March, 2023

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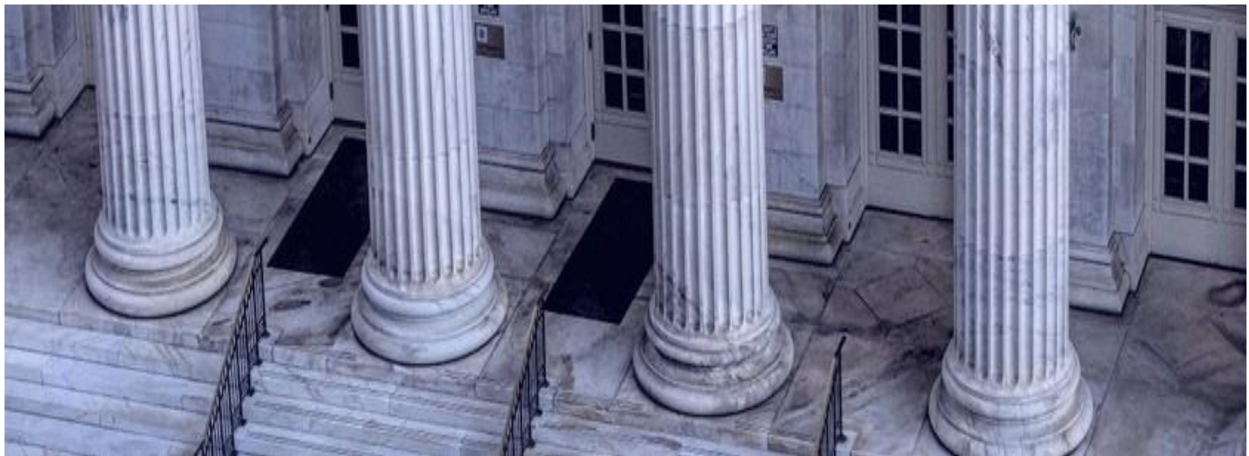
Between the lines...

A BRIEFING ON LEGAL MATTERS OF CURRENT INTEREST



KEY HIGHLIGHTS

* **Delhi High Court**: Arbitrator has no jurisdiction to set aside sale notice issued by secured creditor under Section 13(4) of the SARFAESI Act.
* **NCLAT**: Majority shareholders of a company have the locus to challenge an admission of CIRP against the corporate debtor where the admission took place on account of collusion amongst the creditors.
* **NCLAT**: The nature and character of financial debt does not change upon breach of consent terms.

I. Delhi High Court: Arbitrator has no jurisdiction to set aside sale notice issued by secured creditor under Section 13(4) of SARFAESI Act.

The High Court of Delhi ("**High Court**") has, by a common judgement dated February 21, 2023, in a batch of appeals namely, Arb. Appeal (Comm.) No. 36 of 2022, Arb. Appeal (Comm.) No. 37 of 2022 and Arb. Appeal (Comm.) No. 38 of 2022 ("**Arbitration Appeals**") arising under Section 37(2)(b) (*Appealable orders*) of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"), filed by Indiabulls Housing Finance Limited ("**Indiabulls**") and Edelweiss Asset Reconstruction Company Limited ("**Appellants**") against Shipra Estate Limited, Shipra Hotels Limited and Shipra Leasing Private Limited ("**Respondents**") respectively, held that arbitrator has no jurisdiction to set aside sale notice issued by secured creditor under Section 13(4) (*Enforcement of security interest*) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("**SARFAESI Act**").

Facts

In an arbitration proceeding involving the above-mentioned parties, the Learned Arbitrator, by an order dated June 11, 2022 ("**Impugned Order**"), had set-aside a sale notice dated April 29, 2022 issued by Indiabulls ("**Sale Notice**") under Section 13(4) of the SARFAESI Act read with the Security Interest (Enforcement) Rules, 2002 ("**SARFAESI Rules**") seeking enforcement of their "security interest" in the secured asset being Shipra Mall, Ghaziabad ("**Mall Asset**"). In view of the aforesaid order dated June 11, 2022, Arbitration Appeals arose before the High Court and were disposed of by order dated July 8, 2022. Thereafter, in view of the Learned Arbitrator reiterating his previous order dated June 11, 2022, the aforesaid proceedings were sought to be revived by the Appellants by way of filing of applications, namely, I.A. No. 14180 of 2022, 14179 of 2022 and 14181 of 2022. In view thereof, the High Court allowed the aforesaid applications and was pleased to take on record the Arbitration Appeals.

