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Between the lines...

A BRIEFING ON LEGAL MATTERS OF CURRENT INTEREST

KEY HIGHLIGHTS

* **Calcutta High Court**: Courts cannot re-appreciate the evidence or substitute its view with that of the arbitrator while considering the issue of enforcement of a foreign award.

* **NCLAT**: Notice period of 30 days should be given for E-Auction, even though there are no timelines under Liquidator Regulations.

* **Supreme Court**: Section 327(7) of the Companies Act, 2013 which excludes the application of Section 326 and Section 327 of the Companies Act, 2013 to a company undergoing liquidation under the Insolvency and Bankruptcy Code, is constitutionally valid.

* **NCLAT**: Avoidance application can continue after the completion of CIRP.

I. Calcutta High Court: Courts cannot re-appreciate the evidence or substitute its view with that of the arbitrator while considering the issue of enforcement of a foreign award.

The Calcutta High Court ("**Calcutta HC**") has, in its judgement dated June 23, 2023, in the matter of ***Jaldhi Overseas Private Limited v. Steer Overseas Private Limited [(2023) SCC OnLine Cal 1628]***, held that courts cannot re-appreciate the evidence or substitute its view with that of the arbitrator while considering the issue of enforcement of a foreign award under Section 48 (*Conditions for enforcement of foreign awards*) of the Arbitration and Conciliation Act, 1996 ("**Act**").

Facts

Jaldhi Overseas Private Limited, a company incorporated under the laws of Singapore ("**Petitioner**"), by way of its e-mail dated December 24, 2009 ("**E-mail Correspondence**") addressed to Steer Overseas Private Limited ("**Respondent**") offered to carry the Respondent's cargo of iron ore fines from Haldia and Visakhapatnam ports to a main port in China, in accordance with the terms of the E-mail Correspondence. The Respondent, upon receipt of the E-mail Correspondence, altered the commercial terms therein and returned its counter offer to the Petitioner by way of a separate e-mail and also requested the Petitioner to nominate a vessel to carry the cargo.

The Petitioner prepared a fixture note in furtherance of the terms and conditions of its E-mail Correspondence ("**Fixture Note 1**"), although this Fixture Note 1 was circulated to the Respondent only on January 27, 2010. The Fixture Note 1 provided for an arbitration clause specifying that arbitration was to be held in Singapore and English law was to apply. The Petitioner had separately circulated a fixture note dated December 24, 2009 ("**Fixture Note 2**") to Global Up International Limited, a 100% subsidiary of the Respondent ("**Sister Company**") and raised succeeding invoices pertaining to Fixture Note 2 on the Sister Company.

Upon receipt of Fixture Note 1, the Respondent amended two terms pertaining to discharge and detention rates and re-circulated the modified note ("**Modified Fixture Note 1**") to the Petitioner on January 29, 2010. However, prior to the Respondent circulating the Modified Fixture Note 1 to the Petitioner, the Petitioner had already nominated the vessel namely; MV Dong Jun ("**Vessel**"), which first arrived at Haldia on January 21, 2010, loaded the Respondent's cargo at Haldia and then sailed for Visakhapatnam where the Respondent accepted the notice of readiness to load at Visakhapatnam. Subsequently, the Vessel reached Vishakhapatnam on February 2, 2010, for loading the remaining cargo of the Respondent, however, it did not berth at Visakhapatnam due to non-readiness of the cargo documents. Moreover, the Respondent utilized some days in excess of the lay time at the discharge port of Zhenjiang, China, which resulted in the accrual of demurrage and damages worth $299,047. Additionally, the Respondent through its Sister Company also owed funds to the Petitioner, in relation to fixtures where other vessels were appointed.

In a meeting dated January 24, 2011, the Respondent offered $200,000 to the Petitioner, as a full and final settlement of all dues, however, this settlement was not accepted by the Petitioner. The Petitioner, by way of its letter dated May 4, 2012, initiated arbitral references before the Singapore International Arbitration Centre ("**SIAC**") in relation to all the fixtures between the Petitioner, the Respondent and the Sister Company. The SIAC through its letter dated June 25, 2012, informed the Petitioner and the Respondent of the appointment of Mr. Marcus Gordon as the sole arbitrator ("**Arbitrator**"), in all the

arbitral references instituted by the Petitioner. The Petitioner had discontinued all other arbitral references, except the issue pertaining to Fixture Note 1. On January 20, 2017, the Arbitrator issued a partial award in favour of the Petitioner thereby deciding the Respondent's liability as $12,645.83 and $299,047 on account of detention in Visakhapatnam and demurrage at Zhenjiang, China, respectively ("**Award**").

The Petitioner applied to the High Court of the Republic of Singapore ("**Singapore HC**") for enforcing the Award in Singapore, which application was contested by the Respondent. The Respondent also preferred an appeal before the Singapore HC to set aside the Award, however the said appeal was dismissed by the Singapore HC *vide* its judgement dated November 27, 2017. Further, by way of an order dated December 1, 2017, the Singapore HC granted the Petitioner with leave to enforce the Award in Singapore.

