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Key Highlights

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I. Supreme Court: NCLT cannot adjudicate contractual dispute if termination of contract is based on grounds unrelated to Corporate Debtor's insolvency

The Hon'ble Supreme Court ("**SC**") has in its judgement dated November 23, 2021, in the matter of ***TATA Consultancy Services Limited v. Vishal Ghisulal Jain, Resolution Professional, SK Wheels Private Limited [Civil Appeal No 3045 of 2020]*** held that, the residuary jurisdiction of the National Company Law Tribunal ("**NCLT**") cannot be invoked if the termination of a contract is based on grounds unrelated to the insolvency of the corporate debtor.

Facts

Tata Consultancy Services Limited ("**Appellant**") entered into a facilities agreement dated December 01, 2016 with S. K. Wheels Private Limited ("**Corporate Debtor**") to avail services in the nature of facilities from the Corporate Debtor.

There were multiple lapses by the Corporate Debtor in fulfilling its contractual obligations. The Corporate Debtor failed to remedy satisfactorily such contractual breaches. Thereafter, the Appellant notified the Corporate Debtor by way of an e-mail dated August 01, 2018, that it intended to invoke the penalty clause of the facilities agreement for the alleged contractual breaches. However, the Appellant could not initiate recovery proceedings on account of the moratorium imposed under Section 14 of the Insolvency and Bankruptcy Code, 2016 ("**IBC**"). Thereafter, a termination notice was issued by the Appellant.

Subsequently, the Corporate Debtor disputed the issuance of the termination notice on the ground that no material breaches had occurred and that the Corporate Debtor was not given a period of 30 (thirty) days to cure the defects before the agreement was terminated as per the facilities agreement. Thereafter, the Corporate Debtor filed a miscellaneous application before the NCLT under Section 60(5)(c) of the IBC for quashing of the contract termination notice. The NCLT granted an *ad-interim* stay and observed that, *prima facie* it appeared that the contract was terminated without serving the requisite notice of 30 (thirty) days ("**NCLT Order**").

Thereafter, the National Company Law Appellate Tribunal ("**NCLAT**") by way of its order dated June 24, 2020, upheld the NCLT Order and observed therein that, NCLT had correctly stayed the operation of the termination notice since the main objective of the IBC is to ensure that the Corporate Debtor continues as a going concern. The NCLAT referred to Section 14 of the IBC to highlight that a moratorium is imposed to ensure the smooth functioning of the Corporate Debtor and to safeguard its status as a going concern ("**NCLAT Order**"). Aggrieved by the NCLAT Order, the Appellant preferred the present Appeal before the SC ("**Appeal**").

Issues

1. Whether the NCLT can exercise its residuary jurisdiction under Section 60(5)(c) of the IBC to adjudicate upon the contractual dispute between the parties.

2. Whether in the exercise of such a residuary jurisdiction, it can impose an *ad-interim* stay on the termination of the facilities agreement.

Arguments

Contentions raised by the Appellant:

1. The NCLT has misconstrued the provisions of Section 14 of the IBC which relate to the provision of goods and services to the Corporate Debtor once the moratorium is imposed. In the present case, the Appellant was availing of the services of the Corporate Debtor, to which Section 14 of the IBC had no application.

2. The termination notice was issued to the Corporate Debtor not because it was undergoing Corporate Insolvency Resolution Process ("**CIRP**"), but due to the material breaches of the agreement and several opportunities were provided to the Corporate Debtor to remedy those breaches before the issuance of the termination notice.

3. Since the facilities agreement was not the sole contract of the Corporate Debtor, termination of the said facilities agreement would not lead to its corporate death and is not against the objective of IBC.

4. Additionally, the NCLT under Section 60(5)(c) of the IBC could not have invoked its residuary powers where there was a patent lack of jurisdiction. The IBC does not permit a statutory override of all contracts entered with the Corporate Debtor. A third party has a contractual right of termination.

5. Reliance was placed on ***Gujarat Urja Vikas v. Amit Gupta and Others [(2021) 7 SCC 209]*** wherein the SC had injuncted a third party from terminating its contract with the corporate debtor therein, because there were concurrent findings of the NCLT and the NCLAT that the contract in question was the sole contract of the corporate debtor and the termination of the contract by the third party was merely on the ground of initiation of CIRP, without there being any contractual default on part of the corporate debtor.

Contentions raised by the Corporate Debtor:

1. The NCLT is vested with the jurisdiction under Section 60(5)(c) of the IBC to adjudicate issues relating to fact or law in respect of a company undergoing CIRP.

2. Section 238 of the IBC has an overriding effect over other laws and reliance was placed on the decision of the SC in ***Ashoka Marketing v. Punjab National Bank [1990) 4 SCC 406]*** wherein it was held that two special laws containing non-obstante clauses must be interpreted harmoniously by looking at the purpose of the laws.