Subsequently, by an order dated August 30, 2022, the Learned Arbitrator clarified that the Impugned Order continues to apply, thereby prohibiting enforcement of security interest in the Mall Asset and restraining Indiabulls from confirming the sale of the Mall Asset.

In view of the above-mentioned, the Appellants approached the High Court, challenging the Impugned Order.

Issues

1. Whether the Learned Arbitrator was within his powers to interdict and set aside the Sale Notice.
2. Whether the Learned Arbitrator could have curtailed the rights of a secured creditor in relation to a security interest created under the SARFAESI Act, being a special statute, in relation to which the Respondents have a specific remedy under Section 17 (*Application against measures to recover secured debts*) of the SARFAESI Act, before the Debts Recovery Tribunal.

Arguments

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

It was contended by the Appellant that by restraining Indiabulls from confirming sale of the Mall Asset, the Learned Arbitrator has exceeded his jurisdiction and stepped into the domain of the Debts Recovery Tribunal, which is exclusively empowered to decide on the legal issues pertaining to enforcement of security interest under the SARFAESI Act. Further, the Appellant relied upon the judgment of the Supreme Court in the matter of ***Vidya Drolia and Others v. Durga Trading Corporation [(2021) 2 SCC 1]*** ("**Vidya Drolia Judgment**"), wherein it is held that the matters falling within the purview of SARFAESI Act are non-arbitrable. In order to substantiate the contentions, Indiabulls submitted that they are a "financial institution" and a "secured creditor" within the meaning of Section 2(m) and 2(zd)

of the SARFAESI Act qua the Respondents, who are covered within the meaning of "borrower" in terms of Section 2(f) of the SARFAESI Act and a "security interest" has been created in favour of the Mall Asset, in terms of Section 2(zf) and Section 2(zc) of the SARFAESI Act.

Further, it was contended that Indiabulls is legally empowered to enforce its security interest over the secured asset as per Section 13(4) of the SARFAESI Act, thereby taking possession of the Mall Asset and giving effect to sale of the Mall Asset as per the terms stipulated under Rule 8 of the SARFAESI Rules.

The Appellants further contended that legal remedy against enforcement of secured asset by the secured creditor lies before the Debts Recovery Tribunal under Section 17 of the SARFAESI Act. The Appellant relied upon various judicial pronouncements in order to substantiate the aforesaid contention that, when an efficacious remedy is available to the aggrieved borrower exclusively before the Debts Recovery Tribunal, even the High Court cannot exercise extraordinary writ jurisdiction to entertain a challenge to a sale notice issued under Section 13(4) of the SARFAESI Act. Similarly, by virtue of Section 34 (*Civil court not to have jurisdiction*) of the SARFAESI Act, even Civil Courts are barred from entertaining any challenge to the legality of enforcement of security interest.

It was further argued that enforcement of a 'mortgage', which is a right in rem, cannot be decided by an arbitral tribunal. Further, it was contended that since remedy against enforcement of security interest exists under SARFAESI Act being a special statute, the Arbitration Act cannot over-ride such special remedy, and hence, the "doctrine of election" is not applicable in the present case.

Contentions raised by the Respondents:

It was contended on behalf of the Respondents that the Learned Arbitrator was well within his jurisdiction and has not entered into the domain of SARFAESI Act. The Respondent further submitted that the Learned Arbitrator was empowered to pass such orders which were necessary to preserve the asset, which is the subject-matter of arbitration by way of interim measure of protection, so that the arbitral proceedings are not rendered infructuous. Further, the Respondents contended that the Learned Arbitrator had only prohibited Indiabulls, being the respondent party in the Arbitration proceeding, from confirming the sale of the Mall Asset, through subsequent auction proceedings, without impeding their right to issue sale notice or call for bids.

