Between the lines...

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Key Highlights

I. Supreme Court: An emergency award passed under the SIAC rules can be enforced in India under Section 17 of the Arbitration Act.

II. Supreme Court: Application to initiate corporate insolvency resolution process will be rejected so long as a dispute truly exists in fact and is not spurious, hypothetical or illusory.

III. Supreme Court: A foreign award is enforceable against non-signatories under Part II of the Arbitration and Conciliation Act, 1996.

IV. Supreme Court: Neither the NCLT nor the NCLAT have an unchartered jurisdiction in equity in dealing with resolution plans approved by the CoC.

I. Supreme Court: An emergency award passed under the SIAC Rules can be enforced in India under Section 17 of the Arbitration Act.

The Hon'ble Supreme Court ("**SC**") has in its judgment dated August 06, 2021 ("**Judgement**"), in the matter of ***Amazon.com NV Investment Holdings LLC v. Future Retail Limited & Others [Civil Appeal No.4492-4493/2021],*** held that, the emergency award passed under the arbitration rules of Singapore International Arbitration Centre ("**SIAC Rules**") can be enforced in India under Section 17 (*Interim measures ordered by arbitral tribunal*) of the Arbitration and Conciliation Act, 1996 ("**Act**").

Facts

Mr. V.K. Rajah, who was appointed as per the SIAC Rules ("**Emergency Arbitrator**") passed an emergency award dated October 25, 2020 ("**Emergency Award**") in an arbitration proceeding commenced by Amazon.com NV Investment Holdings LLC ("**Amazon/Appellant**") against Future Retail Limited, respondent no. 1, India's second-largest offline retailer ("**FRL**"), Future Coupons Private Limited, respondent no. 2, a company that holds 9.82% shareholding in FRL and is controlled and majority-owned by respondent nos. 3 to 11 ("**FCPL**") and respondent nos. 1 to 13 (respondent nos. 1 to 13 are hereinafter collectively referred to as the "**Biyani Group/Respondents**"). The seat of the arbitral proceedings was New Delhi, and the applicable rules were SIAC Rules.

Earlier, a shareholders' agreement dated August 12, 2019, was entered into amongst the Biyani Group, ("**FRL SHA**"), wherein, FCPL was accorded negative, protective, special, and material rights with regard to FRL including, in particular, FRL's retail stores ("**Retail Assets**"). The rights granted to FCPL under FRL SHA were to be exercised for Amazon's benefit and thus were mirrored in a shareholders' agreement dated August, 22, 2019 entered into between Amazon, FCPL, and respondent nos. 3 to 13 ("**FCPL SHA**"). Consequently, on December 26, 2019, Amazon invested a sum of INR 1,431 crores in FCPL ("**Investment**") based on the rights granted to FCPL under both the FRL SHA and the FCPL SHA. It was expressly stipulated that the Investment in FCPL would "flow down" to FRL. The Investment had been recorded in the share subscription agreement dated August 22, 2019 entered into between Amazon, FCPL, and respondent nos. 3 to 13.

The basic understanding between the parties was that Amazon's Investment in the Retail Assets of FRL would continue to vest in FRL, as a result of which, FRL could not transfer its Retail Assets without FCPL's consent, which, in turn, could not be granted unless Amazon had provided its consent. Also, FRL was prohibited from encumbering/transferring/selling/divesting/disposing of its Retail Assets to "restricted persons", being prohibited entities, with whom the Biyani Group could not deal. The Mukesh Ambani group ("**Reliance Industries Group**") was a "restricted person" under both the FRL SHA and the FCPL SHA. However, on August 29, 2020, Biyani Group entered into a transaction with the Reliance Industries Group which envisaged the amalgamation and consequential cessation of FRL as an entity, and the complete disposal of the Retail Assets in favour of the Reliance Industries Group ("**Transaction**"). Therefore, Amazon initiated arbitration proceedings and sought for an emergency interim relief (injunctions) under the SIAC Rules, against the Transaction which was granted by way of the Emergency Award.

Thereafter, Biyani Group still proceeded with the Transaction, and described the Emergency Award as a nullity and the Emergency Arbitrator as *coram non judice* in order to press forward for permissions before statutory authorities/regulatory bodies. However, FRL filed a civil suit before the Delhi High Court ("**DHC**"), wherein it sought to

interdict the arbitration proceedings and sought for an interim relief to restrain Amazon from writing to statutory authorities by relying on the Emergency Award, calling it a "tortious interference" with its civil rights. The DHC by its order dated December 21, 2020, refused to grant any interim injunction because there may not be irreparable loss to FRL since, it will be for the statutory authorities/regulators to apply their mind to the facts and legal issues therein and come to the right conclusion. An appeal had been filed by Amazon (currently pending before the SC) against certain observations made in this order.

Meanwhile, Amazon filed an application under Section 17(2) of the Act to enforce the Emergency Award which was disposed of on February 02, 2021, by the learned single judge of DHC, who passed a *status-quo* order wherein he restrained the Biyani Group from proceeding with the Transaction ("**Order**"). An appeal against the Order was filed by FRL, in which a division bench, after reaching certain *prima facie* findings, by order dated February 08, 2021, stayed the operation, implementation, and execution of the Order. Again, division bench of the DHC by order dated March 22, 2021 ("**Impugned Orders**") referred to its aforementioned order and extended the stay of the Order till April 30, 2021 (the next date of hearing). 'Special Leave Petitions' were filed before the SC against the Impugned Orders.

On March 18, 2021, the learned single judge passed a detailed judgment giving reasons for an order made under Section 17(2) read with Rule 2-A (*Consequence of disobedience or breach of injunction*) of Order XXXIX (*Temporary Injunctions and Interlocutory Orders*) of the Code of Civil Procedure, 1908 ("**CPC**") in which it was held that an Emergency Award was enforceable as an order under Section 17(1) of the Act. Since breaches of the agreements aforementioned were admitted, it further held that the injunctions/directions granted by the Emergency Award were deliberately flouted by the Biyani Group. He further observed that any so-called violations of the Foreign Exchange Management Act, 1999, did not render the Emergency Award a nullity, and, therefore, issued a show-cause notice under Rule 2-A of Order XXXIX of the CPC, after imposing INR 20 lakh as costs. The matter was listed for further directions on April 28, 2021. Against the said judgment, an appeal was filed by FRL before the SC.

