Between the lines...

VAISH ASSOCIATES ADVOCATES ESTD. 1971

NEW DELHI | MUMBAI | BENGALURU

March, 2022

Key Highlights

I. NCLAT: No possibility negotiating the resolution plan in the intervening period between approval by the CoC, and pending the approval of the NCLT.

The Hon'ble National Company Law Appellate Tribunal, New Delhi ("**NCLAT**") has in its judgment dated January 27, 2022, in the matter of ***Union Bank of India v. Kapil Wadhawan and Others [Company Appeal (AT) (Insolvency) No. 370, 376-377 & 393 of 2021]*** ("**Judgement**") held that once the resolution plan is approved by the Committee of Creditors ("**CoC**"), the jurisdiction of the adjudicating authority is confined by the provisions of Section 31(1) of the Insolvency and Bankruptcy Code, 2016 ("**IBC**") to determining whether the requirements of Section 30(2) of the IBC have been fulfilled in the plan as approved by the CoC.

Facts

In the instant case, the Union Bank of India ("**Appellant**") filed the appeal on behalf of the CoC of Dewan Housing Finance Limited ("**DHFL**"/"**Corporate Debtor**") against the order of the NCLT, Mumbai ("**NCLT**") dated May 19, 2021 ("**Impugned Order**") whereby the NCLT directed the administrator of DHFL to place the letter dated December 29, 2021 ("**Second Settlement Proposal**") sent by Kapil Wadhwan ("**Respondent No. 1**"), erstwhile promoter and director of DHFL, before the CoC for its consideration, and to inform the NCLT the outcome of the same within 10 days from the date of Impugned Order. The NCLT noted that the Respondent No. 1 had addressed various letters to the administrator, the CoC and also submitted a settlement proposal dated December 13, 2020 ("**First Settlement Proposal**") but did not receive any reply and, therefore, submitted the Second Settlement Proposal. The Fist Settlement Proposal and the Second Settlement Proposal are hereinafter collectively referred to as "**Settlement Proposals**". Respondent No. 1, DHFL and the Reserve Bank of India ("**RBI**") are hereinafter collectively referred to as "**Respondents**".

Subsequently, the Appellant had orally requested the NCLT for a stay of the Impugned Order, which was set aside ("**Second Impugned Order**"). The Impugned Order and the Second Impugned Order are hereinafter collectively referred to as "**Impugned Orders**".

Aggrieved, the Appellant raised the appeal in the instant case against the Impugned Orders, before the NCLAT.

Issues

Whether after the CoC's approval of the resolution plan as submitted by the Piramal Group ("**Resolution Plan**"), and pending approval of the NCLT, the NCLT can direct the CoC to convene a meeting and place the Second Settlement Proposal as offered for consideration, decision and voting.

Arguments

Contentions raised by the Appellant:

The Appellant submitted that the CoC by the Impugned Orders was being compelled to consider the Second Settlement Proposal without any provision of law requiring the CoC to consider such offer, which is in direct contravention of the IBC and Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("**CIRP Regulations**"). The NCLT had acknowledged that there is no provision in the IBC or the CIRP Regulations by which it is empowered to pass the Impugned Orders. Hence, the adjudicating authority has passed the Impugned Orders by

exercising its inherent power under Rule 11 *(Inherent Powers)* of the National Company Law Tribunal Rules, 2017 and Section 60(5) of the IBC.

Further, Respondent No. 1, throughout the corporate insolvency resolution process ("**CIRP**"), sent various letters and proposals, all of which had been placed before the CoC, who felt that such proposals cannot be considered. The Second Settlement Proposal was nothing but the First Settlement Proposal in a different form. An order compelling the CoC to consider every offer by the promoter, who was once in control of the corporate debtor, would gravely hamper the CIRP causing inordinate delays, and materially impacting the sanctity of the process in which the CIRP has been conducted.