Further, it was submitted that once the parties had chosen to refer the dispute to arbitration and submit themselves before the Learned Arbitrator, the Appellant in the present Arbitration Appeal have by implication, waived their right to file a civil suit or to adopt remedies under the SARFAESI Act.

Further, the Respondent made an attempt to demonstrate that the Vidya Drolia Judgment is factually distinguishable from the present case. More particularly, it was contended that Vidya Drolia Judgment has been pronounced in the context of rent control legislation and has no relation to SARFAESI Act.

Further, the Respondents sought reliance upon the principle of "doctrine of election", thereby submitting that if there exist remedies under two statutes, a party is free to elect any one of them. In the context of the present case, it was argued that once the parties to the dispute had elected to resolve their disputes under the Arbitration Act, remedies under SARFAESI Act would no more be available to them.

Observations of the High Court

At the outset, the High Court made it clear that by way of the present judgment, the High Court does not propose to decide on the arbitrability or non-arbitrability of matters covered under SARFAESI Act at large, since the same would depend upon the nature of the dispute and other factors.

In the present case, the High Court relied upon the Vidya Drolia Judgment, and came to the finding that since Section 13(4) of the SARFAESI Act provides for a specific right vested in the secured creditor to

enforce security interest, by issuance of sale notice, the aforesaid right cannot be ousted by an order passed by an arbitral tribunal. Further, the High Court observed that the remedy available to the borrower aggrieved by enforcement of security interest at the behest of the secured creditor lies before the Debts Recovery Tribunal under Section 17 of the SARFEASI Act. In view of the above-mentioned, the High Court observed that the "doctrine of election" is not applicable in the present case, since the question of choice does not arise. It was further observed that the question of remedy under the Arbitration Act as an alternative to a proceeding before the Debts Recovery Tribunal does not arise, since there is no inconsistency or repugnancy before the provisions of the SARFAESI Act and the Recovery of Debts and Bankruptcy Act, 1993 on the one hand and the Arbitration Act on the other hand.

Further, the High Court observed that the challenge to a sale notice issued under Section 13(4) of the SARFAESI Act is non-arbitrable and hence, the Learned Arbitrator had no discretion or jurisdiction to pass any order in this regard. Therefore, grant of an interim measure under Section 17 of the Arbitration Act, which is wholly outside the scope of arbitration, cannot be permitted. Thus, the High Court observed that it is empowered under Section 37(2)(b) of the Arbitration Act to interfere in the Impugned Orders.

Decision of the High Court

In view of the aforesaid observations and precedents, the High Court held that the Learned Arbitrator clearly exceeded his powers and jurisdiction in interdicting and setting aside sale notices issued by Indiabulls. Accordingly, the High Court was pleased to set aside the aforesaid orders.

VA View:

By way of the present judgment, the High Court has answered a pertinent question of law and clarified the legal position that in the event of the borrower being aggrieved by enforcement of security interest by the secured creditor, the remedy would exclusively lie before the Debts Recovery Tribunal under Section 17 of the SARFAESI Act and no other forum including arbitral tribunal can step into the unchartered territory of SARFAESI regime, for which purpose, only the Debts Recovery Tribunal was empowered to grant appropriate relief(s).

This judgment is relevant, particularly for the reason that it reiterates the exclusivity of jurisdiction and powers vested with the Debts Recovery Tribunal in matters falling within the domain of SARFAESI Act (which is a special statute) and makes it clear that even an arbitral tribunal, whilst deciding an application seeking interim reliefs, cannot grant such interim measures, which are supposed to be adjudicated upon by the Debts Recovery Tribunal.

II. NCLAT: Majority shareholders of a company have the locus to challenge an admission of CIRP against the corporate debtor where the admission took place on account of collusion amongst the creditors.