3. In Gujarat Urja Vikas (supra), the SC has held that the residuary jurisdiction of the NCLT under Section 60(5)(c) of the IBC gives it a wide discretion to adjudicate questions of law or fact arising from or in relation to the insolvency resolution proceedings. Further, it was held that Section 14 of the IBC is not exhaustive of the grounds of judicial intervention contemplated under the IBC, otherwise, Section 60(5)(c) of the IBC would be rendered ineffective and one such ground of intervention is when the status of the Corporate Debtor as a going concern is in jeopardy.

4. The Corporate Debtor had two main sources of income – a dealership of Maruti vehicles and the facilities agreement with the Appellant. The dealership was terminated before the initiation of CIRP, thus, the only existing source of income as of the date of initiation of CIRP was the facilities agreement. Hence, the termination of the facilities agreement would adversely affect the Corporate Debtor.

Observations of the Supreme Court

The SC while adjudicating upon the issues in the present Appeal, distinguished the facts in the case of Gujarat Urja Vikas (supra) and the instant case. While examining the ingredients of Section 14 of the IBC, it was observed that the Appellant was neither supplying any goods or services to the Corporate Debtor in terms of Section 14(2) of the IBC, nor was it recovering any property that was in possession or occupation of the Corporate Debtor as the owner or lessor of such property as envisioned under Section 14(1)(d) of the IBC. Thus, the SC concluded that Section 14 of the IBC was indeed not applicable. Further, the Appellant had time and again informed the Corporate Debtor that its services were deficient, and it was falling foul of its contractual obligations. The SC observed that there was nothing to indicate that the termination of the facilities agreement was motivated by the insolvency of the Corporate Debtor.

The SC observed that, however, in Gujarat Urja Vikas (supra), the contract in question was terminated by a third party based on an *ipso facto* clause, that is, the fact of insolvency itself constituted an event of default. It was in this context, the SC held that the contractual dispute between the parties arose in relation to the insolvency of the corporate debtor and it was amenable to the jurisdiction of the NCLT under Section 60(5)(c) of the IBC. The SC had observed that *"…. NCLT has jurisdiction to adjudicate disputes, which arise solely from or which relate to the insolvency of the corporate debtor… The nexus with the insolvency of the corporate debtor must exist*". Thus, the SC observed that, residuary jurisdiction of the NCLT cannot be invoked if the termination of a contract is based on grounds unrelated to the insolvency of the Corporate Debtor.

In view of the above, the SC observed that the NCLT did not have any residuary jurisdiction to entertain the contractual dispute which had arisen *dehors* the insolvency of the Corporate Debtor. Further that, in the absence of jurisdiction over the dispute, the NCLT could not have imposed an *ad-interim* stay on the termination notice.

Decision of the Supreme Court

The SC, while dismissing the NCLAT Order and the proceedings initiated against the Appellant due to absence of jurisdiction, issued a note of caution to the NCLT and the NCLAT regarding interference with a party's contractual right to terminate a contract. The SC further held that even if the contractual dispute arises in relation to the insolvency, a party can be restrained from terminating the contract only if it is central to the success of the CIRP. Crucially, the termination of the contract should result in the corporate death of the corporate debtor.

VA View:

The decision of the SC in the case of Gujarat Urja Vikas (supra) led to the creation of a narrow exception with regards to when a contract cannot be terminated under Section 14 of the IBC. The NCLT and the NCLAT cannot adopt a wide-ranging approach since such a judicial intervention would take away the party's contractual right of termination.

The NCLT and the NCLAT are empowered to set aside the termination of contracts only if the termination took place solely on the ground of insolvency. The jurisdiction of the NCLT under Section 60(5)(c) of the IBC cannot be invoked in matters where a termination may take place on grounds unrelated to the insolvency of the corporate debtor. More importantly, it cannot even be invoked in the event of a legitimate termination of a contract based on an *ipso facto* clause present in the agreement, if such termination will not have the effect of making certain the death of the corporate debtor.

II. Karnataka High Court: An application for compounding under Section 15 of the Foreign Exchange Management Act, 1999 cannot be rejected on the basis of Rule 11 of Foreign Exchange (Compounding Proceedings) Rules, 2000

The Hon'ble Karnataka High Court ("**KHC**") in the matter of ***Mrs. Joyce Lynn Peters v. Reserve Bank Of India and others (Writ Petition No. 26425 of 2017)*** ("**Judgement**"), held that an application for compounding under Section 15 (*Power to compound contravention*) of the Foreign Exchange Management Act, 1999 ("**FEMA**") cannot be rejected on the basis of Rule 11 of Foreign Exchange (Compounding Proceedings) Rules, 2000 ("**Compounding Rules**").