The SC stayed further proceedings before the learned single judge as well as the division bench of the DHC, and set the matter down for final disposal before the SC by its order dated April 19, 2021.

Issues

i. Whether the Emergency Arbitrator's award is contemplated under the Act; and
ii. Whether the Emergency Award can be enforced in India under Section 17 of the Act.

Arguments

Contentions raised by the Appellant:

The order dated February 08, 2021, referred to an agreement between FRL and Reliance Retail Limited, which is an error apparent on the face of the record. The Order and the Impugned Orders of the Division Bench of the DHC suffered from a complete non-application of mind. Further, the Act reflects the grundnorm of arbitration as being party autonomy. The Act is a complete code in itself and if an appeal does not fall within the four corners of Section 37(*Appealable orders*) of the Act, then the appeal is incompetent. A non-obstante clause was added to Section 37(1) of the Act, thereby making it abundantly clear that no appeal could possibly be filed if it was outside the four corners of Section 37 of the Act. The Emergency Award must be taken as it stands as no appeal was made therefrom by the Biyani Group and, therefore, it was not permissible to go behind the Emergency Award. The non-signatories to arbitration agreements would nevertheless be bound thereby and on facts, it was admitted that the "Ultimate Controlling Person" behind the entire transaction was Mr. Kishore Biyani, who was defined as such under the 3 agreements. After openly flouting the Emergency Award, they would have no case on merits to resist the directions issued by the learned single judge, DHC under Section 17(2) of the Act.

Contentions raised by the Respondents:

The 246th Law Commission Report was referred, in which the amendment of Section 2 of the Act was proposed, to include within Section 2(1)(d) of the Act, a provision for the appointment of an emergency arbitrator. However, the parliament did not adopt the same when it amended the Act by the Arbitration and Conciliation (Amendment) Act, 2015 ("**2015 Amendment Act**"). Thereby, given the scheme of the Act, an arbitral tribunal as defined by Section 2(1)(d) of the Act can only mean a tribunal that is constituted between the parties, which then decides the disputes between the parties finally and cannot include the Emergency Arbitrator who is not an "arbitral tribunal" but a person who only decides, an interim dispute between the parties which never culminates in a final award. The scheme, therefore, of the entirety of Part I of the Act, would show that the Emergency Arbitrator is a foreigner to the Act and cannot fit within its scheme unless an amendment is made by parliament.

The provisions of the SIAC Rules relating to an emergency arbitrator's award, which were agreed to between the parties, were subject to the provisions of the Act. Since the Act did not provide for emergency arbitrators, this part of the SIAC Rules would not apply, making it clear that the Emergency Arbitrator's award cannot fall within Section 17(1) of the Act. The scheme of Section 17(1) of the Act made it clear that a party may, during arbitral proceedings, apply to the arbitral tribunal. However, under the SIAC Rules, the Emergency Arbitrator was appointed before the arbitral tribunal is constituted. This being the case, the Emergency Arbitrator, not being appointed during arbitral proceedings, fell outside Section 17(1) of the Act.

Observations of the Supreme Court

Party Autonomy:

The SC, on reading of the provisions of the Act, noted that, an arbitration proceeding can be administered by a permanent arbitral institution. Further, Section 2(6) (*construction of references*) of the Act clarified that parties were free to authorise any person including an institution to determine issues that arose between the parties. Also, under Section 2(8) of the Act, party autonomy went to the extent of an agreement which included being governed by SIAC Rules referred to in the FRL SHA and the FCPL SHA. Likewise, under Section 19(2) of the Act, parties were free to agree on the procedure to be followed by an arbitral tribunal in conducting its proceedings. The SC noted that, importance of party autonomy being virtually the backbone of arbitrations was delineated in the judgment of ***Centrotrade Minerals & Metal Inc. v. Hindustan Copper Limited [(2017) 2 SCC 228]***. Further, the SC noted that, the instant case was akin to Centrotrade (supra), that, the parties to the contract, in the present case, by agreeing to the SIAC Rules and the award of the Emergency Arbitrator, had not bypassed any mandatory provision of the Act. There is nothing in the Act that prohibits contracting parties from agreeing to a provision providing for an award being made by an Emergency Arbitrator. The SC observed that, on the contrary, various provisions of the Act provide for party autonomy in choosing to be governed by institutional rules, hence it was clear that the SIAC Rules would apply to govern the rights between the parties, as specifically endorsed by the Act.

Scope of Arbitral Proceedings & Arbitral Tribunal:

The SC further noted that, Section 21 (*Commencement of arbitral proceedings*) of the Act, subject to agreement by the parties, provided that arbitral proceedings in respect of a particular dispute commenced on the date on which a request for that dispute to be referred to arbitration is received by the respondent. The SC noted that, under rule 3.3 of the SIAC Rules, the arbitral proceedings commenced from the date of receipt of a complete notice of arbitration by the 'Registrar of the SIAC'. Therefore, the SC observed that, the arbitral proceedings under the SIAC Rules commence much before the constitution of an arbitral tribunal thereunder. The SC observed that, when Section 17(1) of the Act uses the expression "*during the arbitral proceedings*", the said expression would be elastic enough, when read with the provisions of Section 21 of the Act, to include emergency arbitration proceedings, which commence after receipt of notice of arbitration by the 'Registrar' under Rule 3.3 of the SIAC Rules. The SC observed that, a conjoint reading of these provisions coupled with there being no interdict, either express or implied, against the Emergency Arbitrator would show that the Emergency Award, provided for under SIAC Rules, would be covered by the Act.

