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I. Supreme Court: An arbitrator cannot grant pendente-lite interest under Arbitration and Conciliation Act, 1996 when expressly barred by the parties.

The Hon'ble Supreme Court ("**SC**") has in its judgement dated October 4, 2021, in the matter of ***M/s Garg Builders v. M/s. Bharat Heavy Electricals Limited (Civil Appeal No. 6216 of 2021),*** held that an arbitrator cannot grant pendente-lite interest as per the Arbitration and Conciliation Act, 1996 ("**1996 Act**") when barred by the parties ("**Judgement**").

Facts

Bharat Heavy Electricals Limited ("**Respondent**") floated a tender for construction of boundary wall at its 2x750 MW Pragati III Combined Cycle Power at Bawana, Delhi ("**Project**"). M/s. Garg Builders ("**Appellant**") submitted its bid for the Project which was accepted by the Respondent. Pursuant to this, Respondent issued a letter of intent ("**LOI**") dated September 9, 2008, to the Appellant and on October 24, 2008, the Respondent and the Appellant entered into a contract ("**Agreement**") with respect to the Project. Clause 17 of the Agreement contained an interest barring clause which stated that "*No interest shall be payable by BHEL on Earnest Money Deposit, Security Deposit or on any moneys due to the contractor*" ("**Clause 17**").

Subsequently, a dispute arose between the Respondent and the Appellant with respect to the Agreement and, after appointment of a sole arbitrator ("**Arbitrator**"), the arbitration proceedings were initiated between the parties under the 1996 Act. The Appellant, during the arbitration proceedings, apart from claiming various amounts under different heads, *inter alia*, claimed pre-reference, *pendente lite* (*interest that accrues to the base amount while the pendency of the suit during the arbitration proceeding*) and future interest at the rate of 24% on the value of the award. The Arbitrator, after hearing the contentions of both the parties, concluded that there is no prohibition in the Agreement and LOI about payment of interest for the pre-suit, *pendente lite* and future period and awarded *pendente lite* and future interest at the rate of 10% per annum to the Appellant on the award amount from the date of filing of the claim petition, that is, December 2, 2011, till the date of realization of the award amount ("**Award**").

The Respondent challenged the Award under Section 34 (*Application for setting aside arbitral awards*) of the 1996 Act before the Delhi High Court ("**DHC**") on various grounds, *inter alia*, on the ground that the Arbitrator, being creature of the arbitration agreement in the Agreement, travelled beyond the terms of the Agreement in awarding *pendente lite* interest on the Award amount as the same was expressly barred by Clause 17 of the Agreement. The DHC by its judgement and order dated March 10, 2017, set aside the Award to the extent of award of pendente lite interest by stating that the Arbitrator fell in error in holding that Clause 17 only prescribed pre-reference interest and not *pendente lite* interest ("**Impugned Order**"). Upon challenge, the division bench of the DHC also upheld the Impugned Order. Consequently, the Appellant filed an appeal before the SC challenging the Impugned Order.

Issues

1. Whether the Arbitrator is justified in granting *pendente lite* interest in the light of Clause 17 of the Agreement.

2. Whether Clause 17 of the Agreement is *ultra vires* in terms of Section 28 of the Indian Contract Act, 1872.

Arguments

Contentions raised by the Appellant:

The Appellant contended that the Arbitrator had taken a plausible view and Clause 17 of the Agreement does not bar the payment of interest for *pendente lite* period. This argument was advanced by citing the judgments of ***Ambica Construction v. Union of India [(2017) 14 SCC 323]*** ("**Ambica Constructions Case**") and ***Raveechee and company v. Union of India [(2018) 7 SCC 664]*** ("**Raveechee Case**"), wherein it was held that the appellant was entitled for the payment of interest for the *pendente lite* period.

In addition, it was argued that Clause 17 of the Agreement, barring payment of interest to the contractor on any sum due to the contractor, is *ultra vires* and against the provisions of Section 28 (*Agreements in restraint of legal proceeding void*) of the Indian Contract Act, 1872 ("**Contract Act**").

Contentions raised by the respondents:

The Respondent submitted that Section 31(7)(a) (*Form and contents of arbitral award*) of the 1996 Act gives paramount importance to the contract entered into between the parties and categorically restricts the power of an arbitrator to award pre-reference and *pendente lite* interest when the parties themselves have agreed to the contrary. It was further argued that if the contract itself contains a specific clause which expressly bars the payment of interest, then it is not open for the arbitrator to grant *pendente lite* interest.

The Respondent further contented that Ambica Constructions Case was not applicable to this matter because it was decided under the Arbitration Act, 1940 ("**1940 Act**") whereas this dispute is in relation to the 1996 Act. In addition, the Respondent argued that Section 3 (*Power of court to allow interest*) of the Interest Act, 1978 ("**Interest Act**") confers power on the court or arbitrator to allow interest in the proceedings for recovery of any debt or damages or in proceedings in which a claim for interest in respect of any debt or damages already paid. However, Section 3(3) of the Interest Act carves out an exception and recognizes the right of the parties to contract out of the payment of interest arising out of any debt or damages and sanctifies contracts which bar the payment of interest arising out of debt or damages. Therefore, Clause 17 of the Agreement was not violative of any of the provisions of the Contract Act.

Observations of the Supreme Court

The SC observed that the law relating to award of *pendente lite* interest by an arbitrator under the 1996 Act is something which has been examined before by courts. The provisions of the 1996 Act give paramount importance to the contract entered into between the parties and categorically restricts the power of an arbitrator to award pre-reference and *pendente lite* interest when the parties themselves have agreed to the contrary. Section 31(7)(a) of the 1996 Act, which deals with the payment of interest, states that if the contract prohibits pre-reference and *pendente lite* interest, an arbitrator cannot award interest for the said period.

