Between the lines...

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Key Highlights

I. Supreme Court: Once the resolution plan is approved by the Committee of Creditors and submitted to the Adjudicating Authority, a successful resolution applicant cannot withdraw or modify the resolution plan

The Hon'ble Supreme Court ("**SC**") has held in its judgment dated September 13, 2021, in the matter of ***Ebix Singapore Private Limited v. Committee of Creditors of Educomp Solutions Limited and Another (Civil Appeal No. 3224 of 2020)*** that a submitted resolution plan is binding and irrevocable as between the Committee of Creditors ("**CoC**") and the successful resolution applicant in terms of the provisions of the Insolvency and Bankruptcy Code, 2016 ("**IBC**") and the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. ("**CIRP Regulations**") and that once the resolution plan is approved by the CoC and submitted to the adjudicating authority; the successful resolution applicant cannot withdraw or modify the resolution plan.

Facts

The National Company Law Tribunal ("**Adjudicating Authority**") by way of its order dated May 30, 2017, admitted the petition filed by Educomp Solutions Limited ("**Educomp**") under Section 10 of the IBC for the initiation of voluntary Corporate Insolvency Resolution Process ("**CIRP**") and thereafter, Ebix Singapore Private Limited was declared as the successful resolution applicant ("**Ebix/ Appellant**"). However, during the pendency of the application for approval of resolution plan, Ebix filed two applications for withdrawal of the resolution plan ("**First Withdrawal Application**" and "**Second Withdrawal Application**") which were both dismissed by the Adjudicating Authority. In the First Withdrawal Application under Section 60(5) of the IBC, Ebix sought the direction of the Adjudicating Authority to grant sufficient time to re-evaluate its proposals contained in the resolution plan and suitably revise/modify and/or withdraw its resolution plan and the Adjudicating Authority dismissed the First Withdrawal Application. The Second Withdrawal Application was also dismissed and Ebix was given the liberty to file a fresh application on the same cause of action.

Pursuant to this, Ebix filed another withdrawal application ("**Third Withdrawal Application**") and the Adjudicating Authority by order dated January 2, 2020, allowed the Third Withdrawal Application and held that a resolution plan becomes binding only after it is approved by the Adjudicating Authority and in the present circumstances on account of the pending SFIO and CBI investigations, an unwilling successful resolution applicant would be unable to effectively implement the resolution plan ("**NCLT Order**"). Thereafter, an appeal was preferred by the CoC of Educomp before the National Company Law Appellate Tribunal ("**NCLAT**"), against the NCLT Order, and the NCLAT, by way of its order dated July 29, 2020, set aside the NCLT Order allowing the Third Withdrawal Application ("**NCLAT Order**"). Thereafter, Ebix filed the present Appeal ("**Appeal**") before the SC under Section 61 of the IBC against the NCLAT Order.

Issues

Whether a resolution applicant is entitled to withdraw or modify its resolution plan once it has been submitted by the resolution professional to the Adjudicating Authority and before it is approved by the latter under Section 31(1) of the IBC.

Arguments

Contentions raised by the Appellant:

1. The Appellant is not bound by the resolution plan until it is approved by the Adjudicating Authority, in terms of the CIRP documents read with the scheme of the IBC and that Section 31(1) of the IBC provides that the resolution plan is "*binding…on all stakeholders*" only upon the approval of the Adjudicating Authority.

2. The CIRP documents, that is, invitation of Expression of Interest ("**EOI**"), the Request for Resolution Plan ("**RFRP**"), sanction letter and resolution plan take effect of a binding contract only upon the approval of the Adjudicating Authority and the terms of the resolution plan indicate that the resolution plan is valid only for a period of six months.

3. Events after the submission of the resolution plan like inordinate lapse of time and that the affairs of Educomp were also being investigated by the SFIO and the CBI, provided further evidence that the affairs of Educomp were severally mismanaged and hence susceptible to criminal investigations.

4. The resolution plan was based on certain considerations that were fundamental to the Appellant's bid for the business of Educomp. However, due to the inordinate delay in the completion of the CIRP, the tenure of the government contracts awarded to Educomp, which were crucial to its functioning, may have ended, leading to an erosion of its substratum.

5. The Appellant was not provided with material information relating to the financial position of Educomp after the submission of the resolution plan, as a consequence of which, there was an impairment of a fair process in the conduct of a commercial transaction. Section 29(2) of the IBC provides that all relevant information should be provided to the resolution applicant and that the resolution applicant's right to complete and accurate information relating to the Corporate Debtor has been recognized under the UNCITRAL Legislative Guide on Insolvency Laws ("**UNCITRAL Guide**").

6. The Adjudicating Authority is empowered under the IBC to permit the withdrawal of a resolution plan prior to its approval under Section 31 of the IBC.

Contentions raised by the respondents:

1. The IBC is a complete code as held by the SC in ***M/s Embassy Property Developments Private Limited v. State of Karnataka & Others [(2020) 13 SCC 308]*** and ***M/s Innoventive Industries Limited v. ICICI Bank & Another [(2018) 1 SCC 407].*** It does not envisage withdrawal of resolution plans after mutual negotiations between the resolution applicant and the CoC, which culminates into a binding agreement.

2. Non-implementation of resolution plans after approval from the Adjudicatory Authority under Section 31 attracts prosecution under Section 74(3) of the IBC.

3. Permitting the withdrawal would push Educomp towards liquidation, which would in turn risk thousands of crores of public monies owed to the public sector banks during the economic crisis caused by the Covid-19 pandemic.

4. The Appellant had conducted its own due diligence in accordance with the RFRP and hence its arguments that the substratum or commercial viability has eroded due to the subsequent circumstances is facetious.

5. The scope of judicial review with the Adjudicatory Authority under Section 31 of the IBC is confined to parameters delineated in Section 30(2) of the IBC, which does not envisage the withdrawal or unwillingness of the resolution applicant to continue with a CoC approved resolution plan.

Observations of the Supreme Court

Statutory period of 330 days prescribed under the IBC:

The SC noted its decision in ***Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta [2020) 8 SCC 531]*** which, while reiterating the rationale of the IBC for ensuring timely resolution of stressed assets as a key factor, had to defer to the principles of *actus curiae neminem gravabit*, that is, no person should suffer because of the fault of the court or the delay in the procedure. The SC observed that the previous statutory experiments for insolvency had failed because of delay as a result of extended legal proceedings and hence it chose to only strike down the word 'mandatorily', keeping the rest of Section 12(3) of the IBC intact. Therefore, the SC held that the law as it stands, mandates the conclusion of the

CIRP – including time taken in legal proceedings, within 330 days with a short extension to be granted only in exceptional cases.

