Between the lines...

VAISH ASSOCIATES ADVOCATES ESTD. 1971

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I. Supreme Court: Guarantor is barred from being a resolution applicant under Section 29A(h) of the Insolvency and Bankruptcy Code, 2016 if guarantee has been invoked by any creditor, not necessarily being the creditor initiating the insolvency proceedings.

The Hon'ble Supreme Court ("**SC**") has in its judgment dated January 18, 2022 ("**Judgement**") in the matter of ***Bank of Baroda and Another v MBL Infrastructures Limited and Others [Civil Appeal No. 8411 of 2019]*** held that once a personal guarantee is invoked by any creditor, notwithstanding the fact that the application initiating the corporate insolvency resolution process ("**CIRP**") was filed by another creditor, such guarantor stands ineligible to submit a resolution plan under Section 29A(h) of the Insolvency and Bankruptcy Code, 2016 ("**IBC**").

Facts

The instant case throws light on the judicial interpretation of Section 29A(h) of the IBC. M/s. MBL Infrastructures Limited ("**Respondent No. 1**") was set up by Mr. Anjanee Kumar Lakhotiya ("**Respondent No. 3**"). Loans/ credit facilities were obtained by the Respondent No. 1 from a consortium of banks. On the failure of the Respondent No. 1 to act in tune with the terms of repayment, some of the respondents were forced to invoke the personal guarantees extended by the Respondent No. 3 for the credit facilities availed by the Respondent No. 1. M/s. RBL Bank and M/s. State Bank of Bikaner and Jaipur issued a notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("**SARFAESI**"), after duly invoking the personal guarantee of the Respondent No. 3. Thereafter, M/s. RBL Bank filed an application under Section 7 *(Initiation of CIRP by financial creditor)* of the IBC before the National Company Law Tribunal, Kolkata ("**NCLT**") to initiate CIRP against Respondent No. 1, which was admitted.

Two resolution plans were received by the resolution professional ("**Respondent No. 2/RP**"), of which, one was authored by Respondent No. 3 on June 29, 2017 ("**Plan**"). Thereafter, by way of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017, Section 29A *(Persons not eligible to be resolution applicant)* was introduced to the IBC. At the instance of the Committee of Creditors ("**CoC**"), the Respondent No. 3 submitted a modified Plan. The CoC held its meeting on December 1, 2017 to deliberate upon the impact of the aforesaid amendment *qua* the eligibility of the Respondent No. 3 in submitting the Plan in the CIRP proceedings. In view of the lingering doubt expressed, the Respondent No. 3 filed an application praying for a declaration that he was not disqualified from submitting the Plan under Section 29A(c) and Section 29A(h) of the IBC.

The NCLT, by its order dated December 18, 2017 ("**2017 Order**") held that the Respondent No. 3 was eligible to submit a resolution plan, notwithstanding the fact that he had extended his personal guarantees on behalf of the Respondent No. 1, which were duly invoked by some of the creditors. This issue was never placed and raised before the NCLT. The NCLT ruled that inasmuch as the personal guarantee having not been invoked and the Respondent No. 3 merely having extended his personal guarantee, as such there is no disqualification per se under Section 29A(h) of the IBC, as the liability under a guarantee arises only upon its invocation. As debt payable by Respondent No. 3 was not crystalized, he could not be construed as a defaulter for breach of the guarantee. With such clarification, the application filed was allowed by taking into consideration the amendment introducing Section 29A of the IBC.

Aggrieved by the 2017 Order, Punjab National Bank ("**Respondent No. 10**") appealed to the National Company Law Appellate Tribunal ("**NCLAT**"), which passed an interim order facilitating the RP and CoC to go through with the Plan, but prohibiting the NCLT to accept the same, without prior approval of the NCLAT. Respondent No. 1, Respondent No. 2, Respondent No. 3 and Respondent No. 10 are collectively referred to as "**Respondents**". The Plan was put to vote and received 68.50% vote share of the CoC. The extended 270 day period of CIRP expired on December 25, 2017. Subsequently, RBL Bank also filed an appeal against the NCLT order to the NCLAT. With the approval of Indian Overseas Bank, the Plan gathered 78.50% vote share. Section 29A(h) was further amended post which it read, "*has executed an enforceable guarantee in favour of a creditor, in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this code*". On March 23, 2018, the NCLAT allowed RBL Bank and Respondent No. 10 to withdraw their respective appeals in view of the Plan having reached the mandatory requirement of 75% as warranted under Section 30(4) of the IBC, making it clear that they did not have any grievance with the CoC decision. However, a request made by Bank of Baroda ("**Appellant**") before the NCLAT seeking to be impleaded as a party to continue the *lis* was not considered favourably without assigning any reasons.

Thereafter, the NCLT approved the Plan by its order dated April 18, 2018 ("**NCLT Order**"), owing to the fact that the issue qua the eligibility under Section 29A(h) of the IBC had been decided, coupled with the Plan crossing the requisite threshold of approval by the CoC, that is, 75% vote share. A subsequent appeal was made before the NCLAT by the Appellant, which confirmed the order of the NCLT ("**NCLAT Order**"). Aggrieved, the Appellant filed an appeal before the SC.

Issue

Whether Respondent No. 3 being the guarantor was ineligible under Section 29A(h) of the IBC to submit the Plan.