In light of the above, the Petitioner approached the Calcutta HC seeking enforcement of the Award in India, by filing an application under Section 46 (*When foreign award binding*) of the Act ("**Application**").

Issue

Whether a court can re-appreciate the evidence or substitute its view with that of the arbitrator while considering the issue of enforcement of a foreign award.

Arguments

Contentions of the Petitioner:

The Petitioner submitted that the Award had been passed in terms of the (Singaporean) International Arbitration Act, 1994 with the arbitral proceedings conducted in consonance with the SIAC rules. Both, India and Singapore, being signatories to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) would make Chapter I (*New York Convention Awards*) of Part II (*Enforcement of certain foreign awards*) of the Act relevant, and as such the Petitioner had complied with Section 47 (*Evidence*) of the Act, by providing the original Award as an annexure to its Application, along with a duly certified copy of the arbitration agreement, the validity of which had not be disputed.

The Petitioner further submitted that foreign awards could not be challenged under the Act, except in the country in which it was made. Further, the Respondent had sought to strike out the leave granted to the Petitioner by the Singapore HC, wherein the Award had been elevated to a decree. However, the Respondent had not made an application to set aside the Award in itself. Moreover, the Respondent sought to challenge the Award under Section 48 of the Act on the same grounds that were put forth by the Respondent before the Singapore HC, albeit already arguing at length before the Arbitrator who had issued a well-reasoned Award after considering oral and documentary evidence submitted by both the Petitioner and the Respondent. Furthermore, the Respondent was seeking to challenge the Award on grounds of merits which was not permissible under the Act.

In order to support its submissions, the Petitioner placed reliance on the judgement passed by the Hon'ble Supreme Court ("**SC**") in the case of ***Shri Lal Mahal Limited v. Progetto Grano Spa [(2014) 2 SCC 433]***, wherein it was held that Indian courts cannot have a second look at foreign awards at the

enforcement stage. Further, reliance was placed by the Petitioner on the judgement passed by the SC in the case of ***Gemini Bay Transcription Private Limited v. Integrated Sales Service Limited and Another [(2022) 1 SCC 753]*** ("**Gemini Bay Case**"), wherein it was held that Indian courts cannot refuse the enforcement of a foreign award when it was found to be contrary to the substantive law agreed to amongst the parties.

The Petitioner concluded its arguments by submitting that while it had on the direction of the Respondent raised invoices pertaining to Fixture Note 2 on the Sister Company and although all arbitral references except the one relating to Fixture Note 1 stood settled, the existence of Fixture Note 2 could not act as an impediment to the enforcement of the Award.

Contentions of the Respondent:

The Respondent submitted that Section 47(1)(b) of the Act requires submission of a duly certified copy of the original arbitration agreement in order to enforce a foreign arbitral award. In relation to this, the Respondent submitted that while the Arbitrator had identified Fixture Note 1 as an arbitration agreement, the certified copy attested by the Petitioner was based on the Modified Fixture Note 1, which did not constitute an arbitration agreement according to the Arbitrator. Since a duly certified copy of Fixture Note 1 has not been provided by the Petitioner, it had not complied with the statutory mandate of Section 47(1)(b) of the Act and therefore the Application filed by the Petitioner was liable to be dismissed.

The Respondent contended that the Petitioner and the Respondent were unable to reach a consensus with respect to certain terms as evidenced by the exchange of Fixture Note 1 and Modified Fixture Note 1 amongst themselves. Hence, there was no valid contract based on the fundamental principles of contract law and consequently, no valid arbitration agreement.

Furthermore, the Petitioner had approached the Sister Company with Fixture Note 2, which was accepted by the Sister Company. Thus, there was *consensus ad idem* between the Petitioner and the Sister Company and as such there was no privity of contract between the Respondent and the Petitioner, and therefore, an arbitration agreement did not exist between the Respondent and the Petitioner. Hence, the Award could not have been enforced under Section 48(2)(a) of the Act.

Examining the documents relied upon by the Arbitrator, it did not appear to the Respondent that the SIAC (a private body which appoints arbitrators to adjudicate disputes) was chosen by the Petitioner and the Respondent, and that since SIAC had no jurisdiction to adjudicate the dispute, the Award was null and void. The Respondent also submitted that Section 48(2)(b) of the Act empowers courts to refuse enforcement of foreign awards that are contrary to the fundamental public policy of India. In this regard, the Respondent relied on the Delhi High Court's judgement in the case of ***Cruz City 1 Mauritius Holdings v. Unitech Limited [2017 SCC OnLine Del 7810]***, wherein the enforcement of the foreign award was refused under Section 48(2) of the Act owing to the fact that such award was passed without jurisdiction.

Observations of the Calcutta HC

With respect to the Respondent's contention that the Petitioner had failed to comply with the provisions of Section 47(1)(b) of the Act, the Calcutta HC observed that the procedural deficiency of non-filing of a duly certified copy of the Fixture Note 1 had been cured by the Petitioner during the hearing before

the Calcutta HC, and therefore, the objection with regard to non-compliance of Section 47(1)(b) of the Act was infructuous.

