Between the lines...

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NEW DELHI | MUMBAI | BENGALURU

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Key Highlights

I. Supreme Court: NCLT has discretion to not admit Financial Creditor's CIRP Application even if Corporate Debtor is in default.

The Hon'ble Supreme Court ("**SC**") has in its judgment dated July 12, 2022 in the matter of ***Vidarbha Industries Power Limited v. Axis Bank Limited [Civil Appeal No. 4633 of 2021]*** held that it is not mandatory for the adjudicating authority to admit an application to initiate Corporate Insolvency Resolution Process ("**CIRP**") even if the existence of debt and default in payment of debt by the corporate debtor is established.

Facts

Vidarbha Industries Power Limited ("**Appellant**"), being the corporate debtor, is an electricity generating company within the meaning of Section 2(28) of the Electricity Act, 2003 and has set up a 600 MW coal-fired thermal power plant comprising of two units each of 300 MW capacity, within the Butibori Industrial Area in the Nagpur District in Maharashtra.

The Appellant is short of funds, for the time being on account of a pending litigation before the SC, more particularly, Civil Appeal Number 372 of 2017 preferred by the Maharashtra Electricity Regulatory Commission ("**MERC**") against an order dated November 3, 2016 passed by the Appellate Tribunal for Electricity ("**APTEL**"), pursuant to which a sum of INR 1,730 Crores is due to the Appellant. Subject to the outcome of Civil Appeal Number 372 of 2017 pending before the SC, implementation of the order dated November 3, 2016 would enable the Appellant to clear all its outstanding liabilities.

On or about January 15, 2020, Axis Bank Limited ("**Respondent**"), in the capacity of financial creditor of the Appellant, preferred an Application under Section 7(2) the Insolvency and Bankruptcy Code, 2016 ("**IBC**") before the National Company Law Tribunal, Mumbai ("**NCLT**") seeking initiation of the CIRP against the Appellant. The Respondent had claimed a total amount to the tune of INR 533 Crores as due from the Appellant.

In view thereof, the Appellant preferred a Miscellaneous Application for seeking stay on the adjudication of CIRP admission proceedings, until the above-mentioned Civil Appeal is pending before the SC. However, by order dated January 29, 2021, the NCLT dismissed the Miscellaneous Application filed by the Appellant for seeking stay on the CIRP admission proceedings and refused to stay the CIRP initiated against the Appellant. The NCLT, inter alia, held that the objective of IBC is to decide petition seeking initiation of CIRP of a corporate debtor in a time bound manner and relied upon the landmark judgment of the SC in the matter of ***Swiss Ribbons Private Limited and Another v. Union of India and Others [(2019) 4 SCC 17]*** ("**Swiss Ribbons Judgment**") to arrive at the aforesaid observation.

Aggrieved by the order dated January 29, 2021 passed by the NCLT, the Appellant preferred an appeal before the National Company Law Appellate Tribunal, New Delhi ("**NCLAT**"). However, the NCLAT dismissed the appeal by order dated March 2, 2021 ("**Impugned Order**"). The NCLAT, inter alia, observed that the Appellant has no jurisdiction in stalling the process and seeking stay of CIRP, with the hidden intent of blocking the passing of order of admission of the Application preferred by the Respondent under Section 7(2) of the IBC for seeking initiation of CIRP of the Appellant. As such, the NCLAT held that there is no merit in the appeal and no infirmity in the order dated January 29, 2021 passed by the NCLT.

Aggrieved by the Impugned Order passed by the NCLAT, the Appellant preferred an appeal before the SC.

Issue

Whether Section 7(5)(a) of IBC is a mandatory or a discretionary provision. In other words, is the expression 'may' to be construed as 'shall', having regard to the facts and circumstances of the case.

Arguments

Contentions raised by the Appellant:

The Appellant submitted that considering the facts and circumstances of the case, the Appellant is unable to realize a sum of INR 1,730 Crores in terms of the order dated November 3, 2016 passed by the APTEL due to Civil Appeal Number 372 of 2017 pending adjudication before the SC, the application preferred by the Respondent under Section 7 of the IBC should not have been admitted against the Appellant.

The Appellant further contended that the use of the word 'may', and not 'shall', in the language of Section 7(5)(a) of the IBC, confers a discretion to the NCLT to reject an application, even if there is existence of debt, for any reason that the NCLT may deem fit, for meeting the ends of justice, keeping in mind the objective of the IBC, which includes revival of the company and value maximization. It was further submitted by the Appellant that Rule 11 of the National Company Law Tribunal Rules, 2016 ("**NCLT Rules**") provides inherent power to the NCLT to pass such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal. In view thereof, the Appellant submitted that on a conjoint reading of Section 7(5)(a) of the IBC read with Rule 11 of the NCLT Rules, it cannot be said that NCLT has no power, except to examine whether a debt exists or not and accordingly accept or reject the application under Section 7 of the IBC.

