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Between the lines...

A BRIEFING ON LEGAL MATTERS OF CURRENT INTEREST

KEY HIGHLIGHTS

* **Bombay High Court:** Secured creditor may initiate recovery proceedings against secured asset owned by guarantor even if principal borrower is placed under moratorium.

* **Calcutta High Court:** Application for removal of arbitrator must be made before the same court as envisaged in Sections 2(i)(e) and 42 of the Arbitration and Conciliation Act, 1996.

* **NCLAT** upholds CCI's order approving acquisition of Hindustan National Glass and Industries Limited by AGI Greenpac Limited.

* **NCLT:** Stock broker company is a financial service provider under the Insolvency and Bankruptcy Code, 2016.

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I. Bombay High Court: Secured creditor may initiate recovery proceedings against secured asset owned by guarantor even if principal borrower is placed under moratorium.

The High Court of Bombay, at Mumbai ("**High Court**") has, by judgment pronounced on July 20, 2023, in the matter of ***Mr. Latif Yusuf Manikkoth v. The Board of Directors of the Bank of Baroda and Others [Writ Petition (L) No. 9116 of 2023]***, *inter alia*, held that Section 14 (*Moratorium*) of the Insolvency and Bankruptcy Code, 2016 ("**IBC**") does not create any bar or moratorium on initiation or continuation of action taken under the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 ("**SARFAESI Act**") when the secured asset is owned by personal guarantor and not by principal borrower/ corporate debtor.

Facts

Alaska Creations Private Limited ("**Principal Borrower**"), a company engaged in the business of export of readymade garments and footwear, had availed loan facilities from Bank of Baroda ("**BoB/ Respondent**") and Mr. Latif Yusuf Manikkoth ("**Petitioner**"), being the guarantor, had created charge in respect Waghbakriwala Building ("**Secured Asset**") owned by him in favour of BoB. Subsequently, the Principal Borrower defaulted in repayment of loan amount to BoB which declared the loan amount as a non-performing Asset ("**NPA**") on March 31, 2019. Thereafter, BoB recalled the entire loan amount by issuing demand notice dated April 25, 2019 under Section 13(2) (*Enforcement of security interest*) of the SARFAESI Act. Thereafter, upon non-payment of the loan amount despite issuance of said demand notice, BoB took symbolic possession of the Secured Asset on September 23, 2019 in terms of Section 13(4) of the SARFAESI Act. However, as peaceful and vacant possession of the Secured Asset was not handed over, BoB filed an application before the Chief Metropolitan Magistrate under Section 14 (*Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset*) of the SARFAESI Act. The Chief Metropolitan Magistrate appointed the Assistant Registrar (Cash), Fort, Mumbai as Court Commissioner to take possession of the Secured Asset. In view of the aforementioned, the Assistant Registrar issued a notice to a senior inspector of police to provide security for taking forceful possession of the Secured Asset from the Petitioner.

In the interim, Kiwi International, which was a supplier of footwear to the Principal Borrower, had initiated proceeding under Section 9 (*Application for initiation of corporate insolvency resolution process by operational creditor*) of the IBC against the Principal Borrower as an operational creditor. In view thereof, the National Company Law Tribunal, Mumbai ("**NCLT**") by order dated September 11, 2019 had admitted the Principal Borrower into Corporate Insolvency Resolution Process ("**CIRP**") and declared moratorium under Section 14 of the IBC.

In light of the above-mentioned circumstances, the Petitioner and the Principal Borrower indulged into filing of multiple proceedings before different courts and fora. More particularly, the Petitioner and Principal Borrower filed a civil suit before the Bombay City Civil Court against Kiwi International. Further, the Petitioner and Principal Borrower filed a writ petition challenging the above-mentioned notices issued under Section 13(2) and Section 13(4) of the SARFAESI Act.

The Petitioner and Principal Borrower challenged the aforementioned order passed by the Chief Metropolitan Magistrate by filing a securitization application no. SA/92/2022 before the Debt Recovery Tribunal, Mumbai ("**DRT**") along with an application seeking interim relief. By way of order dated July 15, 2022, application for interim relief was disposed of by DRT, whereas securitization application No. SA/92/2022 is reserved for orders.

Further, the Petitioner/ Principal Borrower filed writ petition no. WP/644/2023 which was disposed of by the division bench of the High Court on February 13, 2023. Notably, the prayers/ reliefs sought to be granted in writ petition no. WP/644/2023 were more or less identical to the present writ petition. Thereafter, the Petitioner filed an interim application in the aforesaid disposed of writ petition no. WP/644/2023, which was disposed of by way of order dated February 23, 2023.

Issue

1. Whether Section 14 of IBC creates any bar or moratorium on initiation or continuation of action taken under the provisions of SARFAESI Act when the secured asset is owned by personal guarantor and not by principal borrower/ corporate debtor.