The SC, while analysing Clause 17 of the Agreement, stated that, the said clause barring interest was very clear and categorical and used the expression "*any moneys due to the contractor*" by the employer, which includes the amount awarded by the Arbitrator. It further stated that, in ***Sayeed Ahmed and Company v. State of Uttar Pradesh and Others [3 (2009) 12 SCC 26]*** and various other judicial pronouncements, it has held that as per Section 31(7)(a) of the 1996 Act, if the contract bars payment of interest, the arbitrator cannot award interest from the date of cause of action till the date of award. It further stated that both Ambica Constructions Case and Raveechee Case had no application to this case as these cases were decided under the 1940 Act whereas this case was in relation to the 1996 Act. Consequently, the SC came to the conclusion that if the contract contains a specific clause which expressly bars payment of interest, then it is not open for an arbitrator to grant *pendente lite* interest.

With respect to the second issue, the SC examined Section 28 of the Contract Act and observed that exception I to this section contains a rule that a contract by which two or more persons agree that any dispute which has arisen or which may arise between them in respect of any subject or class of subjects shall be referred to arbitration is not illegal. This exception saves contracts where the right to move the court for appropriate relief is restricted but where the parties have agreed to resolve their dispute through arbitration. Thus, a lawful agreement to refer the matter to arbitration can be made a condition precedent before going to courts and it does not violate Section 28 of the Contract Act. It further stated that no cause of action then accrues until the arbitrator has made the award and the only amount awarded in such arbitration is recoverable in respect of the dispute so referred. Section 31(7)(a) of the 1996 Act which allows parties to waive any claim to interest including *pendente lite*, and the power of the arbitrator to grant interest, is subject to the agreement of the parties.

The SC further stated that interest payments are governed in general by the Interest Act in addition to the specific statutes that govern an impugned matter. Section 2(a) (*Definitions*) of the Interest Act defines a "Court" which includes both a tribunal and an arbitrator. In turn, Section 3 (*Power of court to allow interest*) allows a "Court" to grant interest at prevailing interest rates in various cases. The provisions of Section 3(3) of the Interest Act explicitly allow the parties to waive their claim to an interest by virtue of an agreement. Section 3(3)(a)(ii) of the Interest Act states that the Interest Act will not apply to situations where the payment of interest is "*barred by virtue of an express agreement*". Thus, when there is an express statutory permission for the parties to contract out of receiving interest and they have done so without any vitiation of free consent, it is not open for the arbitrator to grant *pendent lite* interest.

Decision of the Supreme Court

Dismissing the case, the SC arrived at the conclusion that the DHC was justified in rejecting the claim of the Appellant seeking *pendente lite* interest on the award amount and Clause 17 of the Agreement is not *ultra vires* in terms of Section 28 of the Contract Act.

VA View:

The SC, in this Judgement, has rightly upheld the principle that an arbitrator is a creature of contract, and it cannot go beyond the four corners of contract. The issue of an arbitrator's power to grant *pendente lite* interest was not clearly settled as the SC, at different instances, such as in the judgement of ***Raveechee Case*** and ***Chittaranjan Maity v. Union of India [(2017) 9 SCC 611],*** used different approaches to resolve the said issue. However, this Judgement rightly clarifies the said issue.

The Judgement clearly states that in case there is an express clause barring interest payment, the arbitrator does not have the power to grant *pendente lite* interest on the award. This is further clarified by another recent judgement of ***Punjab State Civil Supplies Corporation Limited v. Ganpati Rice Mills [LL 2021 SC 591]*** dated October 20, 2021**,** wherein the SC held that, unless otherwise agreed, the arbitrator has substantial discretion to award interest on arbitration award. In light of both these judgements, the parties, while drafting an agreement may consider mentioning about the power of arbitrator to grant *pendente lite* interest explicitly, to avoid any uncertainty and confusion at a later stage.

II. NCLAT: Security Deposit and the interest thereon would fall within the ambit of the definition of 'Financial Debt' under the IBC.

The National Company Law Appellate Tribunal Principal Bench, New Delhi ("**NCLAT**") has in its judgment dated October 07, 2021 ("**Judgement**"), in the matter of ***Sach Marketing Private Limited v. Resolution Professional of Mount Shivalik Industries Limited, Ms. Pratibha Khandelwal [Company Appeal (AT) (Insolvency) No. 180 of 2021],*** held that 'Security Deposit' and the interest thereon would fall within the ambit of the definition of 'Financial Debt' as defined under Section 5(8)(f) of the Insolvency and Bankruptcy Code, 2016 ("**Code**").

Facts

The challenge in this appeal under Section 61 of the Code read with Rule 11 of the National Company Law Appellate Tribunal Rules, 2016, was against the order dated January 18, 2021 ("**Impugned Order**") passed by the National Company Law Tribunal, Jaipur Bench, ("**NCLT**") wherein the decision of Ms. Pratibha Khandelwal, the resolution professional of Mount Shivalik Industries Limited ("**Corporate Debtor**"), (the "**Resolution Professional**"/ "**Respondent**") was upheld, that is, she had considered the claim of Sach Marketing Private Limited (the "**Appellant**") as an operational debt.