Facts

Mrs. Joyce Lynn Peters ("**Petitioner**"), pursuant to the complaint dated February 25, 2011 made by deputy director of Enforcement Directorate ("**ED**"), was issued a show cause notice dated April 6, 2011 ("**SCN**") alleging violation of the provisions of Section 6(3)(d) (*Capital account transactions*) of the FEMA read with the provisions of Foreign Exchange (Borrowing or Lending in Foreign Exchange) Regulations, 2000. After receiving the SCN, the Petitioner applied for compounding of the contravention before the Reserve Bank of India ("**RBI**") and the ED ("**Respondents**"). However, the Petitioner's application was returned by letter dated September 22, 2011 by the Respondents on the ground that compounding was not permissible when adjudicatory proceedings for contravention were being initiated. The Petitioner responded by contending that the return of said application is unsustainable as the pendency of adjudicatory proceedings cannot be a ground for declining the request for compounding.

Subsequently, since no decision was taken by the Respondents thereon, the Petitioner filed a writ petition before the co-ordinate bench of the KHC. The KHC, by judgment dated November 5, 2015, permitted the Petitioner to file another application before the Respondents within two weeks and directed the Respondents to consider the same. Accordingly, after some period of delay, the Petitioner filed another application before the Respondents ("**Application**"). The Application was also rejected by the Respondents stating that since the Petitioner had filed appeal against the adjudicatory

order, Rule 11 of the Compounding Rules would come in the way of the Application being treated favourably ("**Impugned Reply to Application**"). Rule 11 of the Compounding Rules states that no contravention shall be compounded if an appeal has been filed under Section 17 or Section 19 of the FEMA. Aggrieved by the Impugned Reply to Application, the Petitioner filed a writ petition before the KHC challenging the Impugned Reply to Application.

Issues

1. Whether the Petitioner had made the Application for compounding beyond the period prescribed by the co-ordinate bench of the KHC. ("**Issue I**")

2. Whether the pendency of appeal preferred by the Petitioner bars the compounding of contravention, as provided under Section 15 of the FEMA. ("**Issue II**")

3. Whether the Respondents can rely upon Rule 11 of the Compounding Rules for rejecting Petitioner's Application for compounding. ("**Issue III**")

Observations of the Karnataka High Court

Issue I

The KHC observed that the Petitioner filed the Application after expiry of two weeks given by the co-ordinate bench of the KHC, however, the application was rejected by the Respondents on the ground of pendency of appeal and not on the ground of delayed filing. The Impugned Reply to Application is a statutory order and the validity of such order made by the statutory authorities has to be adjudged on the reasons assigned in the very order itself. Even otherwise, the KHC stated that since the earlier application was wrongly returned, the filing of subsequent Application needs to be treated as having revived the earlier application.

Issue II

The KHC stated that pendency of appeal cannot be construed as a bar under Section 15 of the FEMA as one cannot ignore that there is a limitation period prescribed by law for filing of appeals and since the request for condoning delay is ordinarily treated in discretion, an anxious litigant ordinarily does not risk the prospects of his appeal. The KHC further added that since the application for compounding is also a matter of discretion, it may so happen that the Petitioner may lose the application and may be without remedy of appeal, if such rejection takes place after long. Therefore, the subsequent filing of appeal cannot be construed as a bar under Rule 11 of the Compounding Rules for consideration of compounding application on its intrinsic merits, under Section 15(1) of the FEMA.

Issue III

The Respondents submitted before the KHC that since Rule 11 of the Compounding Rules has not been put in challenge, it was not open to them to disobey the mandate of the said rule. The KHC, rejecting the said contention, stated that, the Compounding Rules is a piece of subordinate legislation and it has been a settled position of law that a delegate cannot transcend the delegation of power. In other words, the rule making authority cannot promulgate a rule which travels beyond the scope of delegation.

Section 15(1) of the FEMA, *inter alia*, provides that any contravention under Section 13 of the FEMA may, on an application made by the person committing such contravention, be compounded within 180 days from the date of receipt of application by the ED and the officers of the RBI, as may be authorised in this behalf by the Central Government in such manner as may be prescribed. The KHC stated that the use of the word 'any' in Section 15 of the FEMA indicates that it has been used in a wider sense to mean 'one and all' contraventions and if the Parliament intended a restrictive meaning, it would have indicated the same expressly or by necessary implication. It was further observed that sub-section (2) of Section 15 of the FEMA intends to give quietus to the proceedings or further proceedings, once the contravention is compounded under sub-section (1) of Section 15 of the FEMA, as the said provision uses the expression 'no proceeding or further proceeding'. Further, giving contextual meaning to the words, 'proceeding' means an adjudicatory proceeding which is triggered pursuant to the complaint followed by a show cause notice, and the term 'further proceeding' shall mean the appellate proceeding in which the order made in the adjudicatory proceeding is put in challenge.