Contentions raised by the Respondent:

The Respondent submitted that the Appellant had admittedly defaulted in payment of its dues and the NCLT has rightly declined stay of proceedings initiated by the Respondent. It was further contended that Section 7(5)(a) of the IBC cast a mandatory obligation on the adjudicating authority to admit an application of the financial creditor under Section 7(2) of the IBC, once established that a corporate debtor has committed default in repayment of dues of the financial creditor. As such, there are no grounds to interfere with the concurrent findings of the NCLT and the NCLAT.

The Respondent further relied on the judgment of the SC in the matter of ***Innoventive Industries Limited v. ICICI Bank and Another [(2018) 1 SCC 407]*** to argue that the object of the IBC is resolution of the insolvency and bankruptcy in a time bound manner

Observations of the Supreme Court

The SC observed that placing reliance upon the Swiss Ribbons Judgment, the NCLT held that the imperativeness of timely resolution of a corporate debtor, who was in the red, indicated that no other extraneous matter should come in the way of deciding petitions filed under Section 7 and Section 9 of the IBC. However, in this regard, the SC held that the viability and overall financial health of the corporate debtor are not extraneous matters.

The SC further examined the question as to whether an award of the APTEL in favour of the Appellant for a sum of INR 1,730 Crores, that is, an amount far exceeding the claim of the financial creditor, can be completely disregarded. The SC answered the aforesaid question in the negative.

The SC observed that both, the NCLT and the NCLAT proceeded on the premises that an application must be necessarily entertained under Section 7(5)(a) of the IBC, upon existence of a debt and corporate debtor found to be in default. In this regard, the SC held that the NCLAT and the NCLT erred in deciding that if the aforesaid two aspects are being satisfied, it is sufficient to trigger CIRP of the corporate debtor. In fact, the existence of a financial debt and default in payment in respect thereof only gave the financial creditor the right to apply for initiation of the CIRP. However, the adjudicating authority is supposed to apply its mind to all relevant factors including feasibility of initiation of CIRP and the overall financial health and viability of the corporate debtor under its existing management.

The SC agreed with the contention raised by the Appellant that the legislature has consciously used the word 'may' and not 'shall' in Section 7(5)(a) of the IBC. However, while arriving at the conclusion that it is discretionary upon the adjudicating authority to admit an application filed by financial creditor seeking initiation of CIRP of a corporate debtor, the SC has made it clear that in case of rejection of such application, the financial creditor will not be precluded from applying afresh for initiation of CIRP of that corporate debtor, if the dues continue to remain unpaid.

The SC also drew a comparison between the use of the word 'may' in Section 7(5)(a) of the IBC in the context of financial debt vis-à-vis the use of the word 'shall' in Section 9(5) of the IBC in the context of operational debt. In this regard, the SC observed that the legislature has consciously kept a distinction between financial creditors and operational creditors as there is an inherent difference between the business of investment and financing as in the case of financial creditors and the business of supply of goods and services as in the case of operational creditors. Further, financial debts are secured and for a longer duration in comparison to operational debts which are usually unsecured, for a shorter duration and of lesser amount. As such, the impact of non-payment of operational debts could be more serious than non-payment of financial debts.

In conclusion, the SC observed that it is not the object of the IBC to penalize solvent companies, which are temporarily defaulting in repayment of its financial debts, by initiating the CIRP of such companies. Hence, the SC held that Section 7(5)(a) of the IBC confers discretionary power on the adjudicating authority to admit an application filed by a financial creditor under Section 7 of the IBC for seeking initiation of CIRP of a corporate debtor.

Decision of the Supreme Court

The SC held that the NCLAT and the NCLT erred in holding that once the existence of debt and default in payment of debt by the corporate debtor is established, the adjudicating authority is bound to admit an application filed by a financial creditor under Section 7 of the IBC.

In view of the above, the SC was pleased to allow the appeal and set aside the order dated January 29, 2021 passed by the NCLT and the Impugned Order. Further, the SC directed the NCLT to re-consider the miscellaneous application filed by the Appellant for seeking stay on the adjudication of the CIRP admission proceedings, until the Civil Appeal Number 372 of 2017 is pending before the SC.

VA View:

This judgment can be considered as landmark in the domain of the restructuring and insolvency laws, whereby the SC has provided the much-needed clarity that the legislature has conferred upon the adjudicating authority with the discretionary power to look into the facts and circumstances pertaining to the corporate debtor and apply its mind to relevant factors including the feasibility of initiation of CIRP and overall financial health and viability of the corporate debtor under its existing management, rather than mandatorily initiating the CIRP of the corporate debtor in a mechanical manner once the existence of debt and default in payment of debt by the corporate debtor is established.

Further, the SC has also enlightened with the inherent difference between the nature of operational debt and financial debt, which throws light upon the legislative intent behind the use of the word 'may' in Section 7(5)(a) of the IBC in the context of financial debt vis-à-vis the use of the word 'shall' in Section 9(5) of the IBC in the context of operational debt.

