Between the lines...

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Key Highlights

I. Supreme Court: In the event of unsuccessful conciliation, arbitration proceedings must mandatorily be resorted to.

The Supreme Court ("**SC**") has in its judgment dated December 15, 2021 ("**Judgement**"), in the matter of ***Jharkhand Urja Vikas Nigam Limited v. The State of Rajasthan and Others [Civil Appeal No. 2899 of 2021],*** held that the Facilitation Council must before passing an award under the Micro, Small and Medium Enterprises Development Act, 2006 ("**MSMED Act**"), upon the failure of conciliation proceedings, compulsorily resort to arbitration.

Facts

The instant case is a civil appeal, challenging the order passed by the Rajasthan High Court, Jaipur Bench ("**RHC**"), which affirmed the order of the Single Judge of the RHC, who had dismissed the appeal against the order dated August 6, 2012 ("**Impugned Order**"), passed by the Rajasthan Micro and Small Enterprises Facilitation Council ("**Respondent No. 2"/ "Council**"). Jharkhand Urja Vikas Nigam Limited ("**Appellant**") is the successor company of the Jharkhand State Electricity Board. The Appellant had entered into a contract with M/s. Anamika Conductors Limited, Jaipur ("**Respondent No. 3**"), for the supply of ACSR Zebra Conductors. Respondent No. 3, claiming to be a small-scale industry, had approached the Council, claiming an amount of INR 74,74,041 towards the principal amount of bills and an amount of INR 91,59,705.02 towards interest. The State of Rajasthan ("**Respondent No. 1**"), Respondent No. 2 and Respondent No. 3 are collectively referred to as "**Respondents**".

On the ground that the Appellant had not responded to earlier notices, the Council had issued summons dated July 18, 2012 for appearance of the Appellant before the Council on August 6, 2012. On the ground of non-appearance of the Appellant, the Impugned Order was passed, directing the Appellant to make the payment to Respondent No. 3, within a period of thirty days from the date of the Impugned Order. When the Appellant challenged the Impugned Order before the RHC, the appeal was dismissed by an order dated December 11, 2017 ("**RHC Order**"). Aggrieved, the Appellant filed the instant appeal before the SC.

Issue

Whether the Council could pass the Impugned Order without resorting to arbitration.

Arguments

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

The Appellant vehemently opposed the decision of the Council, contending that only on the ground that the Appellant had not responded immediately in the conciliation proceedings, the Impugned Order was passed by the Council, without granting proper opportunity to the Appellant. The Appellant further argued that the Impugned Order had been passed in utter disregard to the mandatory provision under Section 18 *(Reference to Micro and Small Enterprises Facilitation Council)* of the MSMED Act and the provisions of Arbitration and Conciliation Act, 1996 ("**1996 Act**"). The Appellant submitted that when conciliation fails as per Section 18(3) of the MSMED Act, the Council has to initiate arbitration proceedings.

The Appellant further averred that on failure of conciliation, the Council shall either itself take up the dispute for arbitration or refer to any institution or centre providing alternate dispute resolution services for such arbitration and the

provisions of the 1996 Act shall apply to the dispute, as if the arbitration was in pursuance of arbitration agreement referred to under Section 7 (1) of the 1996 Act. It was argued that due procedure was not followed by the Council, and instead of granting the Appellant an opportunity to participate in arbitration, the Impugned Order was passed.

The Appellant prayed to consider the Impugned Order to be a nullity and not an award under the 1996 Act, since it was passed in sheer disregard to the 1996 Act. It was further submitted that, as per the terms of the contract, any dispute was subject to jurisdiction of civil courts at Ranchi, and the Respondent having agreed to such terms, had approached the Council in the State of Rajasthan. Thus, it was submitted that the Impugned Order was passed by the Council, without jurisdiction and contrary to the terms and conditions of the agreement.

Contentions raised by the Respondents:

The Respondents argued that there were no grounds to interfere with the RHC Order. It was submitted that it was open to the Appellant to challenge the Impugned Order before the competent forum under Section 34(3) of the 1996 Act, within the specified time. The Respondents deemed the appeal brought by the Appellant to be a belated attempt to question the Impugned Order and submitted that since the Appellant had not responded to the various notices and summons issued by the Council, the Council itself had taken up the dispute and passed an award.