The SC also analysed the issue - whether the definition of "*arbitral tribunal*" under Section 2(1)(d) of the Act should so constrict Section 17(1) of the Act, making it apply only to an arbitral tribunal that can give final reliefs by way of an interim or final award. The SC noted that, the "*arbitral tribunal*" as defined in Section 2(1)(d) of the Act speaks only of an arbitral tribunal that is constituted between the parties and which can give interim and final relief, "*given the scheme of the Act*". However, like every other definition section, the definition contained in Section 2(1)(d) of the Act only applies "*unless the context otherwise requires*". The SC observed that given that the definition of "arbitration" in Section 2(1)(a) of the Act meant any arbitration, whether or not administered by a permanent arbitral institution, when read with Sections 2(6) and 2(8) of the Act, would clarify that, even interim order that is passed by Emergency Arbitrator under the SIAC Rules would, on a proper reading of Section 17(1) of the Act, be included within its ambit. The SC observed that, it is significant to note the words "*arbitral proceedings*" are not limited by any definition and thus encompass proceedings before the Emergency Arbitrator.

Section 17(1) of the Act provides for the application by a party for interim reliefs. There is nothing in Section 17(1) of the Act, when read with the other provisions of the Act, to interdict the application of rules of arbitral institutions that the parties may have agreed to. Therefore, insofar as Section 17(1) of the Act is concerned, the "arbitral tribunal" would, when institutional rules apply, include an emergency arbitrator, the context of Section 17 of the Act "*otherwise requiring*", that is, the context being interim measures that are ordered by arbitrators. The same object and context would apply even to Section 9(3) of the Act which clarifies that the court shall not entertain an application for interim relief once an arbitral tribunal is constituted unless the court finds that circumstances exist which may not render the remedy provided under Section 17 of the Act efficacious. Since Sections 9(3) and 17 of the Act form part of one scheme, it is clear that the arbitral tribunal spoken of in Sections 9(3) and 17(1) of the Act would include the Emergency Arbitrator appointed under SIAC

Rules. The SC observed that, therefore, even if Section 25.2 of the FCPL SHA (*pari materia with Section 15.2 of the FRL SHA*) made the SIAC Rules subject to the Act, the said Act, properly construed, would include Emergency Award, there being nothing inconsistent in the SIAC Rules when read with the Act.

The SC noted that, Rule 1.3 of the SIAC Rules indicated that an award of Emergency Arbitrator was included within the ambit of the SIAC Rules. The SC observed that "arbitration" mentioned in Section 25.2 of the FCPL SHA would include an arbitrator appointed in accordance with the SIAC Rules which, in turn, would include the Emergency Arbitrator. The SC noted that as per the SIAC Rules the Emergency Arbitrator had all the powers vested in an arbitral tribunal, including the authority to rule on his own jurisdiction. Further that, the Emergency Award issued by the Emergency Arbitrator which was exactly like an order of an arbitral tribunal, would continue to bind the parties unless the tribunal is not constituted within 90 days of such order or award or it is modified or vacated by the arbitral tribunal, once it is constituted, or until the tribunal makes a final award or until the claim is withdrawn.

Interpretation and objective of various provisions of the Act:

The SC noted that, the 246th Law Commission Report did provide for the insertion of an emergency arbitrator's orders into Section 2(1)(d) of the Act with an objective to ensure that institutional rules such as the SIAC Rules are given statutory recognition in India. The SC noted that, in the case of ***Avitel Post Studioz Limited and Others v. HSBC PI Holdings (Mauritius) Limited [(2021) 4 SCC 713],*** it was held that, mere fact that a recommendation of a 'Law Commission Report' was not followed by Parliament, would not necessarily lead to the conclusion that what has been suggested by the Law Commission cannot form part of the statute as properly interpreted. The SC noted that, the 246th Law Commission Report also recommended the insertion of Section 9(2) with an objective to ensure the timely initiation of arbitration proceedings by a party who is granted an interim measure of protection and 9(3) with an objective to reduce the role of the courts in relation to grant of interim measures once the arbitral tribunal has been constituted in alignment with the spirit of the UNCITRAL Model Law as amended in 2006. The 2015 Amendment Act, therefore, introduced sub-sections (2) and (3) to Section 9, the SC observed that, in essence, what is provided by the SIAC Rules, is reflected in Sections 9(2) and 9(3) so far as interim orders passed by courts are concerned. Accordingly, Section 17 of the Act was substituted by the 2015 Amendment Act to provide the arbitral tribunal the same powers as a court would have under Section 9 to provide for interim relief. Also, Section 17(2) of the Act was added so as to provide for enforceability of such orders, again, as if they were orders passed by a court, thereby bringing Sections 17(*Interim measures ordered by arbitral tribunal*) on par with 9(*Interim measures by court*) of the Act.

The DHC judgment in ***Raffles Design International India Private Limited v. Educomp Professional Education Limited, [2016 SCC OnLine Del 5521]*** dealt with an award by an Emergency Arbitrator in an arbitration seated outside India (as was mentioned in Srikrishna Committee Report ("**SCR**")). The SCR laid down that it is possible to interpret Section 17(2) of the Act to enforce emergency awards for arbitrations seated in India, and recommended that the Act be amended only so that it comes in line with international practice in favour of recognising and enforcing an emergency award and Section 9(3) of the Act would show that the objective was to avoid courts being flooded with Section 9 petitions when an arbitral tribunal is constituted for two good reasons – (i) that the clogged court system ought to be decongested, and (ii) that an arbitral tribunal, once constituted, would be able to grant interim relief in a timely and efficacious manner.

An Emergency Arbitrator's "award", would undoubtedly be an order which furthers the abovementioned objectives. Given the fact that party autonomy is respected by the Act and that there is otherwise no interdict against the Emergency Arbitrator being appointed, it was clarified that the Emergency Award would fall within the institutional rules to which the parties have agreed, and would consequently be covered by Section 17(1) of the Act, when read with the other provisions of the Act. The SC observed that a party cannot be heard to say, after it participates in an emergency award proceeding, having agreed to institutional rules made in that regard, after losing, turn around and say that the award is a nullity or *coram non judice*. The SC noted that, having agreed to be governed by the SIAC Rules, Biyani Group cannot ignore the Emergency Arbitrator's award by stating that it is a nullity when such party expressly agreed to the binding nature of it.

Decision of the Supreme Court

The SC answered the issues in affirmative, by declaring that full party autonomy is given by the Act to have a dispute decided in accordance with institutional rules which can include emergency arbitrators delivering interim orders, described as "awards". The SC observed that, Section 17 of the Act, as construed in the light of the other provisions of the Act, clearly leads to the position that Emergency Award is recognised under the provisions of Section 17(1) of the Act and can be enforced under the provisions of Section 17(2) of the Act.

