VAISH ASSOCIATES ADVOCATES ESTD. 1971

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Key Highlights

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I. Supreme Court: NCLT/NCLAT should not sit in appeal over commercial wisdom of the CoC to allow withdrawal of CIRP.

The Hon'ble Supreme Court ("**SC**") has in its judgment dated June 3, 2022, in the matter of ***Vallal RCK v. M/s. Siva Industries and Holdings Limited and Others [Civil Appeal Nos. 1811-1812 of 2022]***, held that the NCLT/NCLAT should not sit in appeal over commercial wisdom of the Committee of Creditors ("**CoC**") to allow withdrawal of the Corporate Insolvency Resolution Process ("**CIRP**").

Facts

IDBI Bank Limited had preferred an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("**Code**") for initiating the CIRP of M/s. Siva Industries and Holdings Limited ("**Corporate Debtor**") before the National Company Law Tribunal, Chennai ("**NCLT**"). On July 4, 2019, the NCLT admitted the aforesaid application and the CIRP of the Corporate Debtor was initiated. M/s Royal Partners Investment Fund Limited submitted a resolution plan before the CoC of the Corporate Debtor. However, the aforesaid resolution plan could not be approved by the CoC of the Corporate Debtor as it could not meet the requirement of receiving 66% voting share.

Thereafter, the resolution professional preferred an application under Section 33(1)(a) of the Code for seeking initiation of the liquidation process of the Corporate Debtor. Further, the promoter of the Corporate Debtor ("**Appellant**"), preferred a settlement application before the NCLT showing willingness to offer one-time settlement plan and seeking necessary directions to the CoC to consider the terms of the settlement plan. The settlement plan was considered and deliberated by the CoC of the Corporate Debtor during the course of the 13th, 14th and 15th meetings of the CoC. After several rounds of deliberations, the final settlement plan was put up for voting in the 16th CoC meeting held on January 18, 2021 when the settlement plan received only 70.63% votes as against the minimum requirement of 90% voting share as contemplated in Section 12A of the Code. However, subsequently, International Assets Reconstruction Company Private Limited (**"IARCL"**) holding a voting share of 23.60% decided to approve the settlement plan and informed about it to the resolution professional. Hence, pursuant to the approval of IARCL, the settlement plan came to be approved by more than 90% of the CoC in terms of their respective voting share. Accordingly, pursuant to the approval of IARCL, the resolution professional preferred an appropriate application seeking necessary directions from the NCLT. In view thereof, on March 29, 2021, NCLT directed the resolution professional to reconvene a meeting of the CoC. Subsequently, in the 17th CoC meeting held on April 1, 2021, the settlement plan was approved by the CoC with a voting percentage of 94.23%. Accordingly, the resolution professional preferred an application before the NCLT for seeking approval of the settlement plan which was already approved by the CoC.

However, on August 12, 2021, the NCLT passed an order dismissing the above-mentioned application seeking approval of the settlement plan and observed that it was not a settlement simpliciter under Section 12A of the Code but a "Business Restructuring Plan". Further, on the same day, the NCLT passed another order thereby initiating the liquidation process of the Corporate Debtor.

Being aggrieved by both the above-mentioned orders passed by the NCLT on August 12, 2021, the Appellant preferred two appeals before the National Company Law Appellate Tribunal, Chennai ("**NCLAT**"). However, the NCLAT dismissed both the appeals by a common judgment pronounced on January 28, 2022.

Aggrieved by the judgment dated January 28, 2022 pronounced by NCLAT, the Appellant approached the SC. On March 11,

2022, the SC issued a notice upon the respondents and granted stay on the judgment dated January 28, 2022 pronounced by the NCLAT.

Before the SC, there was no representation made on behalf of the Corporate Debtor, whereas the resolution professional of the Corporate Debtor submitted that he does not wish to contest the matter. However, since an important question with regard to the interpretation of Section 12A of the Code arose for consideration, the SC deemed it appropriate to decide the issue involved in the matter.

Issue

Whether the adjudicating authority or appellate authority can sit in appeal over the commercial wisdom of the CoC.

Arguments

Contentions raised by the Appellant:

The Appellant submitted that it is trite law that the adjudicating authority or appellate authority cannot sit in appeal over the commercial wisdom of the CoC. As such, NCLT and NCLAT, both have grossly erred in rejecting the settlement plan and withdrawal of CIRP, considering that the settlement plan was approved by 94.23% of the CoC in terms of voting share.