2. Whether High Court ought to entertain writ petition filed by principal borrower or guarantor when legal remedy is already provided under the relevant provisions of the SARFAESI Act.

Arguments

Contentions raised by Petitioner:

The Petitioner submitted that the Principal Borrower is a micro, small and medium enterprise ("**MSME**") within the meaning of the Micro, Small and Medium Enterprises Development Act, 2006 ("**MSMED Act**"). Further, Section 9 (*Measures for promotion and development*) of the MSMED Act provides that the Central Government may, from time to time, for the purposes of facilitating the promotion and development and enhancing the competitiveness of MSMEs, particularly of the micro and small enterprises, specify by notification, such programmes, guidelines or instructions, as it may deem fit. Pursuant thereto, a Framework for Revival and Rehabilitation of Micro, Small and Medium Enterprises was notified by the Ministry of Micro, Small and Medium Enterprises, Government of India which provides for a detailed mechanism for restructuring and corrective action plan in respect of MSMEs. However, no such opportunity for restructuring under the above-mentioned framework was granted to the Principal Borrower. The Petitioner submitted that the MSMED Act is a subsequent legislation as compared to the SARFAESI Act and should therefore prevail over the provisions of the SARFAESI Act. Also, it was submitted by the Petitioner that SARFAESI Act is a one-sided legislation which tilts in favour of banks and financial institutions, whereas MSMED Act has been enacted as a means of reviving and supporting MSMEs.

It was further contended by the Petitioner that the Principal Borrower had sought one-time restructuring of the credit facilities from BoB, which was not granted. It was further submitted that the business of Principal Borrower was severely hampered due to introduction of goods and services tax, demonetization and Covid-19 pandemic.

Contentions raised by Respondent:

It was submitted that the present writ petition is devoid of merits and ought to be dismissed in light of the fact that the Petitioner had already filed a securitization application before the DRT, which is now reserved for orders.

It was further contended that the Petitioner had suppressed material facts while approaching the High

Court. In particular, the Respondent drew the attention of the High Court to the letters of guarantee dated July 2, 2010 and February 1, 2013, by way of which the Petitioner had guaranteed the due payment of credit facility sanctioned to the Principal Borrower. Further, the Respondent drew the attention of the High Court to the fact that upon default in repayment of loan, the Petitioner and the Principal Borrower indulged into the mala fide practice of forum shopping by filing multiplicity of proceedings before various courts, tribunals and fora.

Observations of the High Court

High Court observed that the Petitioner and the Principal Borrower had filed multiple proceedings before various courts arising out of the same subject matter. In particular, the High Court observed that the Petitioner had filed a securitization application before the DRT which is now reserved for orders.

Further, High Court observed that it is not in dispute that the Principal Borrower had availed credit facilities from BoB, the Petitioner had stood as guarantor and had created charge over the Secured Asset owned by the Petitioner and thereafter the Principal Borrower defaulted in repayment of the loan facilities leading to declaration of the loan account of the Principal Borrower as NPA and subsequent actions under the provisions of the SARFAESI Act.

Thereafter, the High Court delved into the issue of whether it is appropriate for a high court to entertain writ petition filed by principal borrower or guarantor when legal remedy is already provided under the relevant provisions of the SARFAESI Act. In this regard, the High Court referred to and relied upon the judicial pronouncement of the Supreme Court in the matter of ***Authorized Officer, State Bank of Travancore and Others v. Matthew K.C. [(2018) 3 SCC 85]*** dated January 30, 2018, whereby it has been held that the SARFAESI Act is a complete code by itself, providing for expeditious recovery of dues arising out of loans granted by financial institutions, the remedy of appeal by the aggrieved under Section 17 (*Application against measures to recover secured debts*) of the SARFAESI Act before the DRT, followed by a right to appeal before the appellate tribunal under Section 18 (*Appeal to Appellate Tribunal*) of the SARFAESI Act. High Court ought not to entertain writ petitions in view of the adequate alternate statutory remedies available to the principal borrowers and the guarantors. Thereafter, the High Court also analyzed the recent judicial pronouncement of the Supreme Court dated January 12, 2022 in the matter of ***Phoenix ARC Private Limited v. Vishwa Bharti Vidhya Mandir and Others [Civil Appeal Nos. 257-259]*** which reiterates that in view of efficacious statutory remedy available to the principal borrowers and guarantors under Section 17 of the SARFAESI Act, High Courts ought to refrain from entertaining writ petitions on such subject-matters.