However, the flip side of this judgement is that some corporate debtors defending an application filed by the respective financial creditors under Section 7 of the IBC may press this judgment into service, by taking a mechanical defense against the initiation of CIRP against them, wherever an award or decree is already passed in favour of corporate debtor and such award or decree is under appeal by the judgment debtor. In such a scenario, the adjudicating authority will have to cautiously ascertain the viability and pros and cons of initiating CIRP against a corporate debtor, and the same would be prone to appeals.

II. NCLT: Guarantor cannot enjoy 'right of subrogation' after corporate insolvency resolution process against the principal debtor gets concluded.

The National Company Law Tribunal, Hyderabad ("**NCLT/Adjudicating Authority**") has in its judgement dated July 7, 2022 ("**Judgement**"), in the matter of ***State Bank of India v. Shri Ghansham Surajbali Kurmi [CP (IB) 297/95/HBD/2021]*** held that the guarantor cannot enjoy the 'right of subrogation' after corporate insolvency resolution process against the principal debtor gets concluded under the provisions of the Insolvency and Bankruptcy Code, 2016 ("**IBC**").

Facts

Apex Drugs Limited ("**Corporate Debtor**") had been granted various credit facilities amounting to INR 2,08,21,65,555.24

from the State Bank of India ("**Financial Creditor**"). The Corporate Debtor was the principal borrower and Shri Ghansham Surajbali Kurmi ("**Personal Guarantor**") stood as a guarantor so as to secure the repayment of the financial assistance availed by the Corporate Debtor.

After availing the credit facilities offered by the Financial Creditor, the Corporate Debtor failed to adhere to sanction terms and neglected to operate loan accounts as per the terms and conditions of the restructuring package sanction. As a result, the accounts of the Corporate Debtor were classified as Non-Performing Assets ("**NPA**") on June 30, 2013.

Consequently, the Financial Creditor had also exercised its rights and remedies under the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("**SARFAESI Act**"), against the Corporate Debtor and the Personal Guarantor before the Debt Recovery Tribunal-II, Hyderabad, in order to recover the outstanding amounts from the Corporate Debtor and the Personal Guarantor.

The Financial Creditor had also filed a petition before the Adjudicating Authority under Section 9 of the IBC as a result of which the Company Petition was admitted into and Corporate Insolvency Resolution Process was initiated against the Corporate Debtor on September 6, 2018 ("**CIRP**").

Pursuant to the framing of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtor) Rules, 2019 ("**Personal Guarantors Insolvency Rules**"), which came into effect from December 1, 2019, the Financial Creditor issued a demand notice dated August 16, 2021 to the Personal Guarantor, demanding payment of the amount in default and subsequently filed a petition under Section 95(1) of the IBC (*Application by creditor to initiate insolvency resolution process*) read with Rule 7(2) of the Personal Guarantors Insolvency Rules ("**Petition**"), seeking initiation of the Insolvency Resolution Process ("**IRP**") against the Personal Guarantor.

The NCLT by its order dated November 29, 2021, granted interim-moratorium and appointed Shri Kanchinadham Ravi Kumar as the resolution professional ("**Resolution Professional**") directing the Resolution Professional to file his report within ten (10) days of his appointment.

Accordingly, the Resolution Professional filed his report stating that the amount of debt as on July 31, 2021 stood at INR 2,08,21,65,555.24 Crores and that the Personal Guarantor had confirmed that no payment had been made to the Financial Creditor towards the default committed by the Corporate Debtor and a lack of resources to pay the said amount. Hence, the Resolution Professional recommended the admission of the Petition filed by the Financial Creditor under Section 95 of the IBC.

Issue

Whether a guarantor can enjoy the 'right of subrogation' even after conclusion of CIRP against the principal debtor.

Arguments

Contentions raised by the Personal Guarantor:

The Personal Guarantor submitted that the Financial Creditor was part of the Committee of Creditors ("**CoC**") having a voting share of 70.10%. The CoC initially approved the resolution plan of the successful resolution applicant with 100% voting, which was further approved by the Adjudicating Authority under Section 31 of the IBC ("**Resolution Plan**").

Clause F (*Reliefs and Concessions*) of the Resolution Plan read as follows:

"*Once the consideration as envisaged in the resolution plan is paid, all rights, security and interest including but not limited to mortgage, pledge, guarantee and hypothecation created shall stand satisfied in lieu of the said payment.*"

The Personal Guarantor contended that as per Clause F of the Resolution Plan, once the consideration as envisaged in the said resolution plan is paid, all rights, security and interest including but not limited to mortgage, pledge, guarantee and hypothecation created shall stand satisfied in lieu of the said payment. Hence, by virtue of Clause F of the Resolution Plan, the liability of the Personal Guarantor to pay the Financial Creditor towards the default committed by the Corporate Debtor was discharged.

The Personal Guarantor further submitted that the Financial Creditor, despite knowing the fact that the Resolution Plan discharges the Personal Guarantor from future liabilities, has filed the Petition, without paying heed to the provisions of the Resolution Plan.

Therefore, any rights of the Financial Creditor against the Personal Guarantor stand forfeited after the Financial Creditor gave its approval to the said Resolution Plan.