VA View:

The SC in this Judgement correctly observed that the Act is a statute which favours the remedy of arbitration so as to provide expeditious interim reliefs to the parties and declog civil courts which are, in today's milieu, extremely burdened. The SC veraciously observed that, no order bears the stamp of invalidity on its forehead and has to be set aside in regular court proceedings as being illegal. Even if, subsequently, an order is set aside as having being passed without jurisdiction, for the period of its subsistence, it is an order that must be obeyed. Therefore, the Biyani Group was supposed to act in accordance with the Emergency Award.

Party autonomy is the fulcrum in arbitration agreements and Amazon had exercised its choice of forum for interim relief specified thereunder. Thereby, the SC opined that nothing in the Act prohibited contracting parties from obtaining relief from the Emergency Arbitrator. Hence, in such a case where parties had expressly chosen SIAC Rules as the curial law governing the conduct of arbitration, the court would look at the SIAC Rules to the extent that the same was not contrary to the public policy or the mandatory requirements of the law of the country in which arbitration was held. The provisions of emergency arbitration under the SIAC Rules are not contrary to any mandatory provisions of the Act. Hence, the Emergency Arbitrator *prima facie* was not a *coram non judice* and the Emergency Award was not invalid.

II. Supreme Court: Application to initiate corporate insolvency resolution process will be rejected so long as a dispute truly exists in fact and is not spurious, hypothetical or illusory

The Supreme Court ("**SC**") has, by an order passed in the matter of ***Kay Bouvet Engineering Limited v. Overseas Infrastructure Alliance (India) Private Limited [Civil Appeal No. 1137 of 2019]***, decided on August 10, 2021 ("**Judgement**"), upheld the order passed by the National Company Law Tribunal ("**NCLT**") on July 26, 2018, wherein the SC concluded that the application for corporate insolvency resolution process will be rejected so long as a dispute truly exists in fact and is not spurious, hypothetical or illusory.

Facts

The instant case was an appeal filed by Kay Bouvet Engineering Limited ("**Appellant**"), before the SC, challenging the order dated December 21, 2018, passed by the National Company Law Appellate Tribunal ("**NCLAT**"). The NCLAT had set aside the order passed by the NCLT, by which the NCLT had rejected the application filed by Overseas Infrastructure (Alliance) Private Limited ("**Respondent**") as an operational creditor under Section 9 *(Application for initiation of corporate insolvency resolution process by operational creditor)* of the Insolvency and Bankruptcy Code, 2016 ("**IBC**") for seeking initiation of corporate insolvency resolution process ("**CIRP**") against the Appellant. The NCLAT remitted the matter to the NCLT with a direction to admit the petition filed by the Respondent under Section 9 of the IBC after serving demand notice to the Appellant so as to enable it to settle the claim.

The Government of India ("**GoI**") had extended a dollar line credit of USD 150 Million to the Republic of Sudan through Exim Bank of India for carrying out Mashkour Sugar Project in Sudan. On October 11, 2009, Mashkour Sugar Company, Sudan ("**Mashkour**"), entered into a contract with the Respondent, as per which Mashkour was to nominate a sub-contractor. Subsequently, the Appellant was appointed as a sub-contractor through a tripartite agreement, for executing the whole work of designing, engineering, supply, installation, erection, testing and completion of factory plant for Mashkour for a consideration of USD 106.200 million. For the first tranche of payment, the Respondent transferred an amount of INR 47.12 crores (equivalent to USD 10.62 Million) to the Appellant.

Pursuant to exchange of communications between Ministry of External Affairs, GoI and the Sudan Government, the Ambassador of Sudan to India advised GoI to terminate the contract of Mashkour with the Respondent and to appoint the Appellant as the contractor. However, the contract with the Respondent was terminated by Mashkour for failure on its part to perform the duties.

The Respondent served a demand notice to the Appellant under Section 8 *(Insolvency resolution by operational creditor)* of the IBC alleging default under the tripartite agreement, claiming the amount of USD 10.62 Million paid by the Respondent to the Appellant. The Appellant denied the claim of the Respondent, specifying that the amount was received from Mashkour and only routed through the Respondent and the same stood adjusted under the new agreement.

The Respondent filed an application for initiation of CIRP against the Appellant as an operational creditor. However, the NCLT dismissed the petition. Aggrieved, the Respondent herein, filed an appeal with the NCLAT, wherein NCLAT set aside

the order of NCLT. The instant case is an appeal against the order of the NCLAT, filed by the Appellant.

Issue

Whether the allegation of the Appellant with regard to the existence of dispute can be considered to be spurious, illusory or not supported by any evidence.

Arguments

Contentions raised by the Appellant:

By no stretch of imagination, the claim made by the Respondent could be considered to be an operational debt and as such, the Respondent would not fall under the definition of an operational creditor, enabling it to invoke the jurisdiction of the NCLT under Section 9 of the IBC. It was further submitted that, no amount was receivable by the Respondent from the Appellant in respect of the provisions of goods or services, including employment or a debt in respect of the payment of dues.Hence, the said claimed amount would not be covered under the definition of operational debt as provided under Section 5 (21) of the IBC.

It was argued that the payment, which was made to the Appellant by the Respondent, was from the amount received by the Respondent from Mashkour and only routed through the Respondent and the same stood adjusted under the new agreement.

The demand notice and reply thereto, clarified that there was an "existence of dispute" and hence the NCLT had rightly dismissed the petition. However, the NCLAT, misconstruing the provisions, allowed the appeal and directed the admission of the petition under Section 9 of the IBC.

Contentions raised by the Respondent:

The amount which was paid to the Appellant, was an amount paid from the funds of the Respondent and not from Mashkour. It was submitted that a perusal of material placed on record would reveal that the Appellant had admitted receiving the amount from the Respondent and once the party admits of any claim, the same would come in the definition of operational debt as defined under Section 5(21) of the IBC and enable the party to whom admission is made to file the proceedings under Section 9 of the IBC being an operational creditor. Thus, the NCLAT had rightly considered the provisions and allowed the appeal of the Respondent directing the admission of the petition under Section 9 of the IBC. Therefore, it was submitted that the instant appeal deserved to be dismissed.