The KHC, analysing the effect of Section 15 of the FEMA, stated that the net effect of compounding under Section 15(1) of the FEMA, is all pervasive abatement of any proceeding, adjudicatory or appellate, involving the contravention of Section 13 of the FEMA, and an argument to the contrary cannot be sustained without manhandling the text of sub-sections (1)

and (2) of Section 15 of the FEMA. Therefore, the Respondents could not have rejected the Petitioner's application under Section 15 of the FEMA on the basis of the text of Rule 11 of the Compounding Rules. The KHC added that while deciding the rights of citizens, a court has to ascertain the correct position of law by looking into the text of the legislation and of the sub- ordinate legislation, if any, and, in fiscal legislations, the provisions enacting such schemes are construed with a 'pragmatic leniency', subject to all just exceptions.

The KHC summarised the issues of the case by stating that where a sub-ordinate legislation is shown to have been made incompetently or otherwise repugnant to the provisions of the parent act, the same cannot be taken cognizance of and pressed into service to defeat a legitimate claim of the citizen. An aggrieved citizen who is otherwise entitled to relief under the provisions of a parent legislation cannot be sent back empty-handed by the writ court telling that a sub-ordinate legislation which literally runs counter to the Parliamentary intent, comes in his way. A sub-ordinate legislation has to be subservient to the provisions of the parent act and needs to be construed consistent with the statutory object and if it runs repugnant to the plain text of the provisions of the parent act, a writ court cannot attach significance thereto and such a sub-ordinate legislation cannot hijack the statutory object.

Decision of the Karnataka High Court

In view of the above, the KHC held that the endeavour of the Respondents to sustain the Impugned Reply to Application by relying upon Rule 11 of the Compounding Rules does not yield fruit and they are only seeking shelter under a leaking umbrella. The writ petition succeeded and a writ of certiorari was issued quashing the Impugned Reply to Application. The matter was remitted back to the Respondents for consideration afresh, in accordance with law and within a period of eight weeks.

VA View:

In this Judgement, the KHC has rightly held that a delegated legislation cannot curtail the scope of the parent legislation and the pendency of adjudicatory or the appellate proceeding is not indicated as a bar to the invoking of the compounding provision, which in a sense enacts an amnesty scheme.

The KHC, relying on the principles of interpretation of statutes, held that rule of law is one of the basic features of our Constitution which envisages the administration of justice in accordance with law and a purported subordinate legislation which is promulgated without competence or contrary to the parental provisions, cannot be treated as law or as source of law. This Judgement would greatly contribute to interpretation of subordinate legislations in light of their parental provisions and interpretation of compounding provisions of various statutes.

III. Supreme Court: The dishonor of cheque issued as a security can attract offence under Section 138 of the Negotiable Instruments Act

The Supreme Court of India ("**SC**") has in its judgment dated October 28, 2021 ("**Judgement**"), in the matter of ***Sripati Singh (since deceased) through his son Gaurav Singh v. The State of Jharkhand and Another [Criminal Appeal Nos. 1269-1270 Of 2021],*** held that the dishonour of a cheque which is issued as a security can attract offence under Section 138 of the Negotiable Instruments Act, 1881 ("**Act**").

Facts

Sripati Singh (since deceased) through his son Mr. Gaurav Singh ("**Appellant**") challenged the order dated December 17, 2019 ("**Impugned Order**") passed by the High Court of Jharkhand ("**JHC**").

Hitesh K. Jain, the respondent no.2 ("**Accused**") and the Appellant shared family acquaintance and cordial relationship. The Accused had approached the Appellant and sought financial assistance to the tune of INR 1 Crore for business purposes. On the assurance of the Accused that the same would be returned during June/July 2015, the Appellant advanced a total sum of INR 2 Crores during the period between January 2014 to July 2014. Towards the said transaction, four agreements dated August 13, 2014, were entered into acknowledging the receipt of the loan. Further, towards the said loan, total of six cheques amounting to INR 2 Crores were handed over to the Appellant.

In July, 2015 the Accused assured that the amount will be repaid during October, 2015. On October 20, 2015, when the Appellant presented the cheques for realization, they were returned due to 'insufficient funds' in the bank account of the

Accused. The Appellant therefore issued a legal notice dated November 21, 2015 as contemplated under Section 138 of the Act. Since the Accused had taken the money on an assurance that the same would be returned, but had deceived the Appellant, the Appellant contended that the Accused had cheated him and accordingly the complaint was filed both under Section 420 of the Indian Penal Code, 1860 ("**IPC**") and Section 138 of the Act.