Arguments

Contentions raised by the Appellant:

The Appellant submitted that Section 29A of the IBC had to be given a holistic interpretation as the objective was to weed out undesirable persons with the intention of promoting primacy of debt, by disqualifying guarantors who had not fulfilled their co-extensive liability with the insolvent corporate debtor. It was argued that Respondent No. 3 was ineligible to submit the Plan under Section 29A(h) of the IBC, as several personal guarantees executed by the Respondent No. 3 in favour of various creditors of the Respondent No.1 stood invoked, prior to commencement of CIRP, which was suppressed by Respondent No. 2 and Respondent No. 3 before the NCLT. Therefore, the premise on which the NCLT held the Respondent No. 3 eligible to submit the Plan was *ex facie* false. Further, it was argued that the law which was prevailing on the date of the application had to be seen, therefore, the disqualification would be attracted on the date of filing of the application.

Lastly, it was submitted that a legal ineligibility could not be done away with by alleged estoppel and such ineligibility had to be considered by courts irrespective of any waiver by any party or creditor. It was pointed out that the approval of the Plan was made after the expiry of the CIRP period. It was submitted that owing to the clear infraction of Section 12 *(Time limit for completion of insolvency resolution process)* of the IBC, the orders passed should be set aside.

Contentions raised by the Respondents:

The Respondents averred that a decision made by the CoC in its commercial wisdom on being satisfied with the viability and feasibility of the resolution plan, should not be interfered with by the SC. Calling the revised plan accepted by the NCLAT an improvement to the earlier one, it was submitted that the Appellant being aware of the decision of the NCLT in the first instance, ought to have taken it further. Further, it was contended that the Appellant was estopped from questioning the eligibility of Respondent No. 3.

It was further argued that Section 29A(h) of the IBC had to be literally interpreted to the extent that a personal guarantor is barred from submitting a resolution plan only when the creditor invoking the jurisdiction of the NCLT has invoked a personal guarantee executed in favour of the said creditor by the resolution applicant. It was pointed out that no personal guarantee stood invoked by RBL Bank at the time of application to the NCLT under Section 7 of the IBC. It was further submitted that the invocation of the consortium guarantee by Allahabad Bank and State Bank of Bikaner and Jaipur under Section 13(2) of the SARFAESI was *ex facie* illegal in terms of the *inter-se* agreement executed between the members of the consortium of banks.

It was also contended that the object of the IBC is the revival of the corporate debtor, liquidation being the last resort, and any interference would have an adverse effect and militate against the very object of the IBC. The Respondents highlighted

that after the approval of the Plan, several projects of national importance had been completed and various others were under execution. Further, all workmen had also been paid in full, and all current employees, operational creditors and statutory dues were being regularly paid.

Observations of the Supreme Court

The SC noted that the idea of the IBC is to facilitate a process of rehabilitation and revival of the corporate debtor with the active participation of the creditors, and that there are only two principal actors in the entire process, that is, the CoC and the corporate debtor.

The SC noted that the objective behind Section 29A of the IBC is to avoid unwarranted and unscrupulous elements to get into the resolution process while preventing their personal interests to step in and prevent certain categories of persons not in a position to lend credence to the resolution process by virtue of their disqualification. Explaining the scope of Section 29A(h) of the IBC, the SC opined that once a person executes a guarantee in favour of a creditor with respect to the credit facilities availed by a corporate debtor, and in a case where an application for insolvency resolution has been admitted, with the further fact of the said guarantee having been invoked, the bar *qua* eligibility would certainly come into play. The provision requires a guarantee in favour of 'a creditor'. Once an application for insolvency resolution is admitted on behalf of 'a creditor', then the process would be one of *rem*, and therefore, all creditors of the same class would have their respective rights at par with each other.

While interpreting Section 29A(h), the SC noted that the word "such creditor" in Section 29A(h) of the IBC meant similarly placed creditors after the application for insolvency application is admitted by the adjudicating authority. The SC observed that to earn a disqualification under Section 29A(h) of the IBC, there must be a mere existence of a personal guarantee that stands invoked by a single creditor, notwithstanding the application being filed by any other creditor seeking initiation of insolvency resolution process. This is subject to further compliance of invocation of the said personal guarantee by any other creditor. Any other interpretation would lead to an absurdity striking at the very objective of Section 29A of the IBC, and in turn the IBC. Ineligibility has to be seen from the point of view of the resolution process and it can never be said that there can be ineligibility *qua* one creditor as against others.

The SC observed that if there is a bar at the time of submission of resolution plan by a resolution applicant, it is obviously not maintainable. However, if the submission of the plan is maintainable at the time at which it is filed, and thereafter, by the operation of the law, a person becomes ineligible, which continues either till the time of approval by the CoC, or adjudication by the authority, then the subsequent amended provision would govern the question of eligibility of resolution applicant to submit a resolution plan. The resolution applicant has no role except to facilitate the process. If there is ineligibility which in turn prohibits the other stakeholders to proceed further and the amendment being in the nature of providing a better process, and that too in the interest of the creditors and the debtor, the same is required to be followed as against the provision that stood at an earlier point of time. Thus, a mere filing of the submission of a resolution plan has got no rationale, as it does not create any right in favour of a facilitator nor can it be extinguished.

