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Between the lines...

A BRIEFING ON LEGAL MATTERS OF CURRENT INTEREST

KEY HIGHLIGHTS

* **Supreme Court:** Dissenting opinion of an arbitrator cannot be treated as an award if the majority award is set aside.

* **Delhi High Court:** When there are two interconnected agreements with conflicting arbitration clauses, the clause contained in the main agreement should be given primacy.

* **Supreme Court:** Admission of claims after the resolution plan has been accepted by CoC would result in making CIRP prolonged and inefficacious.

* **Supreme Court:** No absolute or unfettered discretion on the part of liquidator to cancel an auction which is otherwise valid.

I. Supreme Court: Dissenting opinion of an arbitrator cannot be treated as an award if the majority award is set aside.

The Supreme Court has, by its judgment pronounced on August 24, 2023, in the matter of ***Hindustan Construction Company Limited v. National Highways Authority of India [Civil Appeal No(s). 4658 of 2023, 4659 of 2023, 4660 of 2023, 4661 of 2023 and 4662 of 2023]***, disposed of a batch of appeals involving a common question pertaining to interpretation of a condition of the contract. Considering that the Supreme Court dealt with multiple appeals in a single judgment, for the purpose of convenience, the Supreme Court has pronounced this judgment treating the judgment dated November 8, 2022 passed by the Division Bench of High Court of Delhi ("**High Court**") in FAO (OS) No. 48/ 2012 as the impugned judgment.

Facts

National Highways Authority of India ("**NHAI/ Respondent**") awarded the work of construction of the Allahabad by-pass project to Hindustan Construction Company Limited ("**Contractor/ Appellant**") by agreement dated June 2, 2004. The project was completed. However, certain disputes arose between the parties with reference to different areas of the contract. Since NHAI has an inbuilt dispute resolution mechanism, namely, the Dispute Resolution Board ("**DRB**") comprising of technical experts, the matter was referred to DRB. However, as the Contractor was not satisfied with the opinion of DRB, the Contractor chose to invoke arbitration proceeding. Three technical persons were appointed to act as arbitrators and after due consideration to the contentions made and materials placed by both the parties, the arbitrators passed an award. While the arbitrators had a unanimous view on most of the questions, however, on some questions, one of the arbitrators gave a dissenting view.

Being aggrieved by the award, NHAI approached the High Court under Section 34 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"). By order dated November 30, 2011, the Single Judge of the High Court dismissed the petition filed by NHAI under Section 34 (*Application for setting aside arbitral awards*) of the Arbitration Act and observed that the majority opinion of the arbitrators reflected a plausible and reasonable view and does not warrant any judicial interference. Aggrieved by the dismissal of the aforesaid petition by the Single Judge, NHAI preferred appeal before Division Bench of the High Court, which set aside the order passed by the Single Judge and held that the award passed by the arbitrators and the majority view taken by them were based on implausible interpretation of the contract.

Issues

1. Whether dissenting opinion given by minority members of a multi-member arbitral tribunal can be treated as an award.

2. Whether an award or interpretation of majority of the members of a multi-member arbitral tribunal, who are experts of the field, on a technical aspect or condition of a contract, which is plausible, is subject to judicial review within the limited scope under Section 34 of the Arbitration Act.

Arguments

Contentions of the Appellant:

It was contended that the Division Bench of the High Court has exceeded its jurisdiction of judicial review in terms of Sections 34 and/or 37 (*Appealable orders*) of the Arbitration Act. It is a settled legal position that there are very limited grounds on which court can interfere upon challenge of an arbitral award and court shall adopt the approach of minimal interference. The Appellant further submitted that contractual conditions relating to method of measurement are dependent heavily on technical understanding as possessed by the arbitral tribunal in the present case comprising of technical experts and such technical conditions cannot be read and interpreted in the same manner as a general provision of a contract.

The Appellant made further submissions on the merits/ technical interpretation of the relevant clause of the contract and assailed the impugned judgment on the ground that the Division Bench of the High Court failed to appreciate that there are two kinds of embankments, one with soil and the other with fly ash and soil and therefore, the Appellant had quoted rates for these two kinds of embankment. Further, the Appellant contended that contract conditions and stipulations are to be read as a whole and hence, technical specifications, drawings and other documents form part of the contract and cannot be considered in isolation.