Adverting to the issue of withdrawal or modification of resolution plan by a successful resolution applicant under the IBC, the SC observed:

Absence of clear legislative provision:

The SC observed that in absence of a clear legislative provision, the SC will not, by a process of interpretation, confer on the Adjudicating Authority a power to direct an unwilling CoC to re-negotiate a submitted resolution plan or agree to its withdrawal, at the behest of the resolution applicant. The Adjudicating Authority can only direct the CoC to re-consider certain elements of the resolution plan to ensure compliance under Section 30(2) of the IBC, before exercising its powers of approval or rejection under Section 31 of the IBC. The absence of any exit routes being stipulated under the statute for a successful resolution applicant is indicative of the IBC's proscription of any attempts at withdrawal at its behest. The rule of *casus omissus* is an established rule of interpretation, which provides that an omission in a statute cannot be supplied by judicial construction.

Commercial Wisdom of the CoC and judicial restraint:

The SC observed that in ***Essar Steel India Limited*** (supra), a three judge Bench of the SC, affirmed a two judge Bench decision in ***K Sashidhar v. India Overseas Bank [2019) 12 SCC 150]***, prohibiting the Adjudicating Authority from second-guessing the commercial wisdom of the parties or directing unilateral modification to the resolution plans. Thus, judicial restraint must be exercised while intervening in a law governing substantive outcomes through procedure, such as the IBC. If resolution applicants are permitted to seek modifications after subsequent negotiations or a withdrawal after a submission of a resolution plan to the Adjudicating Authority as a matter of law, it would dictate the commercial wisdom and bargaining strategies of all prospective resolution applicants who are seeking to participate in the process and the successful resolution applicants who may wish to negotiate a better deal, owing to myriad factors that are peculiar to their own case.

Impact of Covid-19 Pandemic:

In the wake of the Covid-19 Pandemic, since several resolution plans remained pending before adjudicating authorities, the legislature had provided relief by way of imposing temporary suspension on the initiation of CIRP under Sections 7, 9 and 10 of the IBC for defaults arising for six months from March 25, 2020 (extendable by one year). This was followed by an amendment through the Insolvency and Bankruptcy Code (Second Amendment) Act, 2020 which provided for a carve-out for the purpose of defaults arising during the suspended period. The delays on account of the lockdown were also mitigated by the IBBI (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2020, which inserted Regulation 40C on April 20, 2020, with effect from March 29, 2020, and excluded such delays for the purposes of adherence to the otherwise strict timeline. In view of the above, the SC noted that there has been a clamour on behalf of successful resolution applicants who no longer wish to abide by the terms of their submitted resolution plans that are pending approval under Section 31 of the IBC, on account of the economic slowdown that impacted every business in the country. However, no legislative relief for enabling withdrawals or re-negotiations has been provided, in the last eighteen months. Thus, in the absence of any provision under the IBC allowing for withdrawal of the resolution plan by a successful resolution applicant, vesting the Appellant with such a relief through a process of judicial interpretation would be impermissible.

Further, regarding the contention of the Appellant that the clauses under RFRP accepted by the CoC were binding on the CoC and the CoC approved resolution plan was voidable at the instance of the Appellant on account of inordinate delay in the approval of the submitted plan with the Adjudicating Authority; the SC rejected the argument of the Appellant and observed that the 6 months' time period under the RFRP relates to the validity of the resolution plan for the period of negotiation with the CoC and not for a period after the resolution plan is submitted for the approval of the Adjudicating Authority. The court held that parties cannot indirectly impose a condition on a judicial authority to accept or reject its plan within a specified time period, failing which the CIRP process will inevitably come to an end. The time which may be taken before the Adjudicating Authority is an imponderable which none of the parties can predict.

The SC also rejected the argument of the Appellant that its position changed manifestly because of new allegations which came up in relation to the financial conduct of Educomp and observed that the Appellant was responsible for conducting its own due diligence of Educomp and could not use that as a reason to revise/modify the approved resolution plan. In any event, Section 32A of the IBC grants immunity to the corporate debtor for offences committed prior to the commencement of the CIRP and it cannot be prosecuted for such offences from the date the resolution plan has been approved by the Adjudicating Authority under Section 31 of the IBC, if the resolution plan results in a change of management or control of

the corporate debtor, subject to certain conditions.

Decision of the Supreme Court

The SC while dismissing the present Appeal held that the residuary powers conferred on the Adjudicating Authority under the IBC cannot be exercised to create procedural remedies which have substantive outcomes on the process of insolvency. Enabling withdrawals or modifications of the resolution plan at the behest of the successful resolution applicant, once it has been submitted to the Adjudicating Authority, would create another tier of negotiations and trigger litigations not akin to the object of the IBC, and thereby would risk delaying the insolvency process under the IBC.

VA View:

The existing insolvency framework in India provides no scope for effecting further modifications or withdrawals of CoC-approved resolution plans, at the behest of the successful resolution applicant, once the plan has been submitted to the Adjudicating Authority. The existing framework only enables Adjudicating Authority to permit withdrawals from the CIRP under Section 12A of the IBC and Regulation 30A of the CIRP Regulations.

Even the UNCITRAL Guide does not contain any provisions for withdrawal of a submitted plan, and it only discusses the possibilities of amending a resolution plan. The UNCITRAL Guide indicates that the legislature should choose if it wants to allow any amendments to a submitted resolution plan. In the event, it does, it should lay down the detailed steps of proposing amendments to a submitted resolution plan. If the legislature intended to permit parties to amend the resolution plan after submission to the Adjudicating Authority, based on its specific terms of the resolution plan, it would have adopted the critical safeguards highlighted by the UNCITRAL. Since the IBC does not provide for the withdrawal of a resolution plan by the successful resolution applicant; providing a resolution applicant with such a relief through a process of judicial interpretation would bring in the evils which the IBC sought to obviate.