Factually, in the instant case, it was noted that Respondent No. 3 had executed personal guarantees which were invoked by three of the financial creditors even prior to the application filed, thereby attracting Section 29A(h) of the IBC. Thus, in the touchstone of the interpretation of Section 29A(h) of the IBC by the SC, it was held that the plan submitted by the Respondent No.3 ought not to have been entertained. The SC also agreed with the NCLT that Section 12 of the IBC would not get attracted on account of pending proceedings with interim orders.

The SC observed that the majority of the creditors had given their approval to the Plan. The SC agreed with the observation of the NCLT that the Plan was accordingly approved after taking into consideration, the techno-economic report pertaining to the viability and feasibility of the Plan. Moreover, it was observed that the Plan became operational since April 18, 2018, and the Respondent No. 1 was an on-going concern. Taking note of the interest of over 23,000 shareholders and thousands of employees of the Respondent No. 1, and of the ongoing projects of the Respondent No. 1 of public interest, it observed that the ultimate object of the IBC, was to put the corporate debtor back on the rails and no prejudice would be caused to the dissenting creditors as their interests would otherwise be secured by the Plan itself. Hence, the SC wished not to interfere with the Plan.

Decision of the Supreme Court

The SC held that the plan submitted by the Respondent No. 3 ought not to have been entertained. The SC held that the NCLT and the NCLAT were not right in rejecting the contentions of the Appellant on the ground that the earlier appeals having been withdrawn without liberty, the issue *qua* eligibility cannot be raised for the second time. It held that since the Appellant was not a party to the decision of the NCLT on the first occasion, in the appeal the Appellant merely filed an application for impleadment, and so the principle governing *res judicata* and *issue estoppel* would not get attracted. Thus, it

was held that the reasoning rendered by the NCLAT to that extent cannot be sustained in law. However, noting the peculiar facts of the instant case the SC dismissed the appeal so as to not disturb the Plan leading to the on-going operation of the Respondent No. 1.

VA View:

Through this Judgement, the SC has in accordance with the objective of IBC, given prime importance to the revival of the corporate debtor and its working as a going concern. While the SC accepted that the orders passed by the NCLT and NCLAT were flawed, considering the commercial wisdom of the CoC and the possible adverse impact the revocation of the Plan might have on the corporate debtor, the SC, following the spirit of the IBC, did not set aside the Plan.

However, for similar cases that may arise in the future, the SC has categorically laid down that invocation of personal guarantee by any single creditor, irrespective of the fact that an application initiating CIRP has been made by another creditor, suffices to disqualify the guarantor from submitting a resolution plan.

Thus, the SC through this Judgement has struck a fine balance between clarifying the law on Section 29(A)(h) of the IBC, while also ensuring that the corporate debtor is brought back on its feet, without once again getting embroiled in the process of IBC.

II. NCLAT: A 'Successful Bidder' cannot make 'conditional bids' or withdraw bid after paying earnest money deposit

The National Company Law Appellate Tribunal ("**NCLAT**") has in its judgment dated January 11, 2022 ("**Judgement**"), in the matter of ***Visisth Services Limited v. Mr. S. V. Ramani and Others [Company Appeal (AT) (Insolvency) No.896 of 2020],*** held that a 'Successful Bidder' cannot wriggle out of the contractual obligations and withdraw the bid after payment of earnest money deposit on the ground that the offer made was a 'conditional offer'.

Facts

The present appeal had been filed under Section 61 of the Insolvency and Bankruptcy Code, 2016 ("**IBC**"), by M/s. Visisth Services Limited ("**Appellant**") against an order dated August 07, 2020 ("**Impugned Order**") passed by the National Company Law Tribunal, Kolkata Bench ("**NCLT**"). By the Impugned Order, the NCLT had dismissed the application of the Appellant and also disposed of the company application filed by Mr. S. V. Ramani, the liquidator ("**Respondent 1**" / "**Liquidator**") of United Chloro Paraffins Private Limited (the "**Corporate Debtor**") with directions to issue fresh invitation to bidder to provide balance sale consideration within such time as per Schedule I of Regulation 33 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 ("**LPR 2016**"). Further, the NCLT directed that, in case of payment of the full sale consideration, the Liquidator shall execute certificate of sale or sale deed to transfer the assets in the manner specified in the terms of sale as per bidding document and in case of failure to pay the balance sale consideration, the Liquidator was at liberty to cancel the sale in favour of the bidder by forfeiting the earnest money deposit ("**EMD**") and the amount paid towards the price of bidding document and to proceed with sale as per Regulation 32-A of the LPR 2016.

Previously, on October 12, 2018, an application filed under Section 10 of the IBC by the Corporate Debtor was admitted by the NCLT. Subsequently, due to failure of corporate insolvency resolution process ("**CIRP**"), on July 19, 2019, an order of liquidation was passed and Mr. S. V. Ramani was appointed as the Liquidator. Consequently, on September 01, 2019, the Liquidator issued advertisements inviting 'Bids' from prospective buyers through e-auction process for sale of the Corporate Debtor under liquidation as a 'Going Concern'. Pursuant to this, the Appellant purchased the e-Auction Process Information Document ("**Bid Document**") from the Liquidator upon payment of Rs. 5 Lakhs. On September 04, 2019, the Appellant issued an e-mail to the Liquidator – (i) seeking clarifications on several issues with respect to 'E-Auction process' (*the queries pertained to the claims and liabilities of the Corporate Debtor such as charges over the assets, outstanding statutory dues to the 'Tax Authorities, Electricity Authorities', etc.*); (ii) proposed different payment terms; and (iii) specified in the e-mail that their offer of acceptance was conditional to extinguishment of claims of 'Financial Creditors, Tax Department, Operational Creditors, Provident Fund Employees and other contingent liabilities' ("**Conditional Offer E-mail**").