The Appellant further submitted that one of the main objects of the Code is allowing the Corporate Debtor to continue operating as a going concern as well as paying the dues of the creditors to the maximum extent possible. As such, the judgment dated January 28, 2022 passed by the NCLAT and both the orders dated August 12, 2022 passed by the NCLT are against the spirit and object of the Code.

Observations of the Supreme Court

The SC made reference to the Report submitted by the Insolvency Law Committee ("**Committee**") submitted on March 26, 2018, which had, *inter alia,* recommended for inclusion of a provision in the Code for withdrawal of application for initiation of CIRP admitted by the Adjudicating Authority, wherein it was recommended that such an exit should be allowed provided the CoC approves the same by 90% voting share. In view of such recommendation by the Committee, Section 12A was introduced in the Code by way of the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018. Accordingly, Regulation 30A (*which deals with "Withdrawal of application*") was introduced into the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 by way of notification dated July 25, 2019.

The SC further relied upon its observations made in the case of ***Swiss Ribbons Private Limited and Another v. Union of India and Others [(2019) 4 SCC 17]*** wherein it was observed that Section 12A of the Code passes the constitutional muster. Thereafter, the SC relied upon a plethora of landmark decisions passed by it in previous judgments wherein it has been consistently held that the commercial wisdom of the CoC has been given paramount status without any judicial intervention for ensuring completion of the CIRP process within the timelines prescribed by the Code, notwithstanding that majority of those decisions are in the context of approval of resolution plan. However, the underlying principle remains the same that the commercial wisdom of the CoC is paramount.

The SC further observed that in various CoC meetings of the Corporate Debtor, the members of the CoC had widely deliberated on the issue of settlement and the fact that, one of the creditors namely IARCL, who had initially opposed the settlement plan but subsequently decided to support it, substantiates that the decision of the CoC to approve the settlement plan has been taken after sufficient discussion and deliberation on the pros and cons of the settlement plan.

Decision of the Supreme Court

In view of the above-mentioned observations, the SC allowed the appeal, quashed and set aside the judgment dated January 28, 2022 passed by the NCLAT and both the orders dated August 12, 2021 passed by the NCLT and allowed the withdrawal of CIRP of the Corporate Debtor.

VA View:

The SC has rightly observed that when 90% or more of the creditors, in their wisdom after due deliberations, arrive at the conclusion that it will be in the interest of all the stakeholders to permit settlement and withdrawal of CIRP, the adjudicating authority or the appellate authority cannot sit in appeal over the commercial wisdom of the CoC, unless it is observed that the decision of the CoC is capricious, arbitrary, irrational and *de hors* the provisions of the statute or the rules.

In fact, the SC has reaffirmed the supremacy of commercial wisdom of the CoC time and again in a plethora of judgments. As such, it is high time that the adjudicating authority and the appellate authority keep minimal judicial interference and allow a company to undergo CIRP smoothly as per the commercial wisdom of the CoC.

II. SEBI: A company cannot abdicate its responsibility to verify a news article that has appeared in the newspaper.

The Securities and Exchange Board of India ("**SEBI**") has, in its order dated June 20, 2022, in the matter of ***M/s. Reliance Industries Limited (Adjudication Order No. ORDER/BM/LD/2022-23/17202-04)*** held that a company cannot abdicate its responsibility to verify a news article that has appeared in the newspaper.

Facts

SEBI conducted an investigation in the suspected insider trading activities in the scrip of Reliance Industries Limited ("**Noticee 1**"). Based on the findings of the investigation, adjudication proceedings were initiated against Noticee 1, Ms. Savithri Parekh, Compliance Officer ("**Noticee 2**"), and Mr. K. Sethuraman, Compliance Officer ("**Noticee 3**") (collectively, "**Noticees**") under Section 15HB (*which provides for penalty for violation of the provisions of the Act*) of the Securities and Exchange Board of India Act, 1992 ("**SEBI Act**") for the alleged non-compliance with code of conduct for trading window closure and non-adherence to Principle no. 4 under Schedule A - Principles of Fair Disclosure for purposes of Code of Practices and Procedures for Fair Disclosure of Unpublished Price Sensitive Information ("**Principles of Fair Disclosure**").

A Show Cause Notice ("**SCN**") was issued to the Noticees to show cause as to why an inquiry should not be initiated against the Noticees and why penalty, if any, should not be imposed upon Noticees under Section 15HB of the SEBI Act for the aforesaid violations alleged to have been committed by Noticees.