Observations of the Supreme Court

The SC noted that an operational creditor, on the occurrence of default, is required to deliver a demand notice of unpaid operational debt or a copy of invoice, demanding payment of the amount involved in the default to the corporate debtor. Within ten days of the receipt of such demand notice or copy of invoice, the corporate debtor is required to either bring to the notice of the operational creditor, the existence of a dispute or to make the payment of unpaid operational debt. Thereafter, as per Section 9 of the IBC, after the expiry of the period of ten days from the date of delivery of notice or invoice demanding payment under Section 8(1) of the IBC, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under Section 8(2) of the IBC, the operational creditor is entitled to file an application before the NCLT for initiating the CIRP.

The SC noted that in the judgement of ***Mobilox Innovations Private Limited v. Kirusa Software Private Limited [(2018) 1 SCC 353]***, it was observed that one of the objects of the IBC *qua* operational debts is to ensure that the amount of such debts, which is usually smaller than that of financial debts, does not enable operational creditors to put the corporate debtor into the CIRP prematurely or initiate the process for extraneous considerations, therefore, it is enough that a dispute exists between the parties.

The SC also explained the scope of the statutory phrase "existence of a dispute" and the role of the NCLT when adjudicating the same under Section 8(2)(a) of the IBC. The SC opined that, once the operational creditor had filed an application which was otherwise complete, the NCLT was required to reject the application under Section 9(5)(ii)(d) of the IBC, if a notice of dispute had been received by operational creditor or if there was a record of dispute in the information utility. The SC noted that, notice by the corporate debtor must intimate the operational creditor about the existence of a dispute or of the pendency of a suit or arbitration proceedings relating to a dispute between the parties.

The SC noted that all that the NCLT was required to see was whether there was a plausible contention which required

further investigation and determine that the dispute was not a patently feeble legal argument or an assertion of fact unsupported by evidence, and not whether the defence is likely to succeed or not.

The SC observed that the Appellant had pressed into service the "existence of dispute" for opposing the demand made by the Respondent. Examining whether the dispute raised by the Appellant can be considered as spurious, illusory and unsupported by evidence, the SC noted that the contention of the Appellant that the amount of INR 47.12 crores, which was paid to the Appellant by Respondent, was paid on behalf of Mashkour from the funds released to Respondent on behalf of Mashkour, cannot be said to be a dispute which was spurious, illusory or not supported by the evidence placed on record. Moreover, the SC affirmed that the initial payment which was made to the Appellant as a sub-contractor by the Respondent, who was a contractor, was made on behalf of Mashkour and from the funds received by the Respondent from Mashkour.

The SC agreed with the view taken in Mobilox (supra) and thus concluded that so long as a dispute truly existed in fact and was not spurious, hypothetical or illusory, the adjudicating authority had no other option but to reject the application.

Decision of the Supreme Court

The SC upheld the decision of the NCLT and stated that it had rightly rejected the application of the Respondent on grounds that there existed a dispute, raised by the Appellant. The SC held that the NCLAT had patently misinterpreted the factual as well as the legal position and had erred in reversing the order of the NCLT. Thus, the SC quashed the order passed by the NCLAT.

VA View:

The SC by this Judgement, has elaborated on the statutory phrase "existence of dispute" and affirmed the view that a genuine dispute must be *bona fide* and must truly exist in fact, and the grounds for dispute must not be spurious, hypothetical, illusory or misconceived. The defense of "existence of dispute" must be carefully examined and a conclusion as to whether it truly exists in fact should be determined before an application for CIRP is admitted. The SC upheld the legislative intent, which was to prevent premature initiation of CIRP against the corporate debtor.

Further, the SC clarified the limited scope of the adjudicating authority, which was restricted to merely determining whether the dispute was a patently feeble legal argument or not. Emphasizing on the importance of separating the grain from the chaff, so as to reject a spurious defense, which was a mere bluster, the SC, by this Judgement, threw light on the necessity to ascertain that there exists a claim with some substance, rather than it being frivolous and vexatious.

III. Supreme Court: A foreign award is enforceable against non-signatories under Part II of the Arbitration and Conciliation Act, 1996.

The Hon'ble Supreme Court ("**SC**") has in the matter of ***M/s Gemini Bay Transcription Private Limited v. M/s Integrated Sales Services Limited and Others (Civil Appeal No. 8343-8344 OF 2018),*** held that the foreign arbitral awards are binding on non-signatories under Part II of the Arbitration and Conciliation Act, 1996 ("**Act**").

Facts

M/s Integrated Sales Services Limited ("**ISS**"), a company based in Hong Kong, entered into a representation agreement dated September 18, 2000 ("**Agreement**") with M/s DMC Management Consultants Limited ("**DMC**"), a company registered in India. As per the Agreement, ISS was required to assist DMC to sell its goods and services to prospective customers, and in consideration thereof, receive commission. In 2009, a dispute arose between ISS and DMC and a statement of claim dated June 22, 2009, was filed before the arbitrator by ISS against DMC, Mr. Arun Dev Upadhaya (chairman of DMC and DMC Global) ("**ADU**"), DMC Global (company registered in Mauritius), Gemini Bay Consulting Limited (company registered in British Virgin Islands) and Gemini Bay Transcription Private Limited (company registered in India) ("**GBT**"). It was alleged by ISS that DMC is trying to evade its contractual obligations in the Agreement by shifting the client brought by ISS to other entities mentioned hereinabove. ISS further alleged that ADU, who owns the other companies, is using other companies as alter egos of himself to evade DMC's contractual obligations under the Agreement.

The substantive law of the arbitration proceedings was the law of Delaware, the United States. The arbitral tribunal, as per the Delaware law and on the basis of oral and documentary evidence, held that the doctrine of alter ego is an appropriate justification for lifting the corporate veil and ADU, DMC and GBT are jointly and severally liable for breaching the Agreement ("**Award**").