On September 05, 2019, the Liquidator sent two e-mails to the Appellant informing that the terms and conditions of the

Bid Document could not be changed or revised after publication. M/s. State Bank of India ("**SBI**" / "**Respondent 2**") had also replied to the e-mail and clarified the conditions. The Appellant addressed a letter on September 06, 2019 reconfirming its understanding of acceptance of the terms and conditions for the bid ("**Reconfirming E-mail**"). The Appellant submitted an EMD of Rs. 37,10,000/- to the Liquidator. On September 08, 2019, the Appellant sent an e-mail to the Liquidator stating that if any litigation arises from any source, the EMD amount and the Bid Document purchase amount was to be refunded within three days.

The Liquidator issued a provisional sale letter dated September 25, 2019 in favor of the Appellant ("**Provisional Letter of Sale**") upon receipt of communication from SBI confirming that it was the highest successful bidder in the e-auction process. On October 29, 2019, the Appellant addressed a letter to the Liquidator stating that the Provisional Letter of Sale was inconsistent with the terms of payment specified by the Appellant and sought for refund of the money paid with the interest. Subsequently, on January 9, 2020, an affidavit was filed by the Appellant in the application preferred by the Liquidator before the NCLT seeking direction for 'Approval of the Sale' as a 'Going Concern'; wherein the Appellant sought for approval without transfer of any liabilities; and if there exists any impediment, it sought for withdrawing from the bid and the refund of the amount paid.

Issue

1. Whether sale of Corporate Debtor as a 'Going Concern' in liquidation proceedings includes its liabilities.

2. Whether the Appellant could withdraw from the bid after payment of the EMD and seek for refund of the EMD on the ground that the offer made was a 'conditional offer'.

Arguments

Contentions raised by the Appellant:

There was no valid contract between the parties. The Conditional Offer E-mail was sent wherein it was amply clarified that the Appellant would be willing to participate in the e-auction process only if the liabilities attached to the units of the Corporate Debtor, both statutory and non-statutory in nature, were extinguished. Further, different payment terms were proposed. These conditional terms formed part of the multiple subsequent correspondence issued by the Appellant to the Liquidator, including the Reconfirming E-mail.

The terms of the bid laid down in the Bid Document were not absolute, and only an intimation to offer. The intending purchaser was at liberty to negotiate and agree upon the terms subject to which the offer will be made, as formed part of the Conditional Offer E-mail and the Reconfirming E-mail. The Liquidator selectively chose to remain silent on the issues despite repeated clarifications sought by the Appellant and the clear intention that the offer of the Appellant would be conditional. The Liquidator informed the Appellant that SBI had accepted most of the conditions made by the Appellant and, therefore, the Appellant deposited the EMD of Rs. 37,10,000/- assuming that the conditions set out in the Conditional Offer E-mail had been accepted. The Liquidator proceeded to issue the Provisional Sale Letter despite the clear contents of the Appellant's Conditional Offer E-mail.

Since the Liquidator did not assist the Appellant in clarifying the liabilities of the Corporate Debtor, the Appellant informed the Liquidator that if its bid is not accepted with its terms they would seek to withdraw from the bid. An affidavit to this extent was filed by the Appellant before the NCLT on January 09, 2020 seeking to withdraw its bid and sought for refund of the EMD and the amount paid towards purchasing the Bid Document. Subsequently, the sale remained unconfirmed till July, 2020, by which date the pandemic hit the country and on account of this unprecedented force majeure event, the Appellant addressed an e-mail dated July 10, 2020, informing the Liquidator about the poor financial health and seeking to withdraw from the bid.

The Appellant had participated in the bid with the *bona fide* intention to complete the sale conditional to the terms proposed by it. However, the Liquidator failed to clarify the terms of the sale and the Appellant cannot be subjected to the terms that it did not agree to abide by. Further, even in the case where a 'Going Concern' is on an 'as is where is basis', the pre-existing pecuniary liabilities cannot be transferred. The LPR 2016 provides that the Liquidator shall identify and group the assets and liabilities to be sold as a 'Going Concern' in consultation with the 'Consultation Committee of Creditors'. In the present case, the Liquidator had failed to exercise his duty of assisting the Appellant with information and documents pertaining to the liabilities of the Corporate Debtor. If the EMD is forfeited, the Corporate Debtor will be permitted to make unlawful gains and unjustly enrich at the expense of the Appellant.

Contentions raised by the Respondent 1:

The Appellant after payment of the EMD, wrote a letter to the Liquidator on September 06, 2019, that the sale of the Corporate Debtor should be transferred without any liabilities. The Appellant was aware of the fact that the sale of the assets of the Corporate Debtor included its liabilities as the sale was on an 'as is where is basis'. It was also submitted that the Appellant was involved in the CIRP where it was the unsuccessful resolution applicant and, thus, was aware of the liabilities attached to the assets of the Corporate Debtor.