The Corporate Debtor is in the business of manufacturing and distributing beer in India. An agreement dated April 01, 2014, was executed between the Corporate Debtor and the Appellant appointing the Appellant as sales promoter for the promotion of beer for 12 months. Subsequently, after the expiry of the first agreement, on April 01, 2015, another agreement was executed, with similar terms and conditions except for one modification in Clause 10 of the agreement with respect to 'Security Deposit' as follows, "*You have to deposit minimum security of Rs. 53,15,000/- with the Company which will carry interest at 21% per annum. We will provide you interest of Rs. 23,85,850/- at 21% per annum.*"

An amount of Rs. 61,00,850/- was provided by the Appellant in the year 2014. While so, the Corporate Debtor unilaterally adjusted the remaining deposit amount of Rs. 25,00,000/- from the security balance lying in the interest fund account to

the Security Deposit during the Financial Year 2015-16 as recorded in its ledgers. On March 31, 2016, the Corporate Debtor admitted the interest liability of Rs. 18,06,000/-. However, the Corporate Debtor failed to pay interest.

The Corporate Debtor was admitted into insolvency on June 12, 2018, and the Appellant filed their claim of Rs. 1,58,341/- as 'Operational Debt' and Rs. 1,41,39,410/- as 'Financial Debt' including the interest amount. The Resolution Professional addressed an e-mail dated March 18, 2019, stating that the claim for 'Financial Debt' has been considered as an 'Operational Debt'. Aggrieved by the decision of the Resolution Professional, the Appellant preferred an application before the NCLT seeking a direction to quash the unlawful classification and for admitting the claim as 'Financial Debt'. The NCLT negated the Appellant's contention and in the Impugned Order observed that the Resolution Professional has rightly considered the claim as 'Operational Debt'.

Issue

Whether Security Deposit and the interest thereon would fall within the ambit of the definition of 'Financial Debt'.

Arguments

Contentions raised by the Appellant:

The Appellant argued that the NCLT has failed to appreciate that Section 5(8)(f) of the Code is a 'residuary' and 'catch-all provision' and would cover all transactions which have the commercial effect of borrowing. Further that as per the Insolvency Law Committee Report of March 2018, any transaction structure as a tool or means for raising finance would be included as 'Financial Debt' under Section 5(8)(f) of the Code. The Resolution Professional has no adjudicatory power and the NCLT did not take this aspect into consideration. It was further contended that one has to go into the intent of the parties while interpreting a memorandum of understanding, that the same was given by way of financial assistance attracting interest payable thereon.

It was contended that the amount deposited could not be a mere 'Security Deposit' as there were no other transactions between the parties and the money was mandatorily returnable after a fixed tenure without any deduction or forfeiture. It was not a fixed sum. It was argued that the Corporate Debtor has established a practice of securing 'Financial Debt' in the garb of 'Security Deposits' under various agreements, for attaining financial assistance from private entities instead of getting the same from financial institutions.

Contentions raised by the Respondent:

The Resolution Professional submitted that one of the 'Financial Creditors' namely, New View Consultants Private Limited had earlier challenged the decision of the Resolution Professional to include one Mahalakshmi Traders as a 'Financial Creditor' by way of an application before the NCLT wherein by order dated September 28, 2018, the NCLT had dismissed the application and observed that, "*…sales agency commission and amounts due arising purely out of the agency relationship including the security deposit placed as between the Corporate Debtor and the respondent should be strictly excluded from the purview of 'financial debt' ….*" ("**Order**").

It was submitted that the Order had not been challenged and had since attained finality. Hence the same principle as enumerated in the Order is also applicable to the Appellant herein. Therefore, it was contended that 'Security Deposit' does not fall within the definition of Section 5(8) of the Code to be categorised as a 'Financial Debt'. Further that, as per the agreement executed between the Appellant and the Corporate Debtor, the Appellant was termed as a "C&F Agent", hired basically for promotion of sale of beer.

Observations of the NCLAT

The NCLAT noted that Clause 10 of the agreement was a conditional clause meaning thereby that only in the event of the Appellant making such a deposit, he would be appointed as a sales promoter. The said clause stipulated that the Appellant should deposit minimum security of Rs. 53,15,000/- with the Corporate Debtor which will carry interest at 21% per annum. Thereafter, though the minimum 'Security Deposit' of Rs. 53,15,000/- carrying interest at 21% per annum was retained, the amount against which interest at 21% per annum would be paid by the Corporate Debtor to the Appellant was modified to Rs. 32,85,850/-. The NCLAT further noted that, from the provisions of the agreement, it was clear that the Appellant was required to provide adequate funds to cover the operational and other expenses required for running the depot. Further, it was seen from the said agreement that over and above the interest of Rs. 53,15,000/- a further sum of Rs. 7,85,850/- was also to be provided by the Appellant and interest of 21% per annum would be paid for the said amount. It is significant to mention here that this amount was not even termed as 'security' in the agreement dated April 01, 2014.

The NCLAT observed that, for a debt to be termed as 'Financial Debt', the basic elements that are to be seen is whether (a) there is disbursal against consideration for the time value of money; and (b) whether it has a commercial effect of borrowing. The definitions provided in Sections 5(7) and 5(8) of the Code provide that a 'Financial Creditor' refers to a person to whom 'Financial Debt' is owed and includes even a person to whom such debt has been legally assigned or transferred to.

The NCLAT observed that the Legislature has included any financial transaction in the definition of 'Financial Debt' which are usually for a sum of money received today, to be paid over a period of time in instalments, or a single payment in future. The NCLAT noted that the expression time value has been defined in Black's Law Dictionary as "*the price associated with the length of time that an investor must wait until an investment matures or the related income is earned*". In the instant case, the word 'Security Deposit' mentioned in Clause 10 of the agreement has to be given the correct interpretation. The NCLAT observed that the true effect of the transaction ought to be determined from the terms of the agreement, keeping in view, the facts and circumstances of the case.

