds in favour of Respondent No. 1 cannot be regarded as ineffective, unenforceable or invalid. Section 31 of FERA is a directory provision. Hence, not obtaining 'previous' permission of the RBI would not render the Gift Deeds invalid. No consequence has been provided in Section 31 or any other provision of FERA to treat the transaction in violation of Section 31 of FERA as void. It was further submitted that the stipulation under

Section 31 of FERA is only a regulatory measure and not one prohibiting transfer. The consequence of such violation is provided for as penalty under Section 50 of FERA, for which the concerned parties can be proceeded against. However, no action had been taken by any party, including the RBI, in this regard.

The RBI is exclusively entrusted with the task of determining the permissibility of the transaction, being the repository of management of foreign exchange of the country. The Respondent No. 1 further relied on the provisions of the Indian Contract Act, 1872 ("**1872 Act**") to state that there is a distinction between void and voidable transactions. Therefore, the transfer in favour of Respondent No. 1 would at best be voidable, that too, at the instance of the RBI only and no one else.

Respondent No. 1 relied on ***Waman Rao and Others v. Union of India and Others [(1981) 2 SCC 362]*** and contended that different high courts have consistently opined that transaction in contravention of Section 31 of FERA cannot be regarded as void and that view needs no interference. Therefore, following the principle of *stare decisis* and the fact that FERA had been repealed, the SC ought not to countermand the consistent view taken by the high courts prevailing since 1987.

Observations of the Supreme Court

The SC noted that, Mr. David had acquired clear title of the Property transferred to him by virtue of the Sale Deed as it was executed only after receipt of 'previous' permission from the RBI. However, Gift Deeds in favour of Respondent No. 1 were not backed by such previous permission of the RBI. Admittedly, no permission had been sought from the RBI in that regard.

Object and purpose of FERA:

The SC noted the object of FERA was to consolidate and amend the law relating to dealings in foreign exchange and securities, transactions indirectly affecting foreign exchange and the conservation of the foreign exchange resources of the country and the proper utilisation thereof in the interests of the economic development.

The SC observed that while introducing the bill in the Lok Sabha, Mr. Y.B. Chavan, the then Minister of Finance, explained the object of Section 31 of FERA as follows, "*As a matter of general policy it has been felt that we should not allow foreign investment in landed property/buildings constructed by foreigners and foreign controlled companies as such investments offer scope for considerable amount of capital liability by way of capital repatriation. …, there is no reason why we should allow foreigners and foreign companies to enter real estate business.*"

Therefore, the SC noted that the avowed object of Section 31 of FERA was thus to minimise the drainage of foreign exchange by way of repatriation of income from immovable property and sale proceeds in case of disposal of property by a person, who is not a citizen of India.

Understanding the distinction between a void and a voidable transaction:

The SC analysed the purport of expression "void" and "voidable" and hence adverted to the exposition in the case of ***Dhurandhar Prasad Singh v. Jai Prakash University and Others [(2001) 6 SCC 534]*** wherein it was noted that, it is necessary to distinguish between two kinds of invalidity, the one kind is where the invalidity is so grave that the list is a nullity altogether, such that, there is no need for an order to quash it. It is automatically null and void. The other

kind is when the invalidity does not make the list void altogether, but only voidable, such that, it stands valid unless and until it is set aside.

The SC noted that in the case of ***Union of India & Others. v. A.K. Pandey [(2009) 10 SCC 552],*** it was observed that where a contract, express or implied, is expressly or by implication forbidden by statute, no court will lend its assistance to give it effect. The SC observed that it is settled that prohibition and negative words can rarely be directory. The SC noted that it is well established that a contract is void if prohibited by a statute under a penalty, even without express declaration that the contract is void, because such a penalty implies a prohibition. In the case of ***Union of India v. Colonel L.S.N. Murthy and Another [(2012) 1 SCC 718]*** it was opined that the contract would be lawful, unless the consideration and object thereof is of such a nature that, if permitted, it would defeat the provisions of law and in such a case the consideration or object is unlawful and would become void and that unless the effect of an agreement results in performance of an unlawful act, an agreement which is otherwise legal cannot be held to be void and if the effect of an agreement did not result in performance of an unlawful act, as a matter of public policy, the court should refuse to declare the contract void with a view to save the bargain entered into by the parties and the solemn promises made thereunder.

Understanding Section 31 of FERA:

The SC observed that the title of Section 31 of FERA restricts acquisition, holding and disposal of immovable property in India by foreigners/non citizens. It is crystal clear that a person, who is not an Indian citizen, is not competent to dispose of by sale or gift, as in this case, any immovable property situated in India without 'previous' general or special permission of the RBI, except as provided in the proviso, that is, by way of lease for a period not exceeding 5 years. Section 31(2) of FERA mandated a person, who is not an Indian citizen, to make an application to the RBI with necessary disclosures. The second proviso to Section 31(3) of FERA provided for a deemed permission, if no response was received within a period of 90 days from receipt of the application by the RBI. The SC noted that, as per Section 31(4) of FERA, every person, who was not an Indian citizen, holding immovable property situated in India at the time of commencement of FERA, was obliged to make disclosure and declaration within 90 days from the commencement of FERA or such further period as was allowed by the RBI. The SC observed that it is true that the consequences of failure to seek such 'previous' permission had not been explicitly specified in Section 31 of FERA or any other provision in FERA. The SC noted that, the purport of Section 31 of FERA must be understood in the context of legislative intent with which it was enacted, that is, basis the general policy to not allow foreign investment in landed property/buildings constructed by foreigners or enter into real estate business to eschew capital repatriation.

The SC, for harmonious interpretation of provisions, observed the purport of the other provisions of FERA. Section 47(1) of FERA clearly envisaged that no person shall enter into any contract or agreement which would directly or indirectly evade or avoid in any way the operation of any provision of FERA or of any rule, direction or order made thereunder and Section 47(2) of FERA declared that an agreement shall not be invalid if it provides, that thing shall not be done without the permission of the Central Government or the RBI.

The SC noted that, though ostensibly the agreement would be conditional subject to permission of the Central Government or the RBI, as the case may be, and if such term is not expressly mentioned in the agreement, it shall be an implied term of every contract governed by the law of obtaining permission of the Central Government or the RBI before doing the thing provided for in the agreement. In that sense, such a term partakes the colour of a statutory contract. Notably, Section 47 of FERA applied to all the contracts or agreements covered under FERA, which required previous permission of the RBI.

Section 50 (*Penalty*) of FERA reinforced the position that transfer of land situated in India by a person, who is not an Indian citizen, would be penalized. The SC noted that indeed, inserting such a provision did not mean that FERA was a penal statute, but is to provide for penal consequence for contravention of provisions, such as Section 31 of FERA. Further, Section 63 (*Confiscation of currency, security, etc.*) empowers the court trying a contravention, to confiscate the currency, security or any other money or property in respect of which the contravention has taken place.

The SC noted that in the case of ***Mannalal Khetan and Others. v. Kedar Khetan and Others [(1977) 2 SCC 424]*** it was observed that, in the present dispensation provided under Section 31 of FERA read with Sections 47, 50 and 63 of FERA, although it may be a case of seeking 'previous' permission, it is in the nature of prohibition. In every case where a statute imposes a penalty for doing an act, though, the act not prohibited, yet the thing is unlawful because it is not intended that a statute would impose a penalty for a lawful act. When penalty is imposed by statute for the purpose of preventing something from being done on some ground of public policy, the thing prohibited, if done, will be treated as void.