The Liquidator in its response dated January 05, 2020 to the e-mail sent by the Appellant in September, 2019, had clarified that no changes could be made to the Bid Document, once it is published in the public domain. The Appellant was bound by its declaration submitted to the Liquidator on September 05, 2019, that upon failure to act on the terms of the sale, the EMD and all other amounts would be forfeited.

Contentions raised by the Respondent 2:

Subsequent to making its bid on September 06, 2019 and having been declared 'Successful Bidder', the Appellant cannot seek to impose conditions as it has attempted to do so by the Reconfirming E-mail and e-mails dated September 08, 2019 and October 29, 2019. The Appellant was bound by the terms and conditions of the Bid Document, wherein the payment of all statutory dues, taxes, fees, charges, was specified to be the sole responsibility of the Appellant. The Liquidator never either expressly or impliedly accepted the terms and conditions addressed to by the Appellant. The Appellant should have refrained from participating in the bid if it was desirous of sticking to the conditions put forth by it.

It was denied that SBI had ever accepted the conditions proposed by the Appellant. The sale of the Corporate Debtor was as a 'Going Concern' on 'as is where is basis', therefore the assets and liabilities could not be bifurcated. The Bid Document duly clarified that the assets in liquidation were being sold as a 'Going Concern'. The Appellant had accepted condition of forfeiture of the EMD as mentioned in the Bid Document. The amount deposited by the successful bidder accounts for 10% for the 'Reserve Price' and if there is forfeiture, the loss is indeed enormous. The Appellant has no right to make any claim in as much as it has failed to pay the subsequent due towards the sale consideration within the time frame of 90 days as per Clause 12 of Schedule 1 of the LPR 2016.

Observations of the NCLAT

The NCLAT observed that, it could be seen from the paragraphs 3.2.1, 3.2.2 and 4.2.1 of the IBBI Discussion Paper on Corporate Liquidation Process ("**Discussion Paper**") along with Draft Regulations dated April 27, 2019 as well as Regulation 32-A of the LPR 2016, that sale as a 'Going Concern' means sale of assets as well as liabilities and not assets *sans* liabilities. The NCLAT observed that, paragraphs 3.2.1 and 4.2.1 of the discussion paper amply specified that all assets and liabilities, which constitute an integral business of the Corporate Debtor would be transferred together, and the consideration paid must be for the business of the Corporate Debtor.

Thereafter, the NCLAT addressed the second issue, and noted that, it is the main case of the Appellant having communicated to the Liquidator prior to the 'E-Auction process' date; they had participated in the bid process with the *bona fide* intention to comply the sale process as the Respondent 2/SBI had accepted the payment terms. The NCLAT observed that perusal of the terms and conditions of the Bid Document for the proposed sale showed that clauses 12,13,14 and 15 showed that the Appellant had accepted all the terms and conditions and could not revise the same. The Bid Document also specified under the heading 'Costs, Expenses and Tax Implications' that payment of all statutory and non-statutory dues, taxes, rates, assessments, charges, fees, owed by the Corporate Debtor to anybody in respect of the subject property shall be the sole responsibility of the Appellant being the 'Successful Bidder'. The NCLAT also noted that by an e-mail dated September 06, 2019, the Liquidator had clearly mentioned that '*legal issues pertaining to e-Auction cannot be changed after public notification*'. The NCLAT noted that the fact that the Appellant was supposed to comply the auction purchase in 2019 itself and the pandemic erupted in the year 2020.

The NCLAT observed that, the Supreme Court in ***Pawan Kumar Agarwal v. Association of Management Studies and Another [2009 (6) SCC 171]*** had observed in paragraph 26 as follows, "*26. A tender is an offer. It is something which invites and is communicated to notify acceptance. Broadly stated it must be unconditional; must be in the proper form, the person by whom tender is made must be able to and willing to perform his obligations. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. However, a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process*."

The NCLAT observed that, the Liquidator will carry on the business of the Corporate Debtor for its beneficial Liquidation as prescribed under Section 35 of the IBC. The Liquidator will only act and cannot modify/revise the terms of the contract.

The Liquidator shall endeavor to sell the Corporate Debtor as a 'Going Concern' only in accordance with the law. In the declaration signed, the Appellant unconditionally agreed to abide by the terms of the 'E-Auction process' and the Bid Document, which is inclusive of forfeiture of the EMD, in the event the Appellant did not perform their part of obligation after the acceptance of the bid in their favor. The acceptance was conveyed to the Appellant on September 25, 2019. Clearly noting the terms and conditions that the Corporate Debtor was being sold as a 'Going Concern' in an 'as is where is basis', the Appellant cannot now be permitted to turn around and plead that their offer was conditional.

Decision of the NCLAT

The NCLAT concluded that the sale of a company as a 'Going Concern' means sale of both assets and liabilities, if it is stated on 'as is where is basis'. Further, the Appellant being the 'Successful Bidder' cannot wriggle out of the contractual obligations and having regard to Regulation 32-A of the LPR 2016 and the scope and objective of the IBC, the NCLAT was of the opinion that the Appellant cannot be entitled to the EMD amount and the amount paid towards the Bid Document, if he does not comply with the terms of the contract on the ground that the offer made was a 'conditional offer'. As a result, the NCLAT did not find any illegality or infirmity in the order of the NCLT. Hence, the appeal was accordingly dismissed.