Issue

1. Whether the Noticees have violated the Principles of Fair Disclosure read with Regulation 30(11) of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("**LODR Regulations**") by not disclosing or clarifying to the stock exchange the Unpublished Price Sensitive Information ("**UPSI**") relating to Facebook investing in Reliance Jio ("**Jio-Facebook Deal**") which got disclosed through the publication in the newspaper; and

2. Whether Noticee 2 has violated clause 4 of the minimum standards for code of conduct for listed companies to regulate, monitor and report trading by designated persons as specified in Schedule B read with Regulation 9(1) of SEBI (Prohibition of Insider Trading) Regulations, 2015 ("**PIT Regulations**") by not closing the trading window with respect to the UPSIs.

Arguments

<u>Contentions of SEBI</u>:

During the investigation, SEBI gathered that there was lot of news flow around Jio-Facebook Deal in the month of March and April, 2020 prior to the corporate announcement made on April 22, 2020. It was observed that the first news about the impending Jio-Facebook deal was published in the Financial Times, London ("**FT**") on March 24, 2020, post market hours and, thereafter, the said news report of FT was widely circulated in Indian media on the same day and next day. The news articles, *inter-alia*, stated that (i) Facebook is seeking to buy a multibillion-dollar stake in Reliance Jio; (ii) Facebook was close to signing a preliminary deal for a 10% share in Jio; and (iii) a deal with Facebook was due to be announced in March end, coinciding with the end of the Indian financial year. Post publication of said news articles, the scrip price of Noticee 1 went up by almost 15% on March 25, 2020. Various other news articles/items were published/appeared in media relating to Jio-Facebook Deal prior to its corporate announcement by Noticee 1.

It was observed that with regard to the above, the Noticees did not comply with Principle no. 4 of the Principles of Fair Disclosure. The aforesaid principle deals with prompt dissemination of UPSI that gets disclosed selectively, inadvertently or otherwise to make such information generally available. Further, Noticee 2 did not comply with the code of conduct for closure of the trading window, when the UPSI was in existence. Noticee 2 did not (i) close trading window for all designated persons and their immediate relatives for the UPSI; (ii) notify the stock exchanges about the official trading window closure; and (iii) notify the period of closure of trading window to the stock exchanges after closing the trading window during which the UPSI was in existence.

Contentions of the Noticees:

The SCN alleges, firstly, that although Noticee 1 was aware of the news reports published on March 24, 2020 and March 25, 2020, yet it did not issue any clarification, as required under Regulation 30(11) of the LODR Regulations. The Noticees contended that this allegation was wholly misplaced, which is apparent from a plain reading of the said regulation.

Regulations 30(10) and (11) of the LODR Regulations state as follows:

> *"(10) The listed entity shall provide specific and adequate reply to all queries raised by stock exchange(s) with respect to any events or information:*
>
> *Provided that the stock exchange(s) shall disseminate information and clarification as soon as reasonably practicable.*
>
> *(11) The listed entity may, on its own initiative also confirm or deny any reported event or information to stock exchange(s)."*

The Noticees contended that the present case is admittedly not one to which Regulation 30(10) of the LODR Regulations applies, since no query was raised by the stock exchanges. The issue that falls for consideration therefore is whether there is any obligation imposed on a listed entity under Regulation 30(11), *de hors* a query from a stock exchange, to confirm or deny information contained in media reports or appearing in other public fora (such as twitter or other social media platforms). According to the Noticees, plain language of Regulation 30(11) of the LODR Regulations makes it clear that the LODR Regulations impose no such obligation. The use of the phrases "*may*" and "*on its own initiative*" occurring in Regulation 30(11) of the LODR Regulations clearly brings out that what is contemplated in this provision is *suo motu* action by a listed entity. It is a settled principle of statutory interpretation that the word 'may', in a general sense, is permissive and confers discretion. Regulation 30(11) of the LODR Regulations does not impose any obligation on a listed entity, much less a positive obligation to confirm or deny any and every reported event or information.

Secondly, the Noticees contended that the charge framed by SEBI is with reference to the Principles of Fair Disclosure. In order to appreciate the substance of the obligation imposed under Principle no. 4 (*"prompt dissemination of UPSI that gets disclosed selectively, inadvertently or otherwise to make such information generally available"*) of the Principles of Fair Disclosure, it is necessary to read the same with Principle no. 1, which is reproduced below:

"Prompt public disclosure of unpublished price sensitive information that would impact price discovery no sooner than credible and concrete information comes into being in order to make such information generally available."

The term "prompt dissemination" occurring in Principle no. 4 takes its colour from Principle no. 1, which requires that UPSI must be disclosed no sooner than when it has become "credible and concrete information." Any other interpretation of these provisions would result in a conflict between the substantive obligation under Principle no. 1 to disclose only such information as is "credible and concrete" and the requirement under Principle no. 4 to undertake "prompt dissemination" of UPSI.