Referring to the MSMED Act as a beneficial legislation to the small and medium enterprises, it was submitted that though proper opportunity was given, the Appellant had not responded to the same before the Council and there were no grounds to interfere with the RHC Order. Reliance was placed by the Respondents on the judgment of the SC in the case of ***Rajkumar Shivhare v. Assistant Director, Directorate of Enforcement & Another [(2010) 4 SCC 772]*** in support of the submissions, and was further submitted that the Appellant had partly complied the award by paying an amount of INR 63,43,488/-, and hence the Impugned Order was not open to challenge at a later point of time.

Observations of the Supreme Court

The SC took note of the fact that in the instant case, the Appellant had filed a writ petition before the RHC, challenging the Impugned Order. Respondent No. 3 had approached the Council seeking directions against the Appellant for payment of delayed bill amount along with interest under provisions of the MSMED Act. Immediately after filing the application by initiating conciliation proceedings, the Council had issued notices. Since the Appellant had not appeared, summons were issued to the Appellant on July 18, 2012 for appearance on August 6, 2012. The SC noted that only on the ground that even after receipt of summons the Appellant had not appeared, the Council had passed the Impugned Order. As per Section 18(3) of the MSMED Act, if conciliation is not successful, the said proceedings stand terminated and thereafter the Facilitation Council is empowered to take up the dispute for arbitration on its own or refer to any other institution. The SC noted that Section 18(3) of the MSMED Act thus makes it clear that when the arbitration is initiated all the provisions of the 1996 Act will apply, as if arbitration was in pursuance of an arbitration agreement referred to under Section 7(1) of the 1996 Act. The SC clarified that from a reading of Section 18(2) of the MSMED Act, and Section 18(3) of the MSMED Act, the Council was obliged to conduct conciliation for which the provisions of Section 65 *(Submission of statements to conciliator)* to Section 81 *(Admissibility of evidence in other proceedings)* of the 1996 Act would apply. Under Section 18(3) of the MSMED Act, when conciliation fails and stands terminated, the dispute between the parties can be resolved by arbitration. The Council is empowered either to take up arbitration on its own or to refer the arbitration proceedings to any institution as specified in Section 18(3) of the MSMED Act. It is open to the Council to arbitrate and pass an award, after following the procedure under the relevant provisions of the 1996 Act.

The SC explained the fundamental difference between conciliation and arbitration. In conciliation the conciliator assists the parties to arrive at an amicable settlement, in an impartial and independent manner. In arbitration, the arbitral tribunal or arbitrator adjudicates the disputes between the parties. The claim has to be proved before the arbitrator, if necessary, by adducing evidence, even though the rules of the Civil Procedure Code, 1908 or the Indian Evidence Act, 1872 may not apply. Unless otherwise agreed, oral hearings are to be held. The SC observed that if the Appellant had not submitted its reply at the conciliation stage, and failed to appear, the Council could, at best, have recorded the failure of conciliation and proceeded to initiate arbitration proceedings in accordance with the relevant provisions of the 1996 Act, to adjudicate the dispute and make an award. The SC categorically stated that the proceedings for conciliation and arbitration cannot be clubbed. The SC observed that the Council had not initiated arbitration proceedings in accordance with the relevant provisions of the 1996 Act.

The SC thereby concluded that the Impugned Order was a nullity and runs contrary not only to the provisions of the MSMED Act but also contrary to various mandatory provisions of the 1996 Act. The SC noted that under the scheme of the 1996 Act, an arbitral award can only be questioned by way of an application under Section 34 *(Application for setting aside arbitral award)* of the 1996 Act. Further, it noted that when an order is passed without recourse to arbitration and in utter disregard to the provisions of the 1996 Act, Section 34 of the 1996 Act will not apply. Moreover, the SC refused to accept

the contention of delay on part of the Appellant, as submitted by the Respondents. The SC further opined that though Respondent No. 3 had already received an amount of INR 63,43,488/- paid by the Appellant, without any protest and demur, it cannot be said that the Appellant had lost its right to question the Impugned Order.

Decision of the Supreme Court

The SC held the Impugned Order to be patently illegal. The SC thus allowed the appeal and set aside the Impugned Order, directing Respondent No. 2 to either take up the dispute for arbitration on its own or refer the same to any institution or centre providing alternate dispute resolution services, for resolution of dispute between the parties. The SC mandated that for such arbitration, the Council shall follow the provisions of the 1996 Act before passing any award.