II. Supreme Court: Prayer for reference to arbitration can be declined if the dispute does not correlate to the existing arbitration agreement

The Hon'ble Supreme Court ("**SC**") has in its judgment dated September 22, 2021 in the matter of ***DLF Home Developers Limited v. Rajapura Homes Private Limited & Another [Arbitration Petition No. 17 of 2020]*** and ***DLF Home Developers Limited v. Begur OMR Homes Private Limited & Another [Arbitration Petition No. 16 of 2020]*** ("**Judgement**"), held that the prayer for reference to arbitration can be declined if the dispute does not correlate to the existing arbitration agreement under the Arbitration and Conciliation Act, 1996 ("**Act**").

Facts

DLF Home Developers Limited ("**Petitioner**") is a limited liability company involved in the business of providing development, management, and investment services concerning real estate projects. The Petitioner and Ridgewood Holdings Limited ("**Ridgewood**") entered into a joint venture, in the year 2007-2008, wherein Ridgewood invested in four special purpose vehicles, including Rajapura Homes Private Limited ("**Respondent No. 1**") and Begur OMR Homes Private Limited ("**Begur Company**"), for developing residential projects in various cities across India. Respondent No. 1 is a company engaged in the construction, development, operations, and maintenance of residential projects in Karnataka ("**Rajapura Project**"). Similarly, the Begur Company is engaged in the business of construction, development, operations, and maintenance of residential projects, in Tamil Nadu and Karnataka ("**Southern Homes Project**").

In June 2008, Ridgewood transferred its stake in the joint venture to its affiliates, Resimmo PCC ("**Respondent No. 2**"), a company incorporated under the laws of Mauritius and engaged in the business of providing investment management services. Respondent No. 1, Respondent No. 2 and Begur Company are collectively referred to as "**Respondents**". In 2015, the parties agreed to a negotiated settlement, in terms of which, Respondent No. 2 was to acquire sole ownership and control of Respondent No. 1 and the Begur Company. To effect the change in ownership, a share purchase agreement was also executed between the Petitioner, Respondent No. 1 and Respondent No. 2 on July 8, 2016 ("**Rajapura SPA**"). Likewise, a share purchase agreement dated January 25, 2017 was also executed between the Petitioner, the Begur Company and Respondent No. 2. Both the share purchase agreements are collectively referred to as "**Share Purchase Agreements**". The Share Purchase Agreements consisted of an identical arbitration clause which laid down that arbitration was to be conducted in accordance with the rules of the Singapore International Arbitration Centre ("**SIAC Rules**"), with the seat and venue of the arbitration being Singapore.

In pursuance to the conditions of the Share Purchase Agreements, on January 25, 2017, the DLF-Rajapura Homes Construction Management Services Agreement and the DLF-Southern Homes Construction Management Services Agreement, collectively referred to as "**Construction Management Agreements**", were executed. To further clarify the modalities of the fee payable to the Petitioner under the Construction Management Agreements, a Fee Computation Agreement dated January 25, 2017 was also executed between Respondent No. 1, the Begur Company and Respondent No. 2 ("**Fee Agreement**"). The Petitioner issued a written notice dated August 16, 2019 certifying the completion of the Southern Homes Project, which Begur Company refused to accept as a valid notice of completion and cited reasons of delay and non-completion of the Southern Homes Project, incomplete notice, amongst others. The Petitioner also issued written notice dated October 25, 2019, certifying the completion of the Rajapura Project, which Respondent No. 1 by its reply dated January 27, 2020 again refused to accept as a valid notice of completion and cited reasons of delay and non-completion of the Rajapura Project, incomplete notice, amongst others.

Due to non-resolution of the differences, the Petitioner invoked the arbitration clause under Construction Management Agreements, which contemplated the seat and venue of arbitration to be New Delhi. The Petitioner further referred all disputes arising out of the Construction Management Agreements to a common and composite arbitral tribunal comprising a sole arbitrator ("**Arbitral Tribunal**"), and proposed two names, for one of them to be appointed as the sole arbitrator. The Respondents claimed that the differences between the parties have arisen under the Share Purchase Agreements and not under the Construction Management Agreements. The Respondents further refused to have the disputes consolidated into a common and composite tribunal and instead asserted that the same would have to be resolved under separate arbitration proceedings. Aggrieved by the refusal of the Respondents to appoint an arbitrator under the Construction Management Agreements, the Petitioner preferred two separate petitions under Section 11(6) of the Act read with Section 11(12) of the Act, to the SC, praying for appointment of a sole arbitrator for resolution of all disputes arising from the Construction Management Agreements.

Issue

1. Whether the nature of dispute sought to be referred for arbitration fall under the arbitration clauses of Construction Management Agreements, governed by the Act, with the seat and venue for arbitration at New Delhi, or whether such disputes can be arbitrated only in terms of the dispute resolution mechanism specified in the Share Purchase Agreements, that is, under the SIAC Rules, with the seat and venue of the arbitration at Singapore.

2. Whether the disputes should be referred to a consolidated and composite tribunal or should there be two different arbitral tribunals to resolve the same.

Arguments

Contentions raised by the Petitioner:

The Petitioner contended that Begur Company and Respondent No. 1 had acted unreasonably in not accepting the notice of completion. It was alleged that the rejection of the notice certifying the completion of Rajapura Project and Southern Homes Project was done to avoid Respondent No. 2's obligation to pay fees to the Petitioner. It was argued that the contention of the Respondents that the disputes in question cannot be arbitrated under the Construction Management Agreements was legally and factually misconceived. The Petitioner argued that courts while dealing with an application under Section 11(6) of the Act have a narrow scope of examination, confined only to trace out whether there exists an 'arbitrable dispute' and a 'written contract' providing arbitration as the dispute resolution mechanism.

It was submitted that since the parties had not disputed the existence of arbitration agreement or its core contractual ingredients contained in Construction Management Agreements, the present dispute, in terms of the settled law, should be referred to arbitration. Once the existence of the arbitration agreement was established, all other incidental issues should be left to be decided by the arbitrator as prescribed under Section 16 *(Competence of arbitral tribunal to rule on its jurisdiction)* of the Act, which enshrines the principle of "*kompetenz-kompetenz*". The doctrine of *kompetenz-kompetenz* indicates that an arbitral tribunal has the competence to rule on its own jurisdiction, including determining all jurisdictional issues, and the existence or validity of an arbitration agreement.