The Calcutta HC relied on several judicial precedents of the SC, in order to determine the boundaries of discretion that a court could exercise while determining on enforcement of foreign awards and observed that in the Gemini Bay Case and in the case of ***Government of India v. Vedanta Limited [(2020) 10 SCC 1]***, the SC had imposed a bar on courts from (i) re-appreciating evidence; (ii) substituting its own view with that of the arbitrator; or (iii) reviewing the matter afresh.

The Calcutta HC observed that in circumstances where an arbitration agreement is evidently found lacking or there is no concluded contract between parties, the enforcement of an award must be refused under Section 48(2)(b) of the Act. Furthermore, the Calcutta HC observed that there must be *consensus ad idem* between the parties to an agreement, which must further include an arbitration clause. However, an agreement and an arbitration clause might not be found in a singular document and could be gathered from the correspondence between the parties, which could be further corroborated by the resulting conduct of the said parties.

With respect to the contention of the Respondent that the contract was concluded between the Petitioner and the Sister Company, the Calcutta HC observed that indisputably there was a contract that existed between the parties. Moreover, the Award shed light on which contract constituted the agreement between the Petitioner and the Respondent, rather than whether a contract existed between the said parties. The Calcutta HC observed that to refuse enforcement of an award, the evidence must expressly indicate that there was no concluded contract between the Petitioner and the Respondent and that the Arbitrator had gone completely amiss in his duty.

The Calcutta HC further observed that the Arbitrator had passed the Award based on the following considerations:

1. The conduct of the Petitioner and the Respondent indicated existence of an agreement pursuant to which actions were being undertaken even before Fixture Note 1 was circulated to the Respondent.
2. The conduct of the parties indicated that the changes made in the E-mail Correspondence and the Fixture Note 1 were mutually accepted and that they went on with their respective obligations thereafter.
3. The conduct of the parties indicated that several actions were undertaken pursuant to mutual understanding thereby indicating the existence of *consensus ad idem*, even prior to the Fixture Note 2 being circulated by the Petitioner to the Sister Company.

The Calcutta HC observed that the Arbitrator had from appreciation of the evidence concluded that there was in fact an agreement between the Petitioner and the Respondent, owing to communication and subsequent conduct of the said parties. In such a case, the Calcutta HC could not substitute its own views to replace that of the Arbitrator, unless it was manifestly evident that there existed no agreement between the parties.

Decision of the Calcutta HC

The Calcutta HC, keeping in mind the provisions of Section 48 of the Act, held that the concluded contract/ the arbitration agreement entered into between the Petitioner and the Respondent was neither

incapable of settlement by arbitration in India, nor did it shock the conscience of the court in light of forceful imposition of a contract. Therefore, the Calcutta HC did not find a reason to tinker with the Award and rejected the Respondent's objections with respect to the enforceability of the Award and rendered the Award enforceable and executable as a decree.

VA View: The Calcutta HC has rightly summarised the principles relating to the discretion that courts must apply while deliberating on issues dealing with the enforcement of foreign arbitral awards under Section 48 of the Act. The Calcutta HC has reiterated the principle of minimal intervention over an arbitrator's decision by emphasising that an arbitrator's view is sacrosanct and should not be substituted with an alternate opinion that a court may possibly have on re-appreciation of the evidence, particularly in instances where the arbitrator has examined the evidence upon proper application of mind and concluded that there was *consensus ad idem* between the parties based on an agreement.

Therefore, while considering the issue of enforcement of a foreign award, courts must abstain from (i) re-appreciating evidence; (ii) substituting its own view with that of the arbitrator; or (iii) reviewing the matter afresh. Further, in a case where an arbitrator has rendered a finding that there existed an agreement and an arbitration clause, the court should not substitute its own view, unless it is evident that no concluded and binding contract ever came into existence between the parties.

II. NCLAT: Notice period of 30 days should be given for e-auction, even though there are no timelines under Liquidator Regulations.

The National Company Law Appellate Tribunal, New Delhi ("**NCLAT**"), by way of a common judgment dated July 4, 2023, in the matter of ***Naren Seth v. Sunrise Industries and Others [Company Appeal (AT) (Insolvency) No. 401 of 2023] and Marine Electricals (India) Limited v. Sunrise Industries and Others [Company Appeal (AT) (Insolvency) No. 695 of 2023]***, has upheld the order dated March 2, 2023 passed by the National Company Law Tribunal, Mumbai ("**NCLT**"), whereby E-Auction conducted by the liquidator of Ciemme Jewels Limited ("**Corporate Debtor**") was set aside ("**Impugned Order**"). Further, NCLAT observed that notice period of 30 days ought to have been given by the liquidator between the date of issuance of public notice of E-Auction and the date of conducting E-Auction.

Facts

Vijisan Exports Private Limited ("**Operational Creditor**") filed an application under Section 9 (*Application for initiation of corporate insolvency resolution process by operational creditor*) of the Insolvency and Bankruptcy Code, 2016 ("**IBC**") before the NCLT and the Corporate Debtor was admitted into corporate insolvency resolution process. In view of no resolution plan being received to revive the Corporate Debtor, the NCLT allowed liquidation commencement of the Corporate Debtor by way of order dated March 25, 2019 and appointed Mr. Naren Seth as the liquidator ("**Liquidator**").