VA View:

The SC by this Judgement has highlighted the interplay between the MSMED Act and the 1996 Act, and has clarified that exploring dispute resolution through arbitration proceedings is mandatory after failure of conciliation under the MSMED Act. The proceedings for conciliation and arbitration, being fundamentally different, cannot be clubbed to pass an award.

The SC has emphatically laid down that after failure of conciliation, if an award is straightaway passed by the Facilitation Council, without following due process, and without resorting to arbitration, such award would be in contravention of the 1996 Act and the MSMED Act, and hence cannot be considered as an arbitral award in the eyes of the law.

II. NCLT: The shareholders are different from lenders.

The National Company Law Tribunal, Mumbai ("**NCLT**") has in its judgment dated November 29, 2021 ("**Judgement**"), in the matter of ***Hubtown Limited v. GVFL Trustee Company Private Limited [M.A. 2411/2019 IN C.P. 4128/I&B/MB/2018 and others],*** held that shareholders are different from lenders.

Facts

Hubtown Limited ("**Corporate Debtor**") was earlier known as Ackruti City Limited. The Corporate Debtor was a shareholder in a company called Hubtown Bus Terminal (Mehsana) Private Limited ("**HBT Mehsana**"), which was a special purpose vehicle incorporated to, *inter alia*, undertake and complete reconstruction and development of commercial and residential property at Mehsana, Gujarat by the Corporate Debtor. GVFL Trustee Company Private Limited ("**GVFL**") filed a petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("**IBC**") against the Corporate Debtor for a debt by way of equity investment in shares of HBT Mehsana for a total amount of Rs.4,30,54,200/- as principal and Rs.9,96,95,800/- as Internal Rate of Return ("**IRR**") calculated at 26% of the principal up to August 31, 2018.

Earlier, a Share Subscription and Shareholders Agreement dated September 24, 2010 ("**SHA**") was signed between IL&FS Trust Company Limited ("**ILFS**"), IIRF India Realty XVIII Limited ("**IIRF**") and the Corporate Debtor and two other promoters of HBT Mehsana. Consequent to the SHA, IL&FS and IIRF invested in HBT Mehsana by subscribing to Class 'A' equity shares, Class 'B' equity shares and Class 'D' equity shares. On May 29, 2013 a Share Purchase Agreement ("**SPA**") was executed between GVFL, the ILFS group, the Corporate Debtor and two other promoters of HBT Mehsana. In terms of this SPA, GVFL purchased the shares (Class 'D' shares) of HBT Mehsana from the ILFS group for a total amount of Rs.4,30,54,200/-. These shares were reclassified as Class 'E' and Class 'F' equity shares as under.

Name of Shareholders	***No. of Shares at the face value Rs. 10 each***	***%***
Class D		
ILFS	*1173*	*2.79*
IIRF	*40854*	*97.21*
Total	*42027*	*100*
Class E		
GVFL	*100*	*100*
Total	*100*	*100*
Class F		
GVFL	*7873*	*100*
Total	***7873***	***100***

Under the SHA, GVFL was provided with shareholders' rights like right to nominate one director on the board of HBT Mehsana, right to vote in annual general meeting ("**AGM**")/ extraordinary general meeting ("**EGM**"), special veto power, etc. Other shareholders' right which accrued to GVFL included giving various exit options under the SHA which has been enumerated at Clause 13.1 of the SHA, which reads as under:

"13.1. The Investor No.3 shall have the following rights which the Investor No.3 shall be free to exercise at any time in the manner specified in the said clauses:
13.2. Annual Put Option;
13.3. Listing;
13.4. Buy-back of all shares held by the Investors No.3 in the Company;
13.5 Accelerated Put; and
16 – Strategic Sale and Withholding of Sale of Project Assets."

The NCLT noted that these options are part of a shareholder's right. The claim of GVFL was that the payments by GVFL were made to purchase shareholding in HBT Mehsana. GVFL had sought to exercise its right under the "put option" for the first time in December 2013 and the said Section 7 petition under the IBC was filed by them in November 2018 purportedly for a debt amount of Rs. 4,30,54,200/- along with return calculated at IRR of 26% till August 31, 2018.

There were three other projects for which three more special purpose vehicle companies were separately incorporated by the Corporate Debtor and were a subject matter of CP No. CP(IB)-4128/2018 (HBT Vadodara), CP No. CP(IB)-4130/2018 (HBT Ahmedabad) and CP No. CP(IB)-4131/2018 (HBT Adajan) filed under Section 7 of the IBC ("**Other Company Petitions**"). For these Other Company Petitions, miscellaneous applications had been filed by the Corporate Debtor challenging their maintainability. The NCLT noted that, the outcome of the instant maintainability application in the said case will also be applicable to other aforementioned miscellaneous applications filed under Other Company Petitions.