It was further argued that the Arbitral Tribunal would eventually rule whether or not the disputes between the parties fell under the terms of the Construction Management Agreements. Although the Construction Management Agreements were two separate agreements, they were inextricably interlinked, and since the dispute in question related to payment of fees to the Petitioner for its services under both the Construction Management Agreements, the disputes should be referred to a common and consolidated arbitral tribunal, and the proceedings ought to be consolidated to avoid multiplicity of arbitrations and conflicting decisions, which would potentially cause injustice.

Contentions raised by the Respondent:

The Respondents vehemently controverted the case of the Petitioner and reiterated that the dispute sought to be raised in the present arbitration petitions exclusively fell within the ambit of Share Purchase Agreements, and, therefore, the differences between the parties could not be referred to arbitration under the Construction Management Agreements. It was argued that the Share Purchase Agreements were the principal agreements governing the transaction between the parties, and the Construction Management Agreements were subsequently executed only to operationalize the manner in which the Petitioner would fulfill its construction obligation as per the Share Purchase Agreements.

It was contended that the instant disputes could only be arbitrated as per the dispute resolution mechanism specified in the Share Purchase Agreements, namely, by the SIAC Rules, with seat and venue of arbitration at Singapore. It was urged that if the seat of arbitration were to be found outside India, that is, Singapore, the instant applications under Section 11(6) of Act were not maintainable. Citing the decisions of the SC in ***Duro Felgura, S.A. v. Gangavaram Port Limited [(2017) 9 SCC 729]*** and ***Vidya Drolia and Others v. Durga Trading Corporation [(2021) 2 SCC 1*]** **("Vidya Drolia")**, the Respondents contended that while deciding an application under Section 11(6) of the Act, the SC could not act cursorily, and an absolute 'hands off' approach would be counterproductive. The Respondents relied on to the judgement in ***Olympus Superstructure Private Limited v. Meena Vijay Khetan and Others [(1999) 5 SCC 651]*** ("**Olympus Judgement**"), wherein, SC had held that in a situation where there were disputes and differences in connection with the main agreement and also disputes regarding other matters connected thereto, the arbitration would be governed by the general arbitration clause of the main agreement.

Lastly, it was submitted that in the event the instant arbitration petitions were allowed, the SC should appoint separate arbitral tribunals under the Construction Management Agreements, though it may comprise of the same sole arbitrator.

Observations of the Supreme Court

The SC observed that the jurisdiction of the SC under Section 11 *(Appointment of arbitrators)* of the Act is primarily to find out whether there existed a written agreement between the parties for resolution of disputes through arbitration and whether the aggrieved party had made out a *prima facie* arbitrable case. The SC emphasized that the limited jurisdiction, however, did not denude the SC of its judicial function to look beyond the bare existence of an arbitration clause to cut the deadwood. The SC considered the decision of the three-judge bench in Vidya Drolia, which had eloquently clarified that the SC, with a view to prevent wastage of public and private resources, may conduct '*prima facie* review' at the stage of reference to weed out any frivolous or vexatious claims. The SC opined that courts are not expected to act mechanically merely to deliver a purported dispute raised by an applicant at the doors of the chosen arbitrator. Contrarily, the courts are obliged to apply their mind to the core preliminary issues, albeit, within the framework of Section 11(6A) of the Act. Such a review is not intended to usurp the jurisdiction of the Arbitral Tribunal but is aimed at streamlining the process of arbitration. The SC thus clarified that even when an arbitration agreement exists, it would not prevent the court to decline a prayer for reference if the dispute in question does not correlate to the said agreement.

The SC observed that the Share Purchase Agreements and the Construction Management Agreements, had distinct and different objects and fields of operation. The SC found it difficult to accept that the respective Share Purchase Agreements were the 'principal agreements governing the transaction' between the parties or that the present disputes could be resolved solely under the arbitration clause contained therein. The dispute sought to be referred to arbitration by the Petitioner pertained to non-deposit of agreed amount by Respondent No. 2 and the resultant payment thereof as fees which the Petitioner claimed in terms of the Construction Management Agreements. The SC determined that whether or not the Petitioner had complied with the condition precedent under the Rajapura SPA, thereby becoming entitled to the fees, was a question of fact to be determined by the Arbitral Tribunal.

The SC referred to the Olympus Judgement, where it was held that in a situation where there were disputes and differences in connection with the main agreement and also disputes regarding other matters connected thereto, the arbitration would be governed by the general arbitration clause of the main agreement. Noting that the nature of the arbitration clauses in the instant case were substantially different when compared with the dispute resolution clause of the main agreement in Olympus Judgement, the SC observed that the arbitration clause of the Share Purchase Agreements did not have any overriding effect and was not broader or wider when compared to the Construction Management Agreements. The SC found it difficult to construe that arbitration clause of the Share Purchase Agreements contemplated adjudication of the issues that were "connected with" or were "in relation" to the subject matter of the Share Purchase Agreements.

Thus, the SC noted that the scope of the arbitration clause in Share Purchase Agreements was limited to issues relating to the agreement's primary subject matter, that is, any dispute arising out of the transaction of sale and purchase of shares. The provisions of the Construction Management Agreements, and the arbitration clause therein, would be applicable to

any dispute or difference concerning the performance of the construction related obligations and deposit of agreed amount by Respondent No. 2 or payment thereof to the Petitioner. Since the Respondent No. 2 was not aggrieved by non-compliance, deviation or breach of promise to sell its shares by the Petitioner, the SC took the view that, when neither party pleaded the infringement of the core provisions of the Share Purchase Agreements, it could not be said that the controversy fell within the ambit of the arbitration clause of the Share Purchase Agreements and could be adjudicated only under the SIAC Rules, with seat and venue at Singapore.

Considering that the primary twin-test envisioned under Section 11(6) of the Act had been satisfied by the Petitioner, the SC noted that the instant applications were maintainable. The SC observed that the Construction Management Agreements, though interlinked and connected, are two separate agreements. The SC considered the contention of the Respondents that the Petitioner had committed breaches under both Construction Management Agreements, and that the genesis of the disputes lay in separate and distinct facts. The SC observed that save where the parties have resolved to the contrary, it would be inappropriate to consolidate the proceedings originating out of two separate agreements. However, the SC believed that since the Fee Agreement provided that the fee can only be calculated after taking into consideration various financial components of both the Rajapura Homes Projects and the Southern Homes Project, it would be necessary for the sake of avoiding wastage of time and resources, and to avoid any conflicting awards, that the disputes under petitions be referred to a sole arbitrator.