To enforce the Award, ISS went to the High Court of Judicature at Bombay, Nagpur Bench ("**BHC**") however, the hon'ble single judge of BHC held that as per Sections 48(1)(c) to (e) of the Act, the Award cannot be enforced against persons who are non-signatories, even though such non-signatories may have participated in the arbitration proceedings. The said decision of the single judge of BHC was appealed under Section 50 of the Act and the hon'ble division bench of BHC held that the Award could only be challenged under Section 48 of the Act if the Delaware law has not been followed on the alter ego principle. The division bench, being satisfied that the Delaware law has been properly applied, held that none of the grounds contained in Section 48 of the Act would apply so as to resist enforcement of the Award. Consequently, the BHC allowed the appeal and set aside the judgment of the single judge by the judgment dated January 4, 2017. A review petition was subsequently dismissed on February 24, 2017. On account of this decision by the division bench of BHC, GBT and ADU filed an appeal before the SC seeking an order that the foreign Award is not enforceable against GBT and ADU as they are non-signatories to the arbitration agreement.

Issue

Whether a foreign award is enforceable against non-signatories (GBT and ADU) under Part II of the Act.

Arguments

Contentions raised by GBT:

GBT, *inter alia*, contended that as per Section 47(1)(c) of the Act, the burden of proving that a foreign award may be enforced under Part II of the Act is on the person in whose favour that award is made, and that such burden in the case of a non- signatory to an arbitration agreement can only be discharged by adducing evidence which would independently establish that such non- signatory can be covered by the foreign award in question.

It was further contented that as per Section 48(1) of the Act, a foreign award against a non-signatory to an arbitration agreement would be directly barred by sub-clause (a) as well as sub-clause (c) of Section 48 of the Act. Further, it was also contented that no proper reasoning was given in the Award and it should also be set aside on the basis of Section 48(1)(b) of the Act.

GBT also relied on the Supreme Court of Victoria, Australia case of ***IMC Aviation Solutions Private Limited v. Altain Khuder LLC [(2011) VSCA 248]*** to submit that, where a party resists enforcement of a foreign award on the ground that it is not a signatory to the arbitration agreement, the enforcing court is duty bound to examine the question of jurisdiction by itself. Lastly, it was argued that the Award is perverse as two clients of DMC that were shifted to GBT were vital evidence in the case, and the non-examination of these two clients would vitiate the Award.

Contentions raised by ADU:

ADU, first, contented that the dispute is in relation to a tort which is outside contractual disputes that arise under the Agreement and that since the cause of action really arose in tort, the Award was vitiated on this ground. Secondly, relying on the judgement of ***Dallah Real Estate and Tourism Co v. Ministry of Religious Affairs of the Government of Pakistan [(2010) 3 WLR 1472]***, it was contented that a full review based on oral and/or documentary evidence ought to have been undertaken which was not done by the BHC and BHC merely echoed the Award's findings. Lastly, ADU, comparing Section 46 and Section 35 of the Act, argued that under Section 46, a foreign award is to be treated as binding only on "parties" of the Agreement and not on any other non-signatory.

Contentions raised by ISS:

In reply to the contentions of ADU and GBT, ISS, by taking the SC through the Award, argued that the Award is well reasoned and there is no requirement to state elaborate/detailed reasons in an arbitral award so long as the award happens to be reasoned. Further, with respect to Section 48 of the Act, ISS contented that neither Section 48(1)(a) nor Section 48(1)(c) of the Act deal with non-signatories to an arbitration agreement and since there is no objection to the enforcement of the Award with respect to Section 48(2)(b) that is, being contrary to public policy of India, the appeal should be dismissed.

Observations of the Supreme Court:

Burden of proof under Section 47(1)(c) of the Act: The SC stated that the requirement under Section 47(1)(c) of the Act being procedural in nature does not go to the extent of requiring substantive evidence to "prove" that a non-signatory to an arbitration agreement can be bound by a foreign award. The said section only refers to the six ingredients for enforcement of a foreign award which are contained in Section 44 of the Act and, were met in this case.

The SC, citing various authorities, further observed that Part II of the Act is based on the Convention on Recognition and Enforcement of Foreign Awards, 1958 (New York Convention), which follows a pro-enforcement bias, and unless a party is able to show that it's case comes clearly within Sections 48(1) or 48(2) of the Act, the Award must be enforced.

Objections under Section 48(1)(a) of the Act: The SC stated that in the guise of applying Section 48(1)(a), the SC is being asked to undertake a review on the merits which is not possible under Section 48 of the Act. It stated that the grounds mentioned in Section 48(1)(a) of the Act are in themselves specific, and only speak of incapacity of parties and the agreement being invalid under the law to which the parties have subjected it and the attempt to bring non-parties within this ground is *"to try and fit a square peg in a round hole"*. The SC further stated that the Dallah Real Estate (Supra) and the IMC Aviations (Supra) are different in terms of facts as well as on law and are inapplicable when construing Section 48(1)(a) of the Act.

Objection under Section 48(1)(b) of the Act: The SC stated that Section 48(1)(b) of the Act has to be narrowly construed and the only grounds on which a foreign award cannot be enforced under Section 48(1)(b) of the Act are natural justice grounds relatable to notice of appointment of the arbitrator or of the arbitral proceedings, or that a party was otherwise unable to present its case before the arbitral tribunal and both the grounds were not met in this case.

Objections under Section 48(1)(c) of the Act: The SC stated that Section 48(1)(c) of the Act only deals with disputes that could be said to be outside the scope of the arbitration agreement between the parties – and not to whether a person who is not a party to the agreement can be bound by the same. This was further established by the SC by referring to the proviso to Section 48(1)(c) of the Act which stated that an award may be partially enforced, provided that matters which are outside the submission to arbitration can be segregated.

Perversity of the Award: The SC stated that perversity as a ground to set aside an award in an international commercial arbitration is no longer valid after the 2015 amendment to the Act as the "public policy of India" does not take within its scope the "perversity of an award".

Dispute in relation to a tort: The SC stated that the dispute was a tort claim in relation to the Agreement and as per ***Renusagar Power Company Limited. v. General Electric Company, [(1984) 4 SCC 679]*,** Section 44 of the Act recognises the fact that tort claims may be decided by an arbitrator provided they are disputes that arise in connection with the agreement.