Prior to conducting E-Auction on April 8, 2022, the Liquidator had previously made two attempts to sell the asset (being factory premises situated in Mumbai consisting of land and building) by conducting the first E-Auction on December 4, 2019 and the second E-Auction on March 1, 2021. However, both the previous auctions were unsuccessful as no bid was received.

In furtherance of the third auction, the Liquidator published an E-Auction notice on April 2, 2022 which was a bank holiday ("**Notice**"). As per the Notice, the last date to submit Expression of Interest ("**EOI**") and KYC documents was April 4, 2022 (Monday). The Notice was issued on Saturday, which was succeeded by Sunday and the only working day was Monday to submit the EOI and KYC documents. Further, the last date for submitting the Earnest Money Deposit ("**EMD**")/ bid amount was April 7, 2022 (Thursday). There was insufficient time to conduct due diligence of the asset including conducting site visit. Further, the scheduled date of the E-Auction was April 8, 2022 (Friday) from 2.00 P.M. to 4.00 P.M. Additionally, due to a typographical error in the Notice, it was also erroneously stated that the last date for submission of EOI was April 15, 2022 (5.00 P.M.) which was a bank holiday and the last date for payment of EMD is April 16, 2022 (5.00 P.M.) which was after the day of E-Auction.

Thereafter, upon realizing the aforesaid typographical error, the Liquidator issued corrigendum to rectify the mistake on April 8, 2022 on the website of the Insolvency and Bankruptcy Board of India ("**IBBI**") and in the newspapers on April 9, 2022, that is, after the E-Auction was already concluded. The aforesaid corrigendum stated that the last date for submission of EOI was April 4, 2022 and the last day for submission of EMD and other documents was April 7, 2022.

In the meanwhile, Sunrise Industries ("**Sunrise**") filed an application [***Company Appeal (AT) (Insolvency) No. 695 of 2023***] in NCLT thereby challenging the E-Auction, stating that it had furnished the EMD along with EOI and KYC documents. However, the Liquidator informed Sunrise that the last date for submission of EOI was over.

This led to filing of the application bearing number I.A. 947 of 2022 by Sunrise before the NCLT, thereby *inter alia* seeking prayer to quash and set aside the sale notice dated April 2, 2022 and all consequent actions thereof. NCLT disposed of the aforesaid application by passing the Impugned Order and directed the Liquidator to conduct fresh auction by maintaining at least 30 days' time gap between the E-Auction notice publication and date of E-Auction to enable more bidders to participate in the auction for fetching high value of the property.

Aggrieved by the Impugned Order, the Liquidator preferred Company Appeal (AT) (Insolvency) No. 401 of 2023 and the Successful Bidder preferred Company Appeal (AT) (Insolvency) No. 695 of 2023 in respect of the asset of the Corporate Debtor.

Issues

1. Whether sufficient time/ notice period ought to have been given by the Liquidator between the date of issuance of public notice of E-Auction and the date of conducting E-Auction in the absence of any timeline specified in the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 ("**Liquidation Regulations**").

2. Whether the auction process, conducted in haste within a span of 5 days without giving adequate opportunity to all interested bidders for participating in the auction process, is in the interest of value maximization of the asset of the Corporate Debtor.

Arguments

Contentions raised by Liquidator:

The Liquidator assailed the Impugned Order and submitted that NCLT has failed to appreciate that he had followed due procedure in conducting the E-Auction. It was further contended that NCLT has erroneously held that the E-Auction conducted by the Liquidator is bad in law and imposed cost of conducting the fresh E-Auction on the Liquidator.

The Liquidator alleged that Sunrise took undue advantage of the aforesaid typographical error despite the same having been rectified subsequently.

The Liquidator further submitted that the bid submitted by the successful bidder, namely, Marine Electricals (India) Limited ("**Successful Bidder**") was above the liquidation value as well as above the reserve price. More particularly, the Successful Bidder submitted a bid for INR 11.6 Crores inclusive of EMD amounting to INR 1.15 Crores as against the reserve price of INR 11.5 Crores. The Liquidator further submitted that he was discharging his duties to maximize the value of the assets of the Corporate Debtor. Further, the Liquidator contended that NCLT failed to appreciate that the Liquidator acting in his official capacity has the right to accept or reject any bid as per the terms and conditions of the E-Auction process. The Liquidator further submitted that due to some adverse influence by a few individuals/entities in the market, it was felt prudent to proceed with the Successful Bidder and conclude the sale transaction at the earliest.

The Liquidator further submitted that Sunrise submitted their EOI on April 6, 2022, whereas the last date for submission of the EOI was April 4, 2022. Additionally, Sunrise did not submit audited financial statements along with EOI and was declared to be disqualified.

Further, the Liquidator relied upon the judgment dated September 5, 2019, pronounced by NCLAT in the matter of ***Manjit Commercial LLP v. SPM Auto Private Limited and Others [Company Appeal (AT) Insolvency No. 732 of 2019]*** whereby, *inter alia*, it was observed that no time limit was prescribed under IBC and Liquidation Regulations in respect of conducting the E-Auction process.