The National Company Law Appellate Tribunal ("**NCLAT**"), in the case of ***Ashish Gupta v. Delagua Health India Private Limited and Others [Company Appeal (AT) (Ins.) No. 17 of 2022]***, has held that majority shareholders of a company have the locus to challenge an admission of corporate insolvency resolution process ("**CIRP**") against the corporate debtor where the admission took place on account of collusion amongst the creditors of the corporate debtor.

Facts

Ashish Gupta ("**Appellant**") was employed with Delagua Health India Private Limited ("**Corporate Debtor/ Respondent No. 1**") with effect from February 11, 2014 as director of the Corporate Debtor and tendered his resignation on July 2, 2017 with immediate effect. He had not been paid salary for the period from January, 2016 till June, 2017 and submitted that the said operational debt of the Corporate Debtor fell due on June 30, 2017. Not having received the said payment, a demand notice was sent to the Corporate Debtor on June 15, 2019 ("**Demand Notice**"). An application under Section 9 (*Application for initiation of corporate insolvency resolution process by operational creditor*) of the Insolvency and Bankruptcy Code, 2016 ("**IBC**") was filed after the Appellant did not receive any response from the Corporate Debtor ("**Application**").

The National Company Law Tribunal, New Delhi ("**Adjudicating Authority**"), by the order dated October 11, 2021 ("**Impugned Order**"), rejected the Application. The present appeal was preferred by the Appellant under Section 61 (*Appeals and Appellate Authority*) of the IBC against the Impugned Order.

Issues

1. Whether the Application filed before the Adjudicating Authority was a collusive petition.
2. Whether, in the given facts and circumstances of the present case, Delgua Health Limited (Grand Bahamas) ("**Respondent No. 2**") and Delgua Water Testing Limited ("**Respondent No. 3**") as shareholders are entitled to defend the interests of Respondent no.1.
3. Whether there is any pre-existing dispute surrounding the operational debt.

Arguments

<u>Contentions of the Appellant</u>:

The Appellant contended that the Demand Notice was addressed by the Appellant to the Corporate Debtor at its registered office address, as mentioned in the company master data. Further, proof of service of the Demand Notice was provided.

In response to the contentions of the Respondents that the Appellant was in control of the registered office address and the official e-mail ID of the Corporate Debtor, the Appellant had stated that he had taken efforts to delete his name and e-mail address from the company master data besides taking initiative for a new board of the Corporate Debtor by calling extraordinary meeting of the Corporate Debtor in 2018 but was not allowed to do so by the majority shareholders.

The Appellant contended that the Corporate Debtor did not appear before the Adjudicating Authority. Instead, Respondent No. 2 and Respondent No. 3, together holding 98.98% shareholding of the Corporate Debtor, subsequently filed an intervening application though they did not have any locus in the matter. The Adjudicating Authority on October 11, 2021 wrongly proceeded to dismiss the Application by holding it to be a collusive petition without giving any reasons.

The Appellant contended that since the Demand Notice had been sent at the registered office address of the Corporate Debtor, as mentioned in the company master data, there was no infirmity in the service of the Demand Notice.

It was also the contention of the Appellant that the consultancy agreement dated November 4, 2013 ("**Consultancy Agreement**") being referred to by the Respondents was superseded by an employment agreement dated August 1, 2014 ("**Employment Agreement**") and since the dues arose from the Employment Agreement, only the Employment Agreement was mentioned in the Application. Thus, there was no attempt on the part of the Appellant to suppress the Consultancy Agreement and that it was the Respondents who were misleading the NCLAT by making a mention of the Consultancy Agreement which has been superseded by the Employment Agreement.

Further, with respect to the contention of the Respondents that the Appellant had violated the clauses of the Consultancy Agreement pertaining to non-compete, the Appellant contended that Caya Constructs ("**Caya**") and the Corporate Debtor are in different businesses hence clauses 9.1 and 9.2 of the Consultancy Agreement was not attracted and there was no violation of the Consultancy Agreement.