The Noticees contended that it is a well settled maxim that a harmonious construction must always be preferred to one that would present a conflict between provisions occurring in the same body of rules/regulations. A harmonious construction of Principle no. 1 and Principle no. 4 would yield the result that only such information as is "credible and concrete" within the meaning of Principle no. 1 is required to be promptly disseminated in accordance with Principle no. 4.

The SCN takes a position that Principle no. 4 supersedes Principle no. 1. The Noticees contended that it is an elementary legal proposition that such an interpretation, which renders one provision of the regulations redundant, is unsustainable and must be avoided.

The Noticees further contended that after securing the requisite board approvals of all involved parties, the transaction documents were executed on April 21, 2020 in the United States of America and Noticee 1 intimated the stock exchanges on April 22, 2020. Until the execution of the definitive transaction documents, there was only a non-binding arrangement

between the parties to explore the transaction and there was no certainty that the proposed transaction will be consummated. In regard to each investment into Jio, the disclosure was accordingly made by Noticee 1 immediately upon execution of the transaction documents by the parties thereto.

The Noticees iterated that, in addition and without prejudice to the above, the transactions were entered into during highly uncertain times of COVID-19, and the global impact of the pandemic on business sentiment particularly in March and April, 2020. There was no certainty that the deals which were under negotiation would be signed, until the signatures of the counterparty were actually received and there was every likelihood that the then prevailing global restrictions would cause the negotiations to be deferred to an uncertain future date.

Further, with respect to the alleged violations with the code of conduct for closure of the trading window, the Noticees contended that there is no SEBI regulation or standard which requires notification of trading window closure period to the stock exchanges.

Observations of the Adjudicating Officer

It was observed by the Adjudicating Officer ("**AO**") that the UPSI relating to Jio-Facebook Deal had come into existence on September 1, 2019 when the initial discussion on potential transaction with Facebook started and that it became generally available upon its publication in various newspapers and media reports on March 24, 2020. From the submission made by Noticee 1 during the investigation, it was observed that Noticee 1 was aware of all the news reports published/appearing in media on March 24 and 25, 2020 relating to Jio-Facebook Deal.

The AO observed that the Noticee 1, in its submission, stated that the allegation is wholly misplaced, which is apparent from a plain reading of Regulation 30(11) of the LODR Regulations. It noted that the present case is not one to which Regulation 30(10) of the LODR Regulations applies, since no query was raised by the stock exchange(s) with respect to any events or information pertaining to the Jio-Facebook Deal during March, 2020 and particularly with respect to the media reports.

One of the circumstances contemplated in law is that if the UPSI is somehow selectively available to someone or is being made available in bits and pieces like rumours or press articles carried in newspapers, the law provides a mechanism where company can clarify on the rumour or such articles in newspapers. This forms a major part of the task that a company would need to address from rumour verification perspective. It has been argued by the Noticees that no clarification was asked from them and thus they have not provided and that there is no compulsion under the law for them to do so. However, the AO observed that a company cannot abdicate its responsibility to verify a news article that has appeared in the newspaper. One of the issues is that the company wanted to keep the information enveloped in secrecy until made public and it clearly failed in that objective. Further, when the bits of the UPSI became selectively available, the company abdicated its responsibility to verify and come clean on the unverified information that was floating around.

The other predicament the Noticees presented was that they could not have clarified the rumour on its own because the agreement was yet to be signed, approved by the Board of the company and that it was not yet final. Here, too, the AO found it hard to be convinced that the company would respond to rumours only after finality of transactions. On a mere perusal of the announcements made by companies on the stock exchanges, there are plethora of announcements where only the memorandum of understanding has been entered, or where term sheet has been signed, or other acquisition are being scouted.

While Noticee 1 had the obligation to have enveloped the UPSI, however having come to know about the selective availability of the information, the AO noted that it was incumbent upon the Noticee 1 to provide due clarification on its own. Thus, Noticee 2 and Noticee 3, on behalf of Noticee 1, should have clarified to the stock exchanges on the news item.

The Noticees have bargained about the harmonious construction of regulations and the two principles - that there should be prompt disclosure of inadvertent or otherwise available information to make it generally available (Principle no. 4); and that there should be disclosure of credible and concrete information (Principle no. 1). The principle of harmonious construction is the bedrock of legislative interpretation. The harmonious interpretation principle applies to the entire regulation and its various provisions for the ultimate purposes for which the regulation has been notified. Applying this selectively only for the principles 1 and 4 will not provide the desired result sought to be achieved by law, which in this case, the Noticees are attempting to do.