By the Impugned Order, the JHC had set aside the previous orders passed by the Judicial Magistrate First Class, Palamau, ("**JMFC**") (i) dated July 04, 2016 wherein the JMFC had taken cognizance of the offence and issued summons to the Accused; and (ii) order dated June 13, 2019 wherein the JMFC had rejected the petition filed by the Accused seeking discharge in the criminal complaint. The Appellant, therefore, challenged the Impugned Order before the SC.

Issue

Whether dishonour of cheque issued as a security can attract offence under Section 138 of the Act.

Arguments

Contentions raised by the Appellant:

The Appellant contended that the Accused took advantage of the acquaintance with the family and had borrowed the amounts. Further, the cheques that were issued towards discharge of the said legally recoverable debt (the same had been acknowledged by subscribing the signature to the loan agreements), had been dishonoured. Thus, the provisions of Section 138 of the Act would apply. In such event, the order passed by the JMFC for taking cognizance and also to reject the discharge petition filed by the Accused was in accordance with law.

It was further contended that the JHC had in fact committed an error in arriving at the conclusion that the cheque issued by the Accused was towards 'security' and that the same could not have been treated as a cheque issued towards the discharge of legally recoverable debt. Reliance was placed on the decision of the SC in the case of ***Sampelly Satyanarayana Rao v. Indian Renewable Energy Development Agency Limited [(Criminal Appeal No.867 of 2016)]*** and in ***M/s Womb Laboratory Private Limited v. Vijay Ahuja and Another [(Criminal Appeal No.13821383 of 2019)]*** to contend that the cheque issued towards discharge of the loan and presented for recovery of the same cannot be construed as issued for 'security'. Therefore, the order passed by the JHC was liable to be set aside and the criminal complaint be restored to file, to be proceeded in accordance with law.

Contentions raised by the accused:

The JMFC, without application of mind to the fact situation, had taken cognizance and issued summons and had not appropriately considered the case put forth by the Accused seeking discharge of the criminal complaints. The JHC on the other hand, has taken note of the entire gamut of the case and has arrived at the conclusion that the offence alleged both under Section 420 of the IPC and Section 138 of the Act had not been made out.

The claim for the sum of INR 2 Crores as made in the complaint was without basis. Even if the case as put forth in the complaint is taken note, at best the transaction can be considered as an advancement of loan for business purpose. Further, even if it is assumed that the said amount was not repaid, it would only give rise to civil liability. Therefore, the Appellant could have only filed a civil suit for recovery of the loan. It was contended that under any circumstance, the offence as alleged under Section 420 of the IPC cannot sustain. Insofar as the offence alleged against the Accused under Section 138 of the Act, the same would also not be sustainable since the complainant himself has relied on the loan agreement wherein reference is made to the cheque being issued as security for the loan. Therefore, it was contended that the instant appeal ought to be dismissed.

Observations of the Supreme Court:

The SC observed that, the amount advanced by the Appellant was towards the business transaction and a loan agreement had been entered into between the parties. Under the loan agreement, the period for repayment was agreed and the cheque had been issued to ensure repayment. The mere dishonourment of the cheque cannot be construed as an act on the part of the Accused with a deliberate intention to cheat and the *mens rea* in that regard cannot be gathered. The SC upheld the conclusion reached by the JHC, that there was no sufficient evidence for a case punishable under Section 420 of the IPC to be made out in these facts and circumstances.

The SC observed that, however, when the JHC itself had accepted the fact that it was a case of non-refunding of the loan

amount, the first aspect that there is a legally recoverable debt from the Accused to the Appellant was *prima facie* established. In order to consider the aforementioned issue, the SC had, at the outset taken note of the four loan agreements. Under each of the agreements, the promise made by the Accused was to pay the Appellant a sum of INR 50 lakhs, the total of which would amount to INR 2 Crores. Further, the SC noted that, para 5 of the loan agreement indicated that six cheques had been issued as security.

The SC observed that, a cheque issued as security pursuant to a financial transaction cannot be considered as a worthless piece of paper under every circumstance. The SC further observed that, security is given, deposited or pledged to make certain the fulfilment of an obligation to which the parties to the transaction are bound. If in a transaction, a loan is advanced and the borrower agrees to repay the amount in a specified timeframe and issues a cheque as security to secure such repayment; if the loan amount is not repaid in any other form before the due date or if there is no other understanding or agreement between the parties to defer the payment of amount, the cheque which is issued as security would mature for presentation and the drawee of the cheque would be entitled to present the same. The SC observed that, on such presentation, if the same is dishonoured, the consequences contemplated under the provisions of the Act would flow.

The SC observed that, there cannot be a hard and fast rule that a cheque which is issued as security can never be presented by the drawee of the cheque. If such is the understanding, a cheque would also be reduced to an 'on demand promissory note' and in all circumstances, it would only be a civil litigation to recover the amount, which is not the intention of the statute. The SC observed that, when a cheque is issued, even though as 'security', the consequence flowing therefrom is also known to the drawer of the cheque and in the circumstance stated above if the cheque is presented and dishonoured, the holder of the cheque/drawee would have the option of initiating civil proceedings for recovery or criminal proceedings for punishment in the fact situation, but in any event, it is not for the drawer of the cheque to dictate terms with regard to the nature of litigation.