Contentions of the Respondents:

The Respondent No. 2 and Respondent No. 3 submitted that the Appellant and Respondent No. 2 had signed the Consultancy Agreement on November 4, 2013 by virtue of which the Appellant had agreed to provide certain services to Respondent No. 2 to assist them in setting up an entity in India and for overseeing its operations. However, this fact had not been deliberately disclosed by the Appellant before the Adjudicating Authority. The Corporate Debtor had been subsequently incorporated on February 11, 2014. Post incorporation of the Corporate Debtor, the Appellant along with one Mr. K.K. Vashishtha ("**KKV**") were appointed as directors of the Corporate Debtor and thereafter their fees/ remuneration was paid directly by the Corporate Debtor. Both the Appellant and KKV resigned from the directorship of the Corporate Debtor with effect from July 2, 2017 without sending proper intimation to the shareholders of the Corporate Debtor. The abrupt resignation of both directors had caused a void in the board of the Corporate Debtor. Further, because of the said void on the board, the Appellant continued to remain in control of all modes of communications in respect of Corporate Debtor and hence by design ensured that the Demand Notice never actually got served upon the Corporate Debtor. In this way, the Appellant intentionally and deliberately shut the opportunity for the Corporate Debtor to respond to the Demand Notice.

Furthermore, though the Appellant and KKV had submitted their respective resignations on the same day and the Appellant had full knowledge of the resignation of KKV, he acted in collusion with KKV and chose to serve the Demand Notice upon KKV with an ulterior motive. KKV, even though he had already resigned as director of the Corporate Debtor, presented himself before the Adjudicating Authority on behalf of Corporate Debtor and unauthorisedly expressed inability to pay the amount claimed by the Appellant in the Demand Notice during the hearing of the Application. The Adjudicating Authority, having observed this act of connivance between the Appellant and KKV, correctly dismissed the petition as collusive.

It was further argued by the Respondents that the Corporate Debtor having been denied opportunity to respond to the collusive Demand Notice or to defend their interests before the Adjudicating Authority in the context of the Application, Respondent No. 2 and Respondent No. 3 had filed an intervention application before the Adjudicating Authority. It was strenuously contended that as the Corporate Debtor being a subsidiary of Respondent No. 2, they were fully entitled to file the intervention application to protect the interest of the shareholders of the Corporate Debtor.

It was submitted by Respondent No. 2 and Respondent No. 3 that the Appellant had deliberately withheld information from the Adjudicating Authority about the Consultancy Agreement which had been signed between the Appellant and Respondent No. 2 on November 4, 2013. The Respondents further submitted that this Consultancy Agreement was placed on record much later by the Appellant

and that too only after directions were issued on September 6, 2019 by the Adjudicating Authority to produce the original documents. It was also contended that the Consultancy Agreement constituted the basis of relationship between the Appellant and the Corporate Debtor and that it continued to subsist.

The Respondents submitted that clause 9.1 of the Consultancy Agreement stipulated that without the prior written consent of the Corporate Debtor, the consultant could not accept any engagement or employment or have any concern in any business which is similar to or in any way competitive with any of the businesses of the company or any group company. The Appellant while still serving as consultant with Corporate Debtor started engaging himself in the activities of a competing entity, Caya, thus, breaching the terms of the Consultancy Agreement and causing loss to the business of the Corporate Debtor. Furthermore, the Appellant had made excess withdrawals from the accounts of the Corporate Debtor. Pointing out at these pre-existing disputes, it was submitted that the Application is not maintainable.

Observations of the NCLAT

With respect to issue nos. 1 and 2, the NCLAT observed that on the date of issue of the Demand Notice, the Appellant having admitted that both KKV and he had already tendered their respective resignations from the position of director of the Corporate Debtor with effect from July 2, 2017, it defied logic as to why the Appellant sent the Demand Notice at the given address at a time when the board of Corporate Debtor had ceased to exist. Further, the other copy of the Demand Notice has admittedly been addressed to KKV who at that point of time had also resigned from the position of director of the Corporate Debtor. The Appellant in spite of having full knowledge of the fact that KKV had already resigned, yet, addressed the Demand Notice to him which puts question marks on the intention of the Appellant.