Issue

Whether shareholders are lenders, that is, whether GVFL is a financial creditor and, thus, whether the debt claimed is a financial debt.

Arguments

Contentions raised by GVFL:

GVFL contended that, the Corporate Debtor had defaulted as required for admission of a petition under Section 7 of the IBC, as its "put option" was not entertained when the demand notice dated January 02, 2018 was sent to the Corporate Debtor demanding exit by way of "put option".

Observations of the NCLT

The NCLT noted that, it had to analyze whether the claim of GVFL as a shareholder of HBT Mehsana in exercise of its 'put option' tantamounts to a financial debt. The NCLT noted the relevant definitions under the IBC to analyse the said issue were of the "financial creditor" and "financial debt". The NCLT noted that the IBC defines financial creditor under Section 5(7) of the IBC to mean any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to. The NCLT further noted that, financial debt as defined under Section 5(8) of the IBC meant a debt along with interest, if any, which is disbursed against the consideration for the time value of money.

The NCLT further noted that as per the SHA, GVFL invested in HBT Mehsana by purchasing the shares of ILFS group and, therefore, observed that, this cannot be termed as an investment of GVFL by way of a loan. The money paid by GVFL to acquire the shares of HBT Mehsana cannot be construed as a consideration for time value of money and it was solely for the purchase of shares of HBT Mehsana held by ILFS group to become a shareholder in the said company.

The NCLT also noted that the SPA and SHA are both contracts in relation to GVFL's acquisition of equity shareholding in HBT Mehsana. Further, as per the SHA, GVFL had acquired various rights as mentioned above. It was abundantly clear to NCLT that no voting rights ever accrue to a "Financial Creditor" under the IBC in any AGM/ EGM. Therefore, the rights enjoyed by GVFL in HBT Mehsana, like exercising votes in the AGM/ EGM, are typically the rights of a shareholder and not a "Financial Creditor" since equity is not a debt.

The NCLT was of the view that the SPA entered into for the share purchase in HBT Mehsana by GVFL, with exit option of, *inter alia*, "Annual Put Option", cannot be considered as a debt which is disbursed against consideration of time value for money. The NCLT also noted that IRR cannot be equated with interest payments.

The NCLT was of the view that GVFL may be entitled to this claim under the SHA as a shareholder of HBT Mehsana, however, the NCLT had no doubt that the claim of GVFL cannot be termed as a "Financial Debt" as contemplated under the IBC. The NCLT observed that a shareholder is different from a lender.

Decision of the NCLT

Therefore, the NCLT allowed the miscellaneous application challenging the maintainability of the petition filed under Section 7 of the IBC. As a corollary, the NCLT dismissed the Section 7 application stating the same to not be maintainable as per the provisions of the IBC. Similarly, based on the above observations, other miscellaneous applications as mentioned above regarding maintainability of Other Company Petitions were also allowed and as a corollary, the Other Company Petitions were dismissed as not maintainable.

VA View:

The NCLT in this Judgement was of the view that a shareholder is different from a lender. The NCLT correctly observed that, any contract for acquisition of shareholding in a body corporate can never result in the formation of a debt. The NCLT was of the view that the SPA entered into for the share purchase in HBT Mehsana by GVFL with exit option of, *inter alia*, "Annual Put Option", cannot be considered as a debt which is disbursed against consideration of time value for money.

The said observation of NCLT was deduced by analysing the fact that, a shareholder undertakes the risk by investing in shares and derives its return by way of profits in the form of dividends and appreciation in the value of shareholding, that is, capital gains. However, in contrast, a lender gives loans for which the profit is earned on repayment made along with Interest. It was also clarified that, the relevance of IRR for an investor in shares is in relation to expected profit and dividend payout and capital appreciation of the shares, which is totally different from the interest which is return for any investment by way of loan.

III. Supreme Court: The Adjudicating Authority and the Appellate Authority can encourage, but cannot compel the parties to settle a dispute under the Insolvency and Bankruptcy Code, 2016.