Lastly, the Personal Guarantor contended that the Financial Creditor had not only filed the Petition by suppressing essential facts, with an intention to unlawfully hold the Personal Guarantor liable for past and settled dues, but also to harass and cause irreparable harm to the Personal Guarantor, whose liability was discharged after approval of the Resolution Plan.

In view of the above, the Personal Guarantor prayed for dismissal of the Petition filed by the Financial Creditor.

Contentions raised by the Financial Creditor:

The Financial Creditor denied the contentions put forth by the Personal Guarantor and submitted that the Financial Creditor being part of the CoC did not in any manner bar initiation of insolvency proceedings qua the Personal Guarantor. Further, the approval of the Resolution Plan by the CoC and subsequent approval of the said plan by the Adjudicating Authority, in no way affects the proceedings before the NCLT.

With regard to the contention of the Personal Guarantor that his liability to pay the Financial Creditor gets discharged by virtue of Clause F of the Resolution Plan, the Financial Creditor submitted that Clause F dealt with Reliefs and Concessions, whereby the resolution applicant sought certain reliefs/concessions from the Adjudicating Authority for smooth functioning of the Corporate Debtor. Interpreting the said Clause as an extinguishment of the guarantee provided by the Personal Guarantor creates a scenario which would have adverse cascading effects. The Financial Creditor vehemently denied that Clause F of the Resolution Plan discharges the Personal Guarantor from any future liabilities.

The Financial Creditor further submitted that even after the Resolution Plan of Corporate Debtor is approved, the Financial Creditor continues to be at liberty to initiate IRP against the Personal Guarantor by filing an application under Section 95 of the IBC. The IBC does not bar a financial creditor to initiate appropriate insolvency proceedings against personal guarantors. Rather, it provides for a mechanism specifically for insolvency and bankruptcy of the personal guarantors. It is a settled position of law that the liabilities of guarantors are co-extensive with that of the principal debtor/borrower.

Moreover, as per the provisions of Section 134 (*Discharge of surety by release or discharge of principal debtor*) of Indian Contract Act, 1872 ("**Contract Act**"), a guarantor is discharged of its liability towards the creditor only if the creditor on its own instance discharges the principal debtor. Therefore, the main ingredient of the said section is discharge of the principal debtor through voluntary act of the creditor and not due to operation of law.

A scheme or plan that is approved by a court/tribunal becomes a statutory scheme and thereby, in its nature, is an act of operation of law. Therefore, under the IBC, the corporate debtor is discharged by the operation of law, that is, by approval of the resolution plan by the adjudicating authority on its satisfaction and not at the instance of a creditor, irrespective of whether the creditor is in favour of a resolution plan. In other words, the Personal Guarantor cannot be said to be discharged of its liability towards the Financial Creditor as a consequence of discharge of the Corporate Debtor's liability under the IBC.

The Financial Creditor categorically stated that after the CIRP has concluded, a guarantor cannot enjoy a right of subrogation when the payment is made by the guarantor with respect to the debt for which the guarantee is provided. In order to support its submissions, the Financial Creditor placed reliance on the judgment in the case of ***Lalit Mishra and Others v. Sharon Bio Medicine Limited [Company Appeal (AT) (Insolvency) No. 164 of 2018]***, wherein it was held that the guarantor cannot exercise its right of subrogation under the Contract Act, as proceedings under the IBC are not recovery proceedings and that the object of IBC is to revive the company and focus on maximisation of its assets, not to ensure that credit is available to all stakeholders.

The Financial Creditor also placed reliance on ***Lalit Kumar Jain v. Union of India [Transferred Case (Civil) No. 245/2020)]*** ("**Lalit Kumar Case**"), wherein the Hon'ble Supreme Court held that approval of a resolution plan does not ipso facto discharge a personal guarantor of his/her liabilities under the contract of guarantee. Moreover, the release or discharge of a principal borrower from the debt owed by it to its creditor, by an involuntary process, that is, by operation of law or due to liquidation or insolvency proceeding, do not absolve the surety/guarantor of his/her liability, which arises out of an independent contract.

On account of the foregoing, the Financial Creditor prayed that its Petition be allowed and IRP be initiated against the Personal Guarantor.

Observations of the NCLT

The NCLT affirmed the view of the Financial Creditor and observed that as per the provisions of Section 134 (*Discharge of surety by release or discharge of principal debtor*) of the Contract Act, a guarantor is discharged of its liability towards the creditor only if the creditor on its own instance discharges the principal debtor through voluntary act of the creditor and not due to operation of law.

Further, Clause F (*Reliefs and Concessions*) of the Resolution Plan clearly depicts the intention of the resolution applicant for seeking reliefs and concessions as far as the Corporate Debtor is concerned only, which is not only in line with the clean slate theory but also in line with the objectives of the IBC. Interpreting the contents of the said clause as an extinguishment of the guarantee provided by the personal guarantor would create a scenario that would have an adverse cascading effect.

The NCLT further observed that conclusion of CIRP does not bar the Financial Creditor to proceed against the Personal Guarantor and that the Financial Creditor can always approach the Adjudicating Authority as envisaged under the provisions of the IBC.