The Liquidator concluded his arguments by submitting that he had acted in a bona fide manner and in the interest to obtain maximum value for the asset of the Corporate Debtor.

Contentions raised by Successful Bidder:

The Successful Bidder contended that it has duly followed the requisite timelines as proposed by the Liquidator and paid the bid amount of INR 11.6 Crores. After due compliance of all requisite formalities, the Successful Bidder has obtained a sale certificate dated May 11, 2022.

In view of the above-mentioned, the Successful Bidder assailed the Impugned Order as bad in law. Further, the Successful Bidder submitted that Sunrise, who was an ineligible participant in view of delayed submission of EOI, has no locus to challenge the successfully conducted E-Auction process.

In view of the above, the Successful Bidder submitted that the Impugned Order deserves to be set aside and the E-Auction conducted on April 8, 2022 as well as issuance of sale certificate on May 11, 2022 be declared as valid.

Contentions raised by Sunrise:

Sunrise emphasized on the typographical error in the Notice and questioned the wrongful intention of the Liquidator behind issuance of the Notice with vital errors. Further, Sunrise contended that it had acted within the timelines as set out in the Notice.

Further, Sunrise questioned the conduct of the Liquidator who concluded the auction process within a time span of 5 days including Saturday and Sunday without giving reasonable time to the interested bidders. Further, insufficient time was provided for submission of documents and arranging funds and no time was provided for due diligence of the premises include site visit. It was further alleged that no time period for inspection of the premises was provided in the Notice and the sale process was concluded without any inspection of the asset. Further, it was pointed out that the corrigendum was issued on the website of IBBI and newspapers belatedly, that is, after conducting the E-Auction process.

Further, Sunrise relied upon the judgment dated September 30, 2022, pronounced by NCLAT in the matter of ***Raj Singhania v. Chinar Steel Segment Centre Private Limited [(2002) SCC OnLine NCLAT 225]***, whereby a concluded sale of the corporate debtor as a going concern was set aside by the Hon'ble National Company Law Tribunal, Kolkata on the ground of material irregularity on part of the Liquidator in conducting the auction process and the aforesaid decision was upheld by the NCLAT.

Observations of the NCLAT

NCLAT observed that it needs to be ascertained whether correct procedure was followed by the Liquidator in conducting the E-Auction and whether the E-Auction was conducted in a haste without giving adequate opportunity to all participants. NCLAT observed that the entire E-Auction process was conducted in a hurried manner and the NCLT has rightly observed that there was insufficient time gap between vital stages of the E-Auction process. In fact, the entire E-Auction process was completed within a time span of 5 days including Saturday and Sunday. It was further observed that no time frame was provided in the Notice for inspection of the asset to be sold. Further, it was observed that issuance of corrigendum at a subsequent point in time post conducting the E-Auction was a futile exercise.

Further, NCLAT was not convinced with the submission made by the Liquidator that certain individual/entities were trying to wrongfully influence the auction process and in fact observed, from the conduct of the Liquidator, suspicion regarding his true intentions.

Further, NCLAT observed that even though no specific timelines have been provided in the Liquidation Regulations, normally a notice period of 30 days is provided in the interest of value maximization of the asset. In this regard, as a referring point only, NCLAT referred to sub-rule (6) of Rule 8 of Security Interest (Enforcement) Rules, 2002 under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, which provides that the borrower shall be served with a notice of 30 days for sale of immovable secured assets.

Further, NCLAT observed that the errors in the Notice were not merely typographical errors as claimed by the Liquidator and the conflicting dates were sufficient to cause confusion to any interested bidder.

In light of the typographical errors in the Notice and the corrigendum being issued belatedly, NCLAT observed that the Liquidator ought to have examined the bid submitted by Sunshine on merits.

Decision of the NCLAT

In view of the material irregularities on part of the Liquidator in conducting the E-Auction process, NCLAT dismissed both the appeals with concluding observation that there is no error in the Impugned Order and further directed him to bear the costs to be incurred in conducting a fresh auction.

VA View: Prior to amendment in the Liquidation Regulations (effective from September 16, 2022), there was no timeline provided in law for conducting the E-Auction process. Post the amendment, the liquidator shall provide at least 14 days from issue of public notice for submission of eligibility documents by prospective bidder, at least 7 days to qualified bidder for inspection or due diligence of assets under auction, from the date of declaration of qualified bidder and a prospective bidder in an auction process shall deposit earnest money deposit at least up to 2 days before the date of auction.

This judgment still holds utmost importance even in those situations wherein an exact timeline or specific time gap between two stages of an auction process is not provided under law and yet a sufficient, reasonable and prudent timeline has to be maintained by the liquidator. Pertinently, no statute or rules and regulations can be exhaustive to cover all possible scenarios which can exist. However, even in such situations, reasonableness and prudence, which are well established and time-tested principles of common law, must prevail. However, it is clear that one cannot propose or act upon unreasonable timelines whilst conducting an auction process, which defeats the very purpose of value maximization of assets and make the entire auction process prone to being set aside/vitiated upon being challenged before the adjudicating authority.