The Hon'ble Supreme Court ("**SC**") has in its judgement dated December 14, 2021, in the matter of ***E S Krishnamurthy and others v. M/s Bharath Hi Tech Builders Private Limited [Civil Appeal No. 3325 of 2020],*** held that the National Company Law Tribunal ("**Adjudicating Authority**") and the National Company Law Appellate Authority ("**Appellate Authority**") can encourage, but cannot compel the parties to settle a dispute under the Insolvency and Bankruptcy Code, 2016 ("**IBC**").

Facts

A master agreement ("**Master Agreement**") was entered into between M/s Bharath Hi Tec Builders Private Limited ("**Corporate Debtor**"), IDBI Trusteeship Limited and Karvy Realty (India) Limited ("**Facility Agent**") on June 22, 2014, to raise an amount of Rs.50 crores for the development of agricultural land. The terms of the Master Agreement required the Facility Agent to sell the plots to prospective purchasers and the Corporate Debtor was then required to register and convey the plots to the purchasers. However, since the requisite funds could not be generated through the Master Agreement, a Syndicate Loan Agreement ("**Loan Agreement**") was entered into on November 22, 2014, for availing a term loan of Rs.18 crores from prospective lenders. As per the Loan Agreement, the prospective lenders were to lend money to the Corporate Debtor by executing a Deed of Adherence at an assured return for the development of the proposed residential layout in its project.

Thereafter, on the advice of the Facility Agent, their clients extended loans to the Corporate Debtor by executing Deeds of Adherence and through the said Loan Agreement, the Corporate Debtor raised over Rs.15 Crores from nearly 300 investors. The Corporate Debtor sought multiple extensions of the loan period, but failed to convey the plots to the purchasers and make the repayment to the investors. Hence, on April 26, 2019, being aggrieved, 83 purchasers/investors ("**Petitioners**") instituted a petition under Section 7 of the IBC before the Adjudicating Authority, due to the Corporate Debtor's default in making the re-payment of an amount of Rs.33,84,32,493.

The Adjudicating Authority on being satisfied that a settlement process was underway, disposed of the petition and directed the Corporate Debtor to settle the claims of all remaining purchasers/investors within a period of 3 months and if

any party was aggrieved by the settlement process of the Corporate Debtor, they would be at liberty to approach the Adjudicating Authority, in accordance with law ("**NCLT Order**"). Thereafter, the Appellate Authority by way of its order dated July 30 2020, upheld the NCLT order and observed that the Adjudicating Authority by deciding to dismiss the petition under Section 7 of the IBC at the 'pre-admission stage', since a settlement process was underway, protected the rights of all the Petitioners by setting a time-frame of 3 months for the settlement process ("**NCLAT Order/Impugned Order**"). Aggrieved by the NCLAT Order, few of the Petitioners, along with others ("**Appellants**") preferred the present appeal before the SC under Section 62 of the IBC. ("**Appeal**").

Issue

Whether the Adjudicating Authority can without applying its mind to the merits of the petition under Section 7 of the IBC, dismiss the petition on the basis that the Corporate Debtor initiated the process of settlement.

Arguments

Contentions raised by the Appellants:

1. The NCLT Order and the NCLAT Order were contrary to the mandate of Section 7 of the IBC

    a. As per the scope of Section 7 of the IBC, the Adjudicating Authority merely has to satisfy itself whether a default has occurred or not. Section 7(5) of the IBC only provides the Adjudicating Authority with two options-to pass an admission order under Section 7(5)(a) of the IBC or reject the petition under Section 7(5)(b) of the IBC.

    b. The Appellate Authority had also erred in observing that the petition under Section 7 of the IBC was disposed of at a 'pre-admission stage' by the Adjudicating Authority. In the event that the Adjudicating Authority is not satisfied that the financial debt is owed and a default has occurred, Section 7(5)(b) of the IBC provides that it shall reject the application. Thus, an option to dispose at a 'pre-admission stage' was not available to the Adjudicating Authority.

2. The Adjudicating Authority and the Appellate Authority acted beyond the scope of their jurisdiction under the IBC

    a. Once there is an admitted default, the Adjudicating Authority was statutorily bound to admit the petition and had acted patently beyond its jurisdiction in not entertaining it on the ground that there was a possibility of a settlement. Further, out of the 83 Petitioners before the Adjudicating Authority, only 13 had entered into a settlement. As a result, there was no settlement with the remaining 70 Petitioners.

    b. The direction by the Adjudicating Authority to the Corporate Debtor to settle all individual claims was beyond its jurisdiction, as a judicial authority cannot dispose of a petition with a direction to settle a dispute. At the highest, a proceeding may be adjourned in order to enable the parties to explore the possibility of a settlement.