The SC observed that, if the above principle is kept in view, as already noted, under the loan agreement in question the Accused though had issued the cheques as security, he had also agreed to repay the amount during June/July 2015. The cheque which was held as security was presented for realization on October 20, 2015, which is after the period agreed for repayment of the loan amount and the loan advanced had already fallen due for payment. Therefore, *prima facie* the cheque which was taken as security had matured for payment and the Appellant was entitled to present the same. On dishonour of such cheque, the consequences contemplated under the Act had befallen on Accused. The SC observed that, the Accused may put-forth a defense in the proceedings which will be a matter for trial. In any event, the Accused in the fact situation cannot make a grievance with regard to the cognizance being taken by the JMFC or the rejection of the petition seeking discharge at this stage.

The SC observed that, in the background of the factual and legal position, the Appellant cannot be non-suited for proceeding with the complaint filed under Section 138 of the Act merely due to the fact that the cheques presented and dishonoured are shown to have been issued as security, as indicated in the loan agreement. The SC observed that, such contention would arise only in a circumstance where the debt has not become recoverable and the cheque issued as security has not matured to be presented for recovery of the amount, if the due date agreed for payment of debt has not arrived. In the instant facts, as noted, on the date of presentation of the cheque for realization, the repayment of the amount as agreed under the loan agreement had matured. The SC observed that, therefore, the amount had become due and payable.

The SC observed that, in the above circumstance, the cheque though issued as security at the point when the loan was advanced, it was issued as an assurance to repay the amount after the debt becomes due for repayment. The loan was in subsistence when the cheque was issued and had become repayable during June/July 2015 and the cheque issued towards repayment was agreed to be presented thereafter. If the amount was not paid in any other mode before June/July 2015, it was incumbent on the Accused to arrange sufficient balance in the account to honour the cheque which was to be presented subsequent to June/July 2015. The SC observed that, therefore, to contend that the cheque should be held as security even after the amount had become due and payable was not sustainable.

The SC observed that, the further defence as to whether the loan had been discharged as agreed by Accused and in that circumstance the cheque which had been issued as security had not remained live for payment subsequent thereto at best can be a defence for the Accused to be put forth and to be established in the trial. In any event, it was not a case to either refuse to take cognizance or to discharge the Accused in the manner it has been done by the JHC.

Decision of the Supreme Court:

The SC held that, though a criminal complaint under Section 420 of the IPC was not sustainable in the facts and circumstances of the instant case, the complaint under Section 138 of the Act was maintainable. The Impugned Order

passed by the JHC was set aside. Consequently, the aforementioned orders passed by the JMFC were restored. The SC allowed the appeal with an observation that, all contentions of the parties on merit were left open, such that, all contentions and the defense were to be considered during the course of the trial and that the trial court shall independently arrive at its conclusion based on the evidence tendered before it.

VA View:

The SC observed that, 'Security' in its true sense is the state of being safe and the security given for a loan is something given as a pledge of payment. The SC further observed that, when a cheque is issued and is treated as 'security' towards repayment of an amount with a time period being stipulated for repayment, all that it ensures is that such cheque which is issued as 'security' cannot be presented prior to the loan or the instalment maturing for repayment towards which such cheque is issued as security. Further, the borrower would have the option of repaying the loan amount or such financial liability in any other form and in that manner if the amount of loan due and payable has been discharged within the agreed period, the cheque issued as security cannot thereafter be presented.

The SC observed that, therefore, the prior discharge of the loan or there being an altered situation due to which there would be understanding between the parties is a *sine qua non* to not present the cheque which was issued as security. The SC observed that, based on the facts, *prima facie* there was a transaction between the parties towards which a legally recoverable debt was claimed by the Appellant and the cheque issued by the Accused was presented. On such cheque being dishonoured, cause of action had arisen for issuing a notice and presenting the criminal complaint under Section 138 of the Act,.

IV. Supreme Court: Arbitral Tribunal cannot award interest when the parties to the contract have agreed that it is not payable

The Supreme Court ("**SC**") has in its judgment dated November 18, 2021, in the matter of ***Union of India v. Manraj Enterprises*** [***Civil Appeal No. 6592 OF 2021]*** ("**Judgement**") held that the arbitrator in the arbitration proceedings, has no power to award interest, contrary to the terms of the agreement/contract between the parties.