Thus, the AO noted that the Noticees have violated Principle no. 4 of Principles of Fair Disclosure. In the case of ***Chairman, SEBI v. Shriram Mutual Fund [[2006] 5 SCC 361]*** ("**Shriram Mutual Fund Judgment**"), the Hon'ble Court had observed: "*In our considered opinion, penalty is attracted as soon as the contravention of the statutory obligation as contemplated by the Act and the Regulations is established and hence the intention of the parties committing such violation becomes wholly irrelevant. A breach of civil obligation which attracts penalty in the nature of fine under the provisions of the Act and the*

Regulations would immediately attract the levy of penalty irrespective of the fact whether contravention made by the defaulter with guilty intention or not." Therefore, the aforesaid violations committed by Noticees attracted monetary penalty.

Lastly, with respect to the charge of whether the compliance officer has discharged the responsibility under the PIT Regulations, the AO noted that, as per the submissions made by Noticee 2, it is evident that the code has been implemented in the manner that was intended by Noticee 1. Thus, under the company code for closure of trading window, the responsibility was cast on the relevant employees cognizant of their responsibilities.

Decision

The AO did not agree with the submissions made by the Noticees and held them liable for the violation of the provisions of Principle no. 4 of Principles of Fair Disclosure. Basis the Shriram Mutual Fund Judgment, the adjudicating officer imposed monetary penalty on the Noticees.

Further, given that the Noticee 1 had implemented the code of conduct designed by it under the PIT Regulations, the AO did not hold Noticee 2 liable for any violation of not having closed the trading window.

VA View:

Preservation of UPSI is an important duty of any company. Listed entities have the obligation to envelope UPSI. However, having come to know about the selective availability of the information, it is incumbent upon the companies to provide due clarifications on its own. The Principles of Fair Disclosure cast a fiduciary duty to make accurate and complete disclosures to all the stakeholders.

In the present case, it was observed that the Noticees did not comply with the Principles of Fair Disclosure requiring prompt dissemination of UPSI that gets disclosed selectively, inadvertently or otherwise and to make such information generally available. Keeping in view the intent of the regulations, the AO has rightly penalized the Noticees for violation of the Principles of Fair Disclosure.

III. Gujarat High Court: Proceedings under Section 9 of the Arbitration and Conciliation Act, 1996 cannot be used for enforcement of the conditions of a contract.

The Gujarat High Court ("**GHC**") has in its judgment dated June 10, 2022 ("**Judgment**"), in the matter of ***Kanhai Foods Limited v. A and HP Bakes [R/First Appeal No. 2638 of 2021]***, held that issues involving enforcement of the conditions of a contract cannot be the subject matter of an application for interim measures under Section 9 of the Arbitration and Conciliation Act, 1996 ("**Act**").

Facts

Kanhai Foods Limited ("**Appellant**"), a registered company, was engaged in the business of production, marketing and selling of bakery products under its brand 'KABHI B' ("**Appellant's Brand**"). The Appellant had started selling its bakery products in the year 2007 and started granting franchises to other persons in the State of Gujarat as its business started expanding. Amongst the 50 franchises granted by the Appellant, A and HP Bakes ("**Respondent**") was granted franchisee for the Appellant's Brand in the year 2015 at Pij Road, Nadiad ("**Franchised Premises**"). Consequently, a franchise agreement was entered into between the Appellant and the Respondent on November 1, 2017, which, *inter alia*, provided for an initial term of three years.

Subsequently, the franchise agreement was renewed and a fresh Franchise Agreement ("**Franchise Agreement**") was entered into between the parties on November 1, 2020. As per the terms of the Franchise Agreement, the Respondent was obliged to sell only the bakery products of the Appellant's Brand. Further, the Respondent was restrained from, directly or indirectly, conducting similar business during the term of the Franchise Agreement.

Following the execution of the Franchisee Agreement on November 1, 2020, it came to the knowledge of the Appellant that the Respondent had started selling other bakery products, particularly bakery products of the brand 'G5', in which partners of the Respondent were connected. Despite receiving a warning from the Appellant, the Respondent continued to store and sell the products of other bakery brands with a trade mark similar to that of the Appellant's Brand so as to pass them off as the products of the Appellant's Brand.

Thereafter, in the month of July 2021, the Respondent issued a notice to the Appellant seeking to terminate the Franchise Agreement. The Appellant not only rejected such termination by the Respondent but also stated that the Respondent had breached the terms of the Franchise Agreement by attempting to pass off its products as those of the Appellant.