The SC concluded that from the analysis of Section 31 of FERA and upon conjoint reading with Sections 47, 50 and 63 of FERA, the requirement of taking 'previous' permission of the RBI before executing the sale deed or gift deed is the quintessence; and failure to do so must render the transfer unenforceable in law. The dispensation under Section 31 of FERA mandates 'previous' or 'prior' permission of the RBI before the transfer takes effect and, therefore, contract or agreement including the gift pertaining to transfer of immovable property of a foreign national without previous general or special permission of the RBI, would be unenforceable in law.

Validity of the Gift Deeds:

The clear title would pass on and the deed can be given effect to only if permission is accorded by the RBI under Section 31 of FERA to such transaction. There is no possibility of *ex post facto* permission being granted by the RBI under Section 31 of FERA, as noted in the case of Life Insurance Corporation of India (supra).

In light of the general policy prevalent at that time, the SC observed that foreigners should not be permitted/allowed to deal with real estate in India, the peremptory condition of seeking 'previous' permission of the RBI before engaging in transactions specified in Section 31 of FERA and the consequences of penalty in case of contravention, the transfer of immovable property situated in India by a person, who is not a citizen of India, without previous permission of the RBI must be regarded as unenforceable and by implication a prohibited act. Therefore, until permission is accorded by the RBI, it would not be a lawful contract or agreement within the meaning of Section 10 read with Section 23 of the 1872 Act.

The SC commended the decision of the Bombay High Court ("**BHC**") in ***Joaquim Mascarenhas Fiuza v. Jaime Rebello and Another [1986 SCC OnLine Bom 234]***, that dealt with the case of transfer of property, which according to the respondent therein, could not be held by the plaintiff/petitioner, who was a not a citizen of India, in absence of permission given by the RBI in that regard. The BHC took the view that the requirement of seeking 'previous' permission of the RBI in Section 31 of FERA is mandatory.

The SC observed that, the judgment of Piara Singh (supra) relied upon by KHC, erroneously assumed that there was no provision regarding confiscation of the immovable property referred to in Section 31 of FERA. The expression 'property' in Section 63 of FERA is an inclusive term and, therefore, there is no reason to assume that consequence of confiscation may not apply to immovable property in respect of which contravention of the provisions of Section 31(1) of FERA had taken place. The SC further noted that, the basis of that judgment is tenuous and is palpably

wrong. Merely because no provision in the FERA made the transaction void or says that no title in the property passes to the purchaser in case there is contravention of the provisions of Section 31 of FERA, will be of no avail.

A priori, the SC concluded that the various decisions of concerned high courts taking the view that Section 31 of FERA is not mandatory and the transaction in contravention thereof is not void or unenforceable, is not a good law. Accordingly, the SC deemed it appropriate to overrule the decisions of the high courts, taking contrary view, albeit, prospectively. The SC however cautioned that transactions which have already become final including by virtue of the decision of the court of competent jurisdiction, need not be re-opened or disturbed in any manner because of this Judgement. This declaration/direction was issued in exercise of the SC's plenary power under Article 142 of the Constitution of India.

Decision of the Supreme Court

The SC set aside the judgment and decree of the Trial Court as confirmed by the KHC and held that, the condition of seeking 'previous' general or special permission of the RBI for transfer or disposal of immovable property situated in India, by a person, who is not a citizen of India, under Section 31 of FERA is mandatory. Resultantly, the SC declared the Gift Deeds invalid, unenforceable and not binding on the Appellant. The SC observed that *a fortiori,* the Appellant was entitled for possession of the Property from Respondent No. 1 and also mesne profits for the relevant period for which a separate inquiry needs to be initiated under Order 20 (*Judgment and Decree*) Rule 12 (*Decree for possession and mesne profits*) of the Code of Civil Procedure, 1908.

With respect to the second part of issue 2, the SC stated that, the transaction can be voided by the RBI and also by anyone who is affected directly or indirectly by such a transaction. A person affected by such a transaction could set up challenge thereto, by direct action or even by way of collateral or indirect challenge.

VA View:

In the present case, the transaction was executed close to the coming into force of FERA, in the year 1977, when considerations were different and governed by different policy manifested in FERA. The SC relied on the objectives of FERA as stated at the time of introduction of the bill in the Lok Sabha, forbidding foreigners from dealing with real estate in India. This Judgment has on perusal of multiple precedents and resources, clearly interpreted the purpose of Section 31 of FERA in light of the legislative intent with which it had been enacted, that is, keeping in mind the then general policy to not allow foreigners to transact in or hold real estate in India. The SC observed that Section 31 of FERA was mandatory in nature.

The SC rightly observed that behind the simple dichotomy of void and voidable acts (*invalid and valid until declared to be invalid*), lurked terminological and complex conceptual conundrum, that if an act, order or decision is *ultra vires*, in the sense being beyond/outside the jurisdiction, it would be invalid, or null and void. However, if it is *intra vires*, it was, of course, valid. The SC further observed that, if it is flawed by an error perpetrated within the area of authority or jurisdiction, it was usually said to be voidable; that is, valid till set aside on appeal or in the past quashed by certiorari for error of law on the face of the record. The SC eventually concluded that the position of law is clear, that when the enforcement of the contract is against any provision of law, it will amount to enforcement of an illegal contract even though the contract *per se* may not be illegal. Such contracts, where enforcement requires compliance of statutory conditions, failure of such compliance of conditions will amount to statutory violation.

The SC correctly observed that this would nevertheless be a case of transaction opposed to public policy and, thus, the fact that a transaction can be taken forward after grant of permission by the RBI did not make the transaction any less forbidden at the time it was entered into.

II. Bombay High Court: Reiterated that a choice of seat is itself an expression of party autonomy and carries with it the legal effect of conferring exclusive jurisdiction on the courts of the seat

The Hon'ble Bombay High Court ("**BHC**") has in its judgment dated January 29, 2021 ("**Judgement**"), in the matter of ***Aniket SA Investments LLC v. Janapriya Engineers Syndicate Private Limited and Others [Commercial Appeal No. 504/2019],*** held that a choice of seat is itself an expression of party autonomy and carries with it the legal effect of conferring exclusive jurisdiction on the courts of the seat.

Facts

Aniket SA Investments LLC ("**Appellant**"), a foreign investor and Janapriya Engineers and Syndicate Private Limited ("**Respondent No. 1**") were shareholders of Janapriya Townships Private Limited ("**Respondent No. 2**"), a special purpose vehicle carrying out a real estate development project in Telangana. The Appellant, Respondent No. 1 and Respondent No. 2 had entered into a share subscription and shareholders agreement dated August 21, 2008 ("**the Agreement**"). The other respondent nos. 3 to 6, party to the petition, were the promoters of Respondent No. 1 ("**Promoters**"). Respondent No. 1, Respondent No. 2 and the Promoters are collectively referred to as "**Respondents**".

Disputes arose between the Appellant and the Respondents in relation to the implementation and execution of the Agreement. Therefore, the Appellant issued a notice of default dated March 19, 2019. Subsequently, Appellant issued a notice to Respondent No. 1 exercising a 'Put Option' under the shareholders agreement dated July 08, 2019, and finally a dispute notice dated August 22, 2019, to invoke arbitration. The relevant clauses of the Agreement are Clause 20.3 (*Governing Law and Jurisdiction*) that provided jurisdiction to courts at Hyderabad ("**Jurisdiction Clause**") and Clause 20.4 (*Arbitration*) that provided jurisdiction to courts at Mumbai ("**Arbitration Clause**").