Contention under Section 46 of the Act: The SC stated that Section 46 of the Act does not speak of "parties", but of "persons" who may, therefore, be non-signatories to the arbitration agreement. It further stated that Section 35 of the Act speaks of "persons" in the context of an arbitral award being final and binding on the "parties" and "persons claiming under them", respectively. Section 35 of the Act, therefore, refers to persons claiming under parties and is, therefore, more restrictive in its application than Section 46 of the Act which speaks of "persons" without any restriction.

With respect to the damages awarded, the SC stated that the facts of this case cannot even remotely be said to shock the conscience of the court so as to clutch at "the basic notion of justice" ground contained in Section 48(2) Explanation (1)(iii) of the Act. Lastly, the SC also pointed out that the approach of the division bench of the BHC to satisfy the proper application of Delaware Law on the Award is completely erroneous as Section 48 of the Act does not contain any ground for resisting enforcement of a foreign award based upon the foreign award being contrary to the substantive law agreed by the parties.

Decision of the Supreme Court:

In light of the abovementioned, the SC arrived at the conclusion that the foreign award is binding on non-signatories as there is no valid ground under Part II of the Act to restrict the application of a foreign award on non-signatories to the arbitration agreement.

VA View:

The SC's decision, following a pro-arbitration approach, rightly restricts the grounds for non-enforcement of a foreign arbitral award to what is clearly specified in Section 48, Part II of the Act. The SC, by examiniting Section 44 and 47 of the Act, brings a lot of clarity with respect to substantive ingredients for enforcement of foreign arbitral awards.

The decision follows the spirit of New York Covention, on which Part II of the Act is based, by following a pro-enforcement bias towards enforcing a foreign arbitration award unless a party is able to show that its case comes clearly within the ambit of Section 48 of Act. This decision provides a great insight and guidance to foreign and Indian parties looking to enforce a foreign arbitral award on non-signatories to arbitration agreement in India and is a right step forward towards making India a global arbitration hub.

IV. Supreme Court: Neither the NCLT nor the NCLAT have an unchartered jurisdiction in equity in dealing with resolution plans approved by the CoC.

The Hon'ble Supreme Court ("**SC**") has in its judgement dated August 10, 2021, in the matter of ***Pratap Technocrats (P) Limited and Others v. Monitoring Committee of Reliance Infratel Limited and Another [Civil Appeal No 676 of 2021]*** held that the National Company Law Tribunal ("**NCLT**") and the National Company Law Appellate Tribunal ("**NCLAT**") are duty bound to abide by the discipline of statutory provisions envisaged under the Insolvency and Bankruptcy Code, 2016 ("**IBC**") and once the requirements of the IBC have been duly fulfilled, the decisions of NCLT and the NCLAT are in conformity with law and there is no residual equity based jurisdiction with them.

Facts

The Corporate Insolvency Resolution Process ("**CIRP**") of Reliance Infratel Limited ("**Corporate Debtor**") was initiated by an order dated May 15, 2018 of the NCLT. The resolution plan submitted by Reliance Digital Platform and Project Services Limited ("**Resolution Applicant**") was approved by the Committee of Creditors ("**CoC**") with a 100% voting share and, the NCLT by an order dated December 03, 2020, had approved the resolution plan ("**NCLT Order**").

Thereafter, Pratap Technocrats Private Limited and others ("**Appellants**"), who were the operational creditors of the Corporate Debtor challenged the NCLT Order before the NCLAT, *inter alia,* on the ground that the claims of the Appellants had not received fair and equitable treatment. The NCLAT by an order dated January 04, 2021, rejected the appeal and held that equitable treatment can be claimed only by similarly situated creditors ("**NCLAT Order**"). Aggrieved by the NCLAT Order, the Appellants filed the present appeal before the SC under Section 62 of the IBC ("**Appeal**").

Issue

Whether the NCLT and the NCLAT have a jurisdiction in equity in the approval of a resolution plan within the ambit of the IBC.

Arguments

Contentions raised by the Appellants:

The object and purpose of the IBC is to balance the interest of all stakeholders and to maximize the value of assets. Further, it is essential that the CIRP must be just, fair and equitable to all stakeholders and the interest of the financial creditors cannot be placed at a higher pedestal at the cost of other stakeholders. The CIRP was conducted in a secretive manner, in violation of the principles of natural justice. Further that, it was only after the NCLT Order, that the Appellants became aware of the specifics of the resolution plan.

It was claimed that, the operational debts owed to the Appellants constituted over 90 % of the total operational debts of the Corporate Debtor and the Appellants' interests had not been given due regard by the CoC and had placed certain assets of the Corporate Debtor outside the resolution plan. It was contended that, the approved resolution plan reserved a portion of the Corporate Debtor's assets amounting to INR 800 crores realizable from preference shares held by Reliance Bhutan Limited, a wholly owned subsidiary of the Corporate Debtor, for distribution to financial creditors alone, thereby vitiating the object of the IBC. Since the IBC mandates that the CoC must consist only of financial creditors while the operational creditors are only allowed to attend the meeting without voting rights, the operational creditors are left unaware of the process and the entire decision making is left to the commercial wisdom of the CoC.

It was further contended that, on an application filed by Doha Bank, a financial creditor of the Corporate Debtor, the NCLT by an order dated March 02, 2021, had set aside the inclusion of certain financial creditors from the CoC without considering the implication on the distribution of funds under the resolution plan. Such an exclusion resulted in increasing the rate of recovery for the financial creditors from 10.32 % to 91.98 % whereas operational creditors had a mere recovery of 19.62 %.

Contentions raised by the Respondent:

The Respondent while submitting that the provisions of the IBC provide for specific stipulations in respect of operational creditors stated that if the aggregate dues of the operational creditors are not less than 10 % of the debt of the Corporate Debtor, the representation of their views in the CoC is envisaged under Section 24(3)(c) of the IBC through the operational creditors themselves or their representatives. It was further submitted that under Section 30(2)(b) of the IBC, the payment of debts to the operational creditors in the resolution plan shall not be less than the amount to be paid in the event of a liquidation under Section 53 of the IBC as per the priority in terms of the water fall mechanism.

In view of the above, it was contended that if the proceedings were to take place in strict accordance with the provisions of the IBC, the liquidation value would be zero, however, it was pertinent to note that the resolution plan provided a 19.62 % rate of recovery for the operational creditors as opposed to the financial creditors who were to receive only 10.32 % of their dues.