Thereafter, the High Court delved into analysis of the legal issue as to whether Section 14 of the IBC creates any bar or moratorium on initiation or continuation of action taken under the provisions of the SARFAESI Act when the secured asset is owned by personal guarantor and not by principal borrower/ corporate debtor. In this regard, the High Court referred to and relied upon the judicial pronouncement of the Supreme Court dated August 14, 2018 in the matter of ***State Bank of India v. V. Ramakrishnan and Another [(2018) 17 SCC 394]*** whereby it has been held that there is no bar on initiation or continuation of proceedings initiated under the provisions of the SARFAESI Act qua the guarantor even if the principal borrower company is undergoing CIRP and enjoys the protection of moratorium under Section 14 of the IBC.

Decision of the High Court

In view of the above-mentioned observations, the High Court held that a secured creditor is entitled to pursue recovery proceedings against secured asset owned by a guarantor even if the principal borrower is placed under moratorium and that the protection of moratorium exists only in favour of the principal borrower and does not extend to the personal guarantor. Hence, the High Court held that the present writ petition including the prayer sought by the Petitioner pertaining to restructuring under the framework of MSMED Act cannot be entertained and there are no merits in the present writ petition and therefore dismissed the same.

VA View: The present judgment of High Court is a significant judicial pronouncement for multiple reasons.

Firstly, the High Court clearly holds that a secured creditor is entitled to pursue recovery proceedings against secured asset owned by a guarantor even if the principal borrower is placed under moratorium. The protection of moratorium exists only in favour of the principal borrower and does not extend to the personal guarantor. Hence, if a lender intends to pursue action under SARFAESI Act in respect of a secured asset owned by the guarantor, the same is very much permissible in law and not hit by moratorium.

Further, the High Court refused to entertain the plea taken by the Petitioner that the Principal Borrower being an MSME ought to have been resolved under the Framework for Revival and Rehabilitation of Micro, Small and Medium Enterprises. This is a bold and significant decision, despite the technical contention raised by the Petitioner that the MSMED Act enacted in the year 2006 is a more recent legislation as compared by the SARFAESI Act enacted in the year 2002. The High Court has given a clear indication that principles of statutes and their interpretation cannot be mis-utilized by the defaulters with the mala fide intention of running away from their legal obligation to repay the debt.

Lastly, the judgment is a classic example of the fact that invoking the writ jurisdiction of High Court despite existence of alternate and efficacious statutory remedy available to the principal borrowers and guarantors under Section 17 of the SARFAESI Act or indulging into the practice of forum shopping by filing multiplicity of legal proceedings before various courts and tribunals will not help the mala fide cause of the defaulters and such practices will not lead to any relief from the High Court.

II. Calcutta High Court: Application for removal of arbitrator must be made before the same court as envisaged in Sections 2(i)(e) and 42 of the Arbitration and Conciliation Act, 1996.

The Calcutta High Court ("**Calcutta HC**") has, in its judgement dated August 11, 2023, in the matter of ***M/s. Gammon Engineers and Contractors Private Limited v. The State of West Bengal [A.P. No. 785 of 2022]***, held that an application for removal of an arbitrator must be made before the same 'court' as envisaged in Sections 2(i)(e) (*Definition of Court*) and 42 (*Jurisdiction*) of the Arbitration and Conciliation Act, 1996 ("**Act**").

Facts

In 2011, the State of West Bengal ("**Respondent**") offered bids for an e-tender for the construction of a canal. On March 27, 2012, M/s. Gammon Engineers and Contractors Private Limited ("**Petitioner**") tendered its bid to carry out the said construction, and the same was accepted by the Respondent for an amount of INR 1,36,86,88,135.73. Subsequently, a final letter of acceptance was issued by the Respondent on May 23, 2012. The Respondent and the Petitioner had also entered into a general condition of contract ("**Contract**") towards the construction of the said canal.

On May 24, 2012, the Respondent issued a work order which enunciated that the construction was to commence on June 1, 2012, and be completed by May 31, 2014. However, the Petitioner expressed its concerns, on failure to complete the construction in stipulated time, to the Respondent in May, 2014, by way of a letter addressed to the Respondent. This letter, however, was met with threats of legal actions pursuant to which the Respondent terminated the Contract *vide* its letter dated August 1, 2014.

Upon termination of the Contract, the Respondent served a notice invoking 7 bank guarantees aggregating to a sum of INR 6,84,34,407 which had been furnished by the Petitioner. The Petitioner had submitted its final statement of accounts on September 16, 2014, with dues of INR 50,26,89,550 owed to it by the Respondent which the Respondent refused. This prompted the Petitioner to initiate arbitral proceedings by way of a notice dated December 1, 2014, addressed to the Respondent. In the said notice, the Petitioner had suggested the constitution of a 3 member arbitral tribunal and proposed names of retired judges in that regard. However, the Respondent appointed Shri. Ajay Kumar Basak, a former employee of the Inland and Waterways Directorate, Government of West Bengal ("**Department**"), as the sole arbitrator ("**Arbitrator**") to resolve the dispute. In light of the unilateral appointment of the Arbitrator by the Respondent, the Petitioner approached the Calcutta HC by filing an application under Sections 14 (*Failure or impossibility to act*) and 15 (*Termination of mandate and substitution of arbitrator*) of the Act read with Section 11(6) (*Appointment of arbitrators*) of the Act, for termination and substitution of the Arbitrator by virtue of him becoming *de jure* (incapacitated by law) and/or *de facto* (incapacitated by fact) unable to perform his functions ("**Application**").