Thereafter, the Appellant had filed a petition under Section 9 (*Interim measures, etc., by Court*) ("**Section 9 Petition**") of the Arbitration and Conciliation Act, 1996, ("**Act**"). Therein, by order dated October 22, 2019 ("**Impugned Order**"), the learned single judge, BHC, extensively relied on paragraph 96 of the decision of the Supreme Court ("**SC**") in ***Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc [(2012) 9 SCC 552]*** ("**BALCO**"), among other judgements, and held that there was concurrent jurisdiction of court where the cause of action accrued and the court of the seat of arbitration. The Impugned Order further held that as a matter of party autonomy, the parties had made an express choice in conferring jurisdiction on the courts at Hyderabad and that to give effect to this plain commercial term of the Agreement, the expression 'subject to' must be read as 'notwithstanding' and that expression 'seat' must be read as 'venue'. Therefore, the Impugned Order disregarded the choice of Mumbai as a 'seat'**.** Hence, the appeal was filed under Section 37 of the Act to challenge the Impugned Order.

Issues

1. Whether the Impugned Order was correct in relying on paragraph 96 of BALCO to recognize concurrent jurisdiction under Section 2(1)(e) (*definition of court*) of the Act or whether a choice of seat of arbitration has

the legal effect of conferring exclusive jurisdiction on the courts of that seat ("**Issue 1**").

2. If there is concurrent jurisdiction of two courts, is the Impugned Order correct to hold that as a matter of party autonomy, the parties have made an express choice in conferring jurisdiction on the courts at Hyderabad and that to give effect to this plain commercial term of the Agreement, the expression 'subject to' must be read as 'notwithstanding' and that expression 'seat' must be read as 'venue'.

Arguments

Contentions raised by the Appellant:

The Appellant submitted that, even if it is to be assumed that by law, two courts had concurrent jurisdiction under the Act, the clear intent of the parties as gathered by the plain meaning of the clauses is that, choice of courts at Hyderabad in Jurisdiction Clause is made "subject to" Arbitration Clause that provides for the seat at Mumbai. Therefore, in the event of any conflict the latter must prevail in consonance with the well settled meaning of the expression "subject to". There was no warrant for reading "subject to" as "notwithstanding" and giving it the very opposite meaning to the clear words chosen by the parties. The Appellant suggested that one way of reconciling both the clauses is that, the Jurisdiction Clause will apply in relation to a dispute that is not covered by arbitration, and in relation to all disputes under the arbitration agreement, the choice of seat being at Mumbai, the choice of court will also be at Mumbai even in a situation of concurrent jurisdiction with two courts.

The expression 'seat' could never have been read as a mere venue, rather the law in fact leans in favour of reading a reference to 'venue' as 'seat'. When the parties make an express reference to a place as being the 'seat', that choice under the principles of party autonomy must be given full effect. The Appellant relied on the judgment of ***BGS SGS SOMA JV v. NHPC LIMITED [(2020) 4 SCC 234]*** ("***BGS SGS***"), being completely applicable to answer the Issue 1. The SC therein had held that paragraph 96 of BALCO must be read consistently with the entire judgment, that is, when properly construed, it was held that, the courts of the seat of arbitration would have exclusive jurisdiction in relation to disputes arising in relation to the arbitration. The SC in BGS SGS noted the ratio laid down in the case of ***Antrix Corporation Limited v. Devas Multimedia Private Limited [2018 SCC OnLine Del 9338]*** ("**Antrix**"), as relied upon in the Impugned Order, as incorrect and contrary to the ratio in BALCO. It was also observed in BGS SGS that, a reference to a 'place' or 'venue' in an arbitration agreement will generally be understood as being a reference to a 'seat' of the arbitration unless there is a clear indication to the contrary.

Contentions raised by the Respondents:

The SC's decision in BGS SGS does not have a direct bearing on Issue 1. Further, the judgment in BGS SGS does not apply to the present situation, as while analysing precedents and considering 'seat' as being akin to exclusive jurisdiction, it did not consider possibility of an agreement stipulating different places being mentioned in respect of 'seat' in the arbitration clause and an exclusive jurisdiction provided generally in the contracts.

The Arbitration Clause should not be read as being a choice of 'seat' so as to displace an exclusive jurisdiction of the courts at Hyderabad, as stated expressly, as the choice in Jurisdiction Clause. The Impugned Order was correct in reading the expression 'subject to' as 'notwithstanding' so as to give effect to the intent of the parties as was apparent in the Agreement. The Promoters contended that in the year 2008, when the Agreement was entered into between the parties, the expression 'seat' was understood to mean 'venue'. The expression 'seat' as it is now understood was unknown to the parties at that time. Therefore, for the purpose of vesting jurisdiction on courts,

the phrase 'exclusive jurisdiction' was stipulated in the Jurisdiction Clause. It was submitted that, therefore, disregarding common usage at the relevant time will amount to disregarding the intent of parties.

The concept of 'seat' is relevant only to international commercial arbitration. In domestic arbitrations or international commercial arbitrations seated in India, parties would retain the right to vest exclusive jurisdiction with a court from amongst multiple courts which would naturally have jurisdiction over the subject matter or cause of action. It is submitted that reference to 'seat' in domestic arbitrations or international commercial arbitrations seated in India would not subsume within it an exclusive jurisdiction of courts of that 'seat'.

Observations of the Bombay High Court

Jurisprudence laid down in BALCO and BGS SGS on exclusive jurisdiction of the courts at the 'seat':

The BHC extensively noted the observations made in the BGS SGS case by the SC. The BHC noted that the judgment of BALCO was previously understood by some high courts to recognize concurrent jurisdiction of the 'cause of action' court and the 'seat' court. It was noted that the conflicting observations made in the BALCO judgement were clarified in the case of BGS SGS by the SC. The BHC further observed that if, as laid down in paragraph 96 of BALCO, the concurrent jurisdiction was to be the order of the day, despite seat having been located and specifcally chosen by the parties, party autonomy would sufer. The BHC noted the observations of the SC that paragraph 96 of BALCO was not in consonance with other observations as made therein in the judgement. The BHC observed that, the very fact that the parties have chosen a place to be the seat would necessarily carry with it the decision of both the parties that the courts at the seat would exclusively have jurisdiction over the entire arbitral process.

The SC in BGS SGS upheld the ratio of ***Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited [(2017) 7 SCC 678]*** ("**Indus Mobile**") wherein it was clarified that, the moment a seat is designated by agreement between the parties, it is akin to an exclusive jurisdiction clause, which would then vest the courts at the 'seat' with exclusive jurisdiction for the purposes of regulating arbitral proceedings.

The BHC observed that the Antrix case as relied upon by the Impugned Order, is no longer good law as it did not follow BALCO. The BHC observed that it is incorrect to state that the example given in paragraph 96 of BALCO reinforces the concurrent jurisdiction. The judgment in BALCO when read as a whole, applies the concept of 'seat' and harmoniously construes Section 20 (*Place of arbitration*) with Section 2(1)(e) of the Act to effectively broaden the definition of 'court', to take within its ken the courts of the 'seat' of the arbitration. It was observed that the narrow construction of Section 2(1)(e) of the Act was expressly rejected in BALCO.