The NCLT observed that the submissions made by the Personal Guarantor lacked merit.

Decision of the NCLT

The NCLT asserted that the celebrated judgement in the Lalit Kumar Case, was squarely applicable to the instant case and held that after conclusion of CIRP, a guarantor cannot enjoy a right of subrogation against the corporate debtor when the payment is made by the guarantor with respect to the debt for which the guarantee is provided.

Moreover, by virtue of approval of the Resolution Plan, the Personal Guarantor is not discharged of its liability and the Financial Creditor is entitled to initiate IRP against the Personal Guarantor.

Therefore, the NCLT admitted the Petition filed by the Financial Creditor and initiated IRP against the Personal Guarantor, by declaring him insolvent.

VA View:

This Judgement provides much needed clarity on guarantor's subrogation rights and re-emphasizes the principle laid down in the Lalit Kumar Case that the release or discharge of a principal borrower from the debt owed by it to its creditor due to liquidation or insolvency proceeding does not absolve the guarantor of his/her liabilities, which arises out of an independent contract and that a personal guarantor would not be discharged by virtue of a resolution plan of a corporate debtor being approved under the IBC.

III. Supreme Court: There cannot be two proceedings with respect to the same contract/transaction.

The Hon'ble Supreme Court ("**SC**") in ***M/s. Tantia Constructions Limited v. Union of India [Petition for Special Leave to Appeal (C) No. 10722/2022]*** ("**SLP**") observed that it is of the "*firm opinion that there cannot be two arbitration proceedings with respect to the same contract/transaction*". The SC stated that when a dispute has earlier been referred to arbitration and an award was passed on the claims made and a fresh arbitration proceeding is sought to be initiated with respect to some further claims, then it is "rightful" to refuse reference to arbitration, in exercise of Section 11(6) of the Arbitration and Conciliation Act, 1996 ("**Act**").

Facts

M/s. Tantia Constructions Limited ("**Petitioner**") filed an application, A.P. No. 92 of 2016 before the Calcutta High Court ("**CHC**") during the currency of execution of the project due to a dispute regarding price escalation and prayed for appointment of an arbitrator. The arbitral tribunal was constituted and the dispute was disposed of on September 16, 2016. Thereafter, Petitioner filed an application before the CHC, A.P. No. 353/2020, under Section 11 of the Act for appointment of an arbitrator for resolution of disputes between the parties.

The Petitioner had entered into a contract dated March 6, 2013 ("**Contract**") with the Eastern Railway ("**Respondent**") to carry out the work involving earthwork, cutting, blanketing, construction of minor bridges, platform walls/flooring, drains, station buildings, etc. and other ancillary works in Bandel (including yard) and Talandu (including yard up to 51 km) in

connection with the construction of the third line between Bandel and Bainchi. The terms and conditions of the work were provided in the Contract along with General and Special Conditions of Contract ("**GCC**"), framed by the Respondent.

According to Clause 64(3)(a)(ii) of the GCC, all disputes arising between the parties to the Contract would be decided by an arbitral tribunal which was to be constituted by the General Manager of the Respondent ("**GM**"). According to the Petitioner, with the introduction of Section 12(5) of the Act as well as the Seventh Schedule to the Act with effect from October 23, 2015, the GM became ineligible to be involved in the process of constitution of the arbitral tribunal and, as such, an independent person was to be appointed as the sole arbitrator to adjudicate the disputes arising between the parties to the Contract. Therefore, by a letter dated July 29, 2017, the Petitioner invoked the arbitration clause and sought such disputes and differences being adjudicated through an advocate suggested by it as the sole arbitrator. By a letter dated December 20, 2017 ("**Letter**"), the GM forwarded a panel of four persons, who had retired from the service of the railways, to enable the Petitioner to suggest at least two names out of the panel as their nominees and appoint one of them as their nominee arbitrator. The Petitioner by its letter dated January 2, 2018, informed the GM that in view of the provisions of the Act, the persons named in the Letter are ineligible to be appointed as the arbitrator and requested him to take steps in the matter in accordance with law. However, it evoked no response from the Respondent.

The CHC, by its order dated September 16, 2021 ("**Impugned Order**"), dismissed the Application of the Petitioner on the ground that appointment of an arbitrator is sought for resolution of the dispute which in fact has already been adjudicated upon in the earlier claim petition filed by the Petitioner. The CHC relied on the Hon'ble SC's judgment in ***Bharat Sanchar Nigam Limited and Another v. M/s Nortel Networks India Private Limited, [Civil Appeal Nos. 843-844 of 2021],*** ("**Bharat Sanchar Case**") wherein it had been opined that at the referral stage, a court can interfere when it is found that the claim is time barred or there is no subsisting dispute. The dispute in the application was adjudicated upon.

The SLP was filed against the Impugned Order.

Issues

Whether there can be two arbitration proceedings with respect to the same contract/transaction.