Notably, prior to the Application, the Respondent had already filed an application under Section 9 (*Interim measures, etc., by Court*) of the Act, before the District Judge at Jalpaiguri ("**Jalpaiguri Court**") and the Jalpaiguri Court had partially allowed the application filed by the Respondent.

Issue

Whether an application for termination of an arbitrator's mandate can be made in a court other than the 'court' as envisaged in Sections 2(i)(e) and 42 of the Act.

Arguments

Contentions of the Petitioner:

The Petitioner submitted that clause 25 of the Contract specifically authorised the chief engineer of the Department to operate as the sole arbitrator, and there was no sanction under which the chief engineer could appoint someone else as the sole arbitrator. Further, clause 25 of the Contract did not empower the chief engineer to appoint a person who may have a likelihood of bias in favour of the State. However, in the instant case, the Respondent had appointed the Arbitrator, who was a former employee of the Department, having served the Respondent as ex-chief engineer.

The Petitioner argued that since the Respondent had superior bargaining power, the Petitioner was left with no choice but to agree with the appointment of the Arbitrator. Besides, the Arbitrator was ineligible to be appointed as an arbitrator under Section 12(5) (*Grounds for challenge*) of the Act, and that the Petitioner had not provided its written consent to legitimize such appointment. The Petitioner relied on several cases including the case of ***Perkins Eastman Architects DPC and Another v. HSCC (India) Limited [(2019) SCC OnLine SC 1517]***, wherein the Hon'ble Supreme Court ("**SC**") had held that the unilateral appointment of a managing director as an arbitrator, or giving such managing director the unilateral right to appoint an arbitrator, would both be considered as disqualifications under Section 12(5) of the Act, given that such managing director being an employee having a past or present business relationship with the party would be interested in the outcome of the proceeding.

The Petitioner further submitted that it had filed its statement of claims within the time limit prescribed by the Arbitrator, and that even though the Respondent filed its defence statement after a delay of 6 months, the Arbitrator had not passed any order against the Respondent for such delay. Overall, the arbitral proceedings continued for a period of 8 years from the date of notice invoking arbitration, and even then, the proceedings were not concluded. The Petitioner contended that such unreasonable extension had prejudiced the Petitioner and that the Arbitrator had denied justice to the Petitioner, which were against the principles envisaged by the United Nations Commission on International Trade Law model. Hence, the Arbitrator was biased towards the Respondent. Furthermore, the Arbitrator had a duty to disclose possibilities of bias in accordance with Section 12(1) (*Grounds for challenge*) of the Act, but failed to do so. Therefore, in the Petitioner's view, the Arbitrator had concealed a material fact relating to his ineligibility.

The Petitioner concluded its arguments by submitting that it had rightly filed the Application before the Calcutta HC, given that the Calcutta HC had superintending powers to appoint arbitrators under Section 11 of the Act.

Contentions of the Respondent:

The Respondent submitted that the Petitioner had at no point of time during the proceedings raised any objections with respect to the appointment of the Arbitrator or the validity of the arbitration clause in the Contract. Further, although the Arbitrator was a former employee of the Respondent, he had nothing to do with the subject matter of the dispute and was therefore eligible to be appointed as an arbitrator. The Respondent submitted that the Petitioner's participation in the proceedings by filing its statement of claim, rejoinder, evidence, and making full arguments tantamount to a waiver of the applicability of Section 12(5) of the Act.

With respect to the Petitioner's argument pertaining to the unilateral appointment of the Arbitrator and his disqualification to act as an arbitrator under Section 12(5) of the Act, the Respondent relied on the case of ***West Bengal Housing Board v. Abhishek Construction [(2023) SCC OnLine Calcutta 827]*** ("**West Bengal Housing Board Case**") wherein the SC held that the grounds for holding an arbitrator to be *de jure* or *de facto* ineligible to act as an arbitrator vis-à-vis unilateral appointment, cannot be taken in instances where the arbitral proceedings have commenced prior to the 2015 amendments to the Act ("**Amendment Act**").

The Respondent contended that the Application was not maintainable before the Calcutta HC, since the Respondent had already filed an application under Section 9 of the Act before the Jalpaiguri Court.