The BHC further observed that an application under Section 9 of the Act may be preferred before a court in whose jurisdiction part of cause of action arises, in two situations, one, if parties have not agreed on the 'seat' of arbitration, and the other, before such 'seat' may have been determined on the facts of a particular case by the arbitral tribunal under Section 20(2) of the Act. In both these situations, the earliest application having been made to a court in which a part of the cause of action arises would then be the exclusive court under Section 42 (*Jurisdiction*) of the Act, which would have control over the arbitral proceedings.

Applicability of BGS SGS to Impugned Order:

The BHC observed that the Impugned Order in so far as it held paragraph 96 of BALCO to recognize concurrent

jurisdiction of the 'cause of action' court and the 'seat' court could not be sustained as it was inconsistent with the judgment in BGS SGS. The BHC further rejected the contentions of Promoters that the judgment of BGS SGS did not apply to the instant case because the present case is an international commercial arbitration seated in India, while law laid down in BGS SGS was on a situation where it was a domestic arbitration. The BHC observed that, it would be incorrect and contrary to the reading of the judgment itself to restrict the application of the law it laid down, to apply only to some situations and not others as had been contended by Promoters. The BHC concluded that on a reading of the entire judgment, the judgement was clearly applicable to Issue 1 irrespective of whether it is a domestic arbitration or an international commercial arbitration seated in India, such as in the present case.

The BHC further observed that, in the case of BGS SGS it had been held that there is no concurrent jurisdiction of two courts under Section 2(1)(e) of the Act. The BHC further observed that the principles applied in the Impugned Order, that, as a matter of party autonomy the parties can choose one of the two courts and confer exclusive jurisdiction on one of those courts, by relying, *inter alia*, upon paragraph 96 of BALCO, would have no application in a situation where the parties had chosen a seat of arbitration. The BHC observed that a choice of seat, as the SC had also explained, is itself an expression of party autonomy and carries with it the effect of conferring exclusive jurisdiction on the courts of the seat.

The BHC rejected the contentions of the Promoters, that the choice of 'seat' in the year 2008 when the Agreement was entered into was not understood as a choice of courts of the 'seat' and that this could not be the intention attributed to the parties. The BHC observed that the law as laid down in BGS SGS to the effect of choice of 'seat' as conferring exclusive jurisdiction is by no means prospective or applicable only after a particular date. Even the judgment in BALCO, as explained in BGS SGS, must be understood as stating the legal position under the Act and which must be given effect to, even if the Agreement was executed a date prior to the judgment.

The BHC was of the opinion that, in view of the SC's analysis of Indus Mobile in the case of BGS SGS, the Impugned Order was not correct in distinguishing Indus Mobile only because of the clauses in the agreement in Indus Mobile were conferring exclusive jurisdiction on the same court as that of the seat.

Interpretation of the clauses of the Agreement:

The BHC observed that it is a well settled rule of interpretation of agreements that the courts must give effect to the plain language used by the parties and that the intention of the parties must be gathered from the plain meaning of words used in the agreement. The BHC noted that, the Jurisdiction Clause conferred exclusive jurisdiction on the courts at Hyderabad, and that this was not part of the Arbitration Clause of the Agreement. The BHC noted that significantly, the choice of court at Hyderabad was made clearly 'subject to' Arbitration Clause. Therefore, the plain language used in the Agreement, was that Mumbai is chosen as the seat of arbitration proceedings.

The BHC commended the ratio of the judgment in ***South India Corporation Private Limited v. Secretary Board of Revenue [AIR 1964 SC 207]***, that the meaning of the expression 'subject to' is the opposite of 'notwithstanding' and, therefore, 'subject to' could never have been interpreted as 'notwithstanding' as had been done in the Impugned Order. The BHC, hypothetically analysed that, even if one were to accept that concurrent jurisdiction of two courts is possible, the choice of Mumbai as the seat of arbitration would in any view of the matter mean that the courts at Mumbai had concurrent jurisdiction to entertain disputes under the Agreement. The BHC emphasized that, the choice of courts at Hyderabad is made 'subject to' the seat at Mumbai, which implied prevalence of choice of courts at Mumbai, and therefore in the event of any conflict the latter clause should

prevail. The BHC stated that this is the plain meaning, beyond any doubt, of the words 'subject to' and 'seat' and, therefore, this would have the effect of conferring exclusive jurisdiction on the courts at Mumbai.

The BHC observed that the Jurisdiction Clause and the choice of courts expressed therein would apply in a situation not covered by a dispute that is governed by the arbitration agreement in Arbitration Clause. In any view of the matter, even if Jurisdiction Clause does overlap with Arbitration Clause in determining which court would have jurisdiction to entertain applications made under the Act, since Jurisdiction Clause is made 'subject to' Arbitration Clause, the BHC observed that the court of the 'seat' would even under the Agreement have exclusive jurisdiction to entertain applications made under the Act.

The BHC noted that, the SC in BGS SGS had observed that, even when parties use the expression 'venue of arbitration proceedings' with reference to a particular place, the expression 'arbitration proceedings' would make it clear that the 'venue' should be read as 'seat'. The BHC observed that thus, there is no basis for reading Mumbai as a 'venue', only because effect had to be given to the choice of courts at Hyderabad, which is itself 'subject to' the Arbitration Clause.

Decision of the Bombay High Court

The BHC held that the Impugned Order in so far as it related to the interpretation of the Agreement, could not be sustained. The BHC answered the first part of the Issue 1, in the negative; and the second part of the Issue 1 in the affirmative. Further, the issue 2 as mentioned above was answered in negative.

It thus held that, where a provision in the Agreement conferred exclusive jurisdiction on one place and another provision separately provided for a seat of arbitration in another place and the Agreement provides that the first provision is subject to the second provision, the courts at the latter place would have jurisdiction for entertaining the Section 9 Petition. Therefore, the BHC conclusively held that the Arbitration Clause would prevail over the Jurisdiction Clause and hence the courts at the seat, that is, at Mumbai, had the exclusive jurisdiction.

Therefore, the BHC set aside the Impugned Order and allowed the appeal. The Section 9 Petition was ordered to proceed on merits before the BHC and was accordingly restored.

VA View:

The BHC in this Judgement has analysed multiple precedents relied upon by the parties. The BHC relied on the case of BGS SGS to reiterate the clear position of law and reinforced the premise that the concept of juridical seat of arbitral proceedings had to be developed in accordance with the international practice on a case-by-case basis. The BHC after analysing various precedents, and provisions in agreement with the observations made by the SC, noted that it is too late in the day, to contend that the seat of arbitration is not analogous to an exclusive jurisdiction clause.

The BHC in this Judgement has clarified that, BALCO, did not hold that two courts, that is, the seat court and the court within whose jurisdiction the cause of action arises, had concurrent jurisdiction. The BHC noted that the various high courts missed the subsequent paragraphs in BALCO, which clearly and unmistakably stated that the choosing of a 'seat' amounted to the choosing of the exclusive jurisdiction of the courts at which the 'seat' is located.

III. NCLT, Mumbai: Allows application seeking reliefs essential to run a corporate debtor sold as 'going concern' during liquidation

The National Company Law Tribunal, Mumbai bench ("**NCLT**") has in its order dated March 09, 2021 ("**Judgement**"), in the matter of ***Gaurav Jain v. Sanjay Gupta [IA No. 2264 of 2020 in C.P.(IB)No. 1239/MB/2018]***, allowed an application seeking reliefs essential to run a corporate debtor sold as 'going concern' during liquidation.