In view of the above, the Appellant filed an application under Section 9 (*Interim Measures, etc. by Court*) of the Act ("**Application**") before the Commercial Court, City Civil Court, Ahmedabad ("**Commercial Court**") seeking interim measures, including a direction to the Respondent to handover the Franchised Premises to the Appellant and a direction restraining the Respondent from carrying out any activity at the Franchised Premises for a specified period as per the terms of the Franchise Agreement. The Appellant also sought a direction to restraint the Respondent from conducting a business similar to that envisaged in the Franchise Agreement.

The Respondent challenged the said Application by filing a reply contending that the termination of the Franchise Agreement by the Respondent was legal. The Respondent further contended that it could not be restrained from conducting its business as the same is violative of the provisions set out in Section 27 of the Indian Contract Act, 1872.

The Commercial Court by its order dated August 31, 2021 ("**Impugned Order**") rejected the Application filed by the Appellant on the ground that the relief which was prayed for by the Appellant were of the nature in respect of which the Appellant could be compensated in terms of money.

Hence, the Appellant approached the GHC for setting aside the Impugned Order passed by the Commercial Court.

Issue

Whether issues involving enforcement of the conditions of a contract can be the subject matter of an application for interim measures under Section 9 of the Act.

Arguments

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

The Appellant submitted that the Franchise Agreement was for a fixed term of three (3) years and could not be prematurely terminated by either of the parties except in accordance with the terms stipulated in the Franchise Agreement. Further, the franchisor, that is, the Appellant had the sole right to terminate the Franchise Agreement provided that the five requisite conditions mentioned thereunder were satisfied.

Highlighting the provisions of Clause 5(22) of the Franchise Agreement, the Appellant submitted that it was the duty of the franchisee, that is, the Respondent to handover the Franchised Premises to the Appellant for a minimum period of three months in the event a dispute arose between the parties to the Franchise Agreement.

The Appellant referred to Section 14 (*Contracts not specifically enforceable*) of the Specific Relief Act, 1963, and submitted that in view of the nature of conditions incorporated in the Franchise Agreement, the contract between the parties was not determinable in nature and that only the Appellant could terminate the Franchise Agreement.

The Appellant, in order to support its submissions, placed reliance on ***DLF Homes Developers Limited v. Shipra Real Estate Limited and Others [2021 SCC Online Del 4902]***, wherein the Delhi High Court analysed the question on determinability of contracts in detail.

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

Placing reliance on ***ABP Network Private Limited v. Malika Malhotra [O.M.P. (I) (COMM) 292 of 2021]***, the Respondent debated as to what nature of contract could be said to be determinable in law. The Respondent averred that the Franchise Agreement entered into between the Appellant and the Respondent was determinable in nature and thus could be terminated by the Respondent.

With respect to the contention of the Appellant regarding the Respondent's duty to handover the Franchised Premises, the Respondent submitted that the handover of the Franchised Premises to the Appellant had become infructuous in view of the passage of time.

Lastly, the Respondent submitted that the prayers made by the Appellant in its Application, did not fall within the purview of Section 9(ii) clauses (a) to (e) (*application to Court for an interim measures of protection*) of the Act.

Observations of the Gujarat High Court

The GHC observed that as per the law laid down by the Supreme Court in ***Arvind Constructions Company Private Limited v. Kalinga Mining Corporation [(2007) 6 SCC 798]***, the powers under Section 9 of the Act are to be exercised in accordance with the recognized principles that are applicable when a court exercises its powers under Order 39 of the Code of Civil Procedure, 1908, to grant interim injunction.

The GHC further observed that the establishment of *prima facie* case, balance of convenience and irreparable injury are all relevant considerations while passing orders granting interim measures under Section 9 of the Act. Moreover, interim injunction is an equitable remedy and cannot be granted in a case where it would amount to granting a principal relief.

Essentially, the interim reliefs granted by a court under Section 9 of the Act are intended to protect and preserve the subject matter of arbitration as well as balance the equitable rights of the parties, during the pendency of the arbitral proceedings.

The Appellant in its Application had sought a direction to restrain the Respondent from carrying out any activity at the Franchised Premises and to handover the Franchised Premises to the Appellant. The Appellant had also sought to restrain the Respondent from conducting a business similar to the business mentioned in the Franchise Agreement.

The GHC further observed that the Commercial Court had ruled that no irreparable loss would arise to the Appellant and that the Appellant could be compensated monetarily for the reliefs sought by it in its Application, if it finally succeeded in the arbitral proceedings.