The Appellant relied upon the judgment pronounced by the Supreme Court in the matter of ***Associate Builders v. Delhi Development Corporation [(2014) (13) SCR 895]*** ("**Associate Builders Case**"), wherein the Supreme Court had considered the extent to which a court can replace the arbitrator's conclusion with its own conclusion by way of judicial interference.

Contentions of the Respondent:

The Respondent submitted that Supreme Court may not interfere with the impugned judgment of the High Court and other decisions followed by it, which are the subject matter of all the appeals. The Respondent further contended that interference with the award by the Division Bench of the High Court was justified and necessary and the arbitrators had acted beyond the terms of the contract in the sense that their award amounted to not only incorrect interpretation but rather a case of rewriting the terms of the contract.

The Respondent further submitted that the Single Judge of the High Court failed to correctly analyze the conditions of the contract. If the interpretation of the relevant clause of the contract by the arbitrators is accepted, it will lead to absurd result so far as the ratio of soil and pond ash used in embankment is concerned and it would cast an unfair obligation on the Respondent to pay at one rate regardless of the soil and pond ash used for the project. To support its contentions, the Respondent referred to relevant pronouncement of the Supreme Court whereby it was observed that the court may interfere in case if the interpretation of conditions of contract by the arbitrators is incorrect.

Observations of the Supreme Court

The Supreme Court analyzed the relevant conditions of the contract as well as perused the majority award and dissenting view of one of the arbitrators. Thereafter, the Supreme Court examined the interpretation adopted by the DRB in various cases on the technical aspects pertaining to construction of embankment and certain specific conditions of the contract. The Supreme Court observed that in most of the cases, the view adopted by DRB and majority award of the arbitral tribunal favoured the arguments of the Contractors on technical aspects. Dissenting opinion, wherever expressed, was based on separate measurements. When the predominant view taken by majority of the members of DRB and

arbitral tribunal, who are technical experts of the field, was in favour of Contractor, on the technical aspects and conditions of the contract, as such the court should not interfere with the arbitration award under Section 34 of the Arbitration Act. The Supreme Court relied upon judgments pronounced in the matter of ***M/s. Voestalpine Schienen GmbH v. DMRC [(2017) (1) SCR 798]*** and ***Delhi Airport Metro Express Private Limited v. DMRC [(2021) (5) SCR 984]*** and observed that when members of arbitral tribunal are technical experts of the field, their opinion should be given the same value as if the award was passed by a legally trained mind. Supreme Court further observed that an award should be scrutinized and subject to judicial review only under the limited grounds as set out under Section 34 of the Arbitration Act. However, judges often adopt a corrective lens and treat a petition under Section 34 of the Arbitration Act as a regular appeal. As long as the view taken by majority of the arbitrators is plausible, there is no reason to deviate from such view, especially on technical aspects of interpretation of contract. Supreme Court relied upon its previous decision in Associate Builders Case and observed that if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground.

Thereafter, Supreme Court discussed the aspect and relevance of dissenting opinion, which often arises in case of multi-member tribunals. In this regard, Supreme Court relied upon its previous landmark judgment in the matter of ***Dakshin Haryana Bijli Vitran Nigam Limited v. Navigant Technologies Private Limited [(2021) (1) SCR (1135)]*** and reiterated that dissenting opinion is only for the information of parties and does not form part of the award but may be admissible as evidence in relation to procedural matters in the event of a challenge or may add weight to the arguments of a party wishing to appeal against the award.

Decision of the Supreme Court

Supreme Court held that dissenting opinion cannot be placed at the same footing as majority view and cannot be considered to be an award. Further, Supreme Court allowed all the appeals and all the corresponding impugned judgments of the High Court were set aside. The arbitral awards, which were subject matter of challenge before the Supreme Court and to the extent that they were set aside by the High Court, were upheld and restored.

VA View: The present judgment of Supreme Court is a significant judicial pronouncement.

The Supreme Court has clarified on the legal position that when an arbitral tribunal, comprising of technical experts from the requisite field of the subject-matter, pass an award or give an interpretation to a condition in a contract which is technical in nature and such interpretation seems to be plausible then the courts should refrain from looking into such award from corrective lens and avoid interfering or setting aside such well-reasoned award. Courts should bear in mind that unlike a regular appeal, Section 34 of the Arbitration Act stipulates limited grounds on which arbitral awards can be set aside. Otherwise, the very sanctity and intent to promote arbitration proceedings, especially in those cases where subject-matter is technical and requires experts of the field to act as arbitrators, will stand defeated.