Arguments

Contentions raised by the Petitioner:

The Petitioner had submitted in their Application A.P. No. 92 of 2016 that during the execution of the project, there was dispute regarding price escalation and the Petitioner prayed for appointment of an arbitrator by filing an arbitration petition before the CHC. The petition was disposed of directing the appointing authority to ensure the constitution of an arbitral tribunal. The Petitioner stated that the tribunal considered the claim and the Contract was concluded on March 22, 2016, the final bill was prepared and submitted on December 16, 2016, and that as certain claims were rejected, fresh application was filed by the Petitioner for appointment of arbitrator on August 21, 2017. At this stage, it was prayed to the Court to direct a fresh appointment of an arbitrator.

Contentions raised by the Respondent:

The Respondent submitted that at the interim stage, the Petitioner, by raising certain disputes, sought appointment of an arbitrator, and that in terms of the direction issued by the CHC by its order dated September 16, 2016 in A.P. No. 92 of 2016, arbitral tribunal was appointed and claims were adjudicated upon. The Respondent contended that the claim for which the arbitral tribunal was now sought to be appointed again were part of the claim petition filed by the Petitioner and have already been adjudicated upon by the tribunal, that in fact, the Petitioner raised the same issues which it had raised in the earlier arbitration proceedings and has already been dealt with and partly rejected; that once the claims made by the Petitioner have already been adjudicated upon by the arbitrator, no question arises for appointment of fresh arbitrator.

Observation of the Supreme Court

The SC observed that they are of the firm opinion that there cannot be two arbitration proceedings with respect to the same contract/transaction. The SC also observed that it is not in dispute that in the present case, earlier the dispute was referred to arbitration and the arbitrator passed an award on whatever claims were made. Thereafter, a fresh arbitration proceeding was sought to be initiated with respect to some further claims. The SC observed that it is right to refuse the reference of the dispute to arbitration in exercise of Section 11(6) of the Act.

Decision of the Supreme Court

In view of the above-mentioned observation, the SC dismissed the SLP and upheld the Impugned Order of the CHC.

VA View:

The SC has rightly observed that there cannot be two arbitration proceedings with respect to the same contract/transaction. Where a dispute was referred to arbitration and an award was passed in respect of the claims, in exercise of Section 11(6) of the Act, it is rightful to refuse the reference of a dispute to arbitration. An already settled dispute cannot be raised again to request appointment of an arbitrator afresh. The Arbitral Tribunal in respect of the dispute first raised by the Petitioner was constituted on September 16, 2016. The Impugned Order of the CHC indicated that the Demand Notice in respect of the fresh claims was issued by the Petitioner on August 21, 2017 whereas the Arbitral Award was passed on December 11, 2020 which clearly shows that when the fresh demands were raised, the Arbitral Tribunal was clearly seized of the matter. Thus, the Honorable SC has rightly dismissed the SLP filed by the Petitioner.

The SC has upheld the view of the CHC in the Impugned Order. The CHC had held that *"...Considering the aforesaid enunciation of law and the fact that the appointment of an arbitrator is sought for resolution of the dispute which in fact has already been adjudicated upon in the earlier claim petition filed by the applicant, I do not find any case is made out for appointment of an arbitrator afresh."*

IV. Supreme Court: In the absence of any period of time and limitation prescribed by the enactment, every authority is to exercise power within a reasonable period.

The Hon'ble Supreme Court ("**SC**"), in ***Securities and Exchange Board of India v. Sunil Krishna Khaitan and Others [Civil Appeal No. 8249 of 2013]***, examined the question of delay and laches in initiating proceedings and held that in the absence of any period of time and limitation prescribed by the enactment, every authority is to exercise power within a reasonable period.

Facts

Khaitan Electrical Limited ("**KEL**"), a listed company, was founded by late Shri Krishna Khaitan, who had passed away on November 4, 2012. The promoter group consists of his family members/relatives and associate entities (collectively, "**Respondents**"). In the extraordinary general meeting ("**EGM**") held on March 23, 2006, the shareholders of KEL had approved issuance of 10,00,000 equity share warrants on preferential basis to the Respondents. In the EGM held on November 29, 2006, the shareholders had approved issuance of 10,00,000 equity share warrants to M/s. Khaitan Lefin Limited ("**Respondent No. 3**"), an identified member of the promoter group.

On March 12, 2007, the Respondents acquired 13,00,000 shares in KEL in two tranches. Upon receipt of the full consideration in terms of the warrants, KEL had issued shares to the Respondents consequent to which the shareholding of the Respondents underwent a change.

The Respondents were served with the show-cause notice dated March 26, 2012 issued by the Securities and Exchange Board of India ("**Board**") with respect to violation of Regulations 10 (*pertaining to obligation to make an open offer*) and 11(1) (*pertaining to creeping acquisition limit*) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 ("**Takeover Regulations, 1997**"), calling upon them to show cause why suitable directions under the Securities and Exchange Board of India Act, 1992 ("**SEBI Act**") and Regulations 44 and 45 of the Takeover Regulations, 1997 read with corresponding provisions of Regulations 33 and 35 of the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011 ("**Takeover Regulations, 2011**") should not be issued against them. Violation of Regulation 10 was predicated on the ground that on March 12, 2007, shareholding of Respondent No. 3 had individually increased from 10.52% to 17.16% and thereby it was mandatory for it to make a public announcement in accordance with the provisions of Regulation 10 read with Regulation 14(1) of the Takeover Regulations, 1997 within four working days from March 12, 2007. Further, on March 12, 2007, the collective shareholding of the promoter group, including the acquirers, had increased from 25.83% to 34.21% and, therefore, the acquirers collectively were required to make a public announcement in accordance with the provisions of Regulation 11(1) read with Regulations 14(1) of the Takeover Regulations, 1997 within four working days from March 12, 2007.