III. Supreme Court: Section 327(7) of the Companies Act, 2013 which excludes the application of Sections 326 and 327 of the Companies Act, 2013 to a company undergoing liquidation under the Insolvency and Bankruptcy Code, is constitutionally valid.

The Supreme Court of India ("**Supreme Court**"), *vide* its judgement jointly in the matter of ***Moser Baer Karamchari Union Through President Mahesh Chand Sharma v. Union of India and Others [Writ Petition (C) No. 421 of 2019]***, ***Manoj Kumar Nagar v. Union of India [Writ Petition (C) No. 777 of 2020]***, and ***Raj Kumar Verma v. Union of India [Writ Petition (C) No. 712 of 2020]***, has upheld the constitutional validity of Section 327(7) of the Companies Act, 2013 ("**Companies Act**") which provides inapplicability of Section 326 (*Overriding preferential payments*) and Section 327 (*Preferential payments*) of the Companies Act, on a company undergoing liquidation under the Insolvency and Bankruptcy Code, 2016 ("**IBC**").

Facts

By way of a writ petition under Article 32 (*Remedies for enforcement of rights conferred by this Part*) of the Constitution of India ("**Constitution**"), Moser Baer Karamchari Union ("**Petitioner 1**"), Manoj Kumar Nagar and Raj Kumar Verma (collectively, "**Petitioners**") challenged the *vires* of Section 327(7) of the Companies Act ("**Impugned Section**") as being arbitrary and violative of Articles 14 (*Equality before law*) and 21 (*Protection of life and personal liberty*) of the Constitution. Petitioner 1 had also prayed to issue a writ, direction or order in the nature of mandamus so as to leave the statutory claims of the "workmen's dues" out of the purview of waterfall mechanism under Section 53 (*Distribution of assets*) of IBC. Impugned Section, which was introduced by Clause 19(a) of the Eleventh Schedule of IBC, puts a statutory bar on the applicability of Sections 326 and 327 of the Companies Act to liquidation proceedings under IBC. The writ petitions are against the Union of India ("**Respondent**").

Issue

Whether the Impugned Section is constitutionally valid.

Arguments

Contentions of the Petitioners:

The Petitioners contended that Clause 19(a) of the Eleventh Schedule of IBC, which inserted the Impugned Section in the Companies Act, is unreasonable and violative of Article 14 of the Constitution.

The Petitioners also contended that the legislature intended to provide 'overriding preferential payments' to workmen *pari passu* to the claim of secured creditors. In order to support this contention, the Petitioners had cited various committee reports, *inter alia,* Eradi Committee Report, the Report of Expert Committee on Company Law, 2005, etc. It was a result of these committee findings that Section 326 of the Companies Act was amended to provide that the wages/ salaries payable to the workmen for a period of 2 years was protected in the case of winding up. Further, the workmen's due and dues owed to secured creditors, as per Section 325(1) (*Application of insolvency rules in winding up of insolvent companies*) of the Companies Act, ranked *pari pasu*. The Petitioners submitted that Section 53 of IBC provided for waterfall mechanism which completely altered the system under Sections 325 to 327 of the Companies Act, and further Clause 19(a) of the Eleventh Schedule of IBC made Sections 326 and 327 of the Companies Act, inapplicable to a company in liquidation under IBC.

The Petitioners also contended that there was an unreasonable classification between distribution of workmen dues for liquidation of a company (i) under the IBC and (ii) under the Companies Act, which was created by the Impugned Section. The workmen's due for a period of 2 years preceding the liquidation commencement date and the debts owed to secured creditors in event of them relinquishing their security are now ranked as *pari passu.* Further, IBC excludes all sums due to workman or employee from the provident fund, pension fund, and gratuity fund from being included in the liquidation estate.

Contentions of the Respondent:

The Respondent contended that, through a catena of judgements: *Manish Kumar v. Union of India [(2021) 5 SCC 1], Swiss Ribbon Private Limited v. Union of India [(2019) 4 SCC 17]* ("**Swiss Ribbons Case**") and, *Small Scale Industrial Manufacturers Association (Registered) v. Union of India [(2021) 8 SCC 511],* the Supreme Court had advocated the principle of 'judicial hands-off' when it came to economic legislations. They also contended that in economic matters, a wider leeway was given to the law-makers and the court allows for experimentation in such legislation based on practical experiences and other problems seen by the law makers.

The Respondent further contended that in Swiss Ribbons Case, the Supreme Court had upheld the constitutionally validity of the scheme of IBC. Further, reliance was also placed to the judgment of the Supreme Court in the case of *Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta [(2020) 8 SCC 531],* where it was held that the principle of "equality for all" cannot be stretched to treat financial and operational creditors on par as this would defeat the entire objective of the IBC. It was also held that amendment made to the IBC, that guaranteed a minimum of liquidation value to the operational creditors, was not *ultra vires* Article 14 of the Constitution.