Decision of the Supreme Court

The SC ruled that the disputes between the parties could be adjudicated in the arbitral proceedings under the Construction Management Agreements, and if on appreciation of the facts and law, the arbitrator discovered that the 'real dispute' between the parties arose from the Share Purchase Agreements, the arbitrator would be free to wind up the proceedings with liberty to the parties to seek redressal under the SIAC Rules.

The SC referred the disputes under the arbitration petitions to a sole arbitrator and left it to the wisdom of the sole arbitrator to decide whether the disputes should be consolidated and adjudicated under one composite award or otherwise. The SC allowed both the instant arbitration petitions and appointed Mr. Justice (Retd.) R.V. Raveendran, former judge, Supreme Court of India as the sole arbitrator to resolve all disputes and differences between the parties.

VA View:

The SC by this landmark Judgement has elucidated the importance of synchronizing conflicting arbitration clauses in different agreements entered into between the parties. The SC has unequivocally clarified that the courts cannot act in a mechanical fashion, by merely referring the dispute raised to arbitration, basis the arbitration agreement produced before it. The SC has expanded the scope of judicial inquiry under Section 11 of the Act, and has explained that the exercise of a limited *prima facie* review does not intend to usurp the jurisdiction of the arbitral tribunal, or negate the doctrine of *kompetenz-kompetenz*, but rather, is aimed at streamlining the process of arbitration and with a view to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism.

The SC has clarified that courts are obliged to apply their mind to the core preliminary issues, albeit, within the framework of Section 11(6A) of the Act. The SC has expressly laid down that despite the existence of an arbitration agreement, the courts are empowered to decline a prayer for reference to arbitration, if the dispute in question fails to correlate to such arbitration agreement.

III. Supreme Court: The bar under Section 9(3) of the Arbitration and Conciliation Act operates only when the application under Section 9(1) had not been entertained

The Hon'ble Supreme Court ("**SC**") in the matter of ***M/s Arcelor Mittal Nippon Steel India Limited v. M/s Essar Bulk Terminal Limited [Special Leave Petition [(Civil) No. 13129 of 2021],*** decided on September 14, 2021, ("**Judgement**") held that a bar under Section 9(3) of the Arbitration and Conciliation Act, 1996 ("**Act**") only operates when the application under Section 9(1) of the Act had not been entertained.

Facts

M/s Arcelor Mittal Nippon Steel India Limited ("**Appellant**") and M/s Essar Bulk Terminal Limited ("**Respondent**"), entered into an agreement for handling cargo ("**Agreement**") at the Hazira Port, Surat. Clause 15 of the Agreement provided that all disputes arising out of the Agreement were to be settled in courts, in accordance with the provisions of

the Act and be referred to a sole arbitrator appointed mutually by the parties. The Appellant invoked the said arbitration clause in the Agreement by a notice of arbitration dated November 22, 2020 ("**Notice**"). On December 30, 2020, the Respondent replied to the Notice by contending that the dispute is not arbitrable. In response, the Appellant, for the appointment of an arbitral tribunal, approached the Hon'ble High Court of Gujarat at Ahmedabad ("**GHC**") under Section 11 (*Appointment of arbitrators*) of the Act ("**Section 11 Application**").

On January 15, 2021 and March 16, 2021, the Appellant and the Respondent also filed an application under Section 9 (*Interim measures by the court*) of the Act in the commercial court ("**CC**"), respectively ("**Section 9 Applications**"). The CC heard the Section 9 Applications, and, after multiple adjournments, reserved the same for orders on July 20, 2021. On July 9, 2021, the Section 11 Application was disposed of by appointing a three-member arbitral tribunal ("**Tribunal**"). Thereafter, on July 16, 2021, the Appellant filed an interim application before the CC praying for reference of Section 9 Applications to the Tribunal, however, the CC dismissed the said application. The Appellant, challenging the said order of the CC, filed an application before the GHC under Article 227 of the Constitution of India, 1950. The said application was heard by a division bench of the GHC and by an order dated August 17, 2021, the GHC dismissed the application, holding that the CC has the power to consider whether the remedy under Section 17 of the Act is inefficacious and pass necessary orders under Section 9 of the Act ("**Impugned Order**"). On account of the Impugned Order, a special leave petition was filed by Appellant before the SC challenging the Impugned Order.

Issue

1. Whether the court has the power to entertain an application under Section 9(1) of the Act, once an arbitral tribunal has been constituted, and if so, what is the true meaning and purport of the expression 'entertain' in Section 9(3) of the Act.

2. Whether the court is obliged to examine the efficacy of the remedy under Section 17 (*Interim measures ordered by the arbitral tribunal*) of the Act, before passing an order under Section 9(1) of the Act, once an arbitral tribunal is constituted.

Arguments

Contentions raised by the Appellant:

The Appellant, *inter alia*, contended that Section 9(3) of the Act, as amended, restricts the power of the court to entertain an application under Section 9(1) of the Act once an arbitral tribunal has been constituted and, therefore, the CC cannot proceed with the Section 9 Applications under the Act. The Appellant, citing the 246th Law Commission Report, the UNCITRAL Model Law and ***Amazon NV Investment Holdings LLC v. Future Retail Limited & Others [2021 SCC Online SC 557],*** emphasised that the purpose of insertion of Section 9(3) of the Act was to reduce the role of the court in relation to grant of interim measures once the arbitral tribunal has been constituted and even though Section 9(3) of the Act does not completely oust the jurisdiction of the court under Section 9(1) of the Act, it restricts the role of the court post the constitution of an arbitral tribunal and once an arbitral tribunal is constituted, the court should not entertain an application under Section 9 of the Act unless it finds that such circumstances exist, which may render the remedy under Section 17 of the Act inefficacious.

The Appellant argued that the fact that an order is reserved does not mean that the court has stopped entertaining the Section 9 Applications and since the CC had not passed its orders in the Section 9 Applications, as on the date of the Impugned Order, the CC was 'entertaining' the Section 9 Applications. The Appellant substantiated this argument by submitting that the term 'entertain', under Section 9(3) of the Act, would not mean admitting for consideration, but would mean the entire process upto its final adjudication and passing of an order on merits and the fact that an order was reserved does not mean that the court has stopped 'entertaining' the Section 9 Applications.