Contentions raised by the Corporate Debtor:

1. Since the settlement process was progressive, it was in this backdrop that the Adjudicating Authority disposed of the petition, with specific directions that the Appellants could approach it if the Corporate Debtor did not settle their claims within three months.

2. The Corporate Debtor should not be pushed to insolvency merely because a few of its alleged creditors are not willing to settle and reiterated its commitment to settle with the proposed purchasers, despite the real-estate industry being severely affected due to the COVID-19 pandemic.

Observations of the Supreme Court:

The SC on its careful perusal of the criteria set out under Section 7, Section 3(11) and Section 3(12) of the IBC, which provide for the initiation of corporate insolvency resolution process ("**CIRP**") by a financial creditor, the definition of debt and the definition of default, respectively, opined that the Adjudicating Authority had clearly acted outside the terms of its jurisdiction under Section 7(5) of the IBC, as being an Adjudicating Authority, it is empowered only to verify whether a default has occurred or if a default has not occurred. Thereafter, the Adjudicating Authority must either admit or reject an application, as these are the only two courses of action which are open to the Adjudicating Authority in accordance with Section 7(5) of the IBC.

The SC noted that no settlement was arrived at by all the original Petitioners who had instituted the proceedings and the

Adjudicating Authority disposed of the petition under Section 7 of the IBC on the ground that the settlement process was progressing. Hence, the SC observed that the Adjudicating Authority cannot compel a party to the proceedings before it to settle a dispute and that the Adjudicating Authority and the Appellate Authority, in the present case, abdicated their jurisdiction to decide a petition under Section 7 of the IBC by directing the Corporate Debtor to settle the remaining claims within three months and leaving it open to the original Petitioners, who are aggrieved by the settlement process, to move fresh proceedings in accordance with law, the course of action of which is not contemplated under the IBC.

Decision of the Supreme Court:

In view of the above, the SC held that the NCLT Order and the NCLAT Order suffered from an abdication of jurisdiction and thus set aside the Impugned Order. Accordingly, the petition under Section 7 of the IBC was restored to the Adjudicating Authority for disposal afresh.

VA View:

The IBC is a complete code in itself and the Adjudicating Authority and the Appellate Authority are creatures of the statute. The provisions of the IBC do provide for settlements even after a petition under Section 7 of the IBC is admitted, and before the Committee of Creditors ("CoC") is formed the parties can settle the dispute. Further, even after the CoC is formed, Section 12A of the IBC does provide for a mechanism through which the petition can be withdrawn in the event that the parties were to reach a settlement.

The powers of the Adjudicating Authority under the ambit of Section 7 of the IBC are limited to determining whether a default under Section 3(12) of the IBC has occurred and if it is of the opinion that a default has occurred, it has to admit the application as per the IBC. Thus, the Adjudicating Authority cannot act like a court of equity and its jurisdiction is limited by the provisions of the IBC.

IV. NCLT: A foreign award is not sufficient to initiate insolvency proceedings against the corporate debtor under the Insolvency and Bankruptcy Code, 2016.

The Hon'ble National Company Law Tribunal, Cuttack Bench ("**NCLT**") in the matter of ***Jaldhi Overseas Pte. Limited v. Steer Overseas Private Limited [TP No. L8/CTB/2019],*** held that a foreign award is not sufficient to initiate insolvency proceedings against the corporate debtor under the Insolvency and Bankruptcy Code, 2016 ("**IBC**").

Facts

Steer Overseas Private Limited ("**Corporate Debtor**") engaged Jaldhi Overseas Pte. Limited ("**Operational Creditor**"), a company incorporated under the laws of Singapore, for availing its vessel services for carrying its cargo of iron-ore fines from Haldia and Vizag port to a port in China. In the course of transportation of goods from the vessel which was taken on hire by the Corporate Debtor from the Operational Creditor, detention and demurrage charges became payable at Vizag and China port respectively. The amount of charges to be payable became disputed between the Corporate Debtor and the Operational Creditor. Consequently, the dispute was referred to arbitration by the Operational Creditor which was duly contested by the Corporate Debtor and upon completion of hearing and pleadings, the partial foreign award was passed by the arbitrator against the Corporate Debtor on January 20, 2017 ("**Foreign Award**").