The Respondent also contended that initially the insolvency process in case of winding up of companies were provided under Section 325 of the Companies Act. However, Section 325 of the Companies Act was omitted with effect from November 15, 2016, on the advent of the IBC. It was, therefore, contended that as on date, the winding up procedure is not governed by the Companies Act, and that the provision of the IBC is the only applicable law to deal with such situation as it is a complete code in itself. It was also contended that an amendment with effect from November 15, 2016 was brought in the Impugned Section, wherein it has been clarified that Sections 326 and 327 of the Companies Act would not be applicable in the event of liquidation under IBC.

Observations of the Supreme Court

The Supreme Court, after a conspectus of the relevant laws and provisions of the Companies Act and the IBC, observed that the object and purpose of amending the Companies Act and to exclude Sections 326 and 327 of the Companies Act in the event of liquidation under the IBC appears that there may not be two different provisions with respect to winding up/ liquidation of a company. Therefore, in view of the enactment of IBC, it was necessitated to exclude the applicability of Sections 326 and 327 of the Companies Act which cannot be said to be arbitrary as contended by the Petitioners.

The Supreme Court also observed that merely because under the earlier regime and in case of winding up of a company under the Companies Act, 1956/2013, the dues of the workmen may be *pari passu* with that of the secured creditors, the Petitioners cannot claim the same benefit in case of winding up/liquidation of the company under the IBC.

With respect to Section 53 of the IBC, the Supreme Court observed that as per Section 53(1)(b), the workmen's due for the period of 24 months preceding the liquidation commencement date shall rank equally between the workmen and the secured creditors in the event such secured creditor has relinquished security in the manner set out in Section 52 (*Secured creditor in liquidation proceedings*) of the IBC. Therefore, workmen's due for the period of 24 months preceding the liquidation commencement date shall rank *pari passu* with the dues of secured creditors.

With respect to the exclusion of provident fund, pension fund, and gratuity fund from the liquidation estate asset by reason of Section 36(4) of IBC, Supreme Court observed that it was a conscious decision

that has been taken by the legislature in its wisdom to keep out all the sums due to workmen from such provident fund, pension fund, and gratuity fund from the liquidation estate assets. It cannot be said to be violative of Articles 14 and 21 of the Constitution since IBC is altogether a complete code with different purpose than that of the Companies Act. The Supreme Court also placed reliance upon its judgment in the Swiss Ribbons Case and in *R.K. Garg v. Union of India [(1981) 4 SCC 675]*, wherein it was held that in laws relating to economic activities, it is important to give greater latitude to them, and that judicial hands-off *qua* economic legislation is important.

The Supreme Court also observed that Section 53 of the IBC began with a non-obstante clause and states that notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of liquidation asset shall be distributed in the order of priority which is stipulated and within such period and such manner as may be specified. Supreme Court observed that the waterfall mechanism is based on a structured mathematical formula and the hierarchy is created in terms of payment of debts in order of priority with several qualifications. Thus, the inapplicability of Sections 326 and 327 of the Companies Act in case of liquidation under IBC was made by the Parliament in its wisdom. Thus, the Supreme Court observed that Impugned Section was not unconstitutional.

Decision of the Supreme Court

The Supreme Court, in view of the above stated reasons and provisions of law held that the Impugned Section, which made Sections 326 and 327 of the Companies Act inapplicable to a company undergoing liquidation under the provisions of the IBC, was not unconstitutional, since both IBC and Companies Act were operative in different fields and for different purpose, and there could not be two simultaneous mechanisms with respect to a company undergoing liquidation under the IBC.

VA View: The Supreme Court of India has rightly upheld the constitutional validity of the Impugned Section.

IBC and the Companies Act are enacted for different purposes. IBC is a complete code in itself, which, *inter alia*, provides for the waterfall mechanism stipulating the order of priority in which the payment of claims should be made. Therefore, it was important that the Impugned Section was enacted in order to clarify that Sections 326 and 327 of the Companies Act are inapplicable in an event where a company is undergoing liquidation under the IBC. Further the difference in classification between the treatment of an operational creditor and a financial creditor has been, *inter alia*, upheld by the Supreme Court in a catena of judgments including in the case of Swiss Ribbons Case. Additionally, in the case of *R.K. Garg v. Union of India [(1981) 4 SCC 675]* it is well settled that in laws relating to economic activities, it is important to give greater latitude to them, and that 'judicial hands-off' *qua* economic legislation is important.

IV. NCLAT: Avoidance application can continue after the completion of CIRP.

The National Company Law Appellate Tribunal, New Delhi Bench ("**NCLAT**"), in the matter of ***Kapil Wadhawan v. Piramal Capital and Housing Finance Limited and Others*** **[*Company Appeal (AT)***

***(Insolvency) Nos. 437, 439, 441, 442, 445, 451, 452 and 512 of 2023*]**, held that avoidance applications can continue even after completion of Corporate Insolvency Resolution Process ("**CIRP**").

Facts

The Reserve Bank of India ("**RBI**"), in exercise of its powers under Section 45-IE (*Supersession of Board of directors of non-banking financial company (other than Government Company)*) of the Reserve Bank of India Act, 1934, superseded the board of directors of Dewan Housing Finance Corporation Limited ("**Corporate Debtor**") and appointed Mr. R. Subramaniakumar as the administrator of the Corporate Debtor ("**Administrator**").