Facts

A contract was entered into between the Union of India ("**Appellant**") and Manraj Enterprises ("**Respondent**") with regards to three work contracts. A dispute arose between the parties and both the parties went into arbitration for the resolution of the dispute. The learned sole arbitrator by award dated January 17, 2011, awarded an amount of INR 78,81,553.08. The arbitrator also awarded pendente lite and future interest at the rate of 12% and 18% respectively on the entire awarded amount, except for the earnest money deposit and security deposit.

The Appellant had filed an appeal with the Delhi High Court ("**DHC**") under Section 34 (Application for setting aside arbitral award) of the Arbitration and Conciliation Act, 1996 ("**1996 Act**") challenging the award pertaining to pre-suit, pendente lite and future interest awarded on the balance due payment, from the due date of payment. The DHC, subsequently, had by order dated April 12, 2021, upheld the award of interest by the sole arbitrator. Aggrieved, the Appellant had filed the instant appeal before the SC.

Issue

Whether the contractor is entitled to any interest pendente lite on the amounts payable to the contractor other than upon the earnest money or the security deposit.

Arguments

Contentions raised by the Appellant:

The Appellant vehemently submitted that as per the General Conditions of Contract ("**GCC**"), governing the contract between the parties, there was a bar against payment of interest. It was submitted that as agreed between the parties and as per Clause 16(2) of the GCC, no interest shall be payable upon the earnest money or the security deposit or the amounts payable to the contractor under the contract. The Appellant urged that under Section 31(7)(a) of the 1996 Act, unless otherwise agreed between the parties, the arbitral tribunal may include in the sum for which the award is made, interest,

at such rate as it deems reasonable, on the whole or any part of the money. It was submitted that if there is an expression "agreed between the parties" governing the contract that no interest shall be payable, parties are bound by such an agreement and no interest either *pendente lite* or future interest on the amount due and payable under the contract shall be awarded.

The Appellant further contended that in the present case, Clause 16(2) of the GCC governing the contract between the parties specifically bars payment of interest, not only on the earnest money or security deposit, but also upon any amounts payable to the contractor under the contract. It was urged that since the parties are governed by the contract and the arbitrator and the arbitration proceedings are creatures of the contract, they cannot traverse beyond what has been contemplated in the contract between the parties. The Appellant further relied on ***Union of India v. Bright Power Projects (India) (P) Ltd [(2015) 9 SCC 695]*** ("**Bright Power Projects**"), wherein it was held that in view of the specific contract between the parties and the bar for awarding the interest, the payment of interest was not permissible even on earnest money deposit or security deposit or amounts payable to the contractor under the contract. It was further submitted that the expression "*amounts payable to the contractor under the contract*" is wide enough to cover every payment of amount payable under the contract.

The Appellant argued that the SC, while analysing the expression "money due under the contract" in ***Garg Builders v. Bharat Heavy Electricals Limited, 2021 [SCC OnLine SC 855]***, held that if the contract prohibits pre-reference and *pendente lite* interest, the arbitrator cannot award interest for the said period. Therefore, where the contract contains a specific clause which expressly bars payment of interest, then it is not open for the arbitrator to grant *pendente lite* interest. The Appellant further argued that the phrase "amounts payable to the contractor under the contract" cannot be read with "earnest money deposit" or "security deposit" by applying the principle of *ejusdem generis (of the same kind).* It was further urged that the earnest money deposit and security deposit are the amounts which are payable by the contractor whereas the amount awarded by the arbitrator or any other amounts payable under the contract could be under different circumstances and could be payable by either party.

It was submitted that the expression "amounts payable to the contractor under the contract" has been employed to cover such other situations or circumstances. It was therefore submitted that it is not possible to apply the principle of *ejusdem generis*. Relying on the case of ***Jaiprakash Associates Ltd. v. Tehri Hydro Development Corporation (India) Ltd.*, *[(2019) 17 SCC 786],*** it was contended that if the agreement between the parties specifically prohibits grant of interest, the arbitrator cannot award *pendente lite* interest in such cases.

The Appellant prayed to allow the present appeal and quash and set aside the judgments and orders passed by the DHC as well as the award passed by the learned arbitrator awarding the interest, *pendente lite* and future interest.

Contentions raised by the Respondents:

The Respondent submitted that if the entire Clause 16 of the GCC is read, it is evident that the said clause pertains specifically to earnest money and security deposits and the same can in no way be read in a manner to imply a bar on *pendente lite* interest or other amounts as contended on behalf of the Appellant.