The Operational Creditor thereafter applied before the High Court of the Republic of Singapore for leave of the court to enforce the Foreign Award which was duly accepted and allowed by the High Court of Singapore by judgment dated December 1, 2017. Thereafter, the Operational Creditor had raised a demand notice demanding payment in respect of the Foreign Award. However, the Corporate Debtor failed to repay the debt. Consequently, the Operational Creditor filed an application under Section 9 (*Application for initiation of corporate insolvency resolution process by operational creditor*) of the IBC for initiation of corporate insolvency resolution process ("**CIRP**") against the Corporate Debtor.

Issue

Whether a foreign award is sufficient to initiate insolvency proceedings against the Corporate Debtor under the IBC.

Arguments

Contentions raised by the Corporate Debtor:

The Corporate Debtor contended that the enforcement of Foreign Award through NCLT is impermissible and a CIRP under the IBC cannot be initiated on the basis of a foreign award. It further contented that the NCLT is not a civil court and nor an executing court for enforcement of Foreign Award. Lastly, the Corporate Debtor contented that since there is a pre-existing dispute between both the parties, the Foreign Award cannot be enforced and the petition is not maintainable as the claim is not an "operational debt".

Contentions raised by the Operational Creditor:

The Operational Creditor submitted that its claim is based on the Foreign Award which was passed in its favour by an arbitral tribunal based in Singapore. The High Court of the Republic of Singapore, after rejecting objections raised by the Corporate Debtor, by its judgement dated December 1, 2017, also enforced the Foreign Award in favour of the Operational Creditor. Lastly, it contended that since the Foreign Award was recognised by the High Court of Singapore against the Corporate Debtor and the Corporate Debtor failed to repay the debt, even after repeated demand notice, the Foreign Award should be recognised as an operational debt and CIRP should be initiated against the Corporate Debtor under the IBC.

Observations of the National Company Law Tribunal

The NCLT stated that foreign awards are different from domestic awards. Unlike a domestic award, a foreign award has to undergo certain test to become an enforceable award/deemed decree and cannot directly constitute debt to initiate proceedings against the corporate debtor under the IBC. The NCLT, by citing the judgment of the Hon'ble Supreme Court in ***Government of India v. Vedanta Limited [2020 SCC online SC 749],*** further elaborated this by stating that the mere production of Foreign Award is not enough to give an effect. Part II, Chapter I of Arbitration and Conciliation Act, 1996 ("**1996 Act**") deals with enforcement of foreign awards in India and as per explanation to Section 47 (*Evidence*) of the 1996 Act, 'the court' refers to only High Courts. Therefore, relying on Section 47 of the 1996 Act, the NCLT stated that the High Courts in India alone have the exclusive jurisdiction to deal with enforcement of foreign awards.

The NCLT further stated that to enforce foreign awards in India, the party in whose favour award stands shall file the documents referred in Section 47 (l) and (2) of the 1996 Act, and the enforcement of foreign award is subject to the satisfaction of the concerned High Court and only after the satisfaction of the High Court, the foreign award becomes enforceable and shall be deemed to be a decree as per Section 49 (*Enforcement of foreign awards*) of the 1996 Act.

The NCLT concluded by stating that Section 47 of the 1996 Act makes it clear that only the concerned High Court has the exclusive jurisdiction to deal with Foreign Award and give effect to the same and in this case, the NCLT cannot act upon the Foreign Award under the presumption that an undisputed debt amount is due towards the Corporate Debtor and as such an exercise would amount to bypassing/violating the procedures laid down in Part II, Chapter I of the 1996 Act.

Decision of the National Company Law Tribunal

In view of the above, the NCLT rejected the application of the Operational Creditor.

VA View:

In this judgement, the NCLT, by analysing the provisions of the 1996 Act, rightly opined that a foreign award is insufficient to initiate insolvency proceedings against the Corporate Debtor under the IBC. As highlighted by the NCLT, a foreign award cannot be considered as an operational debt under the IBC as it is not considered as deemed decree of the court.

To enforce a foreign award, one has to follow the procedure laid down in Part II, Chapter I of the 1996 Act. A foreign award is not an automatically recognised debt under the IBC and has to undergo certain test to become enforceable award/deemed decree. This judgment brings further clarity towards treatment of foreign awards under the IBC and would be helpful to parties looking to enforce foreign awards to claim their debt from Indian debtors.

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