Decision of the Gujarat High Court

The GHC ruled that the Commercial Court was justified in observing that the reliefs which were prayed for by the Appellant were of such nature in respect of which the Appellant could be compensated in terms of money.

The GHC held that granting the relief of directing the Respondent to handover the Franchised Premises to the Appellant and to restrain the Respondent from carrying out any activity at the Franchised Premises, were reliefs of a final nature. Moreover, the effect of granting such relief to the Appellant would bring the business of the Respondent to a complete halt.

Further, the issues involving enforcement of conditions of the Franchisee Agreement and the applications of the parties arising therefrom, should be decided and resolved in the arbitration proceedings. As such, the question of determinability of the Franchisee Agreement is also an arbitrable issue that is to be decided by the arbitrator and cannot be weighed for merits by the GHC.

Therefore, there being no grounds to interfere with the Impugned Order passed by the Commercial Court, the GHC dismissed the appeal filed by the Appellant.

VA View:

The GHC in this Judgment has rightly held that proceedings under Section 9 of the Act are not meant for enforcement of the conditions of a contract as the said conditions could be enforced only when the rights of the parties to such contract are finally adjudged or crystalized by the arbitrator. Besides, granting any relief in favour of the Appellant, directing the Respondent to handover the Franchised Premises to the Appellant and restraining the Respondent from carrying out any activity at the Franchised Premises, would tantamount to granting principal relief to the Appellant.

Affirming the Commercial Court's decision, the GHC reiterated that the proceedings under Section 9 of the Act which are for interim measures, cannot be converted into proceedings where a party may seek the final relief indirectly.

Therefore, through this Judgment the GHC has clarified that the principal relief cannot be granted at the interim stage, and granting interim directions which are indirectly in the nature of final relief is not permissible in law.

IV. NCLT: Material facts are to be pleaded in preferential, fraudulent or avoidable transactions.

The National Company Law Tribunal, Kolkata ("**NCLT**"), in its order dated May 30, 2022, in the matter of ***Star India Private Limited v. Advance Multisystem Broadband Communications Limited (I.A. No. 841/KB/2020)*** combined with ***Shri***

Kuldeep Verma, Resolution Professional of Advance Multisystem Broadband Communications Limited v. IndusInd Media and Communications Limited and Others (I.A. No. 1288/KB/2020) held that a transaction cannot be alleged to be preferential, fraudulent or avoidable by the resolution professional, unless an enquiry has been conducted by the relevant experts and specific material facts have been stated as to why such transaction would be covered under Sections 45/46/47 (*Avoidance of undervalued transactions and application by creditor in cases of undervalued transactions*) and Section 66 (*Fraudulent trading or wrongful trading*) of the Insolvency and Bankruptcy Code, 2016 ("**Code**").

Facts

Advance Multisystem Broadband Communications Limited ("**AMBC/ Corporate Debtor**") was admitted into Corporate Insolvency Resolution Process ("**CIRP**") through an order of the NCLT dated September 30, 2019. Mr. Kuldeep Verma ("**Applicant**") was appointed as the resolution professional. IndusInd Media and Communications Limited ("**Respondent No. 1**") invested in AMBC through a Shareholder's Agreement dated May 18, 2012 ("**SHA**") and held 59.61% of the paid up and issued share capital of AMBC. The remaining percentage of the share capital was held by the operating shareholders (local cable operators). Respondent No. 1 sold its shareholding when the business of AMBC was transferred to a competitor in an allegedly fraudulent manner.

The Applicant filed an application under Section 60(5) (*which empowers NCLT to dispose of the matters related to the insolvency concerning the corporate debtor*) and Section 25(2)(j) (*which empowers a resolution professional to file an application for avoidance of transactions in accordance with Chapter III, if any*) of the Code against the Respondent No. 1 seeking imposition of vicarious liability, piercing of corporate veil, declaring the share transfer to be preferential, undervalued, fraudulent and *void ab initio*, directions for forensic audit of AMBC and the Respondent No. 1, and initiation of investigation for money laundering.

Issue

Whether the sale of its shareholding by the Respondent No. 1 is a preferential, fraudulent or avoidable transaction.

Arguments

Contentions raised by the Applicant:

The Applicant submitted that AMBC had availed credit facilities from Allahabad Bank ("**Bank**") vide sanction letter dated November 16, 2017 ("**Letter**"). The Letter mentioned a condition that the shares of AMBC cannot be transferred without the consent of the Bank. The Applicant contended that the Respondent No. 1 is a promoter and holding company of AMBC and by selling its shareholding, it has violated the terms and conditions of the Letter.