The Respondent placed reliance on ***Secretary, Irrigation Department, State of Orissa v. G.C. Roy [(1992) 1 SCC 508]***, wherein it was held that when the agreement between the parties does not prohibit grant of interest and where the party claims interest and the dispute has been referred to an arbitrator, then the arbitrator does have the power to award interest *pendente lite*. The Respondent further relied on the case of ***Raveechee and Company v. Union of India [(2018) 7 SCC 664]***, wherein it was held that the power to grant interest *pendente lite* is inherent in an arbitrator who also exercises the power to do equity and unless the agreement expressly bars the arbitrator from awarding interest *pendente lite*, the arbitrator has all the powers to grant *pendente lite* interest. It was urged that in the present case, Clause 16 of the GCC does not bar an arbitrator to award interest *pendente lite*. It was submitted that the arbitrator is never a party to the agreement and therefore it does not bar the arbitrator from awarding *pendente lite* interest. It was further contended that the bar is on the parties from claiming interest on security deposits and earnest money and not on the arbitrator from awarding interest *pendente lite* on other amounts. It was submitted, therefore, that unless there is an express and specific bar against the arbitrator to award the *pendente lite* interest, the arbitrator is not precluded from awarding the interest on the amounts awarded.

The Respondent further submitted that in the present case, even the Appellant had claimed interest at the rate of 18% from the Respondent by way of counter-claim and the same has been recorded in the arbitral tribunal's award dated January 17, 2011. It was submitted that the Appellant cannot now be permitted to say that no interest *pendente lite* is liable to be awarded by the learned arbitrator.

Observations of the Supreme Court

The SC observed that in the case of Bright Power Projects, while considering *pari materia* clause with Clause 16(2) of the GCC, a three Judge Bench of the SC had held that when the parties to the contract agree to the fact that interest would not be awarded on the amount payable to the contractor under the contract, they are bound by their understanding, and having once agreed that the contractor would not claim any interest on the amount to be paid under the contract, he could not have claimed interest either before a civil court or before an arbitral tribunal. In the decision of Bright Power Projects, the SC also considered Section 31(7)(a) of the 1996 Act, and it was specifically held that Section 31(7) of the 1996 Act, by using the words "unless otherwise agreed by the parties" categorically specifies that the arbitrator is bound by the terms of the contract insofar as award of interest from the date of cause of action to date of the award is concerned.

It was further observed and held that where the parties had agreed that no interest shall be payable, the arbitral tribunal cannot award interest. The SC refuted the contention of the Respondent that the arbitral tribunal can independently and on equitable ground and/or to do justice, award interest *pendente lite* or future interest, and noted that once the contractor agrees that he shall not be entitled to interest on the amounts payable under the contract, including the interest upon the earnest money and the security deposit as mentioned in Clause 16(2) of the GCC, the arbitrator in the arbitration proceedings, being the creature of the contract has no power to award interest, contrary to the terms of the agreement/contract between the parties and contrary to Clause 16(2) of the GCC.

The SC explained that the expression "amounts payable to the contractor under the contract" has to be read independently and disjunctively to earnest money deposit and security deposit, as the word used is "or" and not "and" between "earnest money deposit", "security deposit" and "amounts payable to the contractor under the contract". Therefore, the principle of *ejusdem generis* was not applicable in the present case. The SC further opined that, merely because the Appellant has claimed interest, does not imply that the Respondent shall be entitled to interest *pendente lite*. Had the Appellant been awarded interest, the same would not be permissible and could have been a subject matter of challenge. In other words, there cannot be an *estoppel* against law.

Decision of the Supreme Court

The SC held that the arbitrator, in the instant case, had erred in awarding *pendente lite* and future interest on the amount due and payable to the contractor under the contract in question and the same had been erroneously confirmed by the DHC.

The impugned judgment and order passed by the division bench of the DHC in an appeal under Section 37 *(Appealable orders)* of the 1996 Act and the order passed by the learned Single Judge in an application under Section 34 of the 1996 Act, and the award passed by the learned arbitral tribunal awarding *pendente lite* and future interest on the amounts held to be due and payable to the contractor under the contract, were quashed and set aside. It was held that in view of the specific bar contained in Clause 16(2) of the GCC, the Respondent was not entitled to any interest *pendente lite* or future interest on the amounts due and payable to it under the contract.

VA View:

The SC by this Judgement has categorically laid down that a contractual bar on payment of interest bars not only the parties to the contract from claiming it, but also the arbitrator from awarding such interest. The SC rightly decided that the arbitral tribunal cannot independently on the grounds of being just and equitable award interest *de hors* the contractual bar. Once the parties have agreed to the terms of interest not being paid, they are bound by such terms.

Thus, upholding the concept of party autonomy, the SC held that an arbitral tribunal, as a creature of the contract entered into between the parties, cannot be said to be empowered to award *pendente lite* interest or future interest when the parties had specifically agreed not to have such interest awarded in their contract.

The Judgement is in line with the recent decision of the SC in ***M/s Garg Builders v. Bharat Heavy Electricals Limited, 2021*** *(supra),* which dealt with an identical issue as the instant case. In light of this law, reiterated by the SC, the lower courts and arbitral tribunals must take note of these decisions of the SC as precedents and abide by the same, while awarding interest.

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