The NCLAT observed that, in the instant case, the 'Sales Promotion Agreement' mandated a 'Security Deposit' carrying interest at 21% per annum. It was not in dispute that the Corporate Debtor did not adhere to the payment of interest and that there was a default. In other words, neither the 'Debt' nor the 'Default' was disputed. The only question which arose was whether it is an 'Operational Debt' or a 'Financial Debt'. The Appellant had specifically denied securing any 'stocks', 'goods' or other properties to the Corporate Debtor and was only appointed for the sole purpose of sales promotion of beer.

The NCLAT noted that the financial statement of the Appellant for the financial year 2017-18 shows revenue from interest on the 'Security Deposit'. The financial statements mention the 'Security Deposit' under the head of other financial liabilities alongwith entries such as '*interest accrued on borrowings*'. The NCLAT observed that the said amounts were treated as long term loans and advances in the financial statement of the Corporate Debtor for the financial year 2015-16 and under 'other long term liabilities' for the financial year 2016-17. The NCLAT reiterated that the 'Security Deposit' amount had admittedly an element of interest payable at 21% per annum and hence could be construed as having commercial effect of borrowing.

The NCLAT noted the fact that amounts were paid with a specific term and tenure as evident from the term loan dated April 01, 2014, and April 01, 2015, which specified the time periods. The Corporate Debtor had accepted the 'Security Deposit' from the Appellant and credited the interest for some time against such amounts for the period 2014-15. The NCLAT observed that the payment of interest on the amounts borrowed by the 'Corporate Debtor' is nothing but consideration for the time value of money and the interest is being paid to the Appellant for using the money belonging to the Appellant over a period of time. The NCLAT accordingly arrived at the conclusion that the status of Appellant is that of a 'Financial Creditor' *vis-à-vis* the amount of 'Security Deposit' as per Section 5(7) read with Section 5(8) of the Code.

Decision of the NCLAT

The NCLAT held that the 'Security Deposit' in question is a 'Financial Debt'. Consequentially this appeal was allowed and the Impugned Order was set aside by the NCLAT.

VA View:

In this Judgement, the NCLAT has rightly analyzed that, any of the transactions specified in Clauses (a) to (i) of Section 5(8) of the Code would fall within the ambit of the definition of 'Financial Debt' only in the event if they include the essential elements stated in the principal clause that is an element of disbursal, against the consideration for the time value of money and has the commercial effect of borrowing.

The NCLAT relied upon precedents and observed that the case of a deposit is something more than a mere loan of money. It will depend on the facts of each case whether the transaction is clothed with the character of a deposit of money. The surrounding circumstances, the relationship and character of the transactions and the manner in which parties treated the transactions will throw light on the true form of the transactions. For a person to be defined as a Financial Creditor of the Corporate Debtor, it had to be shown that the Corporate Debtor owed a Financial Debt to such a person.

III. Supreme Court: Chairman, directors, and other key managerial personnel of a company cannot be automatically held vicariously liable for the offences committed by a company.

The Hon'ble Supreme Court ("**SC**") in ***Ravindranatha Bajpe v. Mangalore Special Economic Zone Limited and Others*** *(decided on September 27, 2021)*, held that the chairman, directors, and other key managerial personnel of a company cannot be automatically held vicariously liable for the offences committed by a company unless specific allegations and averments against them are made with respect to their individual role.

Facts

Ravindranatha Bajpe ("**Appellant/Complainant**"), the original complainant, filed a private complaint against thirteen accused (accused nos. 1 to 13) in the Court of the learned Judicial Magistrate, First Class, Mangalore ("**Magistrate**"). The Complainant was the absolute owner and in possession and enjoyment of the certain immovable property ("**Schedule Properties**").

Accused nos. 1 and 6 were companies incorporated under the Companies Act and accused nos. 2, 3 and 4 were the Chairman, Managing Director and Deputy General Manager (Civil & Env.) of accused no. 1, respectively. Accused no. 5 was the planner and executor of the project work. Accused nos. 7, 8 and 9 were the Chairman, Executive Director and Site Supervisor of accused no. 6. Accused no. 10 was the sub-contractor under accused no. 6 and accused nos. 11 to 13 were the employees of accused no. 10.

It was contended by the Complainant that accused no. 1 intended to lay water pipeline by the side of Mangalore-Bajpe Old Airport Road abutting the Schedule Properties, and for the said purpose, it had obtained permission from the Department of Public Works, Mangalore. Accused no. 2 on behalf of accused no. 1 appointed accused no. 6 as a contractor for execution of the said project of laying the water pipe line. They in turn had appointed accused no. 9 as Site Supervisor and the accused no. 10 being the sub-contractor engaged accused nos. 11 to 13 as labourers.

It was contended that accused nos. 2 to 5 and 7 to 13 had conspired with common intention to lay the pipeline beneath the Schedule Properties belonging to the Complainant without any lawful authority and right whatsoever. In furtherance thereof, they had trespassed over the Schedule Properties and demolished the compound wall. Further, they had cut and destroyed valuable trees and laid pipeline beneath the Schedule Properties. It was contended that when this high-handed act was committed by the accused, the Complainant was out of station and that he came back and noticed the destructive activities.

It was contended that the accused were having no right to commit trespass over the Schedule Properties, and each of the accused had common intention to lay the pipeline by damaging the property of the Complainant. With that intention, they committed criminal trespass and caused damages. It was contended that all the accused are jointly and severally liable to make good the loss to the Complainant.

The learned Magistrate by order dated September 24, 2013 ("**Order**") directed to register the case against all the accused. Aggrieved, the accused preferred Criminal Revision Petition before the learned Sessions Court. The learned Sessions Court allowed the Criminal Revision Petition and quashed and set aside the Order passed by the learned Magistrate. The Complainant preferred revision applications before the High Court of Karnataka and by the impugned judgment and order, the High Court of Karnataka dismissed the said revision applications. Hence, the Complainant approached the SC.