The core of Applicant's contention was that the Respondent No. 1 has not provided any documents and has not cooperated with the Applicant while he was functioning in the capacity of a resolution professional. In addition to this, Respondent No. 1 has entered into vulnerable transactions like inter-se sale of the shares of AMBC, as preferential, undervalued and fraudulent, and that forensic audit of the so-called holding company and subsidiary company be directed to be held.

Contentions raised by the Respondent No. 1:

The Respondent No. 1 submitted that since the shares are not the property of the Corporate Debtor, therefore, there was no restriction on the sale of shares held by it in the Corporate Debtor. Consequently, the question of the transaction being preferential, undervalued or fraudulent does not arise. The Respondent No. 1 denied being the promoter of AMBC as it was never in control of the board of AMBC which could be proved from the annual returns and the SHA. The Respondent No. 1 submitted that the reason behind selling of its shares was the illegalities committed by the promoters and directors of the Corporate Debtor and that it had even filed a complaint before the Registrar of Companies against it.

The Respondent No. 1 contended that shares are separate and distinct from the assets of the company, and transfer of shares cannot be construed as transfer of assets of the company. Therefore, the selling of shares held by the Respondent No. 1 was not subject to the conditions laid down in the Letter.

Observations of the NCLT

The NCLT observed that the Applicant himself was not sure whether the impugned transactions were wrong as alleged, since he sought for a forensic audit in the prayer. The NCLT was of the view that a resolution professional can file an application under Section 25(2)(j) of the Code only after being satisfied about the particular transaction being avoidable,

fraudulent or undervalued. Similarly, in terms of Section 25(2)(d), it is incumbent upon the resolution professional to seek assistance of the forensic audit if so required, to engage the services of accountants, legal or other professionals with a view to satisfy himself about the transaction being avoidable.

The NCLT relied upon the judgement of the Hon'ble Supreme Court in ***Anuj Jain v. Axis Bank Limited and Others [(2020) 8 SCC 401]*** ("**Anuj Jain Case**"), wherein it was held that the scheme of the Code, the parameters and the requisite enquiries as well as the consequences in relation to Sections 43, 45 and 66 of the Code are different and it is explicit in the provisions. Enquiry of an undervalued transaction is different than that of a preferential transaction and it is the responsibility of any resolution professional to fulfil the requirements set out in the applicable provisions before making an application. It was also held in the same case that "*Specific material facts are required to be pleaded if a transaction is sought to be brought under the mischief sought to be remedied by Sections 45/46/47 or Section 66 of the Code. As noticed, the scope of enquiry in relation to the questions as to whether a transaction is of giving preference at a relevant time, is entirely different. Hence, it would be expected of any resolution professional to keep such requirements in view while making a motion to the Adjudicating Authority*."

The NCLT observed that the Applicant has not met the requirements set out in the Anuj Jain Case and a composite application has been made without conducting enquiry or setting out specific material facts for the transactions to be covered under Sections 45, 46, 47 and 66 of the Code. It was observed that the Applicant has vaguely asserted the facts and generalised the provisions of the Code against the Respondent No. 1

Decision of the NCLT

The NCLT held that there was no illegal or fraudulent transaction done by the Respondent No. 1 stating that "*When according to the Applicant himself there was no asset of the corporate debtor, and the company had gone into losses and was left with no debtors, the applicant should have performed his duties assigned to him in the Code instead of flogging a dead horse.*". The NCLT dismissed the composite application.

VA View:

This order of the NCLT, Kolkata is in consonance with the Code as well as the previous judgment of the Hon'ble Supreme Court in the Anuj Jain Case. The NCLT has rightly pointed out that when the resolution professional makes an application to declare a transaction as undervalued, preferential or fraudulent, he must comply with the requirements provided in the Code beforehand. It was held in the **Anuj Jain case** that the scope of enquiry in relation to the questions as to whether a transaction is preferential is entirely different from that of a transaction being undervalued and it would be expected of any resolution professional to keep such requirements, as provided in Sections 43 and 45 of the Code, in view while making a motion to the Adjudicating Authority.

The order reaffirms the authority of the Code and the importance of understanding the intent of the legislature. If it is required under the law that an enquiry by relevant experts has to be conducted and material facts have to be specified to cover the transactions under the relevant section, then it is the responsibility of the resolution professional to comply with the said requirements. In such cases, the resolution professional has to ensure that, in terms of procedure, the provisions of the Code and judicial precedents are being followed prior to the application being filed before the concerned Tribunal.

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