Furthermore, the NCLAT observed that when the Application was filed before the Adjudicating Authority, at which time KKV had already resigned as a director, he still appeared before the Adjudicating Authority, not only recording his presence but also making a statement expressing inability on the part of the Corporate Debtor to pay the amount claimed by the Appellant. In view of the above, the NCLAT stated that the Appellant had connived with KKV to manipulate the Section 9 proceedings in his favour by making KKV unauthorisedly represent on behalf of the Corporate Debtor.

With respect to the contention of the Appellant that intervention on part of shareholders is not permissible, the NCLAT stated that, in view of the peculiar circumstances of the case where the Demand Notice could not be responded to by the Corporate Debtor for reasons beyond their control and a collusive petition having been filed, Respondent No. 2 and Respondent No. 3, being majority shareholders of the Corporate Debtor deserved to be heard in the interest of justice. Hence, the NCLAT held that present appeal deserved to be considered on merit.

With respect to issue no. 3, the NCLAT observed that it was an admitted fact by both parties that the Consultancy Agreement is dated November 4, 2013 while the Employment Agreement is dated August 1, 2014. The Appellant was appointed as director in the Corporate Debtor on February 11, 2014 which was before the Employment Agreement was signed. Based on the chronological sequencing of the two agreements, it was the contention of the Appellant that the Employment Agreement supersedes the terms and conditions of the Consultancy Agreement. However, the Respondents had questioned the validity of the Employment Agreement since it was a document signed only between the Appellant and KKV. The Corporate Debtor or the shareholders or their authorised representatives do not figure anywhere in the document as signatories and therefore was not binding on them. It had also been submitted that the Employment Agreement was not a registered document and hence legally untenable. On the other hand, the Consultancy Agreement was signed between the Appellant and Respondent No. 2.

The NCLAT was of the considered view that given the framework of Section 9 of IBC, the remit of the tribunal is summary in nature and it therefore does not behove the tribunal to undertake either the comparative examination of the areas of specialisation of Caya and the Corporate Debtor. All that the NCLAT observed at this stage is that a dispute centring on breach of fiduciary duty by the Appellant in the context of Consultancy Agreement has been raised by the Respondents as their defence against the claim of the Appellant which is evidenced from the material placed on record.

Hence, in the light of the submissions and pleadings made by Respondent No. 2 and Respondent No. 3 and after seeing the material on record, NCLAT was satisfied that dispute raised on behalf of the Corporate Debtor is not a moonshine dispute or a bluster. In respect of issue no. 3, the NCLAT answered in the affirmative.

Decision of the NCLAT

The NCLAT held that the Adjudicating Authority had not committed any mistake in observing that the Application was collusive and dismissed it on the same grounds.

VA View:

The NCLAT has upheld the spirit of the IBC and protected the interests of stakeholders involved by preventing an unjust admission of a company into CIRP. In cases of collusion such as the above, it is important to look at the circumstances surrounding the facts in order to unveil the true picture which is falsely portrayed by the creditors.

It is a well settled canon of natural justice that anything which eludes or frustrates the recipient of justice should be avoided and reasonable opportunity of hearing be allowed to advance the cause of justice. By taking cognizance of the apparent dispute in existence, the NCLAT has also protected the interests of the shareholders of the Corporate Debtor, namely Respondent No. 2 and Respondent No. 3 and adhered to this well settled position of law and equity.

III. NCLAT: The nature and character of financial debt does not change upon breach of consent terms.

The National Company Law Appellate Tribunal, Principal Bench, New Delhi ("**NCLAT**") has in its judgement dated February 1, 2023 ("**Judgement**"), in the matter of ***Priyal Kantilal Patel v. IREP Credit Capital Private Limited and Another [Company Appeal (AT) (Insolvency) No. 1423 of 2022]***, held that the nature of financial debt would not change on account of breach of consent terms that have been agreed between the parties.

Facts

Rajesh Landmark Projects Private Limited ("**Corporate Debtor**") had issued debentures to IREP Credit Capital Private Limited ("**Financial Creditor**"). On December 20, 2019, the Financial Creditor filed a petition under Section 7 *(Initiation of corporate insolvency resolution process by financial creditor*) of the Insolvency and Bankruptcy Code, 2016 ("**IBC**"), seeking initiation of corporate insolvency resolution process ("**CIRP**") against the Corporate Debtor ("**Original Petition**").