Issue

Whether the accused, being officials of a company, can be held liable for the actions of a company in the absence of specific allegations on the role played by them.

Arguments

<u>Contentions raised by the Appellant/ Complainant</u>:

It was submitted that the accused have conspired with common intention to lay the pipeline beneath the Schedule Properties belonging to the Complainant, without any lawful authority and right whatsoever. In furtherance thereof, they committed trespass and demolished the stone compound wall and valuable trees of the Complainant.

It was further submitted that, even otherwise there was a specific allegation in the complaint that accused nos. 1 to 8 conspired with the co-accused to lay the pipeline under the Schedule Properties of the Complainant and, therefore, at the stage of issuing process/summons, the revisional court could not have interfered with the Order passed by the learned

Magistrate summoning the accused. It was submitted that, being the administrators of the companies, all the executives are vicariously liable.

Contentions raised by the accused:

It was submitted that in the facts and circumstances of the case, and more particularly when it was found that there are no specific allegations and role attributed to the accused, except the bald statement that all of them have connived with each other, the learned Sessions Court was absolutely justified in setting aside the Order passed by the learned Magistrate issuing the process/summons against the accused. Further, it was submitted that, the SC in catena of decisions has held that issuing summons/process by the Court is a very serious matter and, therefore, unless there are specific allegations and the role attributed to each accused, the Magistrate ought not to have issued the process. It was further submitted that accused nos. 2 to 5 were arrayed as accused merely in their capacity as Chairman, Managing Director, Deputy General Manager (Civil & Env.) of accused no. 1. Accused no. 5 was the planner and executor of the project work and accused nos. 7 and 8 were arrayed merely in their capacity as being Chairman and Executive Director of accused no. 6. All of them were stationed at Hyderabad at the time of the commission of the alleged offence. Further, there are no allegations that at the time of commission of the alleged offence, they were present.

Observations of the Supreme Court:

The SC noted the reliance placed by the accused on the case of ***Sunil Bharti Mittal v. Central Bureau of Investigation [(2015) 4 SCC 609]*** wherein it was observed that an individual who has perpetrated the commission of an offence on behalf of a company can be made an accused, along with the company, if there is sufficient evidence of his active role coupled with criminal intent. The second situation in which he can be implicated is in those cases where the statutory regime itself attracts the doctrine of vicarious liability, by specifically incorporating such a provision.

Further, as observed by the SC in the case of ***GHCL Employees Stock Option Trust v. India Infoline Limited [(2013) 4 SCC 505]*** the Court held that the learned Magistrate has to record his satisfaction about a *prima facie* case against the accused who are Managing Director, Company Secretary and the Directors of the Company and the role played by them in their respective capacities which is *sine qua non* for initiating criminal proceedings against them. Looking to the averments and the allegations in the complaint, there were no specific allegations and/or averments with respect to role played by them in their capacity as Chairman, Managing Director, Executive Director, Deputy General Manager and Planner & Executor. Merely because they are Chairman, Managing Director/Executive Director and/or Deputy General Manager and/or Planner/Supervisor of accused nos. 1 and 6, without any specific role attributed and the role played by them in their capacity, they cannot be arrayed as an accused, more particularly they cannot be held vicariously liable for the offences committed by accused nos. 1 and 6.

Decision of the Supreme Court:

In absence of any specific allegations and the specific role attributed to the accused as Chairman, Managing Director, Deputy General Manager (Civil & Env.), Planner & Executor, Chairman and Executive Director, the learned Magistrate was not justified in issuing process against accused nos. 1 to 8 for the offences punishable under the Indian Penal Code, 1860.

In view of the above, the SC dismissed the present appeals.

VA View:

The instant judgment reinforces the jurisprudence on the criminal liability of chairman, managing director and other key managerial personnel when a company is made the accused. Vicarious liability of directors would arise only when the statute provides for the same.

The judgment passed by the SC along with the observations made, clarifies the position of accountability of directors and key managerial personnel of a company. In the absence of specific allegations proving culpability and the role played in the crime, the directors and key managerial personnel cannot be held accountable and proceeded against. This judgment would prevent key managerial personnel not being involved in the offence from being maliciously arrayed as an accused and being held accountable for the actions of the company.

IV. Supreme Court: Limitation period for appeal under Insolvency and Bankruptcy Code, 2016 begins from the date of pronouncement of order and delay in uploading the order cannot exclude limitation.

The Supreme Court ("**SC**") has in its judgment dated October 22, 2021 ("**Judgement**"), in the matter ***V Nagarajan v. SKS Ispat and Power Limited and Others [Civil Appeal No. 3327 of 2020],*** held that the period of limitation for filing of appeal against an order as per Section 61 of the Insolvency and Bankruptcy Code, 2016 ("**IBC**") will start running as soon as the same is pronounced, and that it is not dependent on the date when the order is uploaded.