The Appellant contended that the NCLT by the Impugned Orders has asked the CoC to consider the Second Settlement Proposal, which has neither been submitted in compliance with the Request for Resolution Plan ("**RFRP**") nor in compliance with Section 12A *(Withdrawal of application admitted under section 7, 9 or 10)* of the IBC (and related regulations), and that such a direction of the NCLT was passed after the CoC had, by an overwhelming majority, approved the Resolution Plan, and the administrator had already filed the plan approval application, which had been heard and reserved for orders by the NCLT. Moreover, the RBI had granted its no-objection certificate regarding the Resolution Plan contemplated in Rule 5(d)(iii) of the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019. Therefore, it was submitted that these directions of the NCLT were without jurisdiction, and prejudicial to the stakeholders' interests and are very likely to adversely impact the timely conclusion of the CIRP.

The Appellant contended that only a Resolution Plan compliant with the provisions of the IBC or an application under Section 12A of the IBC could be placed before the CoC. The Second Settlement Proposal was neither a compliant Resolution Plan nor an application under Section 12A of the IBC. The Appellant further contended that inherent powers could not override express provisions of the law. The provisions in relation to settlement proposals are codified under Section 12A of the IBC and Regulation 30A *(Withdrawal of application)* of the CIRP Regulations. The Appellant argued that there was no provision of law that permits the NCLT to compel the CoC to consider an offer that is not a settlement under Section 12A of the IBC nor even a proposal as per the provisions of the IBC.

Contentions raised by Respondents:

The Respondents submitted that the Second Settlement Proposal is different from the First Settlement Proposal and that on a perusal of the minutes of the meeting of the CoC, wherein the First Settlement Proposal was purportedly discussed, would show that the said proposal was never considered on merits and was rejected on hyper technicalities.

They argued that objections by the Appellant alleging lack of jurisdiction on the part of the NCLT are misconceived. It was further argued that the objection by the Appellant that the Impugned Order will interfere with the commercial wisdom of the CoC was incorrect as the adjudicating authority had merely directed consideration of the Second Settlement Proposal and not interfere with the commercial wisdom of the CoC. The Respondents further argued that the Resolution Plan is not in the interest of creditors and, therefore, the Second Settlement Proposal must be considered.

Observations of the NCLAT

The NCLT by the Impugned Order had directed the COC to consider the Second Settlement Proposal of Respondent No. 1 when the Resolution Plan after approval from the CoC was pending adjudication under Section 31 *(Approval of Resolution Plan)* of the IBC. The CoC contends that the Second Settlement Proposal was neither submitted in compliance with the RFRP nor with Section 12A of the IBC and related regulations. Such a direction of the NCLT was passed despite the fact that the CoC of the corporate debtor had by an overwhelming majority approved the Resolution Plan. The administrator had already filed the plan approval application, and that application was heard and reserved for orders by the learned NCLT.

It is pertinent to mention that the Supreme Court ("**SC**") in the case of ***Ebix Singapore Private Limited v. Committee of Creditors of Educomp Solutions Limited, [2021 SCC online SC 707]*** **("Ebix Judgement")**, has very recently dealt with the same issue which has arisen in this appeal. In the Ebix Judgement, the SC had observed that "*CoC-approved Resolution Plans, before the Approval of the Adjudicating Authority under Section 31, are a function and product of the IBC's mechanisms. Their validity, nature, legal force and content is regulated by the procedure laid down under the IBC, and not the Contract Act. The voting by the CoC also occurs only after the R.P. has verified the contents of the Resolution Plan and confirmed that it meets the conditions of the IBC and the regulations therein*.

[…]

The Court held that there was no scope for negotiations between the parties once the Resolution Plan has been approved by the CoC. Thus, contractual principles and common law remedies, which do not find a tether in the wording or the intent of the

IBC, cannot be imported in the intervening period between the acceptance of the CoC and the Approval by the Adjudicating Authority.

[…]

We cannot afford to be swayed by abstract conceptions of equity and 'contractual freedom' of the parties to freely negotiate terms of the Resolution Plan with unfettered discretion, that are not grounded in the intent of the IBC."