Facts

The Bank of Baroda filed a petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("**IBC**") against Topworth Pipes and Tubes Private Limited ("**Corporate Debtor"/ "Company**"). By an order of NCLT dated December 11, 2018, the Corporate Insolvency Resolution Process ("**CIRP**") was initiated against the Corporate Debtor. Thereafter, on June 12, 2020, NCLT passed an order for liquidation of the Corporate Debtor under Section 33 of the IBC since no resolution plan was received in relation to the CIRP of the Company.

Subsequently, Mr. Sanjay Gupta ("**Liquidator**") had invited bids by an e-auction process memorandum dated October 13, 2020, for the sale of the Corporate Debtor. The Liquidator published two addendums dated October 29, 2020 and November 03, 2020, to the e-auction process memorandum. The e-auction process memorandum stated that the sale of the Company was on a 'going concern' basis in accordance with the provisions of the IBC read with Regulation 32(e) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 ("**Liquidation Process Regulations**") and the e-auction process memorandum. It further stated that the sale of the Company was proposed to be done on 'as is where is basis', 'as is what is basis', 'whatever there is basis' and 'no recourse basis'. The reserve price fixed was INR 152 Crores. It was clarified that, the proposed sale of the Company on 'going concern' basis did not entail transfer of any other title, except the title which the Company had on its assets as on the date of transfer.

Among other information mentioned in the e-auction process memorandum, it was also stated that, *"any liabilities, current or long term, contingent or not whether due or otherwise pertaining to the operations of Khopoli unit post liquidation commencement date and all current employees related liabilities including provident fund, employee state insurance and other retirement/terminal benefits shall be to the account of the successful bidder including any liabilities accruing post auction date, i.e. November 2nd, 2020."* Further, it was also mentioned that on payment of the total bid amount, and applicable taxes, registration fees, etc. the successful bidder shall be issued the letter for confirmation of sale, which was subject to the necessary approvals, if any, by various statutory and non-statutory authorities.

Mr. Gaurav Jain ("**Applicant**") had participated in the e-auction process held on November 11, 2020 and had submitted a bid for INR 190.90 Crores to acquire the Corporate Debtor as a 'going concern' ("**Sale Consideration**"). The Liquidator confirmed the Applicant's bid and issued letter of intent to the Applicant on November 12, 2020. Thereafter, the Applicant submitted his bid price before the Liquidator by depositing the earnest money deposit ("**EMD**") of INR 15.2 Crores. Subsequently, on November 18, 2020, the Applicant deposited a sum of INR 32.52 Crores. Therefore, in total, the money deposited by the Applicant amounted to INR 47.72 Crores, that is, 25% of the Sale Consideration.

Issue

1. To consider the sale of Corporate Debtor as a '*going concern*' during liquidation.

Submissions

Submissions made by the Applicant:

The Applicant submitted that it was agreed between the Liquidator and the Applicant that on payment of the remaining 75% of the Sale Consideration to the Liquidator on December 11, 2020, the Corporate Debtor would be transferred to the Applicant in accordance with the provisions of the IBC and the Liquidation Process Regulations and that such a date of transfer would be considered as the date of acquisition.

The Applicant submitted that the mere purchase of the Corporate Debtor as a 'going concern' as per the Liquidation Process Regulations would not suffice to ensure smooth running of the business of the Corporate Debtor. Therefore, it was imperative that certain additional reliefs, concessions, relaxations and permissions be granted by the NCLT, which would be essential and necessary to run the business of the Corporate Debtor as a 'going concern', to achieve the purpose of revival and value maximization of the Corporate Debtor. The Applicant submitted that, the NCLT was empowered to grant necessary reliefs, as mentioned in the application, in favour of the Applicant, in relation to the Corporate Debtor sold as a 'going concern' under the provisions of the Liquidation Process Regulations and under Section 60(5)(c) of the IBC.

Submissions made by the Liquidator:

The Liquidator submitted that he had filed second progress report dated October 10, 2020, with the Registry of the NCLT, in accordance with Regulation 15(1)(b) of the Liquidation Process Regulations and informed that all the secured financial creditors had relinquished their security interest in liquidation estate of the Corporate Debtor. The Liquidator stated that the prayer (a) to permit the Applicant to pay/adjust the Sale Consideration in a two-fold manner such that, an investment of INR 40 Crores into the equity shares of the Corporate Debtor and the balance amount of INR 150.90 Crores in the form of unsecured debt, were in consonance with the letter and spirit of the e-auction memorandum.

The Liquidator further submitted that he did not have any objections in respect of the prayers (m), (n) and (o) of the application, that sought directions to be issued to the Liquidator to, (i) cooperate and provide assistance to the Applicant in amending, modifying, creating the land records in relation to the immovable properties and assets, (ii) write back all the liabilities which were not payable and reflect the total liabilities at the Sale Consideration, (iii) the assets which were not recoverable to be written down to their realizable value, in the financial statements of the Corporate Debtor and finally that the filing of necessary documents and returns along with said financial statements had to be prepared and filed with the relevant regulators and authorities, by the Liquidator.

Observations of the NCLT

The NCLT noted that while the Liquidation Process Regulations recognised 'going concern' sale as one of the methods of sale of the Corporate Debtor, however, there was no definition provided for the term 'going concern' either in the IBC or in the Liquidation Process Regulations. Therefore, a reference was made to paragraph 8.1 of the report of the Insolvency Law Committee dated March 26, 2018, wherein the committee observed the meaning

of the term 'going concern' as follows "… *that the Corporate Debtor would be functional as it would have been prior to the initiation of CIRP, other than the restrictions put by the Code*." Further, a reference was also made to paragraph nos. 7 and 8 of the Round Table of Insolvency and Bankruptcy Board of India ("**IBBI**") held on May 21, 2018, wherein a note as published by IBBI defining 'going concern' was noted as follows, *"'Going Concern' means all the assets, tangibles or intangibles and resources needed to continue to operate independently a business activity which may be whole or a part of the business of the corporate debtor without values being assigned to the individual asset or resource*." In view of the said definitions, the following options were considered by NCLT:

a. The Corporate Debtor may be sold as a going concern, as provided in the Liquidation Process Regulations. Therefore, the legal entity of the Corporate Debtor would survive and, consequently, there would be no need for dissolution of the Company in terms of Section 54 of the IBC. The NCLT noted that the ownership generally is transferred by the Liquidator to the purchaser. Consequently, after the sale of the Corporate Debtor as a 'going concern', the Applicant would be carrying on the business of the Corporate Debtor.

b. The business of the Corporate Debtor may be sold as a 'going concern', that is, sale of business only and not the Corporate Debtor. Therefore, the Corporate Debtor would be liquidated in accordance with the Liquidation Process Regulations. The NCLT noted that, the assets and liabilities relevant for the business are transferred to a new entity, and stakeholders are paid from proceeds of sale in accordance with Section 53 of the IBC and, thereafter, the Corporate Debtor would be dissolved. The NCLT observed that since the amount is paid to the creditors in terms of the IBC, the liabilities of the Corporate Debtor towards the creditors would be treated as settled.

The NCLT observed that, both the options required consent of the secured creditors to relinquish security interest. Further, if security interest was not relinquished, other modes of sale as available under the Liquidation Process Regulations would have to be considered.