Facts

The instant case is an appeal before the SC under Section 62 *(Appeal to Supreme Court)* of the IBC against the judgement of the National Company Law Appellate Tribunal, Delhi ("**NCLAT**") dated July 13, 2020, wherein the NCLAT had dismissed the appeal filed by the resolution professional ("**Appellant**") against the National Company Law Tribunal, Chennai's ("**NCLT**") order dated December 31, 2019 ("**NCLT Order**"), as barred by limitation. The NCLT had dismissed the Appellant's application in a liquidation proceeding, seeking interim relief against the invocation of a bank guarantee by SKS Power Generation Chhattisgarh Limited ("**Respondent No. 10**"), the subsidiary of SKS Ispat and Power Limited ("**Respondent No. 1**"), against Cethar Limited ("**Corporate Debtor**"), a corporate entity, engaged in engineering and project consultancy, undergoing liquidation. After an unsuccessful attempt at resolution, the Appellant was appointed as its liquidator on April 25, 2018. Respondent No. 1 and Respondent No. 10 are collectively called "**Respondents**". The Appellant instituted proceedings under Section 43 *(Preferential transactions)* of the IBC and Section 45 *(Avoidance of undervalued transactions)* of the IBC to avoid preferential and undervalued transactions of the Corporate Debtor, in which no relief was sought against Respondent No. 10. The Appellant subsequently discovered that Respondent No. 1 and Respondent No. 10 had colluded with the promoters of the Corporate Debtor and defrauded the latter of over INR 400 crores by entering into a fraudulent settlement of INR 4.58 crores. The Appellant alleged that these transactions formed a part of the ongoing investigation by the Central Bureau of Investigations and the Enforcement Directorate. Respondent No. 10, allegedly at the behest of Respondent No. 1, sought to invoke certain bank guarantees issued by the Corporate Debtor for its failure to perform its engineering services. The Appellant filed an application to resist the invocation of the performance guarantee until the conclusion of the liquidation proceedings.

The NCLT refused to grant an injunction against the invocation of the bank guarantee until the conclusion of liquidation proceedings. A copy of the NCLT Order was uploaded on the NCLT website only on March 12, 2020, with the incorrect name of the judicial member who had passed the order. The corrected order was uploaded on March 20, 2020. Subsequently, the Appellant awaited the issue of a free copy and allegedly sought the free copy on March 23, 2020, under the provisions of Section 420(3) of the Companies Act, 2013 ("**Companies Act**") read with Rule 50 *(Registry to send certified copy)* of the National Company Law Tribunal Rules, 2016 ("**NCLT Rules**"). According to the Appellant, the free copy has not been issued till date. Owing to the COVID-19 ("**Pandemic**") induced lockdown, the appeal before the NCLAT was filed by the Appellant on June 8, 2020 with an application for exemption from filing a certified copy of the order as it had not been issued. The NCLAT in its order dated July 13, 2020, citing Section 61(2) of the IBC which mandates a limitation period for appeals to be thirty days, extendable by fifteen days, held that the appeal filed under Section 61(1) of the IBC was barred by limitation. It noted that the statutory time limit of thirty days had expired and an application for condonation of delay had not been filed. Further, it noted that contrary to Rule 22 *(Presentation of appeal)* of the National Company Law Appellate Tribunal Rules, 2016 ("**NCLAT Rules**") which provides that every appeal must be accompanied with a certified copy of the impugned order, the same had not been annexed in this case. Aggrieved, the Appellant filed the instant appeal before the SC against the order of the NCLAT on the question of limitation.

Issue

Whether 'Success Fees' was chargeable by the Appellant.

Arguments

<u>Contentions raised by the Appellant</u>:

The Appellant submitted that after the NCLT Order, the constitution of the bench was changed shortly thereafter, hence the copy of the order was not uploaded until March 12, 2020, and the copy uploaded on March 12, 2020, was defective. The corrected copy was uploaded only on March 20, 2020. A request for the free copy was made at the NCLT registry on March 23, 2020, by the Appellant. The NCLAT was shut on account of the Pandemic from March 24, 2020 and a statement of purpose for commencement of virtual hearings was issued on May 30, 2020. The Appellant had immediately filed an appeal on June 8, 2020 with a downloaded copy, relying on the SC's *suo motu* order dated March 23, 2020 ("**Suo Motu Order**"), extending limitation and the lack of receipt of a free certified copy. The Appellant argued that the Suo Motu Order

had stopped the clock of limitation with effect from March 15, 2020 on account of the Pandemic. It was submitted that the appeal was *de jure* filed within three days of the order being received, within the thirty day limitation period prescribed under Section 61 *(Appeals and Appellate Authority)* of the IBC. It was argued that Rule 22 of the NCLAT Rules mandates a certified copy of the order for filing an appeal. However, Rule 14 *(Power to exempt)* of the NCLAT Rules permits a waiver from compliance with any of the rules, which has been usually granted in case of a downloaded online copy, in lieu of a certified copy of the order. The Appellant submitted that the appeal was not found defective under Rules 26 (*Endorsement and scrutiny of petition or appeal or document)* and 27 (*Registration of proceedings admitted)* of the NCLAT Rules as an application for waiver of filing a certified copy was duly filed and allowed.

The Appellant contended that Section 420(3) of the Companies Act read with Rule 50 of the NCLT Rules mandates a free copy of an order to be issued to every party, obviating the need for any party to obtain a certified copy of an order it seeks to impugn by way of an appeal. Therefore, it was submitted that the clock of limitation under Section 61 of the IBC would run from the date the free copy is issued to the party. Reliance was placed on the order of a three judge bench of the SC in ***Sagufa Ahmed v. Upper Assam Plywood Products Private Limited [2021 (2) SCC 317]*** ("**Sagufa Ahmed**"), albeit in the context of a case under the Companies Act, wherein it was held that the limitation period would run only from the date on which a copy of the order is made available to the aggrieved party. The Appellant submitted that Section 420(3) of the Companies Act and Rule 50 of the NCLT Rules would equally apply to proceedings under the IBC and the ratio in Sagufa Ahmed would squarely apply, by relying on the decision of the SC in ***BK Educational Services Private Limited v. Parag Gupta and Associates [2019 (11) SCC 633]*** ("**BK Educational Services**").