VA View:

The NCLAT in this Judgement has correctly observed that, the Appellant was bound by the terms and conditions of the Bid Document and no communication to the Liquidator stating that it was a conditional offer, was sustainable. If the Appellant had any apprehensions and conditions about the liabilities, the Appellant could have exercised its choice of not participating in the bid.

The NCLAT observed that, having participated, the Appellant cannot propose certain conditions subsequent to its participation and bid. It was analysed that, if the Appellant is allowed to withdraw from the bid at this stage and seek refund on the ground that its conditional offer has not been accepted, then the liquidation process would be a never ending one, defeating the scope and objective of the IBC.

III. Supreme Court: An arbitrator has the power to grant post-award interest on the interest amount awarded under the Arbitration and Conciliation Act, 1996.

The Hon'ble Supreme Court of India ("**SC**") has in its judgement dated January 7, 2022 ("**Judgement**"), in the matter of ***UHL Power Company Limited v. State of Himachal Pradesh [Civil Appeal Nos. 10341 and 10342 of 2011],*** held that an arbitrator has the power to grant post-award interest on the interest amount awarded under the Arbitration and Conciliation Act, 1996 ("**Act**").

Facts

UHL Power Company Limited ("**UHL**") and the State of Himachal Pradesh ("**State of H.P.**") executed a memorandum of understanding dated February 10, 1992 ("**MoU**") and implementation agreement dated August 22, 1997 ("**Implementation Agreement**") with respect to construction of a project. However, after execution of the MoU and the Implementation Agreement, differences arose between the parties and arbitration proceedings were initiated between UHL and the State of H.P., wherein the learned sole arbitrator, by award dated June 05, 2005, awarded a sum of INR 26,08,89,107.35/- in favour of UHL towards expenses claimed along with pre-claim interest capitalized annually, on the expenses so incurred. In addition, the arbitrator also awarded compound interest in favour of UHL at the rate of 9% per annum till the date of claim and in the event the awarded amount is not realized within a period of six months from the date of making the award, future interest at the rate of 18% per annum was also awarded on the principal claim with interest ("**Award**").

Dissatisfied with the Award, the State of H.P. challenged the Award under Section 34 of the Act before the High Court of Himachal Pradesh ("**High Court**"). The High Court, by judgment dated December 16, 2008, disallowed the Award. The said judgment was challenged by UHL under Section 37 of the Act before the division bench of the High Court. The division bench of the High Court, on the conclusion that the Implementation Agreement was prematurely terminated by the State of H.P., awarded the payment of actual principal amount of INR 9,10,26,558.74/- in favour of UHL along with simple interest at the rate of 6% per annum from the date of filing of the claim till the date of realization of the awarded amount. However, relying on the judgement of ***State of Haryana v. S.L. Arora and Co [(2010) 3 SCC 690]*** *("**S.L. Arora case**")* wherein it was held that compound interest can be awarded only if there is a specific contract or authority under a Statute for compounding of interest, and that there is no general discretion vested in courts or tribunals to award compound

interest, the High Court denied the Award of compound interest and stated that in the absence of any provision for interest upon interest in the contract, an arbitrator does not have the power to award interest upon interest, or compound interest, either for the pre-award period or for the post-award period ("**Impugned Judgement**"). Aggrieved by the Impugned Judgement, both UHL and the State of H.P. challenged the Impugned Judgement before the SC by filing different appeals which was clubbed by the SC.

Issue

Whether an arbitrator has the power to grant post-award interest on the interest amount awarded under the Act.

Arguments

Contentions raised by UHL:

The UHL, *inter alia*, contended that the ratio of S. L. Arora, case on which reliance has been placed in the Impugned Judgement, was set aside by a three-judge bench of the SC in ***Hyder Consulting (UK) Ltd. v. Governor, State of Orissa through Chief Engineer [(2015) 2 SCC 189] ("Hyder Consulting Case")*** wherein it was held that post-award interest can be granted by an arbitrator on the interest amount awarded. As the judgment of S.L. Arora case has been overruled by the SC, UHL contended that the findings of the Impugned Judgment insofar as it relates to grant of the compound interest should be reversed while restoring the Award on the above aspect in favour of UHL.

Contentions raised by the State of H.P.:

The State of H.P. contended that, the Impugned Judgement is gravely erred and failed to appreciate that the MoU did not merge into the Implementation Agreement as both were distinct documents, and that the MoU and the Implementation Agreement contained separate arbitration clauses. Secondly, the State of H.P. argued that the arbitral tribunal in the Award has committed a grave error in arriving at the conclusion that the Implementation Agreement was prematurely terminated by the State of H.P. much before the expiry of the prescribed period.

Observations of the Supreme Court:

The SC, first, noted that, since the judgment of S.L. Arora case has been overruled by the Hyder Consulting Case, the findings returned by the High Court in the Impugned Judgment to the effect that an arbitrator is not empowered to grant compound interest or interest upon interest is quashed and set aside.