The Appellant further emphasised that the word 'entertain' in Section 9(3) of the Act has to be interpreted in the context of Section 9(1) of the Act. Section 9(1) of the Act provides for the 'making of orders' for the purpose of grant of interim relief. The internal aid to construction provided under Section 9 of the Act substantiates its submission that the term 'entertain' would necessarily mean all acts including the act of making orders under Section 9(1) of the Act. Lastly, the Appellant argued that, after the constitution of the arbitral tribunal, a court can only grant interim relief under Section 9 of the Act, if circumstances exist which might not render the remedy under Section 17 of the Act efficacious, which were not present in the case. Therefore, the CC cannot proceed with the Section 9 Applications under the Act as it is barred by Section 9(3) of the Act.

Contentions raised by the Respondent:

The Respondent, on the other hand, submitted that the prayers of the Appellant should be answered in the negative since the Section 9 Applications were heard on merits and reserved for orders before the constitution of the Tribunal. The Respondent argued that a party can apply to the court under Section 9(1) of the Act, before, during or after the arbitral proceedings and the courts do not lose jurisdiction upon constitution of the tribunal as Section 9(3) of the Act is neither a non-obstante clause nor an ouster clause that would render the courts *coram non judice*, immediately upon the constitution of the arbitral tribunal.

The Respondent argued that Section 9(3) of the Act restrains the court from entertaining an application under Section 9, unless circumstances exist which may not render the remedy provided under Section 17 of the Act efficacious. However, in this matter, before the constitution of the Tribunal, the Section 9 Applications had already been entertained, fully heard and since only the formality of pronouncing the order in the Section 9 Applications was remaining, Section 9(3) of the Act would not apply in this case.

The Respondent, on the basis of various judicial pronouncements, argued that an application is 'entertained' when the court takes up the application for consideration and applies its mind to it. It further substantiated that the word entertain means "admit into consideration" or "admit in order to deal with" and in this case, Section 9 Applications had already been "admitted into consideration", and the CC had already applied its mind to the Section 9 Applications. Therefore, the Section 9 Applications had gone past the stage of "entertainment", as contemplated under Section 9(3) of the Act. Lastly, the Respondent submitted that the Act did not confer any power on the court, to relegate or transfer a pending application under Section 9(1) of the Act to the arbitral tribunal, the moment an arbitral tribunal is constituted.

Observations of the Supreme Court:

The SC, while examining Section 9 of the Act, stated that Section 9(3) of the Act has two limbs. The first limb prohibits an application under Section 9(1) of the Act from being entertained once an arbitral tribunal has been constituted. The second limb carves out an exception to that prohibition, if the court finds that circumstances exist, which may not render the remedy provided under Section 17 of the Act efficacious. It was further observed that even after an arbitral tribunal is constituted, there may be myriads of reasons why the arbitral tribunal may not be an efficacious alternative to Section 9(1) of the Act due to any reason such as temporary unavailability of any one of the arbitrators of an arbitral tribunal by reason of illness, travel, etc.

The SC noted that the court is obliged to exercise power under Section 9 of the Act, if the arbitral tribunal is yet to be constituted and the expression 'entertain', under Section 9(3) of the Act, means that, once the arbitral tribunal is constituted, the court cannot take up an application under Section 9 for consideration, unless the remedy under Section 17 is inefficacious. However, once an application is 'entertained' in the sense that it is taken up for consideration, and the court has applied its mind to the case, the court can certainly proceed to adjudicate the application. The SC further noted that the intent behind Section 9(3) of the Act was not to turn back the clock and require a matter already reserved for orders to be considered in entirety by the arbitral tribunal under Section 17 of the Act. The bar of Section 9(3) of the Act would not operate, once an application has been entertained and taken up for consideration, as in the instant case, where hearing has been concluded and judgment has been reserved.

In relation to examining the efficacy of the remedy under Section 17 of the Act, the SC stated that when an application has already been taken up for consideration and is in the process of consideration or has already been considered, the question of examining whether remedy under Section 17 is efficacious or not would not arise. The requirement to conduct the exercise arises only when the application is being entertained and/or taken up for consideration.

Lastly, the SC concluded by reiterating that Section 9(1) of the Act enables the parties to an arbitration agreement to approach the appropriate court for interim measures before the commencement of arbitral proceedings, during arbitral proceedings or at any time after the making of an arbitral award but before it is enforced in accordance with Section 36 of the Act. The bar of Section 9(3) of the Act operates where the application under Section 9(1) had not been entertained till the constitution of the arbitral tribunal. If an application under Section 9 had been entertained before the constitution of the arbitral tribunal, the court always has the discretion to direct the parties to approach the arbitral tribunal, if necessary, by passing a limited order of interim protection, particularly when there has been a long time gap between hearings and the application has to be, for all practical purposes, be heard afresh, or the hearing has just commenced and is likely to consume a lot of time.

Decision of the Supreme Court:

In light of the abovementioned, the SC stated that the Impugned Order has rightly directed the CC to proceed to complete

the adjudication of Section 9 Applications and allowed the appeal only to the extent of clarifying that it shall not be necessary for the CC to consider the efficacy of relief under Section 17 of the Act, since the Section 9 Applications have already been entertained and considered by the CC.

VA View:

The interim measures under Section 9 and Section 17 of the Act form an integral aspect of arbitration proceedings in India and the SC in this Judgement clarifies the important aspects of the scope and interplay between Section 9 and Section 17 of the Act.

The SC in this Judgement, first, by interpreting the word 'entertain' under Section 9(3) of the Act, clarifies that the parties to the arbitration proceedings are not required to argue afresh before the arbitral tribunal for an interim measure when the matter is already 'entertained' by the court prior to the constitution of the arbitral tribunal. However, at the same time, it also provided the court with the discretion to direct the parties to approach the arbitral tribunal, if necessary. Secondly, the SC clarified the powers of court under Section 9 of the Act by stating that, when an application under Section 9 of the Act is entertained, the court shall not consider the efficacy under Section 17 of the Act. This is a welcome clarification by the SC as it ensures that there is no undue repetition in the arbitration proceedings which would eventually result in a speedy dispute resolution of the arbitration proceedings.