During the pendency of the Original Petition, the Financial Creditor and the Corporate Debtor entered

into consent terms recorded in a settlement agreement ("**Consent Terms**") where under the Financial Creditor agreed to withdraw the Original Petition. Further, the Consent Terms placed an obligation on the Corporate Debtor to release the amounts agreed to thereunder and entitled the Financial Creditor to claim the entire outstanding amount as would be due on the date of the Corporate Debtor's default of the Consent Terms. The Consent Terms also contemplated revival of the Original Petition in the event of default of the Consent Terms on part of the Corporate Debtor.

Subsequently, the cheques which were issued to the Financial Creditor were dishonored and thereby the Consent Terms were defaulted on part of the Corporate Debtor. The Financial Creditor, instead of reviving the Original Petition, filed a fresh company petition against the Corporate Debtor under Section 7 of the IBC ("**Fresh Petition**").

In the Fresh Petition, the Financial Creditor based its claim on the initial financial debt that was claimed by it in the Original Petition along with giving details of the Consent Terms and the subsequent events which took place. The Fresh Petition was admitted by the National Company Law Tribunal, Mumbai ("**Adjudicating Authority**") in its order dated October 10, 2022 and CIRP was initiated against the Corporate Debtor ("**Impugned Order**").

Aggrieved by the Impugned Order, the present appeal has been filed before the NCLAT by the director of the Corporate Debtor namely, Priyal Kantilal Patel ("**Appellant**").

Issue

Whether the nature and character of financial debt changes upon breach of Consent Terms.

Arguments

Contentions raised by the Appellant:

The Appellant submitted that the Fresh Petition filed by the Financial Creditor was not maintainable. A breach of the Consent Terms by the Corporate Debtor did not furnish any right on the Financial Creditor to file a Fresh Petition initiating CIRP against the Corporate Debtor, given that a breach of Consent Terms could not be treated as a financial debt.

The Appellant placed reliance on the judgment passed by the NCLAT in the case of ***Amrit Kumar Agarwal v. Tempo Appliances Private Limited [2020 SCC OnLine NCLAT 1202]*** ("**Amrit Kumar Case**") wherein it was held that "*mere obligation to pay under a Settlement Agreement would not amount to disbursal of amount for consideration against the time value of money and breach thereof would not entitle the Appellant in the instant case to trigger Corporate Insolvency Resolution Process against the Respondent. Viewed from this prospective, we find that bouncing of cheques issued in discharge of obligation under the Settlement Agreement would not fall within the purview of default in regard to financial debt.*"

The Appellant also submitted that there was no consensus amongst the majority debenture holders for initiating CIRP against the Corporate Debtor under Section 7 of the IBC and that the Financial Creditor amounted to a mere 12% of the total debenture holders.

Lastly, the Appellant submitted that the Adjudicating Authority had committed an error by admitting the Fresh Petition filed by the Financial Creditor.

Contentions raised by the Financial Creditor:

The Financial Creditor contended that the debt which was claimed by it under the Fresh Petition remained a financial debt and that the nature of the debt would not change merely by virtue of the Consent Terms being entered into between the parties.

Moreover, in the present case, the Financial Creditor by filing the Fresh Petition, was not trying to enforce the Consent Terms entered into between the parties, but was rather claiming the original financial debt.

The Financial Creditor also submitted that while the Consent Terms stipulated that any default on part of the Corporate Debtor in abiding by the Consent Terms would entitle the Financial Creditor to revive the Original Petition, the mere filing of a Fresh Petition instead of reviving the Original Petition, could not be a ground to defeat the Fresh Petition.

The Financial Creditor therefore contended that the Fresh Petition had been rightly admitted by the Adjudicating Authority.

Observations of the NCLAT

The NCLAT observed that there was no dispute on the fact that the Original Petition was withdrawn basis the Consent Terms that were entered into between the parties.