Moreover, applications filed under Sections 14 and 15 of the Act fall under the ambit of Part I of the Act, and therefore, the bar under Section 42 of the Act would become applicable. Furthermore, the Petitioner's application for appointment of a new arbitrator under Section 11(6) of the Act was not maintainable considering that the earlier appointment of the Arbitrator was continuing. Besides, even if the appointment of the Arbitrator was invalid, the time period for making an application under Section 11(6) of the Act had lapsed.

Observations of the Calcutta HC

In order to opine on the maintainability of the Application, the Calcutta HC examined the provisions of Section 42 of the Act. The Calcutta HC placed reliance on the case of ***State of West Bengal v. Associated Contractors [(2015) 1 SCC 32]***, wherein the SC had laid down the law vis-à-vis Sections 9 and 42 of the Act and held that Section 2(1)(e) of the Act contained an exhaustive definition marking out only the Principal Civil Court of original jurisdiction in a district or a High Court having original civil jurisdiction in the State as 'court' for the purpose of Part I of the Act. Further, applications under Section 9 of the Act fall within the purview of Section 42 of the Act. The Calcutta HC observed that the understanding of a 'court' under Section 42 of the Act was indisputably to be considered in terms of Section 2(1)(e) of the Act. Therefore, once an application under Section 9 of the Act had been made to a 'court' as understood under Section 2(1)(e) of the Act, all further applications under Part I of the Act should be made before the same 'court' wherein the prior application was made.

The Calcutta HC also relied on the case of ***Swadesh Kumar Agarwal v. Dinesh Kumar Agarwal and Others [(2022) 10 SCC 235]***, wherein the SC held that in a case where a dispute arises on the mandate of the arbitrator being terminated on the grounds of such an arbitrator becoming *de jure* or *de facto* unable to perform his functions or for failure to act without undue delay, such a dispute has to be raised before the 'court', defined under Section 2(1)(e) of the Act, and as such the said dispute cannot be decided on an application filed under Section 11(6) of the Act. Therefore, in the Calcutta HC's view, the Petitioner's argument that the Application could be filed under Sections 14 and 15 of the Act read with Section 11(6) of the Act, was superfluous.

The Calcutta HC further observed that although the arbitration proceedings had continued for a period of 8 years, not once had the Petitioner raised any objection towards the appointment of the Arbitrator and fully participated in the said proceedings. The Calcutta HC relied on the West Bengal Housing Board Case and concurred with the Respondent's stance that the issue of unilateral appointment and the proscription under Section 12(5) of the Act were inapplicable to arbitrations which commenced prior to the Amendment Act coming into force.

Decision of the Calcutta HC

The Calcutta HC held that the 'court' to be approached under Section 14(1)(a) of the Act, for termination of an arbitrator's mandate, for *de jure* or *de facto* reasons, is the 'court' as set out under Section 2(1)(e) of the Act, and that since an application under Section 9 of the Act was already made before the Jalpaiguri Court, it was the 'court' under Section 2(1)(e) of the Act. Correspondingly, the bar under Section 42 of the Act was squarely applicable to the instant case.

Therefore, an application under Section 14(1)(a) for termination of an arbitrator's mandate, being required to be made before a 'court' as per Section 2(1)(e) and Section 42 of the Act, was to be presented

before the Jalpaiguri Court alone. Accordingly, the Calcutta HC dismissed the Application as not maintainable.

VA View: Section 42 of the Act serves as a jurisdictional bar aimed at avoiding conflicting jurisdiction by different courts, and places the supervisory jurisdiction over all arbitral proceedings (*in connection with the arbitration*) in one court exclusively. Through this judgement, the Calcutta HC has reiterated the mandate of Section 42 of the Act which is that once an application to a 'court' as understood under Section 2(1)(e) of the Act is made, all further applications (*to a 'court'*) under Part I of the Act must be made to the same 'court' where the prior application has been made.

The Calcutta HC has rightly held that the relevant 'court' under Section 42 of the Act would be the Jalpaiguri Court, being the court where the Respondent had already filed an application under Section 9 of the Act. Therefore, any further application to a 'court' ought to have been made before the Jalpaiguri Court alone.

III. NCLAT upholds CCI's order approving acquisition of Hindustan National Glass and Industries Limited by AGI Greenpac Limited.

National Company Law Appellate Tribunal ("**NCLAT**") has, collectively in the matters of:

The U.P. Glass Manufacturers Syndicate v. Competition Commission of India and Others [Competition Appeal (AT) No. 07 of 2023];
Independent Sugar Corporation Limited v. Competition Commission of India and Another [Competition Appeal (AT) No. 08 of 2023];
Geeta and Company v. Competition Commission of India and Others [Competition Appeal (AT) No. 09 of 2023]; *and*
HNG Industries Thozilalar Nala Sangam v. Competition Commission of India and Another [Competition Appeal (AT) No. 10 of 2023],

quashed all the four appeals filed against the order dated March 15, 2023 approving a combination by the Competition Commission of India ("**CCI/ Respondent no. 1**"), which was approved in response to a notice from AGI Greenpac Limited ("**Impugned Order**").