The NCLT observed that the crux of the sale as 'going concern' is that the equity shareholding of the Corporate Debtor was extinguished and the acquirer would take over the undertaking. The undertaking included the business of the Corporate Debtor, assets, properties, licenses and rights etc. excluding the liabilities. The NCLT noted that, however, in the instant case the assets that were included in the e-auction memorandum only had to be taken over by the Applicant.

The NCLT observed the difference that, in the normal parlance 'going concern' sale would be transfer of assets along with the liabilities. However, as far as the 'going concern' sale in liquidation is concerned, there was a clear difference that only assets were transferred and the liabilities of the Corporate Debtor had to be settled in accordance with Section 53 of the IBC. Hence, the Applicant would take over only the assets without any encumbrance or charge and they would be free from the action of the creditors.

Conclusively, the NCLT observed that, selling the Corporate Debtor 'as a going concern' included the following advantages:

a. The corporate debtor itself would be transferred.
b. The equity shareholding would be transferred or extinguished and new shares would be issued.
c. The purchaser would be expected to carry on the business of the corporate debtor after the sale of assets would be confirmed.
d. The existing employees would have a chance to continue in their employment.

Decision of the NCLT

As a consequence, the NCLT allowed the application and granted the following reliefs that were considered essential and necessary to run the Corporate Debtor sold as 'going concern' during liquidation and to achieve the purpose of revival of the Corporate Debtor:

(a) The Applicant was permitted to bring in INR 40 crores as share capital and INR 150.90 crores as unsecured debt towards payment of Sale Consideration.

(b) All the rights, title and interest over whole and every part of the Corporate Debtor, including but not limited to contracts, free from security interest, encumbrance, claim, counter claim or any demur were to be transferred to the Applicant upon payment of the Sale Consideration. Further, that the Sale Consideration, when received, were to be distributed by the Liquidator in terms of Section 53 of the IBC.

(c) All the claims, demands, liabilities of the Corporate Debtor, in relation to any period prior to the date of acquisition, were to be written off in full and extinguished, *qua* the Applicant. The Applicant was not to be responsible for any other claims, liabilities, obligations etc. payable by the Corporate Debtor thereon, to the creditors or any other stakeholders.

(d) Any proceedings against or in relation to, or in connection with the Corporate Debtor (other than those against the erstwhile promoters or former members of the management of the Corporate Debtor) pending or threatened, present or future, as on date of the Judgement, with respect to its liabilities, enquiries, investigations, assessments, claims, disputes, litigations etc. would not have any bearing against the assets sold in the liquidation process. The said assets were free from any financial implications arising out of any pending proceedings before relevant authorities, if any.

(e) The existing share capital of the Corporate Debtor would stand cancelled without any consideration to the shareholders. The Liquidator in consultation with the Registrar of Companies ("**RoC**") concerned shall take action to change the status of the Corporate Debtor in the records of the RoC from the status of "liquidation" to the status of "active".

(f) The board of the Corporate Debtor could be reconstituted and necessary filings could be made with the RoC concerned.

(g) All subsisting consents, licenses, approvals, rights, entitlements, benefits and privileges whether under law, contract, lease or license, granted in favour of the Corporate Debtor or to which the Corporate Debtor was entitled to were deemed to be continued subject to payment of renewal fees, if any, from date of the Judgement, to the licensing authorities.

(h) The assets specified in the e-auction memorandum, on payment of the Sale Consideration would vest with the Applicant. The Applicant and Corporate Debtor shall have the right to review and terminate any contract that was entered into previously.

(i) The Applicant shall not be held responsible / liable for any of the past liabilities of the Corporate Debtor in inquiries, investigations, assessments, notices, causes of action, suits, claims, disputes, litigations, arbitration or

other judicial, regulatory or administrative proceedings against or in relation to, or in connection with the Corporate Debtor prior to the date of the Judgement.

(j) The Applicant was entitled to get all the rights, title and interest whole and every part of the Corporate Debtor.

(k)The dues of all creditors of the Corporate Debtor would stand extinguished *qua* the Applicant.

(l) The non-compliance of provisions of any of the laws, rules, regulations, directions, notifications, circulars, guidelines, policies, licenses, approvals, consents or permissions, prior to the date of acquisition, stood extinguished *qua* the Applicant.

(m) All the assets specified in the e-auction memorandum would be continued as the assets of the Corporate Debtor on total payment of the Sale Consideration to the Liquidator.

(n) The Liquidator was directed to provide all support and assistance to the Applicant for the smooth functioning of the Corporate Debtor and to complete the acquisition.

(o) The Liquidator and Applicant would be at liberty to take all the steps required to make accounting entries for the smooth transmission and preparing the balance sheet.

(p) The Liquidator was directed to ensure completion of pending filings with the concerned RoC, Income Tax Authorities and any other government / statutory authorities.

(q) The Corporate Debtor was entitled to get the benefits of brought forward losses, if any, subject to permission of the appropriate authority under the relevant provisions of the Income Tax Act, 1961.

(r) The Corporate Debtor could apply for incentives under the 'Package Incentive Scheme', framed by the state government of Maharashtra, subject to the eligibility and other norms as provided in the said scheme.

(s) As far as the prayer for considering the bid submitted by the Applicant as resolution plan under Section 79 of Income Tax Act, 1961 was concerned, the Applicant could approach the relevant authority who would consider such request.

VA View:

It is rare that a company survives through the liquidation process as a 'going concern'. In this Judgement, the NCLT granted reliefs to the Applicant that were necessary for allowing the Corporate Debtor to survive and run as a 'going concern' on completion of the sale under relevant provisions of the IBC and Liquidation Process Regulations. This Judgement is in line with and amplifies the main objectives of the IBC including maximization of value and revival of the Corporate Debtor. The Judgement has also analyzed the meaning of the term 'going concern' in view of lack of a definition under the IBC and Liquidation Process Regulations. This Judgement of the NCLT addresses various concerns of acquirers in general, including but not limited to apprehensions of being hit by unknown/uncertain liabilities or other contingencies and concerns related to the smooth functioning and continuity of business operations of the Corporate Debtor, that is sold as a 'going concern' during the liquidation process.

IV. Supreme Court: The provisions of the Limitation Act would apply mutatis mutandis to proceedings under the IBC in the NCLT or NCLAT

The Supreme Court ("**SC**") has in its judgement dated March 22, 2021, in the matter of ***Sesh Nath Singh & Another v. Baidyabati Sheoraphuli Co-Operative Bank Limited and Another [Civil Appeal No. 9198 of 2019]*** ("**Judgement**") held that provisions of the Limitation Act, 1963 ("**Act**") would apply *mutatis mutandis* to proceedings under the Insolvency and Bankruptcy Code, 2016 ("**IBC**") in the National Company Law Tribunal/National Company Law Appellate Tribunal. It further held that there was no bar to exercise by the court or tribunal, of its discretion to condone delay under Section 5 of the Act in the absence of formal application.