Further, in the case of ***Pratap Technocrats Private Limited v. Monitoring Committee of Reliance Infratel Limited [2021 SCC Online SC 569]***, the SC held that "*neither the adjudicating Authority (NCLT) nor the appellate Authority (NCLAT) has been endowed with the jurisdiction to reverse the commercial wisdom of the dissenting financial creditors and that too on the specious ground that it is only an opinion of the minority financial creditors.*"

Based on the law laid down in the cases mentioned above, the NCLAT, in the instant case observed that once the Resolution Plan was approved by a 100% voting share of the CoC, the jurisdiction of the NCLT was confined by the provisions of Section 31(1) of the IBC to determining whether the requirements of Section 30(2) of the IBC have been fulfilled in the plan as approved by the CoC. Once the requirements of the IBC have been fulfilled, the NCLT and the NCLAT are duty-bound to abide by the discipline of the statutory provisions. Neither the NCLT nor the NCLAT has an unchartered jurisdiction in equity. The jurisdiction arises within and as a product of a statutory framework. The jurisdiction of the adjudicating authority is confined by the provisions of Section 31(1) of the IBC to determining whether the requirements of Section 30(2) of the IBC have been fulfilled in the plan as approved by the CoC. There was no scope for negotiations between the parties once the CoC had approved the Resolution Plan.

It was further observed that the principles of contractual construction and interpretation may serve as interpretive aids, in the event of ambiguity over the terms of a Resolution Plan, however, remedies that are specific to the Indian Contract Act, 1872 ("**Contract Act**") cannot be applied, *de hors* the over-riding principles of the IBC. It was also observed that if resolution applicants are permitted to seek modifications after subsequent negotiations or a withdrawal after a submission of a resolution plan to the NCLT as a matter of law, it would dictate the commercial wisdom and bargaining strategies of all prospective resolution applicants who are seeking to participate in the process and the successful resolution applicants who may wish to negotiate a better deal, owing to myriad factors that are peculiar to their own case. The broader legitimacy of this course of action can be decided by the legislature alone, since any other course of action would result in a flurry of litigation which would cause the delay that the IBC seeks to disavow.

Decision of the NCLAT

In the instant case, the NCLAT noted that after approval of the Resolution Plan by the CoC, the application was pending before the NCLT under Section 31 of the IBC, for approval of the Resolution Plan, during which the NCLT directed the CoC to consider the Second Settlement Proposal within 10 days and take an appropriate decision. The NCLAT concluded that the Impugned Order was liable to be set aside. Relying on the ratio of the Ebix Judgement, which expressly laid down that there was no scope for negotiations between the parties once the CoC has approved the resolution plan, the NCLAT set aside the Impugned Order deeming it to be unsustainable.

VA View:

The NCLAT through this Judgement re-emphasised on the postulate that commercial or business decisions of the financial creditors are not open to any judicial review by the NCLT or NCLAT. The NCLAT upheld the law laid down by the SC in the Ebix Judgement that once the resolution plan is approved by the CoC, the plan cannot be revisited and modified. The NCLAT rightly upheld the principle that a resolution plan cannot be construed purely as a contract governed by the Contract Act, in the period intervening its acceptance. Even during such intervening period, the resolution plan is binding owing to the IBC framework. Through this Judgement, the NCLAT has reiterated that CIRP proceedings should not be taken lightly by those intending to submit resolution plans for approval. Thus, when the plan has been approved by the CoC and pending the NCLT's approval, the jurisdiction of the NCLT is limited to the extent of verifying the compliance of the plan with regard to the provisions laid down under the IBC and the NCLT should not interfere with the CoC's decision, thereby second guessing its commercial wisdom.

II. DHC: Multiple arbitrations can exist if the cause of action continues or arises after the constitution of a tribunal.

The High Court of Delhi ("**DHC**") has in its judgment dated January 17, 2022 ("**Judgement**"), in the matter of ***Panipat Jalandhar NH 1 Tollway Private Limited v. National Highways Authority Of India [ARB.P. 820/2021],*** held that multiple arbitrations can exist if the cause of action continues or arises after the constitution of a tribunal.

Facts

The petition had been filed by Panipat Jalandhar NH-1 Tollway Private Limited (formerly known as M S Soma Isolux NH 1 Tollway Private Limited) ("**Petitioner**") under Section 11(6) of the Arbitration and Conciliation Act, 1996 ("**Act**") to seek (i) appointment of a nominee arbitrator of the National Highways Authority Of India ("**Respondent**"/ "**NHAI"**) for adjudication of disputes with regard to concession agreement dated May 09, 2008 entered into for a duration of 15 years commencing from May 11, 2009 till May 11, 2024 ("**Concession Agreement**") and (ii) to declare that the purported appointment of Justice (Retd.) G.P. Mathur, former Judge, Supreme Court, was *non est* and bad in the eyes of law.