It was pointed out that Section 12(2) of the Limitation Act, 1963 ("**1963 Act**") was applicable from the date on which the copy of the order is made available and not from the date when such order is passed. The explanation to Section 12(2) of the 1963 Act, which states that "*in computing under this section the time requisite for obtaining a copy of a decree or an order, any time taken by the court to prepare the decree or order before an application for a copy thereof is made shall not be excluded*", would not be attracted in cases where a free copy is mandated by the statute and online copies can be used for filing an appeal. Section 12(2) of the 1963 Act excludes the time taken from the date of order to it becoming available. Section 61 of the IBC prescribing a limitation period is subservient to the principle of *lex non cogit ad impossibilia* which states that the law cannot mandate a person to do an impossible act. Further, the Appellant submitted that an application for condonation of delay was not required when the Appellant had instituted the appeal in time and was statutorily entitled to a free certified copy.

Contentions raised by the Respondents:

It was submitted that since Section 61 of the IBC mandates an appeal against any order under the Companies Act to be filed within 30 days, the limitation to challenge the NCLT Order expired on February 15, 2020, even after accounting for the fifteen day extension, granted discretionarily under Section 61(2) of the IBC. Section 61(2) of the IBC does not state that limitation is to be applicable from the date of the order being 'made available', as against the provision enumerated under Section 421(3) of the Companies Act. It was argued that special acts override general enactments. It was contended that "made available" does not imply that parties can indefinitely wait until a free certified copy is provided to them. It was emphasized that a timely application for a certified copy has to be filed.

It was argued that as per the decision of the NCLAT in ***Pr. Director General of Income Tax v. Spartek Ceramics India Ltd***, the period of thirty days for filing an appeal commences from the date of the 'knowledge' of the order. Section 12 *(Exclusion of time in legal proceedings*) of the 1963 Act prescribes that the limitation period can be ascertained only after an application for a certified copy of the judgement or order is filed within the limitation period, in order to not be declared as time barred. The time period of limitation can either be calculated from the date of the NCLT Order, or from the date of filing an application for a certified copy of the said order. In the absence of compliance with either, any appeal will be deemed as barred by limitation. It was further submitted that Rule 22(f) of the NCLAT Rules mandates an appeal to be accompanied with a certified copy of the order. The Appellant did not file for a certified copy of the NCLT order. Yet, the Appellant instituted its appeal before the NCLAT on the basis of an online copy without an application seeking exemption from filing a certified copy or an application seeking condonation of delay.

The Respondents further argued that the Appellant should have either waited to receive the free certified copy from the NCLT as per Section 420(3) of the Companies Act or applied for a certified copy within the limitation period, and could not selectively take shelter under one provision. Time is of the essence under the IBC, since it is a special enactment interpreted with strict limitation periods, due to which the Respondents expected diligence on the part of the Appellant. It was pointed out that in ***Mobilox Innovations Private Ltd v. Kirusa Software Private Ltd***, the SC observed, in the context of appeals, that timelines are sacrosanct under the IBC as the best interests of all the stakeholders of the process lay in the time bound completion of resolution or liquidation of the company without being protracted.

Observations of the Supreme Court

The SC, noting the overriding effect of the IBC over the 1963 Act, observed that as per Section 9 *(Courts to try all civil suits unless barred)* of the Code of Civil Procedure, 1908, there is an inherent right to bring a suit of a civil nature, unless the suit is barred by a statute. The SC analyzed the comprehensive dispute resolution process, envisaged by the IBC, wherein the NCLT is the empowered adjudicating authority under Section 60 *(Adjudicating Authority for corporate persons)* of the IBC with the jurisdiction to entertain any proceeding in relation to insolvency resolution or liquidation proceedings under the IBC. An appeal lies against an order of the NCLT to the NCLAT, under Section 61(1) of the IBC, and an order of the NCLAT is subject to an appeal on a question of law to the SC under Section 62 of IBC. The jurisdiction of civil courts has been explicitly ousted by Section 63 *(Civil court not to have jurisdiction)* of the IBC. Section 61(2) of the IBC specifically provides for a limitation period of thirty days, extendable by a maximum of fifteen days on the demonstration of sufficient cause for the delay. The SC noted that in BK Educational Services, the SC had considered the interplay of the IBC, 1963 Act and the Companies Act constituting the NCLT and had held that the 1963 Act is applicable to proceedings under the IBC by virtue of Section 238A *(Limitation)* of the IBC.

In Sagufa Ahmed the SC held, in the context of a winding up petition under the Companies Act, that the aggrieved party could wait till it received its free copy under Section 420(3) of the Companies Act read with Rule 50 of the NCLT Rules, and was not obligated to file an application for a certified copy for the purposes of the computation of limitation. However, the SC in Sagufa Ahmed clarified that this would not apply once an application for a certified copy was made and the order was received. The SC observed in Sagufa Ahmed that irrespective of when the free certified copy is received, the limitation period would be computed from the date of receipt of the certified copy. In a field not covered by a special law which invests the NCLT with jurisdiction, the general principle for the computation of limitation for filing an appeal against an order of the NCLT is governed by the statutory mandate of Section 420(3) of the Companies Act read with Rule 50 of the NCLT Rules, which enables a party to compute limitation from the date of receipt of the statutorily mandated free certified copy, without having to file its own application. However, the statutory mandate of a free copy is not to enable litigants to take two bites at the apple where they could compute limitation from either when the certified copy is received on the litigant's application or received as a free copy from the registry, whichever is later. The SC recognized that IBC is a complete code in itself and overrides any inconsistencies that may arise in the application of other laws. The notable difference between Section 421(3) of the Companies Act and Section 61(2) of the IBC is, in the absence of the words "*from the date on which a copy of the order of the Tribunal is made available to the person aggrieved*" in the latter. The absence of these words cannot be construed as a mere omission which can be supplemented with a right to a free copy under Section 420(3) of the Companies Act read with Rule 50 of the NCLT Rules for the purposes of reckoning limitation. This would ignore the context of the IBC's provisions and the purpose of the legislation.