Secondly, the SC, analysing the facts of the case, stated that the fact that the State of H.P. admits to having executed the MoU with UHL and the MoU being annexed as "Appendix A" to the Implementation Agreement itself demolishes the plea taken by the State of H.P. that the MoU did not merge into the Implementation Agreement. This was also reinforced on a reading of the definition of the word "agreement" in the Implementation Agreement which clearly stated that the word "agreement", wherever used in the Implementation Agreement, included all its appendices and annexures. Therefore, the MoU having been described as Appendix A to the Implementation Agreement would have to be treated as having merged with the Implementation Agreement for all effects and purposes. Thus, the disputes that were referable to arbitration under the Implementation Agreement included disputes arising under the MoU, even though the latter did contain a separate arbitration clause. On this basis, the SC held that the contention that the MoU forms a part of the Implementation Agreement, does not deserve any interference.

Thirdly, the SC noted that a plain reading of clauses 4.1(a) and (b) of the Implementation Agreement leaves no doubt that UHL was required to commence construction of a project within a period of one year from the effective date of Implementation Agreement only after obtaining the necessary clearances. However, it was agreed by the parties that since obtaining of the relevant clearances was not entirely in the hands of UHL, in the event of any delay beyond a period of three months reckoned from the effective date, the stipulated period of one year contemplated in the Implementation Agreement could be extended. In the light of the aforesaid clauses of the Implementation Agreement, the SC noted that the submission made by the State of H.P. is unmerited.

Lastly, the SC, by citing various judicial pronouncements, concluded by stating that the jurisdiction conferred on courts under Section 34 of the Act is fairly narrow and when it comes to the scope of an appeal under Section 37 the Act, the jurisdiction of an appellate court in examining an order, setting aside or refusing to set aside an award, is all the more circumscribed. Therefore, the interpretation of the relevant clauses of the Implementation Agreement, as arrived at by the learned arbitrator in the Award, are both, possible and plausible.

Decision of the Supreme Court:

In view of the above, the SC partly allowed the appeal by UHL by stating that the arbitrator has the power to grant post-award interest and rejected the appeal of the State of H. P. *in toto*.

VA View:

In the Judgement, the SC throws additional clarity on two important aspects of arbitration law in India. The SC, in line with the recent judgement with respect to the power of arbitrators to grant interest and *pendente-lite* interest in the cases of ***Punjab State Civil Supplies Corporation Limited v. Ganpati Rice Mills [LL 2021 SC 591]*** and ***M/s Garg Builders v. M/s Bharat Heavy Electronics Limited (Civil Appeal No. 6216 of 2021),*** held that an arbitrator has the power to grant post-award interest on the interest amount awarded. In light of these judgements, the parties, while drafting the agreement, may consider explicitly mentioning about the power of arbitrator to grant post award or any other form of interest to avoid any uncertainty and confusion at a later stage.

Secondly, with respect to the judicial review of arbitral awards, the SC rightly stated that the jurisdiction conferred on courts under Section 34 of the Act is fairly narrow and when it comes to the scope of an appeal under Section 37 of the Act, the jurisdiction of an appellate court is more circumscribed and when there are two plausible interpretations of the terms and conditions of the contract, then no fault can be found if the arbitrator proceeds to accept one interpretation as against the other.

IV. Supreme Court: An arbitral tribunal constituted in violation of the neutrality clause under Section 12(5) of the Arbitration and Conciliation Act, 1996 will lose its mandate and cannot be given effect.

The Hon'ble Supreme Court ("**SC**") has in its judgment dated January 4, 2022 ("**Judgment**"), in the matter of ***Ellora Paper Mills Limited v. The State of Madhya Pradesh [Civil Appeal No. 7697 of 2021]*** held that an arbitral tribunal constituted in violation of the neutrality clause under Section 12(5) of the Arbitration and Conciliation Act, 1996 ("**Act**") will lose its mandate and cannot be given effect.

Facts

The State of Madhya Pradesh ("**Respondent**") had issued a tender for supply of cream wove paper and duplicating paper for the year 1993 to 1994. Ellora Paper Mills Limited ("**Appellant**") participated in the tender process and was awarded the contract by way of a supply order dated September 22, 1993. Thereafter, a dispute arose when the Respondent did not make 90% of the payments as per the terms of the contract for the paper supplied by the Appellant and rejected some consignments without providing any justifications and subsequently by a letter dated November 15, 1993, the Respondent informed the Appellant that the paper supplied did not conform to their specifications.

The Appellant filed a civil suit in the Civil Court, Bhopal, seeking the relief of permanent injunction against the Respondent, restraining it from awarding the contract to a third party. However, the suit had become infructuous since the Respondent had already awarded the contract to a third party. Thereafter, the Appellant filed another suit before the Civil Court to recover Rs. 95,32,103, and in the said suit the Respondent preferred an application under Section 8 of the Act and sought a stay of proceedings on the ground that there existed an arbitration clause in the contract between the Appellant and the Respondent. However, the said application was rejected by the Civil Court. The Respondent filed a revision petition before the Madhya Pradesh High Court ("**HC**") and the parties were referred to arbitration by the Stationery Purchase Committee ("**Arbitral Tribunal**") comprising officers of the Respondent.