The Petitioner had entered into the Concession Agreement with NHAI for development of the six-lanes of Panipat-Jalandhar Section of NH-1 having a total length of 291.10 km in the State of Haryana and Punjab. Subsequently, certain disputes arose between the parties in the year 2013 and these were pending adjudication before an independent arbitral tribunal. Therein, the Petitioner had claimed that out of the total 291.10 km, work on 269 km had been completed when the Respondent took a decision to delink 22.1 km out of the total length, on the ground of delay and failure on the part of the Respondent to hand over the stretch. Consequently, due to this delinking, the Petitioner suffered severe loss to the tune of more than INR 2,000 crores. Accordingly, the Petitioner had sent a notice of dispute dated October 25, 2019 ("**Notice of Dispute**") to the Respondent. Since the parties failed to resolve the disputes, the Petitioner invoked arbitration under Clause 44.3 of the Concession Agreement and issued a notice dated February 7, 2020 calling upon the Respondent to confer a set of arbitrators. However, on December 4, 2020 the Respondent suspended the Concession Agreement against which the Petitioner preferred a petition under Section 9 of the Act. During pendency of the aforesaid petition, the Respondent terminated the Concession Agreement on March 5, 2021, which was also challenged by the Petitioner.

According to the Petitioner, the disputes with regard to aforesaid suspension and termination of Concession Agreement were pending adjudication before the second arbitral tribunal comprising of (i) Justice (Retd.) M.K. Sharma, Presiding Arbitrator; (ii) Justice (Retd.) A.K. Sikri (the "**Petitioner's Nominee Arbitrator")**; and (iii) Justice (Retd.) G.P. Mathur as proposed by the Respondent and appointed by order dated May 4, 2021 ("**Appointment Order**") of the DHC (the "**Respondent's Nominee Arbitrator**"), hereinafter referred to as the "**Arbitral Tribunal**". A declaration was given on May 25, 2021 by Respondent's Nominee Arbitrator that he had been appointed arbitrator in three other matters by the Respondent in last three years and his fourth appointment was by virtue of the Appointment Order on the second Arbitral Tribunal ("**Declaration 1**"). Therefore, if nomination of Respondent's Nominee Arbitrator in response to the Petitioner's Invocation Notice (*defined below*) was accepted, this would be his fifth appointment on behalf of the Respondent.

Further, since the parties failed to resolve their disputes mentioned in the dispute notice, the Petitioner issued a notice dated June 4, 2021 to the Respondent invoking arbitration, appointed Mr. V.K. Tyagi as its nominee arbitrator and called upon the Respondent to appoint its nominee arbitrator within 30 days ("**Invocation Notice**"). However, to avoid multiplicity of the proceedings, instead of appointing an alternate arbitrator, the Respondent had requested to consolidate the second and third arbitrations. Further, the Respondent appointed Justice (Retd.) G.P. Mathur as its nominee arbitrator and intimated the Petitioner as well as the Petitioner's Nominee Arbitrator. The aforesaid requests were objected by the Petitioner by its letter dated July 6, 2021, explaining that the disputes raised in proposed third and the second arbitration were completely different and independent even though they arose out of the same Concession Agreement. Further that, if these disputes were consolidated then it would result in delaying the outcome of second arbitration, as pleadings therein were complete. Further, the Petitioner objected to the appointment of Respondent's Nominee Arbitrator since he had already been appointed by the Respondent in four matters, including the second arbitration between the same parties.

Issue

1. Whether multiple arbitrations can exist if the cause of action continues or arises after the constitution of an arbitral tribunal.

Arguments

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

It was submitted that the Respondent had failed to appoint its nominee arbitrator within 30 days of receiving the

Invocation Notice. The Petitioner drew attention of the DHC to the twin pre-conditions to the appointment of Respondent's Nominee Arbitrator, (i) that by filing petition under Section 11 of the Act, the Respondent had in fact forfeited its right to appoint an arbitrator in view of Supreme Court's ("**SC**") decision in ***Datar Switch gears Limited v. Tata Finance Limited [(2000) 8 SCC 151]***; and (ii) All arbitrators had to comply with the requirements of the relevant Schedules of the Act. The Petitioner raised doubts on the independence and impartiality of the Respondent's Nominee Arbitrator. The Petitioner elaborated that the appointment and the Declaration 1 of Respondent's Nominee Arbitrator was in contravention of Entry No. 22 of the Fifth Schedule of the Act. The Petitioner submitted, the interpretation that, the Respondent's Nominee Arbitrator considered his appointment in the present matter as an appointment by the DHC and not by the Respondent, is in contravention of Entry No. 22 of the Fifth Schedule of the Act.