An application was filed by RBI against the Corporate Debtor before the National Company Law Tribunal, Mumbai Bench ("**NCLT**"), under the provisions of the Insolvency and Bankruptcy Code, 2016 ("**IBC**"). The said application was admitted by NCLT *vide* order dated December 3, 2019, and confirmed the appointment of Administrator for performing all the functions of a resolution professional under IBC and for conducting the CIRP of the Corporate Debtor.

The Administrator filed various interlocutory applications for avoidance of different transactions undertaken by the Corporate Debtor in the CIRP of the Corporate Debtor. The Committee of Creditors ("**CoC**") on January 15, 2021, approved the resolution plan submitted by Piramal Capital and Housing Finance Limited ("Successful Resolution Applicant **(SRA)/ Respondent**"). Post approval of the resolution plan by the CoC, an application was filed by the Administrator before NCLT for approval of the resolution plan, which was approved by the NCLT *vide* an order dated June 7, 2021.

The clause no. 2.13 of the resolution plan stated that SRA will pursue avoidance applications preferred by the Administrator. In accordance with the said clause, SRA filed different interlocutory applications to amend the memorandum of parties and to substitute itself in the place of the Administrator for pursuing the transaction application. An affidavit was filed by Mr. Kapil Wadhawan, who was an ex-promoter of the Corporate Debtor ("**Appellant**"), in reply to the applications by SRA and raised various objections to the said application.

However, the interlocutory applications filed by the SRA seeking amendment of the memorandum of parties and substitution of its name was allowed by NCLT *vide* an order dated February 9, 2023 ("**Impugned Order**"). Consequently, aggrieved by the same, Appellant filed the present appeal, before the NCLAT challenging the Impugned Order.

Issue

Whether SRA can pursue an avoidance application under IBC by substituting the Administrator.

Arguments

Contentions of the Appellant:

The Appellant advanced an argument that two applications filed by the Administrator were after the resolution plan was voted on January 15, 2021.

It was contended by the Appellant that the Impugned Order, permitting continuance of the avoidance applications by SRA, is not in accordance with law as once CIRP is completed and the resolution plan is approved, avoidance applications could not have been allowed to continue. Thus, the Impugned Order deserves to be set aside.

The Appellant submitted that since SRA is having different legal interests as opposed to the Administrator, therefore it cannot be substituted in place of Administrator. SRA holds vested interest in the outcome of the avoidance application so it would act in its own interest, contrary to a resolution professional/ administrator, who plays an impartial role under IBC.

Contentions of the Respondent:

It was submitted by the Respondent that the Appellant has no locus to challenge the Impugned Order. The substitution order merely permits the Respondent for pursuing the avoidance applications pending before the NCLT.

The Respondent had put forth that the avoidance applications can continue after the completion of CIRP and CIRP is completely different from proceedings for avoidance applications. Additionally, the resolution professional is not a persona designate under IBC for the purpose of prosecuting the avoidance applications.

Observations of the NCLAT

NCLAT placed reliance on the Sections 25 (*Duties of resolution professional*) and 26 (*Application for avoidance of transactions not to affect proceedings*) of IBC. It was observed by the NCLAT that Section 26 of IBC indicates that an avoidance application can continue even after completion of the CIRP as CIRP is not affected by an avoidance application. NCLAT also took into consideration the statutory scheme of IBC as enshrined under Regulation 35A (*Preferential and other transactions)* of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Sections 43 (*Preferential transactions and relevant time)*, 45(1) (*Avoidance of undervalued transactions)* and 66(1) (*Fraudulent trading or wrong trading*) of IBC and held that preferential transactions, undervalued transactions or fraudulent transactions has to be brought to the notice of NCLT by an application filed by the resolution professional/ liquidator.

NCLAT relied on the case of ***Tata Steel BSL Limited v. Venus Recruiter Private Limited and Others [(2023) SCC OnLine Del 155]***, wherein the Delhi High Court held that avoidance application can be heard after conclusion of CIRP.

It was also noted by the NCLAT that under IBC and related regulations, there exist no such provisions which indicates that avoidance application filed after approval of the resolution plan by the CoC is to be rejected or not and thus it is dependent on the facts and circumstances of each case.

Decision of NCLAT

NCLAT upheld the Impugned Order and ruled that NCLT has rightly permitted SRA to pursue the avoidance applications, which were filed by Administrator and were pending before NCLT. Further, it was held by the NCLAT that the avoidance applications can continue even after the CIRP.

VA View: The legislative scheme of Section 26 of IBC makes it clear that CIRP is not affected by the avoidance applications in any manner and therefore it can even continue post CIRP. The nature of transactions (such as preferential undervalued and fraudulent transactions, etc.) is determined by the resolution professional or a liquidator, who accordingly files an appropriate application to the NCLT.

The avoidance applications are different from CIRP and even after the completion of the CIRP, the statute envisages recoveries through proceedings for avoidance transactions. The object behind continuation of the avoidance applications, post the CIRP is for discovering of dubious transactions. Therefore, permitting such preferential undervalued and fraudulent transactions to continue would result in depriving the benefit of these transactions to the persons who wrongfully derived benefit from such transactions.

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