The Respondents contested the show-cause notice on various grounds. The Whole-Time Member of the Board ("**Whole Time Member**") did not agree with the submissions made by the Respondents and *vide* his order dated December 31, 2012 held that there was a violation of the Takeover Regulations, 1997 and, therefore, the Respondents shall make a combined public announcement to acquire shares of KEL.

The Respondents preferred an appeal before the Securities Appellate Tribunal ("**Appellate Tribunal**"), which by the impugned order was partly allowed. The Appellate Tribunal held that Regulation 10 was not violated, but Regulation 11(1) was violated *albeit* the direction with regard to issue of public announcement and open offer was not sustainable at a belated stage. There was a delay of about five years in issuing show-cause notice relating to acquisition/ incidents which pertain to the year 2006-07, and as the impugned order came to be passed only on December 31, 2012, the directions of the Whole Time Member for issue of public announcement and open offer were set aside. However, monetary penalty was imposed.

In this regard, the Respondents have filed the present appeals. However, the Respondents did not challenge the penalty imposed by the Appellate Tribunal for violation of Regulation 11(1) of the Takeover Regulations, 1997.

Issue

Primary questions of law raised in the appeal related to the (i) interpretation of Regulation 10 of the Takeover Regulations, 1997; (ii) the power and exercise of the power by the Board under Regulations 44 read with 45 of the Takeover Regulations, 1997; and (iii) the power and jurisdiction of the Appellate Tribunal under Section 15T of the SEBI Act.

Arguments

Contentions of the Board

The Board contended that there was a violation of both Regulation 10 and Regulation 11(1) of the Takeover Regulations, 1997, as the shareholding of Respondent No. 3 increased beyond the stipulated threshold and no public announcement was made. Regulations 10 and 11(1) have to be read accordingly and in line with the objective of the Takeover Regulations, 1997 which is to ensure that an exit option is provided to the existing shareholders once any person, whether individually, and/or along with any another person acting in concert with each other, acquires shares that cross the % threshold.

The Board has been conferred with powers under the SEBI Act under Section 11 thereof to issue appropriate direction for protection of interest of the shareholders. The Board stated that the Appellate Tribunal should not have interfered with the directions to make an open offer, which are in line with the objectives of the SEBI Act read with Regulation 44 of the Takeover Regulations, 1997. The order passed by the Whole Time Member directing making of public announcement for open offer along with paying interest to the shareholders of the target company, was made with the larger objective of protecting interests of the shareholders who have a right and expectation to be provided with the opportunity to exit the company in case the shareholding/voting rights of a person and/or persons acting in concert crosses the stipulated threshold at any point of time.

Scope of power of the Appellate Tribunal enumerated in Section 15-T (*pertaining to appeals*) of the SEBI Act does not extend to substituting directions issued by the Board with monetary penalty. The scope of power of the Appellate Tribunal is wide but cannot be exercised in a manner which is inconsistent with the scheme of the SEBI Act. Further, the directions issued for public announcement and open offer are in line with the objectives of the SEBI Act which states that as soon as the contravention of the statutory obligation is established, penalties must follow.

The Board further contended that the Appellate Tribunal does not exercise jurisdiction under Article 226 of the Constitution of India and is a creation of the statute and, therefore, cannot pass any order inconsistent with the scheme of the SEBI Act. Thus, imposition of monetary penalty for violation of Regulation 11(1) of the Takeover Regulations, 1997, as directed by the Appellate Tribunal, is contrary to law and would also result in weakening of investor confidence in securities market as defaulters would be able to escape the obligation.

Further, the delay in issue of show-cause notice itself would not exonerate the defaulters under the SEBI Act and the relevant regulations, as has been held in ***Adjudicating Officer, Securities and Exchange Board of India v. Bhavesh Pabari [(2019) 5 SCC 90]*** ("**Bhavesh Pabari Judgment**").

Observations of the Supreme Court

Regulation 10 of the Takeover Regulations, 1997 applies to the 'acquirer' acquiring voting rights, with reference to the existing holding as a person and in concert with other persons, because the acquisition is to be "taken together with shares or voting rights held by the acquirer himself or by person acting in concert with him". The combined holding of the person and the 'person acting in concert' determines application of Regulation 10. If an 'acquirer' already holds more than 15 % shares or voting rights in concert with other persons, such holding is not be fragmented to calculate the shares or voting rights of the 'acquirer' in his personal capacity under Regulation 10. The expression 'acquirer', as defined in the Takeover Regulations, 1997, is broad, wide and is given an expansive definition.