Further, even the subsequent declaration dated August 5, 2021 by Respondent's Nominee Arbitrator ("**Declaration 2**") was not in accordance with Sixth Schedule of the Act. The Declaration 1 and Declaration 2 ("**Declarations**") were bereft of all material particulars as required under the Act. It was submitted that, the Declarations did not provide information of the total ongoing arbitrations and whether other three arbitrations wherein Respondent's Nominee Arbitrator was appointed as arbitrator were pending or not. The Petitioner submitted that Section 11(8)(b) of the Act required the DHC to have due regard to the 'contents of the disclosure and other considerations to secure impartial and independent arbitrator'.

Contentions raised by the Respondent:

The Respondent submitted that the present petition was not only ill-conceived and motivated but also filed with *mala fide* intention to create confusion. The Respondent submitted that it had been in regular touch with the Petitioner over appointment of its nominee arbitrator and thereby, the Petitioner could not claim that the Respondent had failed to take steps to nominate its arbitrator within 30 days of the Invocation Notice. The Respondent submitted that appointment of the Respondent's Nominee Arbitrator was in compliance with the Act and disputes should be referred to the second Arbitral Tribunal. Therefore, when an arbitrator had been appointed by a party and intimation thereof has been conveyed to the other, an application for appointment of an arbitrator under Section 11 of the Act was not maintainable. The present petition under the provisions of Section 11(6) of the Act deserved to be rejected as it had been filed on the false pretext that the Respondent had failed to appoint its nominee arbitrator within 30 days.

With regard to the plea of the Petitioner that the Respondent's Nominee Arbitrator had made insufficient Declarations, the Respondent submitted that the learned arbitrator had specifically stated that he had been nominated by the Respondent in three other matters out of which one nomination was made way back on June 1, 2018, that is, more than three years ago. It was also submitted that the fourth nomination was by the DHC by virtue of the Appointment Order.

The Respondent further submitted that by filing this petition, the Petitioner was seeking appointment of third arbitral tribunal for adjudication of disputes relating to a project for which second Arbitral Tribunal had already been constituted. This would lead to multiplicity of proceedings which is wholly unwarranted and unsustainable. It was also submitted that appointment of the Respondent's Nominee Arbitrator in the second Arbitral Tribunal was with the consent of the Petitioner and, therefore, the Petitioner could not raise objection with regard to his impartiality. It was submitted that, it would be a wholesome approach while deciding all the disputes which might be interlinked, if all the disputes between the parties for the same project arising out of common Concession Agreement were referred to the same Arbitral Tribunal. Since the disputes sought to be resolved in the present petition pertain to the same project between the parties, the Petitioner's objection to refer it to the second Arbitral Tribunal could not sustain.

Observations of the Delhi High Court

The DHC observed that the jurisdiction of the court under Section 11 of the Act is primarily to find out whether there exists a written agreement between the parties for resolution of disputes through arbitration and whether the aggrieved party has made out a *prima facie* arbitrable case. In ***Vidya Drolia and Others v. Durga Trading Corporation [Special Leave Petition (Civil) Nos. 5605-5606 of 2019]***, the SC had clarified that, with a view to prevent wastage of public and private resources, court may conduct '*prima facie* review' beyond the bare existence of an arbitration clause, at the stage of reference to weed out any frivolous or vexatious claims. Such a review, is not intended to usurp the jurisdiction of the arbitral tribunal but is aimed at streamlining the process of arbitration. The DHC noted that, the Invocation Notice was replied to by the Respondent on June 17, 2021 stating that with respect to the Concession Agreement, the Arbitral Tribunal was constituted in May, 2021 and, therefore, these disputes should have been referred to the same Arbitral Tribunal. Further, the Respondent appointed the Respondent's Nominee Arbitrator, hence, it could not be said that the Respondent had failed to respond to the Invocation Notice. The Invocation Notice records that *"all claims raised by the Concessionaire in its Notice of Dispute is being referred to Arbitral Tribunal to be formed in accordance with Clause 44.3 of the Concession Agreement …"*. The DHC further observed that, during the course of the hearing, the Petitioner time and again reiterated that no question had been raised to the integrity and fairness of Respondent's Nominee Arbitrator but the

only objection raised is that he had been appointed as an arbitrator on more than three previous occasions.