Facts

The Corporate Insolvency Resolution Process ("**CIRP**") under the Insolvency and Bankruptcy Code, 2016, was initiated against Hindustan National Glass and Industries Limited ("**HNG/ Respondent no. 2**") in October, 2021. AGI Greenpac Limited ("**AGI/ Respondent no. 3**") filed a resolution plan for HNG's acquisition, which was approved by the Committee of Creditors ("**CoC**").

During the pendency of resolution plan's approval, AGI filed Form II (*long form*) with the CCI, announcing the proposed transaction for approval. U.P. Glass Manufacturers Syndicate ("**Appellant/ UPGMS**") filed objection against the combination on October, 2022 before the CCI. Subsequent to the

objection letters by the Appellant, CCI issued a show-cause notice ("**SCN**") under Section 29(1) (*Procedure for investigation of combinations*) of Competition Act, 2002 ("**Act**"), to AGI directing it to respond within 30 days, enquiring as to why the investigation into the proposed transaction should not be carried out.

CCI formed a prima facie opinion that the proposed combination is likely to cause an appreciable adverse effect on competition in India's relevant markets ("**AAEC**"). In March 2023, AGI filed its response to the SCN and proposed certain voluntary amendments to alleviated concerns about substantial AAEC, which was later recognized and accepted by the CCI *vide* Impugned Order.

CCI sent a letter addressing the Appellant's objections and representations against the said combination. CCI noted concerns about the proposed combination but denied a personal hearing and inspection of case records. CCI concluded that the proposed combination addressed the AAEC concern and that it is not likely to have an AAEC.

Aggrieved by the Impugned Order, Appellants filed the present appeal before the NCLAT ("**Appeal**").

Issues

1. Whether the Appellant(s) have locus to challenge the Impugned Order within the scope of Section 53B (*Appeal to Appellate Tribunal*) of the Act.

2. Whether CCI in the Impugned Order has examined the relevant aspects as contained in Section 29(2) of the Act or the Impugned Order suffers from non-compliance of the procedure.

3. Whether the Impugned Order can be said to have been passed in violation of principles of natural justice.

Arguments

Contentions of the Appellant:

The Appellant contends that ambit and scope of 'any person aggrieved' under Section 53B of the Act has to be widely interpreted looking to the nature and purpose of the Act. The object of the Act is to eliminate practices having adverse effect on competition. The Impugned Order adversely affects the competition in the relevant market which shall affect the Appellant and hence it cannot be said that Appellant has no locus to file the Appeal. The proposed merger between AGI and HNG could lead to an AAEC, as the combined entity would have a 60% market share, increasing prices in the Indian container glass market. The Appellant also claimed that the acquisition would affect product pricing, encourage predatory pricing and cartelization, thereby negatively impacting smaller players like UPGMS.

The Appellant relied on the Supreme Court's judgment in ***Samir Agarwal v. CCI and Others [2021 3 SCC 136]***, wherein the Supreme Court held that the expression 'person aggrieved' must be understood widely and not be constructed narrowly. The court also noted that the expressions used in Sections 53B and 53T (*Appeal to Supreme Court*) of the Act are 'any person', meaning all persons who bring information of practices contrary to the Act could be aggrieved by an adverse order of the CCI.

CCI formed a prima facie opinion that a merger is likely to cause an AAEC, which required further investigation under Section 29(2) of the Act. The case required a full investigation and CCI should have issued an order for a report from the director general. However, CCI skipped this procedure and did not direct the parties of the combination to publish details of the merger for public knowledge. This interpretation is not in accordance with the Act. Mandatory procedures must be followed even when modifications are offered under Regulation 25 (1A) of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ("**Combination Regulations**").

The Appellant further argued that the SCN was only issued to Respondent no. 3, which is not a party to the combination, as required by the Combination Regulations**.** CCI's failure to hear Respondent no. 2 and issue notice to it vitiates the proceeding. The Appellant argued that the approval of the combination was done in breach of the Act. CCI accepted a unilateral modification proposed by Respondent no. 3, which absolves it of its statutory duty under Section 18 (*Duties and functions of Commission*) of the Act read with Sections 6 (*Regulation of combinations*) and 29 of the Act. CCI has not examined the proposed combination and has not approved it.

The Appellant has questioned the Impugned Order, claiming that it violated principles of natural justice. The Appellant argued that there was no consideration of the concerns raised by it at the time of the Impugned Order, indicating that principles of natural justice were violated.