Facts

Debi Fabtech Private Limited ("**Corporate Debtor**") was, *inter alia*, engaged in the business of export of textile and garments. In February, 2012, pursuant to the request made by the Corporate Debtor, the financial creditor, that is, Baidyabati Sheoraphuli Co-operative Bank Limited ("**Respondent**") granted a cash credit facility of INR 1,00,00,000, after which the Corporate Debtor opened a cash credit account with the Respondent and executed a hypothecation agreement. On default in repayment by the Corporate Debtor, the Respondent declared the account of the Corporate Debtor as a non-performing asset ("**NPA**"). The Respondent on January 18, 2014, issued a notice to the Corporate Debtor under Section 13(2) *(Enforcement of security)* of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("**SARFAESI**"), calling upon the Corporate Debtor to discharge in full, its outstanding liability of INR 1,07,88,536 inclusive of interest as on September 28, 2019, to the Respondent, within 60 days from the date of notice, failing which action would be taken under Section 13(4) of the SARFAESI. The Corporate Debtor made a representation to the Respondent under Section 13(3A) of the SARFAESI, objecting to the notice, which the Respondent rejected and issued further notice requesting the Corporate Debtor to clear the outstanding dues and finally a notice under Section 13(4) of the SARFAESI to handover peaceful possession of the secured immovable assets. On December 19, 2014, the Corporate Debtor filed a writ application in the Calcutta High Court ("**CHC"**) under Article 226 of the Constitution of India challenging the said notices issued by the Respondent under Section 13(2) and 13(4) of the SARFAESI. During the pendency of the writ petition, the Respondent notified the Corporate Debtor, the guarantors and the public, that they had taken possession of the secured assets of the Corporate Debtor under Section 13(4) of the SARFAESI. On July 24, 2017, the CHC passed an interim order restraining the Respondent from taking any action against the secured assets of the Corporate Debtor to await further orders.

On July 10, 2018, the Respondent filed an application in the National Company Law Tribunal, Kolkata ("**NCLT**") under Section 7 *(Initiation of corporate insolvency resolution process by financial creditor)* of the IBC, to initiate Corporate Insolvency Resolution Process ("**CIRP**"), which was admitted by the NCLT. The Corporate Debtor appeared through Shesh Nath Singh ("**Appellant**"). Aggrieved, the Corporate Debtor filed an appeal before the National Company Law Appellate Tribunal ("**NCLAT**") under Section 61 *(Appeals and Appellate Authority)* of the IBC, contending that the application filed by the Respondent was barred by limitation. The NCLAT dismissed the appeal, with the observation that the ground of limitation had been taken by the Corporate Debtor for the first time in the appeal and not before the NCLT. It further held that the application of the Respondent under Section 7 of the IBC was well within the limitation period. Hence, aggrieved, the Corporate Debtor under Section 62 *(Appeal to Supreme Court)* of the IBC filed an appeal before the SC.

Issues

1. Whether delay beyond three years in filing an application under Section 7 of the IBC can be condoned, in the absence of an application for condonation of delay made by the applicant (*in the instant case, the Respondent*) under Section 5 *(Extension of prescribed period in certain cases)* of the Act.

2. Whether Section 14 *(Exclusion of time of proceeding bona fide in court without jurisdiction)* of the Act applies to applications under Section 7 of the IBC. If so, is the exclusion of time under Section 14 of the Act available only after the termination of proceedings before the wrong forum.

Arguments

Contentions raised by the Appellant:

The Appellant submitted that the application under Section 7 of the IBC by the Respondent was barred by limitation and ought to be dismissed. Reliance was placed on ***Ishrat Ali v. Cosmos Cooperative Bank Limited and Another [Company Appeal (AT) (Insolvency) No. 1121 of 2019]*** **("Ishrat Ali")**, where it was held by the NCLAT that in an application under Section 7 of the IBC, the applicant is not entitled to the benefit of Section 14 of the Act in respect of proceedings under the SARFAESI. It was submitted that the account of the Corporate Debtor with the Respondent had been declared as NPA on March 31, 2013, on which date the cause of action accrued. Thus, the three-year period expired on March 31, 2016, due to which the application under Section 7 of the IBC, filed after five years and three months from the date of declaration of the account as NPA, was fatally time-barred. Further, the Respondent had not filed any application before the NCLT under Section 5 of the Act. The delay in filing the application under Section 7 of the IBC, could not, therefore, have been condoned. It was submitted that since the NCLT/NCLAT was not a forum for recovery of debt, Section 14 of the Act would not apply, as held in Ishrat Ali. Placing reliance on the Explanation to Section 14 of the Act, it was further contended that Section 14 of the Act could apply if any earlier proceedings initiated by the applicant were dismissed for want of jurisdiction or any other like reason, but since the proceedings initiated by the Respondent under SARFAESI were pending, the Respondent could not take benefit of Section 14(2) of the Act.

Contentions raised by the Respondent:

It was submitted that the Respondent had in its application filed in the NCLT under Section 7 of the IBC, enclosed a synopsis of relevant facts and significant dates, with supporting documents. The relevant dates revealed that the cash credit account of the Corporate Debtor was declared an NPA with effect from March 31, 2013. Proceedings under the SARFAESI commenced on January 18, 2014, when a demand notice was issued under Section 13(2) of SARFAESI, approximately 9 months and 18 days after the date of accrual of the right to issue. The proceedings under the SARFAESI were stayed by the CHC, in July 2017, on the ground of want of jurisdiction. About 11 months thereafter, while the writ petition filed by the Corporate Debtor was still pending in the CHC, and the interim stay of proceedings under SARFAESI still continuing, the Respondent initiated the application under Section 7 of the IBC.

Observations of the Supreme Court

The SC observed that the Insolvency Committee of the Ministry of Corporate Affairs, India, in a report published in March, 2018, stated that the intent of the IBC could not have been to give a new lease of life to debts which were

already time barred. Thereafter, Section 238A *(Limitation)* was incorporated in the IBC by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, with effect from June 6, 2018. Section 238A of the IBC states that, *"The provisions of the Limitation Act, 1963 (36 of 1963) shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal, as the case may be.*" There is no specific period of limitation prescribed in the Act for an application under the IBC before the NCLT. Hence, it is governed by Article 137 of the Schedule to the Act., where the period of limitation prescribed for such an application is 3 years from the date of accrual of the right to apply. Thus, applications under Sections 7 and 9 of the IBC have a limitation period of 3 years from the date of default.

As observed by the SC in ***B.K. Educational Services Private Limited v. Parag Gupta Associates and Others***. ***[(2019) 11 SCC 633]***, the NCLT/NCLAT has the discretion to entertain an application/appeal after the prescribed period of limitation. The condition precedent for exercise of such discretion is the existence of sufficient cause for not preferring the appeal or the application within the period prescribed by limitation. The SC relied upon various precedents which held that "sufficient cause" must be construed liberally to advance substantial justice. The SC clarified that whether the explanation furnished for the delay would constitute 'sufficient cause' or not would depend on facts of each case and there is no straight jacket formula for accepting or rejecting the explanation furnished by the applicant/appellant for the delay in taking steps. Acceptance of explanation furnished ought to be the rule and refusal an exception, when no negligence or inaction or want of *bona fides* can be imputed to the defaulting party. The courts must strike a balance between the legitimate rights and interests of the respective parties.

Section 5 of the Act does not speak of any application. Section 5 of the Act enables the court to admit an application or appeal if the applicant satisfies the court that he had sufficient cause for not making the application and/or preferring the appeal, within the time prescribed. Although, it is the general practice to make a formal application under Section 5 of the Act in order to enable the court or tribunal to weigh the sufficiency of the cause for the inability of the applicant to approach the court/tribunal within the time prescribed by limitation, there is no bar to exercise by the court/tribunal of its discretion to condone delay, in the absence of a formal application. The SC was of the opinion that it is not mandatory to file an application in writing before relief can be granted under Section 5 of the Act. However, the SC clarified that no applicant or appellant can claim condonation of delay under Section 5 of the Act as of right, without making an application.