The NCLAT took note of clause 9 of the Consent Terms wherein the Corporate Debtor had undertaken to fully comply with the payment schedule set out thereunder and to not commit any default in releasing the amounts agreed under the Consent Terms. The NCLAT also observed that in the event of Corporate Debtor's default of the Consent Terms, the Financial Creditor was at liberty to claim the entire outstanding amount and revive the Original Petition.

Further, the NCLAT observed that the Amrit Kumar Case relied upon by the Appellant, was a case wherein an application under Section 7 of the IBC was filed on the ground of default in payment of a settlement agreement and therefore the NCLAT had opined that a default in payment of settlement agreement does not constitute a financial debt. However, in the eyes of the NCLAT, the facts of the instant case were distinguishable from that of the Amrit Kumar Case, considering that in the instant case, the Fresh Petition had been filed by the Financial Creditor not only for default of the Consent Terms on part of the Corporate Debtor, but also, for claiming the original financial debt which was extended by the Financial Creditor to the Corporate Debtor.

The NCLAT also observed that a mere breach of the Consent Terms on part of the Corporate Debtor would not extinguish the financial debt which was claimed by the Financial Creditor nor would the nature and character of the financial debt change due to breach of the Consent Terms. Besides, permitting such an interpretation would give a premium to the Corporate Debtor who has breached the Consent Terms.

Furthermore, although a reading of clause 9 of the Consent Terms made it evident that the Financial Creditor would be entitled to revive the Original Petition upon Corporate Debtor's breach of the Consent Terms, the mere fact that instead of reviving the Original Petition, the Financial Creditor chose to file the Fresh Petition, could not be a reason to reject the Fresh Petition altogether.

With regard to the contention of the Appellant that there was no consensus amongst the debenture holders for initiating CIRP against the Corporate Debtor under Section 7 of the IBC and that the Financial Creditor amounted to a mere 12% of the total debenture holders, the NCLAT observed that the fact that the majority debenture holders had not initiated CIRP under Section 7 of the IBC against

the Corporate Debtor, would not preclude the Financial Creditor from initiating the same on its own right.

Decision of the NCLAT

The NCLAT held that the Corporate Debtor's breach of the Consent Terms, would not extinguish the financial debt which was claimed for by the Financial Creditor nor would the nature and character of the financial debt change due to breach of Consent Terms.

In view of the above, NCLAT did not find any reason to interfere with the Impugned Order passed by the Adjudicating Authority and therefore dismissed the appeal filed by the Appellant.

VA View:

The NCLAT has, through this Judgment, rightly opined that a mere breach in Consent Terms on part of the Corporate Debtor would not wipe out the original financial debt nor would the nature and character of the financial debt change.

Pertinently, in relation to filing of a Fresh Petition by the Financial Creditor instead of reviving the Original Petition as stipulated in the Consent Terms, the NCLAT reiterated that the same could not be a ground to reject the Fresh Petition filed under Section 7 of the IBC.

This Judgement emphasizes that although the parties have mutually agreed upon 'revival' of the proceedings, a financial creditor may, at its will, also proceed to file a fresh application for initiation of CIRP against a corporate debtor, thereby safeguarding the financial creditor's interest. Therefore, consent terms cannot alter the nature or character of a financial debt whereby the statutory rights of a financial creditor are stripped away.

Contributors:

Aayush Jain, Navya Shukla, Pritika Shetty and Rishabh Chandra

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NEW DELHI
1st, 9th and 11th Floor,
Mohan Dev Bldg,
13 Tolstoy Marg,
New Delhi - 110001, India
Phone: +91-11-42492525
Fax: +91-11-23320484
delhi@vaishlaw.com

MUMBAI
106, Peninsula Centre,
Dr. S.S. Rao Road, Parel,
Mumbai - 400012, India
Phone: +91-22-42134101
Fax: +91-22-2134102
mumbai@vaishlaw.com

BENGALURU
105-106, Raheja Chambers,
#12, Museum Road,
Bengaluru - 560001, India
Phone: +91-80-40903588/89
Fax: +91-80-40903584
bangalore@vaishlaw.com