Contentions of the Respondents:

The Respondents argued that the Appellant has no locus to challenge the Impugned Order, as they cannot be considered aggrieved persons under Section 53B of the Act, as the term 'aggrieved' refers to a person directly affected by an order, and therefore, their appeals are liable to be rejected.

The Respondents relied on the judgment of ***Jasbhai Motibhai Desai v. Roshan Kumar, Haji Bashir Ahmed and Others [AIR 1976 SC 578]***, wherein it was held that the appellant has not been denied or deprived of a legal right. He has not sustained injury to any legally protected interest. In fact, the order does not operate as a decision against him, much less does it wrongfully affect his title to something. He has suffered no legal grievance. He has no legal peg for a justiciable claim to hang on. Therefore, he is not a 'person aggrieved' and has no locus standi to challenge the order.

The Respondents relying upon the said judgement have contended that since the Appellant has not suffered any legal injury, they have no right to challenge the Impugned Order.

The Respondent contended that Section 30 (*Procedure in case of notice under sub-section (2) of section 6*) of the Act requires that after any person or enterprise has given a notice under Section 6(2) of the Act, CCI shall examine such notice and form its prima facie opinion as provided in Section 29(1) of the Act, and thereafter CCI is to proceed as per the provisions contained in Section 30 of the Act. Section 30 of the Act cannot be read to mean that even if, prima facie opinion at the second stage is not formed by CCI, CCI should direct publication of details of the combination. Hence, the submission of the Appellant cannot be accepted.

Observation of NCLAT

The Supreme Court's judgment in ***A. Subash Bhai v. State of Andhra Pradesh [(2011) 7 SCC 616]***,

emphasized that the term 'aggrieved person' is an elusive concept that depends on the content and intent of the statute alleged, emphasizing the importance of considering these factors when addressing the issue of the Appellant.

NCLAT held that the Act and its regulations, particularly the Combination Regulations, provide a detailed procedure for participation in competition appeals. CCI can call for information from other enterprises to determine if a combination has an AAEC. However, this does not entitle anyone other than those who have given notice to participate in the appeals. The right to public participation arises when CCI directs parties to publish the details of the combination. In this case, the stage for filing objections or providing information by the public did not arise. The Appellant, thus, was appropriately communicated that they cannot be allowed to participate.

It was further observed that CCI's inquiry procedure under Section 6(2) of the Act does not violate principles of natural justice.

Decision of NCLAT

It was held that the Impugned Order followed the procedure outlined in the Act and its regulations. In exercising its competence under Section 31(1) (*Orders of Commission on combinations*) of the Act, CCI approved the combination after carefully considering all relevant features and materials on the record. Thus, the Appeal was dismissed.

VA View:

This case is the first in which an approval order issued by the CCI regarding the target entity's CIRP has been challenged before the NCLAT. The NCLAT found no substance in the arguments of the Appellant and no procedural defect in the Impugned Order. Furthermore, this is a milestone decision under Section 29 of the Act, in which the NCLAT considered the interaction between Phase I and Phase II investigations for the first time.

This unusual challenge to an acquisition approval under IBC demonstrates the regulatory framework's tenacity under the Competition Act, 2002, in the face of legal scrutiny.

IV. NCLT: Stock broker company is a financial service provider under the Insolvency and Bankruptcy Code, 2016.

National Company Law Tribunal, New Delhi ("**NCLT**"), *vide* its order dated August 2, 2023, in the case of ***M/s. Bezel Stockbrokers Private Limited v. Security Exchange Board of India and Another [Company Petition No. (IB)-251(ND)/2021]***, held that a stock broker company is a financial service provider under the Insolvency and Bankruptcy Code, 2016 ("**IBC**").

Facts

An application was filed by M/s. Bezel Stockbrokers Private Limited ("**Applicant**") under Section 10 (*Initiation of corporate insolvency resolution process by corporate applicant*) of IBC seeking initiation of the Corporate Insolvency Resolution Process ("**CIRP**") against it as it has been facing hardships in

carrying out its operations and incurring ample losses every year.

As per the Applicant, owing to the financial crisis, it failed to deposit the 20% margin of the total price of the stocks which was purchased by the Applicant on behalf of its clients according to the rules of Securities and Exchange Board of India ("**SEBI/ Respondent**"), as a result of which SEBI forfeited the amount of the shares and thus, created a significant liability of INR 3,35,84,815 towards its shareholders/ clients. Further, the advance funds like cash and collateral (unused and kept for future orders) which were given to the Applicant by the clients were also not paid back, which resulted in creation of a further liability of INR 91,78,621. Hence, the Applicant's aggregate liability towards its clients amounted to INR 4,27,63,436.