The DHC noted that, in ***Gammon India Limited and another v. National Highways Authority of India [AIR 2020 Delhi 132]*** while dealing on the aspect of multiplicity-multiple invocations, multiple references, multiple arbitral tribunals, multiple awards and multiple challenges, between the same parties, in respect of the same contract or the same series of contracts, the court therein had observed that, filing of different claims at different stages of a contract or a project is permissible in law, inasmuch as the contract can be of a long duration and the parties may wish to seek adjudication of certain disputes, as and when they arise. Further, the endeavour of courts in the domain of civil litigation is always to ensure that claims of parties are adjudicated together, or if they involve overlapping issues, the subsequent suit is stayed until the decision in the first suit. The DHC observed that it is with the intention of avoiding multiplicity that the principle of *res judicata* is a part of the Code of Civil Procedure, 1908. It was also observed by the DHC that, multiple arbitrations before different arbitral tribunals in respect of the same contract is bound to lead to enormous confusion and refute the purpose of arbitration being speedy resolution of disputes. It was also observed by the DHC that a previously appointed tribunal was already seized of the disputes between the parties under the same contract and the constitution of three different tribunals was unwarranted and inexplicable. The DHC further noted that, there was no justification for the Petitioner having invoked third arbitration by virtue of the Invocation Notice within less than a month of constitution of second Arbitral Tribunal in respect of the Concession Agreement and Notice of Dispute.

The Fifth Schedule of the Act provided that, the following grounds give rise to justifiable doubts as to the independence or impartiality of arbitrators: (Arbitrator's relationship with the parties or counsel) - "…*The arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the* parties." Further, on the aspect of applicability of Entry No. 22 of the Fifth Schedule of the Act, the SC in ***HRD Corporation v. GAIL (India) Limited [(2018) 12 SCC 471]***, had observed as follows, *"The disqualification contained in Items 22 and 24 is not absolute, as an arbitrator who has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties or an affiliate, may yet not be disqualified on his showing that he was independent and impartial on the earlier two occasions…"* The DHC noted that, the fact that an arbitrator had already rendered an award in a previous arbitration between the parties would not, by itself, on the ground of reasonable likelihood of bias, render him ineligible to be an arbitrator in a subsequent arbitration.

The DHC noted that a perusal of the Declarations made it manifestly clear that all necessary disclosures under the relevant provisions of the Act had been made. The Declarations clarified that the Respondent's Nominee Arbitrator or any of his family members had no relationship with the Respondent. The DHC observed that, the stand of the Respondent while nominating name of Mr. Justice (Retd.) G.P. Mathur was clearly with the intent to refer the disputes to the second Arbitral Tribunal, of which he was a member. Further, the decision in HRD Corporation (supra) made it clear that there was no bar in appointment of an arbitrator in multiple cases, if so warranted. In the light of afore-noted discussions, the DHC found that objections raised by the Petitioner with regard to nomination and appointment of Respondent's Nominee Arbitrator were baseless and liable to be rejected.

The DHC was informed that the disputes pertaining to the year 2013 were pending before the first arbitral tribunal. The suspension and termination of the Concession Agreement in question are subject matter of consideration before the second Arbitral Tribunal. In the considered opinion of the DHC, forming another tribunal would lead to multiple observations and findings by two different tribunals, which could not be permitted.

Decision of the Delhi High Court

The DHC was informed that the proceedings before the second Arbitral Tribunal were in progress, however, not yet complete. The DHC noted that , since the members of the second Arbitral Tribunal were well conversant with the facts and disputes raised between the parties, having dealt the same Concession Agreement and Notice of Dispute, it would enable it to expedite the resolution of disputes rather than delaying it. Moreover, there shall be no confusion or complexity in the outcome of the arbitration, having avoided multiple proceedings.