The object of the wide definitions in the Takeover Regulations, 1997 is to ensure that no one is able to dribble past and defeat its objects by resorting to camouflage and subterfuge. Thus, the contention of the Board that the interpretation by the Appellate Tribunal defeats the object and purpose of the Takeover Regulations, 1997 was a feeble and evanescent argument. In the context of the present case, it is to be noted that the Board is the draftsman of the legislation having enacted the Takeover Regulations, 1997 and hence, their interpretation and understanding of the Regulations is of importance and relevance. In the context of the present case, the Board, nearly five years after the transactions, had issued the show-cause notice and then passed an order taking a view on interpretation of Regulation 10, which was contrary to the view expressed by it in several communications as also orders passed by the adjudicating authority. Past is passe and not present, and by giving 'retroactive' operation without good reason and ground, the direction violates fundamental notions of predictability and legal stability.

The SC observed that the principle of doubtful penalisation would be applicable in the present case. The SC, in the case of ***Tolaram Relumal and Another v. State of Bombay [(1955) 1 SCR 15]*** had held that it is a well settled rule of construction of penal statutes that if two views and reasonable constructions can be put on a provision, the court must lean in favour of construction which exempts the subject from penalty rather than one which imposes penalty.

Regulation 10 of the Takeover Regulations 1997, as interpreted and applied by the Board for over ten years, was sought to be overturned by the Board, thereby, creating penal consequences. The SC noted that this should not be permitted and is hardly acceptable if the principle of good governance is applied. Further, the argument of the Board that Takeover Regulations, 2011 are retrospective was rejected. It is a general rule of law of interpretation that unless explicitly mentioned, a law cannot be presumed to be retrospective.

Regulation 44 states that the Board, without prejudice to their rights to initiate action under Chapter VI-A and Section 24 of the SEBI Act, may in the interest of the securities market or for protection of the interests of the investors, issue such directions as it may deem fit. Thereafter, it specifies certain directions in clauses (a) to (i), using the word 'including', which implies that the directions issued by the Board can include the directions given in clauses (a) to (i), *albeit* the Board may issue directions even beyond what is stated in clauses (a) to (i). Thus, the Board's power to give directions is wide. Regulation 44 states that the Board while issuing directions, has to keep in mind the interest of the securities market and its role as a protector of interest of investors.

The SC agreed with the reasoning given by the Appellate Tribunal for setting aside the directions given in the order passed by the Whole Time Member. The violation alleged relates to the years 2006-07. The order issuing the directions was passed on December 31, 2012, several years after the alleged violation. The direction given is that the shareholders should be given an option to sell the shares held by them on June 16, 2007 by directing the respondents to make a public announcement to acquire the shares. Direction has also been given to pay interest @ 10% per annum from June 16, 2007 till shares have been accepted in the open offer.

The SC observed that, though this direction can be issued, the exercise of discretion to issue the said direction has to be predicated and based upon good grounds and reasons. The directions of such nature are not automatic and are to be issued only when they are warranted and justified. The directions were for the reason that the acquirer had failed to comply with Regulation 10 of the Takeover Regulations, 1997 in the remote past, that is, in the year 2006 and 2007. It is whimsical and arbitrary exercise of discretion by the Board.

The SC, in the Bhavesh Pabari Judgment, had examined the question of delay and laches in initiating proceedings under Chapter VI-A of the SEBI Act and the principle of law that when no limitation period is prescribed proceedings should be initiated within a reasonable time and what would be reasonable time would depend upon facts and circumstances of each case. Whenever a question with regard to inordinate delay in issuance of a show-cause notice is made, it is open to the noticee to contend that the show-cause notice is bad on the ground of delay and it is the duty of the authority/officer to consider the question objectively, fairly and in a rational manner.

Further, in the present appeal, it is to be noted that an order in the form of directions was issued. It was this order which

was made subject matter of challenge before the Appellate Tribunal. The SC did not accept the contention of the Board that the Appellate Tribunal while exercising appellate power could not have set aside and quashed the directions given in the appeal.

Decision of the Supreme Court

The SC upheld the order of the Appellate Tribunal, setting aside the directions of public announcement with open offer, given by the Whole Time Member for violation of Regulation 11(1) of the Takeover Regulations, 1997.

However, the SC disagreed with the Appellate Tribunal on the aspect of the power of Appellate Tribunal under Section 15T (*pertaining to appeals*) of the SEBI Act. It clarified that the power of the Appellate Tribunal under Section 15T of Chapter VI-A of the SEBI Act is confined to examination of correctness and legality of the order under challenge.

VA View:

The SC has rightly upheld the Bhavesh Pabari Judgment and observed that in the absence of any period of time and limitation prescribed by the enactment, every authority is to exercise power within a reasonable period. What would be the reasonable period would depend upon facts and circumstances of each case. As there is public interest involved, regulatory authorities should take actions and exercise their powers in a timely manner. When no limitation period is specified, they should endeavor to take actions within reasonable time.

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