Section 238A of the IBC makes the provisions of the Act, as far as may be, applicable to proceedings before the NCLT and the NCLAT. The IBC does not exclude the application of Sections 6 or 14 or 18 or any other provision of the Act to proceedings under the IBC in the NCLT/NCLAT. All the provisions of the Act are applicable to the proceedings in the NCLT/NCLAT, to the extent feasible. The SC observed that there was no reason as to why Sections 14 or 18 of the Act should not apply to the proceedings under Section 7 or Section 9 of the IBC. Section 14 (2) of the Act provides that in computing the period of limitation for any application, the time during which the petitioner had been prosecuting, with due diligence, another civil proceeding, whether in a court of first instance, or of appeal or revision, against the same party, for the same relief, shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of like nature, is unable to entertain it. The conditions for exclusion are that the earlier proceedings should have been for the same relief, the proceedings should have been prosecuted diligently and in good faith and the proceedings should have been prosecuted in a forum which, from defect of jurisdiction or other cause of a like nature, was unable to entertain it. The SC relied on the judgement pronounced in ***Commissioner, M.P. Housing Board and Others. v. Mohanlal & Co.***

[(2016) 14 SCC 199], that Section 14 of the Act has to be interpreted liberally to advance the cause of justice. Section 14 of the Act would be applicable in cases of mistaken remedy or selection of a wrong forum.

The SC then addressed the argument that prior proceedings under the SARFAESI do not qualify for the exclusion of time under Section 14 of the Act, as they were not civil proceedings in a court. It further considered the question of availability of Section 14 of the Act under the IBC, that whether for proceedings initiated *bona fide* and prosecuted with due diligence under the SARFAESI, the exclusion of time under Section 14 of the Act, would only be available if the proceedings, which could not be entertained for defect of jurisdiction, or other cause of a like nature, had ended. The SC observed that Section 14 of the Act needed to be read as a whole. A conjoint and careful reading of Sections 14 (1), 14(2) and 14(3) of the Act makes it clear that an applicant who has prosecuted another civil proceeding with due diligence, before a forum which is unable to entertain the same on account of defect of jurisdiction or any other cause of like nature, is entitled to exclusion of the time during which the applicant had been prosecuting such proceeding, in computing the period of limitation. The substantive provisions of sub-sections (1), (2) and (3) of Section 14 of the Act do not state that Section 14 of the Act could only be invoked on termination of the earlier proceedings, prosecuted in good faith. The SC placed reliance on ***Bihta Co-operative Development Cane Marketing Union Limited. and Another. v. Bank of Bihar and Others [AIR 1967 SC 389]***, which held that the explanation must be read so as to harmonize with and clear up any ambiguity in the main section. It should not be so construed as to widen the ambit of the section. The SC opined that explanation (a) of Section 14 of the Act could not be construed in a narrow manner to mean that Section 14 of the Act can never be invoked until and unless the earlier proceedings have been terminated. The intent behind explanation (a) of Section 14 of the Act is clarificatory, to restrict the period of exclusion to the period between the date of initiation and the date of termination, and not any further. In the instant case, though the proceedings under the SARFAESI may not have formally been terminated, the proceedings have been stayed by the CHC by an interim order, on the *prima facie* satisfaction that the proceedings initiated by the Respondent, a co-operative bank, was without jurisdiction. The writ petition filed by the Corporate Debtor was not disposed of even after almost four years. The carriage of proceedings was with the Corporate Debtor. The interim order was still in force, when proceedings under Section 7 of the IBC were initiated, as a result of which the Respondent was unable to proceed further under the SARFAESI. The SC was of the view that since the proceedings in the CHC were still pending on the date of filing of the application under Section 7 of the IBC in the NCLT, the entire period after the initiation of proceedings under the SARFAESI could be excluded and hence the application in the NCLT was well within the limitation of three years.

Unlike the Arbitration and Conciliation Act, 1996, which expressly makes the provisions of the Act, as they apply to court proceedings, also applicable to arbitration proceedings, Section 238A of the IBC makes the Act applicable to proceedings in NCLT/NCLAT 'as far as may be' that is, to the extent they may be applied. The SC explained that the use of the words 'as far as may be', occurring in Section 238A of the IBC tones down the rigour of the words 'shall' in Section 238A of the IBC which is normally considered as mandatory. The expression 'as far as may be' is indicative of the fact that all or any of the provisions of the Act may not apply to proceedings before the NCLT or the NCLAT if they were patently inconsistent with some provisions of the IBC. At the same time, the words 'as far as may be' could not be construed as a total exclusion of the requirements of the basic principles of Section 14 of the Act, but permits a wider, more liberal, contextual and purposive interpretation by necessary modification, which is in harmony with the principles of Section 14 of the Act. The SC observed that if in the proceedings under Sections 7 and 9 of the IBC, Section 14 of Act were interpreted in a rigid and literal fashion, to hold that only civil proceedings in the court would enjoy exclusion, it would result in the applicant not even being entitled to exclusion of the time spent *bona fide* invoking and diligently pursuing earlier application under the same provision

of the IBC for the same relief before an adjudicating authority, lacking territorial jurisdiction, which would not have been the legislative intent. Thus, the SC dissented from the NCLAT judgement of Ishrat Ali and emphatically laid down that proceedings under the SARFAESI were civil proceedings. The SC did not find any rationale behind excluding proceedings initiated by a secured creditor against the borrower under SARFAESI for taking possession of secured assets, from the category of civil proceedings. Thus, it could not be said that merely because the proceedings were not conducted in a civil court, they would be excluded from the ambit of Section 14 of the Act.

Decision of the Supreme Court

The SC affirmed the stance taken by the NCLAT. The SC ruled that, had Section 5 of the Act required the mandatory prerequisite of a written application, it would have expressly provided for the same. Thus, it held that the court is not precluded from condoning delay in the absence of a formal application. It held that Section 14 of the Act excludes the time spent in proceeding in a wrong forum, which is unable to entertain the proceedings for want of jurisdiction, or other such cause. Where such proceedings have ended, the outer limit to claim exclusion under Section 14 of the Act would be the date on which the proceedings ended. The Chief Metropolitan Magistrate or the Judicial Magistrate, as the case may be, exercising powers under Section 14 of the SARFAESI, functions as a civil court or executing court. Proceedings under the SARFAESI would, therefore, be deemed to be civil proceedings in a court. The expression 'court' in Section 14(2) of the Act would be deemed to be any forum for a civil proceeding including any tribunal or any forum under the SARFAESI. It was further held that the provisions of the Act would apply *mutatis mutandis* to proceedings under the IBC in the NCLT or NCLAT.

VA View:

The Judgement laid down by the SC throws light on the interplay between the IBC and the Act. The SC has categorically ruled that Section 14 of the Act applies to applications under Section 7 of the IBC. All the provisions of the Act are applicable to the proceedings carried out in the NCLT or NCLAT. Through this Judgement, the SC has furnished purposive interpretation to Section 238A of the IBC, by clarifying that the words "as far as may be" must be construed in a manner to further the legislative intent instead of curtailing it. Deeming SARFAESI proceedings to fall within the ambit of civil proceedings, the SC pronounced the Judgement in tandem with the legislative intent behind Section 14 of the Act which was to discount the calculation of the time period exhausted in *bona fide* prosecution.

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