The DHC held that, multiple arbitrations could exist if the cause of action continues or arises after the constitution of a tribunal. Consequently, it was directed that the subject matter of disputes raised in Invocation Notice with regard to the Concession Agreement and the Notice of Dispute shall be dealt by the second Arbitral Tribunal. Therefore, the present petition was accordingly disposed of.

VA View:

The DHC in this Judgement observed that constitution of multiple tribunals is inherently counter-productive. Further, in any agreement or contract, an arbitration clause is inserted with an object of speedy resolution of disputes. Therefore, a situation where multiple arbitral tribunals parallelly adjudicate different claims arising between the same parties under the same contract, especially raising overlapping issues, should be avoided. In cases where the disputes are of larger magnitude and multiple in number, to avoid any confusion or infirmity, the disputes should be referred to the same arbitral tribunal prior to the constitution of a tribunal.

The DHC rightly observed that, there was no doubt that the Act had been brought in force to ensure independence and impartiality of an arbitrator. Further, at the same time, provisions of the Act do not incapacitate the courts in arriving at just decision given the facts of a particular case. However, multiple arbitrations could exist if the cause of action continues or arises after the constitution of a tribunal.

III. Supreme Court: Compensation in lieu of specific performance cannot be granted under the Specific Relief Act, 1963 unless specifically claimed in the plaint.

The Hon'ble Supreme Court of India ("**SC**") has in its judgement dated February 18, 2022 ("**Judgement**"), in the matter of ***Universal Petro Chemicals Limited v. B.P. PLC and Others [Civil Appeal No.3128 of 2009],*** held that compensation in lieu of specific performance cannot be granted under the Specific Relief Act, 1963 ("**SRA**") unless specifically claimed in the plaint.

Facts

Universal Petro Chemicals Limited ("**Appellant**") entered into a collaboration agreement dated November 1, 1994 ("**Collaboration Agreement**") with one of the respondents, a German company, by which the Appellant had to manufacture lubricants using the formulation of Aral and was given exclusive license regarding the distribution, blending, rebranding and marketing of Aral lubricants in India. Subsequent to this, necessary approvals were obtained from the Reserve Bank of India ("**RBI**") under the Foreign Exchange Management Act, 1973 on November 25, 1994 ("**Approvals**"), which were incorporated in the Collaboration Agreement by a supplementary agreement dated January 3, 1995.

In 2002, Veba Oil, the holding company of the German company referred above was acquired by BP Public Limited Company, a UK entity ("**Respondent(s)**"). As the Approvals were lapsing, the Appellant applied to the Ministry of Commerce and Industry, Government of India for extension of the Approvals with respect to the Collaboration Agreement. On November 13, 2002, the Government approved the request of the Appellant and extended the Approvals. However, it was specified that the royalty was payable from January 1, 2003, to December 31, 2009 and that the duration of the extended Collaboration Agreement would be from January 1, 2003, to December 31, 2009. This updated approval was also made an integral part of the Collaboration Agreement by execution of yet another supplementary agreement dated December 27, 2002 ("**Supplementary Agreement**").

Thereafter, a termination notice was issued by the Respondent on April 14, 2004 on the ground that the Collaboration Agreement would come to an end on October 31, 2004 as per Clause 5 of the Collaboration Agreement and that there would be no extension thereafter ("**Termination Notice**"). Against the Termination Notice, the Appellant filed Civil Suit No.214 of 2004 before the High Court of Calcutta ("**High Court**"). The High Court by an interim order dated August 19, 2004, restrained the Respondents from giving effect to the Termination Notice and from interfering with the Appellant's usage of 'Aral'. The interim order was extended on three occasions and was vacated thereafter by the High Court in its order dated January 10, 2005. The High Court refused to grant a decree of specific performance of the Collaboration Agreement. Aggrieved thereby, the Appellant filed an appeal which was dismissed by an order of the Division Bench of the High Court dated February 18, 2008. Hence, the present appeal was filed before the SC for compensation in lieu of specific performance.

Issue

Whether compensation in lieu of specific performance can be granted under the SRA if not specifically claimed for in the plaint.