It was further submitted that the exclusion of certain financial creditors from the CoC was stayed by the NCLAT, however, the issue was a *non sequitur* as the exclusion of any financial creditor had no significance to the requisite majority required for passing a resolution plan.

The principle of equitable treatment only applies between creditors belonging to the same class and that there is a fundamental difference between the position of operational creditors and financial creditors which is emphasised by Explanation 1 to Section 30(2)(b) of the IBC and in the decision of the SC in ***Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta [2020) 8 SCC 531]***. It was further contended that there was a fundamental error on the part of the Appellants in overlooking that INR 800 crores, which was the realisable value of preference shares had already been duly considered and was a part of the liquidation value.

The CoC had approved the resolution plan based on its commercial wisdom and the NCLT did not have the jurisdiction to scrutinize the commercial wisdom of the CoC and, thus, the NCLT acted in accordance with the provisions of the IBC.

Observations of the Supreme Court

The SC while dealing with the issue of the jurisdiction of the NCLT and the NCLAT while approving a resolution plan, also clarified three factual aspects which had a bearing on the outcome of the Appeal:

1. Valuation of preference shares

It was the contention of the Appellants that INR 800 crores which was the realisable value of preference shares held by Reliance Bhutan Limited had not been included in the liquidation value. The SC observed that the contention was factually incorrect since the realisable value for the Corporate Debtor on account of any proceeds from the preference shares was included in the determination of its liquidation value and it was supported by relevant excerpts from valuation reports by appointed valuers.

2. Liquidation value

With reference to the contention of the Appellants that the resolution plan reserved a sum of INR 800 crores exclusively for distribution to the financial creditors, the SC clarified that even if the liquidation value of the realisable value of the preference shares were to be considered in isolation for distribution amongst all operational creditors, in terms of the priority contained in Section 53(1) of the IBC, the liquidation value due to the Appellants would remain at nil.

3. The impact of exclusion of certain financial creditors

The exclusion of certain financial creditors has no implication on the operational creditors for two reasons, firstly, the resolution plan continued to be approved with a 100% majority even after their exclusion and, secondly, the only consequence would be the *inter se* distribution between financial creditors which had no consequence for the operational creditors.

4. The exercise of jurisdiction to approve a resolution plan

The SC revisited various provisions of the IBC in relation to the submission and approval of a resolution plan and observed that Section 30(1) of the IBC provides for the submission of resolution plan by a resolution applicant and the resolution professional is required to ensure that the plan is in accordance with the statutory requirements in clauses (a) to (f) of Section 30(2) of the IBC. Thereafter, the resolution professional presents the resolution plan to the CoC for its approval and the CoC may approve a resolution plan with a voting percentage of not less than 66 % of the voting shares of the financial creditors as enshrined under Section 30 (4) of the IBC.

The SC observed that, in view of the above, the jurisdiction of the NCLT under Section 31 of the IBC is limited to determining whether the resolution plan as approved by the CoC under Section 30(4) of the IBC meets the requirements under Section 30(2) of the IBC. This jurisdiction is statutorily defined, recognised and conferred and cannot be equated with a jurisdiction in equity that operates independently of the provisions of the statute. Similarly, the jurisdiction of the NCLAT under Section 61(3) of the IBC, while considering an appeal against an order approving a resolution plan is limited to the grounds specified therein.

The SC observed that the perusal of the definitions of 'financial creditor', 'financial debt', 'operational creditor' and 'operational debt' along with Section 30(2)(b) of the IBC, indicates that the ambit of the NCLT is to determine whether the amount payable to operational creditors under the resolution plan is consistent with the requirements of Section 30(2)(b) of the IBC. The SC further clarified that Explanation 1 to clause (b) of Section 30(2) of the IBC provides that a distribution "shall be fair and equitable" to such creditors. Fair and equitable treatment, in other words, is what is fair and equitable between operational creditors as a class and not different classes of creditors.

Thereafter, the SC proceeded to examine the nature of jurisdiction exercised by the NCLT and the NCLAT by relying on the consistent principle of law laid down in ***K Sashidhar v. India Overseas Bank [(2019) 12 SCC 150]*** and Essar Steel India Limited (supra) that, neither the NCLT nor the NCLAT can enter into the commercial wisdom underlying the approval granted by the CoC to the resolution plan. The SC further observed that, the decision in Essar Steel India Limited (supra) emphasised that, equitable treatment of creditors is "equitable treatment" only within the same class and that the decision in ***Swiss Ribbons Private Limited. v. Union of India [(2019) 4 SCC 17]*** highlights the principle that financial creditors belong to a class distinct from operational creditors.

The SC observed that, the IBC is a complete code in itself and it defines what is fair and equitable by constituting a comprehensive framework. Further, to argue that a residuary jurisdiction must be exercised to alter the delicate economic coordination that is envisaged by the statute would do violence on its purpose and would be an impermissible exercise of the NCLT's power of judicial review.

Decision of the Supreme Court

The SC while dismissing the Appeal held that, since the resolution plan was approved by the requisite majority of the CoC in conformity with Section 30(4) of the IBC, the exclusion of certain financial creditors was of no consequence and that the jurisdiction of the NCLT and the NCLAT was confined by the provisions of Section 31(1) of the IBC, that is to determine whether the requirements of Section 30(2) of the IBC have been fulfilled in the resolution plan as approved by the CoC.

VA View:

Financial creditors, from the very beginning of the CIRP, are involved with assessing the viability of the corporate debtor, preserving the corporate debtor as a going concern while maximising the value of its assets and hence there exists an *intelligible differentia* between financial creditors and operational creditors which is directly related to the objects sought to be achieved by the IBC. Even though certain foreign jurisdictions allow resolution plans to be challenged on the grounds of fairness and equity, a conscious choice has been made by the legislature not to confer any independent equity-based jurisdiction on the NCLT.

Further, the precedents laid down by the SC are consistent with the recommendations given in the UNCITRAL's Legislative Guide on Insolvency Law which states that it is desirable that a court does not review the economic and commercial basis of the decision of creditors. The SC has time and again reiterated that the commercial or business decisions of financial creditors are not open to judicial review by the NCLT or the NCLAT.

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