Thus, due to increased financial distress, the Applicant has been declared as a defaulter and expelled from the National Stock Exchange membership. Therefore, it has filed the present petition for initiation of CIRP against it.

Issue

Whether a stock broker company is a corporate person under IBC and eligible for initiation of CIRP.

Arguments

Contentions of the Applicant:

It was contended by the Applicant that due to the financial crisis, it sought for initiation of CIRP. The Applicant relied upon the case of ***Mr. Vipul Harshad Raja v. M/s. Simandhar Broking Limited [CP (IB) No. 510/7/NCLT/AHM/2019]*** ("**Vipul Harshad Case**"), wherein it was held that the respondent merely being a company engaged in stock broking business and derivative transactions cannot be claimed to be a financial service provider since it is directly dealing with the financial products and not only rendering advice or soliciting or agreeing in that regard. Additionally, the Applicant while substantiating its case before NCLT, placed: (a) a copy of special resolution passed by members authorizing it to file an application under Section 10 (*Initiation of corporate insolvency resolution process by corporate applicant*) of IBC to initiate CIRP; (b) its financial statements for the financial year 2018-2019 and 2019-2020 and a copy of the provisional balance sheet for the year 2020-2021; and (c) defaulter notice issued by SEBI.

Contentions of the Respondent:

It was contended by the Respondent that Applicant is a financial service provider and therefore, it does not fall within the definition of corporate person. The Respondent, for strengthening their contention relied on the order of NCLT in the case of ***Globe Capital Market Limited v. Narayan Securities Limited [Company Petition No. (IB)-856(ND)/2022]***, wherein it was held that Narayan Securities Limited was a financial service provider as per Section 3(17) (*Definition of financial service provider*) of IBC, due to which, it cannot be considered a corporate person as defined under Section 3(7) (*Definition of corporate person*) of IBC. Accordingly, no application can be filed against a financial service provider for initiating CIRP.

Additionally, the Respondent rebutted the Applicant's claim by stating that Vipul Harshad Case has been stayed by the National Company Law Appellate Tribunal in the case of ***Nitin Pannalal Shah (Suspended Director of Simandar Broking Limited) v. Vipul H Raja and Others [Comp. Appeal (AT) (Ins.) No. 379 of 2021]***.

Observations by the NCLT

NCLT took into consideration the definitions provided under Sections 3(15), 3(16), 3(17), 3(18) of IBC and Section 2 (*Definitions*) of the Securities Contracts (Regulation) Act, 1956 ("**SCRA**"). NCLT held that as per Section 3(15) of IBC, financial products consist of securities and various types of contracts. Further, according to Section 2 of SCRA, securities within its ambit includes shares, scrips, stocks, bonds, debentures, and debenture stocks, consequently they are treated as financial products under Section 3(15) of IBC. Also, the Applicant being a stockbroker, was dealing in the activities of buying, selling, or dealing in securities, etc., which according to Section 3(15) of IBC are financial products.

The Applicant is registered under the Securities and Exchange Board of India Act, 1992 read with SEBI (Stock Brokers and Sub-brokers) Regulations, 1992. Therefore, it was observed by NCLT that the Applicant, being a financial service provider, is subject to control and supervision of SEBI (which is a financial sector regulator according to Section 3(18) of IBC).

In a nutshell, it was observed by NCLT that as the Applicant was providing financial service according to Section 3(16) of IBC, therefore, it is a financial service provider.

Decision of the NCLT

NCLT dismissed the present application and held it to be not maintainable in respect to the CIRP. It was held by NCLT that the Applicant, being a financial service provider, does not fall within the ambit of the definition of a corporate person under Section 3(7) of IBC and is not a corporate debtor under Section 3(8) of IBC.

Hence, a stock broker company will be considered as a financial service provider and not a corporate person under the scope of IBC.

VA View: NCLT has rightly held that the Applicant is a financial service provider and thus, kept it outside the purview of corporate person as defined under Section 3(7) of IBC.

On perusal of the definitions under Section 2 of SCRA, it can be observed that shares, scrips, stocks, bonds, debentures, debenture stocks, etc., are included under the term securities. Hence, the same can also be treated as a financial product as defined under Section 3(15) of IBC. The Applicant providing the financial service qualifies as a financial service provider and is registered with SEBI. Therefore, it is outside the purview of the definition of a corporate person as defined under Section 3(7) of IBC and is not a corporate debtor in terms of Section 3(8) of IBC.

The National Company Law Appellate Tribunal in the case of ***Nitin Pannalal Shah (Suspended Director of Simandar Broking Limited) v. Vipul H Raja and Others [Comp. Appeal (AT) (Ins.) No. 379 of 2021]*** on September 11, 2023, has overruled the Vipul Harshad Case and held that such stock broking companies are financial service providers and therefore cannot be qualified as corporate person for the purpose of IBC.

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