IV. NCLAT: 'Success Fees' which is more in the nature of contingency and speculative is not part of the provisions of the IBC and the Regulations and the same is not chargeable

The National Company Law Appellate Tribunal, Principal Bench, New Delhi ("**NCLAT**") has in its judgment dated September 20, 2021 ("**Judgement**"), in the matter of ***Mr. Jayesh N. Sanghrajka v. The Monitoring Agency nominated by the Committee of Creditors of Ariisto Developers Private Limited [Company Appeal (AT) (Insolvency) No.392 of 2021],*** held that 'Success Fees' which is more in the nature of contingency and speculative is not part of the provisions of the Insolvency and Bankruptcy Code, 2016 ("**IBC**") and the Insolvency and Bankruptcy Board of India ("**IBBI**") (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("**Regulations**"), and the same is not chargeable.

Facts

The corporate insolvency resolution process ("**CIRP**") of Ariisto Developers Private Limited ("**Corporate Debtor**") was initiated on November 20, 2018. In the first Committee of Creditors ("**CoC**") meeting, Mr. Jayesh N. Sanghrajka was appointed as the resolution professional ("**Resolution Professional**"/"**Appellant**"). The 'Monitoring Agency' of the Corporate Debtor is the respondent herein ("**Respondent**").

The NCLAT referred to the agenda of the 20th CoC meeting dated November 12, 2019, and the adjourned CoC meeting dated November 13, 2019, regarding evaluation of resolution plans, to finalize the distribution matrix and way forward. The 'Item No.7 of the Agenda' was relevant for the present matter, which was to ratify CIRP expenses incurred as on November 10, 2019, and decide the way forward. The amicus curiae (*defined below*) submitted that all copies of minutes of the CoC meetings were collected from the Appellant and he could not verify if the chart provided therein was part of the agenda circulated earlier, since the agenda did not have any link to the said chart. If the chart made available by the Resolution Professional was perused, the fine print had various entries of CIRP expenses including one entry '*Success Fees**' and a footnote stating that '*Amount of Success Fees to be decided by the COC*'.

Thereafter, the Appellant filed an application for approval of the resolution plan before the National Company Law Tribunal, Mumbai ("**NCLT**"). The NCLT by an order dated March 23, 2021 ("**Impugned Order**"), though approved the resolution plan submitted by Prestige Estates Projects Limited ("**Resolution Applicant**"), it disagreed with the CoC which had approved 'Success Fees' of an amount of INR 3 Crores to the Resolution Professional and directed distribution thereof. Consequently, the appeal was filed by the Resolution Professional to challenge certain observations made in the Impugned Order passed by the NCLT. The Respondent stated that, the approval of the 'Success Fees' was a commercial decision of the CoC and the NCLT could not have interfered while approving the resolution plan.

The NCLAT had on June 07, 2021, observed that it being more of a legal issue, it is not necessary to call the response of the Respondent or the CoC, as the CoC had expressed itself in the minutes of the meeting. Thus, to assist NCLAT, Advocate Mr. Sumant Batra was appointed as "**Amicus Curiae**" by an order dated June 14, 2021.

Issue

Whether 'Success Fees' was chargeable by the Appellant.

Arguments

Contentions raised by the Appellant:

The Appellant referred to various efforts undertaken as the resolution professional during the course of CIRP, such as, assets of the Corporate Debtor worth INR 1,089 Crores were handled and safeguarded, he convened 20th CoC meeting, pursued more than 20 hearings before the NCLT, NCLAT and the Supreme Court ("**SC**") having different classes of stakeholders which included approximately, 100 financial creditors, 400 homebuyers, arranged various meetings between homebuyers and Resolution Applicant to harmoniously resolve the issues and concerns of homebuyers, further that the Appellant got CoC's approval on the Resolution Plan. Further, the Appellant referred judgments of ***Committee of Creditors of Essar Steel India Limited Through Authorised Signatory v. Satish Kumar Gupta and Others [Civil Appeal No. 8766-67 of 2019]*** and ***K. Sashidhar v. Indian Overseas Bank and Others [MANU/SC/0189/2019]***, to argue that the NCLT or the NCLAT cannot interfere with the commercial decision of the CoC. It was claimed that the 'Success Fee' approved was part of commercial wisdom of the CoC. Hence, only the CoC can consider if the 'Success Fee' is to be paid and quantum of the 'Success Fee'. Thus, the issue before NCLT or NCLAT could only be reasonableness of 'Success Fees'. Further argued that, if the NCLT did not agree with the fee approved it should have sent back the Resolution Plan to the CoC. However, the Appellant accepted that there is no judgment of the SC which had considered whether or not quantum of fees accepted, is or not a commercial decision.

The Appellant referred to IBBI Discussion Paper dated April 01, 2018 ("**Discussion Paper**"), to submit that therein the IBBI had discussed the aspect with regard to the resolution fees payable to the resolution professional and the question was left open. The Appellant accepted that such Discussion Paper did not have any reference to 'Success Fees'.

The Appellant relied on Regulation 34 of the Regulations to state that, the CoC had to fix the expenses to be incurred by the Resolution Professional including fee which will constitute CIRP costs. Thus, Appellant submitted that Para 23 of the Impugned Order cannot be maintained. Further, the Appellant referred the Impugned Order and submitted that, the NCLT did not mention that the 'Success Fee' could not be charged.

Submissions of the Amicus Curiae and observations of the NCLAT

The Amicus Curiae submitted that in the IBC and the Regulations, there is no express provision for grant of 'Success Fee'. The Amicus Curiae referred to Section 208(2) of the IBC to submit that the Resolution Professional had to abide by the code of conduct mentioned therein and therefore, the Appellant was duty bound to take reasonable care and diligence while performing his duties. The Amicus Curiae also referred to the provisions of the Circular dated June 12, 2018 ("**Circular**") and the Paras 25 to 27 of the Code of Conduct, First Schedule below IBBI (Insolvency Professionals) Regulations, 2016 ("**Code of Conduct**"). Further, the Amicus Curiae submitted that in the scheme of the IBC, the resolution professional was appointed in the first CoC meeting as per Section 22 of the IBC, at which stage, invariably and transparently the fee gets fixed. The NCLAT noted that, with regard to fees payable, there is no express provision in the IBC and the Regulations prescribing/quantifying or prohibiting the remuneration nor as to the form in which fees can be charged or paid. The NCLAT further noted that, it is against the principle of transparency if at the last moment, when the Resolution Plan is being approved, higher amounts as fees are squeezed in it.