The SC observed that the power to condone delay is tightly circumscribed under the IBC and conditional upon showing sufficient cause, even within the period of delay which is capable of being condoned. The IBC sought to structure and streamline the entire process of insolvency, right from the initiation of insolvency to liquidation, as a one-stop mechanism. Section 12(3) of the IBC prescribes a strict timeline for the completion of the corporate insolvency resolution process of one hundred and eighty days which is extendable by ninety days. The proviso to Section 12(3) of the IBC imposes an outer-limit of three hundred and thirty days, including time taken in legal proceedings. When timelines are placed even on legal proceedings, reading in the requirement of an "order being made available" under a general enactment like the Companies Act, would do violence to the special provisions enacted under the IBC where timing is critical. The IBC, as a prescriptive mechanism, affecting rights of stakeholders who are not necessarily parties to the proceedings, mandates diligence on the part of applicants who are aggrieved by the outcome of their litigation. An appeal, if considered necessary and expedient by an aggrieved party, is expected to be filed forthwith without awaiting a free copy which may be received at an indefinite stage. Hence, the omission of the words "*from the date on which the order is made available*" for the purposes of computation of limitation in Section 61(2) of the IBC, is a consistent signal of the intention of the legislature to nudge the parties to be proactive and facilitate timely resolution.

The SC clarified that it could not be said that the parties can automatically dispense with their obligation to apply for and obtain a certified copy for filing an appeal. Any delay in receipt of a certified copy, once an application has been filed, has been envisaged by the legislature and duly excluded to not cause any prejudice to a litigant's right to appeal. A person wishing to file an appeal is expected to file an application for a certified copy before the expiry of the limitation period, upon which the time requisite for obtaining a copy is to be excluded. However, the time taken by the court to prepare the decree or order before an application for a copy is made cannot be excluded. If no application for a certified copy has been made, no exclusion can ensue. It could not be said that the right to receive a free copy under Section 420(3) of the Companies Act obviated the obligation on the Appellant to seek a certified copy through an application.

The SC emphasized that owing to the special nature of the IBC, the aggrieved party was expected to exercise due diligence and apply for a certified copy upon pronouncement of the order it seeks to assail, in consonance with the requirements of Rule 22(2) of the NCLAT Rules. Section 12(2) of the 1963 Act allows for an exclusion of the time requisite for obtaining a

copy of the decree or order appealed against. The person aggrieved by an order under the IBC could not await the receipt of a free certified copy under Section 420(3) of the Companies Act read with Rule 50 of the NCLT Rules and prevent limitation from running. Accepting such a construction will upset the timely framework of the IBC. The litigant has to file its appeal within thirty days, which can be extended up to a period of fifteen days, and no more, upon showing sufficient cause. Rule 22(2) of the NCLAT Rules mandates the certified copy being annexed to an appeal, which continues to bind litigants under the IBC. While it is true that the tribunals may choose to exempt parties from compliance with this procedural requirement in the interest of substantial justice, as reiterated in Rule 14 of the NCLAT Rules, the discretionary waiver does not act as an automatic exception where litigants make no efforts to pursue a timely resolution of their grievance.

Decision of the Supreme Court

The SC held that the period of limitation for filing an appeal under Section 61(1) of the IBC against the NCLT Order, expired on January 30, 2020, in view of the thirty days period prescribed under Section 61(2) of the IBC. Any scope for a condonation of delay expired on February 14, 2020, in view of the outer limit of fifteen days prescribed under the proviso to Section 61(2) of the IBC. The Pandemic induced lockdown from March 23, 2020 and the Suo Motu Order has had no impact on the rights of the Appellant to institute an appeal in this proceeding. The SC emphasized that the act of filing an application for a certified copy was not just a technical requirement for computation of limitation but also an indication of the diligence of the aggrieved party in pursuing the litigation in a timely fashion. The SC further held that since the Appellant failed to apply for a certified copy, it rendered the appeal filed before the NCLAT as clearly barred by limitation. The SC thus upheld the decision of the NCLAT of having dismissed the appeal on the ground of limitation, and accordingly dismissed the instant appeal under Section 62 of the IBC.

VA View:

By this Judgement, the SC has reiterated that courts cannot condone delays beyond statutory prescriptions in special statutes containing a provision for limitation. The SC has upheld the integrity of the IBC and its fundamental purpose, that is, insolvency resolution in a speedy and time-bound manner. The SC has recognized the criticality of strict timelines under the IBC, which is crucial to the workability of the mechanism, health of the economy, recovery rate of lenders and valuation of the corporate debtor.

Since the IBC is a watershed legislation which seeks to overhaul the previous bankruptcy regime, which was afflicted by delays and indefinite legal proceedings, the SC has rightly ensured that a sleight of interpretation of procedural rules does not defeat the substantive objective of a legislation like the IBC that has an impact on the economic health of the nation.

Contributors:
Aayush Jain, Dharmesh Khandelwal, Oorja Chari, Simran Gupta and Simrann Venkkatesan.

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Contact Details :

www.vaishlaw.com

NEW DELHI
1ST, 9TH 11TH Floor,
Mohan Dev Bldg, 13 Tolstoy Marg,
New Delhi-110001, India
Phone : +91-11-4249 2525
Fax : +91-11-23320484
delhi@vaishlaw.com

MUMBAI
106, Peninsula Centre,
Dr. S.S. Rao Road, Parel,
Mumbai – 400012, India
Phone : +91-22-4213 4101
Fax : +91-22-4213 4102
mumbai@vaishlaw.com

BENGALURU
105-106, Raheja Chambers,
#12, Museum Road,
Bengaluru-560001, India
Phone : +91-80-40903588/89
Fax : +91-80-40903584
bangalore@vaishlaw.com