Arguments

Contentions raised by the Appellant:

The Appellant contended that the Collaboration Agreement stood extended till December 31, 2009 in view of the Supplementary Agreement. Further, the relief of specific performance of the Collaboration Agreement cannot be granted as the Collaboration Agreement expired on December 31, 2009, however, it was entitled for damages for the period from August 24, 2005 to December 31, 2009. Relying on various case laws, it was argued that the Appellant is entitled for damages even though such a relief was not specifically sought for either in the suit or in the appeal before the High Court. The Appellant referred to the proviso to Section 21(5) of the SRA to contend that the Appellant should be allowed to seek compensation at any stage of the proceeding and that on the basis of Section 73 of the Indian Contract Act, 1872 ("**ICA**") it is entitled for compensation due to the breach of contract.

It was further submitted that specific performance of the Collaboration Agreement was a relief that could have been granted at the time when the Appellant approached the SC in 2008 but cannot be done at this point of time. Therefore, the Appellant is entitled for damages, especially after the Appellant succeeded before the High Court which declared the Termination Notice as illegal.

Contentions raised by the Respondent:

The Respondent contended that the judgments cited by the Appellant pertained to award of compensation under the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, wherein the manner of calculation of compensation was either ascertainable or expressly agreed upon between the parties, and are not applicable to the facts of this case.

The Respondent submitted that the Appellant failed to plead relief for damages before the Civil Court, the High Court and even before the SC and even assuming that the Collaboration Agreement expired on December 31, 2009, the Appellant did not raise this ground or seek to amend the relief during the pendency of this appeal for the past 13 years.

The Respondent also referred to a judicial pronouncement of ***Shamsu Suhara Beevi v. G. Alex and Another ((2004) 8 SCC 569)*** *("**Shamsu Case**")* to contend that the plaintiff who has been remiss in expressly seeking the relief of damages under Section 21(5) of the SRA, is not entitled for any such relief. Lastly, as per Section 73 of the ICA, it contented that the damages can only be granted for the loss suffered and not for the loss of profits.

The Respondent further contended that approval granted by the RBI and the Government of India related only to payment of royalty which did not impinge on the power of the parties to terminate the agreement as provided under Clause 5 of the Collaboration Agreement.

Observations of the Supreme Court

The SC observed that the Appellant admitted to the fact that no relief for damages or compensation was claimed in the suit by the Appellant and such a relief was not sought for either before the Division Bench or before the SC. Further, the Appellant also did not take any steps to amend the appeal even after the date of expiry of the Collaboration Agreement.

The SC further examined the scope of sub-sections (4) and (5) of Section 21 of the SRA and stated that as per the judicial pronouncement of the Shamsu Case wherein the recommendations of the Law Commission of India ("**Law Commission**") were discussed, in no case the compensation should be decreed, unless it is claimed by a proper pleading. It further stated that the Law Commission was of the opinion that it should be open to the plaintiff to seek an amendment to the plaint, at any stage of the proceedings in order to introduce a prayer for compensation, whether in lieu or in addition to specific performance. However, in this case, no claim for compensation for breach of agreement of sale was claimed either in addition to or in substitution of the performance of the agreement. It might be true that the Appellant was interested in the relief of specific performance of the Collaboration Agreement when it filed the Special Leave Petition in 2008 as the Collaboration Agreement subsisted till December 31, 2009. However, even thereafter no steps were taken by the Appellant to specifically plead the relief of damages or compensation.

Further, with respect to the judicial pronouncement cited by the Appellant, the SC stated that the judgments relied upon by the Appellant were not applicable to this case.

Decision of the Supreme Court:

In view of the above, the SC stated that the Appellant is not entitled to claim damages for the period between August 24,

2005 to December 31, 2009 and thus, refused the request of the Appellant for grant of damages.

VA View:

The SC in this Judgement has correctly observed that, the Appellant had erred in asking for compensation under Section 21 of the SRA in addition to the relief of specific performance, in the absence of a prayer made to that effect either in the plaint or by amending the same at any later stage of the proceedings to include the relief of compensation in addition to the relief of specific performance.

On equitable consideration, the court cannot ignore or overlook the provisions of the statute and equity must yield to law. In light of this Judgement, the parties, while drafting their plaint for any dispute with respect to specific performance should explicitly mention to claim damages in lieu of specific performance.

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