The Amicus Curiae submitted that a harmonious reading of the relevant provisions of the IBC and the Regulations clarified that the charging of fees by the resolution professional and manner/ method of payment shall be subject to the following:-

i. Approval of the CoC by prescribed majority;
ii. Fee should be a reasonable reflection of the work necessarily and properly undertaken;
iii. Fee should be charged in a transparent manner and the resolution professional shall maintain written contemporaneous record of decision taken in respect of fees;
iv. The resolution professional shall take reasonable care and diligence while performing his duties associated with charging fees and process associated therewith;
v. There shall be item wise disclosure by resolution professional to all stakeholders; and
vi. Not be inconsistent with the applicable regulations.

The Amicus Curiae stated that the Circular only guides the stakeholders as to what could constitute "reasonable" in the matter of charging fees and it does not provide, prescribe, recommend, promote, endorse or sanctify payment of 'Success Fee'. Accordingly, the claim of the Appellant that the Circular provides for payment of 'Success Fee' was misplaced.

The provisions of the IBC and the Regulations read with the Code of Conduct, indicate that the IBC and the Regulations intend to control the manner in which resolution professional charged fees. The NCLAT noted that, according to Amicus Curiae, the quantum of fees payable could be fixed by the CoC but it was justiciable before the NCLT. Further, the NCLAT noted that, the judgments relied on by the Appellant, did not bar the jurisdiction of the NCLT to review the quantum of fees charged by the Resolution Professional or that approved by the CoC. It was noted that, had this not been so, there would have been no need of sections and regulations referred in the Circular harping on transparency and reasonableness and it could have been blankly left for CoC to decide fees, which is not the case. The NCLAT noted that, the IBBI has power to take disciplinary action in the event of misconduct or breach by insolvency professional. In the case of ***Parish Tekriwal v. VRG Digital Corporation Private Limited [C.P. (IB) No. 859 of 2019]*** the NCLT held that fixation of the fees of professionals does not come within the domain of the commercial wisdom of CoC and hence is justiciable.

The NCLAT noted that, through the Circular and the Discussion Paper, in substance, the IBBI has directed the insolvency professional that the fee payable to them should be reasonable; that the same should be '*directly related to and necessary for the CIRP*' and that the fee should be determined on an arms' length basis, in consonance with the requirements of integrity and independence. The NCLAT noted that, Section 208(2)(a) of the IBC requires the insolvency professional to take reasonable care and diligence while performing his duties, including incurring expenses. The NCLAT further noted that, the Amicus Curiae was right in his submissions that the Circular is only a circular which cannot be equated with the rules and regulations framed under the provisions of the IBC. Apart from the fact that the IBC or the Regulations as existing do not provide for fee on speculative basis. The Circular also, in the portion where directions are given or clarification issued, does not make any such 'Success Fee' or 'contingency fee' payable. Thus, it cannot be said that charging of 'Success Fee' is within the provisions of the IBC or the Regulations.

The Amicus Curiae further submitted that the minutes of 20th CoC meeting recorded that it was the Resolution Professional who brought about the successful Resolution Plan. However, this cannot be accepted as a reason for the 'Success Fee' since as per the scheme of the IBC, the Resolution Professional is merely a facilitator. Further, it is the CoC who had to deliberate with the Resolution Applicant and it is their efforts which lead to the resolution plan getting settled down so as to be approved. The NCLAT noted that, the Amicus Curiae rightly submitted that if the minutes of the 20th CoC meeting are perused, it is a case of approving a big gift for the Resolution Professional, which can be only at the cost of creditors waiting in line and whose percentage of dues would consequently get reduced.

The NCLAT noted that, fees payable to resolution professionals have been made part of CIRP costs so as to safeguard their interests. Further that, the protection for payment of CIRP costs in priority to the payment of other debts of the Corporate Debtor under Section 30(2) of the IBC, is for the CIRP costs that are validly incurred. The Amicus Curiae relied on the judgment of ***Alok Kaushik v. Bhuvaneshwari Ramanathan & Others [(2015) 5 SCC 787]*** to submit that the SC held that NCLAT had powers to determine fees and expenses, etc. payable to a professional as an intrinsic part of the CIRP.

On the submission that, the NCLT should have sent the matter back to the CoC if it was not approving the 'Success Fee', the NCLAT observed that, this submission deserves to be discarded, as the NCLT, while not accepting the 'Success Fee', merely asked proportionate distribution which would even otherwise have happened if 'Success Fee' was set aside, as the money would become available improving percentage of other creditors' dues.

Decision of the NCLAT

The NCLAT held that 'Success Fee' which is more in the nature of contingency and speculative is not part of the provisions of the IBC and the Regulations and the same is not chargeable. Apart from this, even if it was to be said that 'Success Fee' was chargeable, the NCLAT found that in the present matter, the manner in which it was included at the last minute at the time of approval of the resolution plan, and the quantum, are both improper and incorrect. The NCLAT did not find any substance and dismissed the appeal.

VA View:

In this judgement, the NCLAT has rightly analysed that, if the Resolution Professional sought to have 'Success Fee' at the initial stage of CIRP, it would interfere with independence of Resolution Professional which can be at the cost of Corporate Debtor. If 'Success Fee' was claimed when the Resolution Plan was going through or after the Resolution Plan was approved, it would be in the nature of gift or reward instead of being expenditure incurred on or by the Resolution Professional, as in the instant case. Further, the term "Success fee" was contrary to what the IBBI provided in its circulars, that the Resolution Professional shall render services for a fee which is a reasonable reflection of his work. The absence of a provision quantifying the fee is with the expectation that the market players will self-regulate themselves and behave in a reasonable manner.

The role of the resolution professional was to be like a dispassionate person concerned with performance of his duties under the IBC and thus it cannot be result oriented. The NCLAT observed that, the CoC exercised commercial decision with regard to approval or rejection of a resolution plan but the reasonableness of fees charged was not part of commercial decision. Therefore, when the fees have to be on the basis of the case and work related to acts performed or to be performed in furtherance of the CIRP, the reasonability or otherwise would be justiciable.

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