The Appellant filed its objections to the constitution of the Arbitral Tribunal and also challenged its jurisdiction by filing an application under Section 13 of the Act, which was rejected. Thereafter, the Appellant filed another application under Section 14 read with Sections 11 and 15 of the Act before the HC seeking termination of the mandate of originally constituted Arbitral Tribunal and for appointment of a new arbitrator. The Appellant, relying on Section 12 (5) of the Act, submitted that since all the members of the Arbitral Tribunal were employees of the Respondent, a new Arbitral Tribunal had to be constituted.

However, the HC dismissed the application filed by the Appellant and held that since Section 12(5) of the Act was made effective from October 23, 2015 and was introduced through the Arbitration and Conciliation (Amendment) Act, 2015 ("**Amendment Act, 2015**"), it cannot have retrospective operation in the arbitration proceedings already commenced

prior to the Amendment Act, 2015, unless the parties otherwise agree ("**Impugned Judgment**"). Being aggrieved by the Impugned Judgment, the Appellant filed the present appeal before the SC ("**Appeal**").

Issue

1. Whether the Arbitral Tribunal consisting of the officers of the Respondent had lost its mandate as per Section 12 (5) read with the Seventh Schedule of the Act.

2. Whether a fresh arbitrator had to be appointed as per the Act.

Arguments

Contentions raised by the Appellant:

It was contended that the Impugned Judgment was contrary to the decision of the SC in ***Jaipur Zila Dugdh Utpadak Sahkari Sangh Limited v. Ajay Sales & Suppliers [AIR 2021 SC 4869]*** and that the continuation of the Arbitral Tribunal consisting of the officers of the Respondent would frustrate the object and purpose of the Amendment Act, 2015, by which Section 12(5) read with the Seventh Schedule was inserted to keep in check the impartiality and neutrality of the arbitrators. It was further contended that the HC erred in observing that the arbitration proceedings had commenced since there was a stay granted by the HC and the earlier members of the Arbitral Tribunal had already retired. Hence, it could not be claimed that the arbitration proceedings had commenced and that further steps were taken by the Arbitral Tribunal.

In view of the above, it was submitted that the members of the Arbitral Tribunal had lost their mandate as per Section 12(5) of the Act and were ineligible to continue as members of the Arbitral Tribunal and therefore a fresh arbitral tribunal was to be constituted.

Contentions raised by the Respondent:

It was submitted that the Arbitral Tribunal was constituted in the year 2000, and Section 12(5) read with the Seventh Schedule of the Act was inserted into the statute with effect from October 23, 2015. Therefore, it would not be retrospectively applicable in the present factual background, as had been held in the Impugned Judgment.

It was further submitted that the decision of the SC in ***Jaipur Zila Dugdh Utpadak Sahkari Sangh Limited (supra)*** was not applicable since in the aforementioned case, the arbitrator was appointed after the Amendment Act, 2015. However, in the present case, the arbitrator was appointed approximately 20 years prior thereto and thereafter the arbitration proceedings commenced and the Appellant had also participated.

Observations of the Supreme Court

The SC observed that the Arbitral Tribunal was constituted in the year 2001 as per the agreement entered into between the parties, however, the arbitration proceedings could not commence due to the proceedings initiated by the Appellant. In the meanwhile, the officers of the originally constituted Arbitral Tribunal had also retired. Hence, the SC was of the view that given the circumstances, technically the arbitration proceedings had not commenced.

The SC by placing reliance on ***Jaipur Zila Dugdh Utpadak Sahkari Sangh Limited (supra)*** and ***Bharat Broadband Network Limited v. United Telecoms Limited [(2019) 5 SCC 755],*** further observed that Section 12 of the Act was amended by Amendment Act, 2015 based on the recommendations of the Law Commission, which specifically dealt with the issue of neutrality of arbitrators. To achieve the main purpose for amending the provision, Section 12(5) of the Act specifically provides that when an arbitration clause is found to be foul with the amended provision, the appointment of the arbitrator would be outside the scope of the arbitration agreement, empowering the court to appoint such an arbitrator as may be permissible and the other party cannot insist upon the appointment of the arbitrator in terms of the arbitration agreement. When the party appointing an adjudicator is the State, the duty to appoint an impartial and independent adjudicator is that much more onerous and the right to natural justice cannot be said to have been waived only on the basis of a "prior" agreement between the parties at the time of the contract and before arising of the disputes.

Decision of the Supreme Court

In view of the above, the SC held that the Arbitral Tribunal comprising of officers of the Respondent had lost its mandate in view of Section 12(5) read with Seventh Schedule of the Act. Considering that the dispute between the parties was pending

since the year 2000, instead of remanding the matter back to the HC, the SC decided to appoint a former Judge of the SC as the new arbitrator.

VA View:

In this Judgment, the SC considered and relied upon its earlier decisions and emphasised that independence and impartiality of an arbitrator are the hallmarks of any arbitration proceedings and the rule against bias is a fundamental principle of natural justice. When an arbitrator is appointed in terms of a contract and by parties to the contract, he is required to be independent of the parties. Thus, where the balance between the principles of natural justice and binding nature of the contract between the parties is considered, party autonomy cannot be stretched beyond the requirement of impartial and independent adjudicators for resolution of disputes.

Hence, the principles of impartiality and independence cannot be abandoned at any stage of the proceedings, more importantly at the stage of constitution of the arbitral tribunal, and it would be implausible to consider that the autonomy of the party can be exercised in disregard of these principles even if the same was agreed prior to the disputes arising between the parties.

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