Additionally, Supreme Court also clarified that legal position that dissenting opinion given by minority members of a multi-member arbitral tribunal cannot be treated as an award. It is only for the information of parties and does not form part of the award but may be admissible as evidence in relation to procedural matters in the event of a challenge or may add weight to the arguments of a party wishing to appeal against the award.

II. Delhi High Court: When there are two interconnected agreements with conflicting arbitration clauses, the clause contained in the main agreement should be given primacy.

The Delhi High Court ("**Delhi HC**") has, in its judgement dated August 22, 2023, in the matter of ***Amit Guglani and Another v. L and T Housing Finance Limited and Another [ARB.P. 1317/2022 and I.A. No. 19286/2022]***, held that when there are two interconnected agreements with conflicting arbitration clauses, the clause contained in the main agreement should be given primacy over the other clause.

Facts

L and T Housing Finance Limited ("**Respondent No. 1**"), a company engaged in the business of advancing finance in different categories such as home loans, auto loans, and micro loans, under a scheme of amalgamation, merged with L and T Finance Limited with effect from April 12, 2021. Raheja Developers ("**Respondent No. 2**"), a company engaged in the business of real estate, constructed a residential real estate project namely 'Raheja Vanya' in Gurgaon and had started inviting applications for allotment by sale of residential units/ flats in the said project on a construction linked option.

Mr. Amit Guglani and another ("**Petitioners**") wanted to book a residential unit in the 'Raheja Vanya' project and approached Respondent No. 1 for a home loan of INR 67 lakhs towards the payment of the purchase consideration of the said residential unit/ flat. The terms and conditions of the home loan were recorded in the tripartite agreement dated October 24, 2018, executed between the Petitioners, Respondent No. 1, and Respondent No. 2 ("**Tripartite Agreement**"), whereunder the Petitioners agreed to secure Respondent No. 1 by mortgaging all rights, title and benefits accruing from the residential unit in favour of Respondent No.1. In turn, Respondent No. 2 undertook not to create third party rights or security interest in the mortgaged unit, without prior written consent of Respondent No. 1. The Petitioners and Respondent No. 2 had also agreed that the pre-equated monthly instalments ("**EMIs**") shall be subvented by Respondent No. 2 for a maximum period of 48 months or from October 7, 2017 to June 6, 2022, whichever was earlier, and Respondent No. 1 was to deduct the pre-EMIs for the term of subvention, upfront from the first disbursement.

Based on the aforementioned Tripartite Agreement, the Petitioners and Respondent No. 1 entered into a separate home loan agreement on January 17, 2019 ("**Loan Agreement**"). Consequently, Respondent No. 1 sanctioned and disbursed the home loan to the Petitioners *vide* a letter dated January 17, 2019, as per the terms of the Loan Agreement. While the Tripartite Agreement provided for resolution of disputes through arbitration and designated New Delhi as the seat of arbitration, the Loan Agreement contained an arbitration clause designating exclusive jurisdiction to the courts at Calcutta.

As per the terms of the Tripartite Agreement, the interest rate applicable to the home loan was linked to Respondent No. 1's basic prime lending rate ("**BPLR**") and any increase in the rate was to be borne by Respondent No. 2 (during the pendency of the scheme) and was to be paid upfront on the date of change of interest for the balance subvention period of the said loan. However, on September 6, 2019, the Petitioners received a letter from Respondent No. 1 stating that the BPLR of the home loan was erroneously mentioned in the sanction letter as 17.75%, while the actual BPLR was in fact 18.10%. The Petitioners protested against the increase of the BPLR by way of several e-mails addressed to Respondent No. 1 stating that the unilateral modification of the BPLR was impermissible and contrary to the terms of the Tripartite Agreement.

Thereafter, Respondent No. 1 served a legal notice dated July 15, 2022, on the Petitioners demanding the payment of INR 23,084/- towards the EMI within a period of 15 days from the receipt of the said notice. The Petitioners filed a complaint with the ombudsman seeking a compensation of INR 10 lakhs for the mental agony suffered by them. The Petitioners also wrote to the grievance redressal officer, however, there was no reconciliation of the dispute.

The Petitioners also received a notice under Section 13(2) (*Enforcement of security interest*) of the Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002, from Respondent No. 1 stating that the loan account of the Petitioners had been classified as a non-performing asset on September 4, 2022, owing to Petitioners' defaults in the payment of home loan instalments. Further, the entire liability of INR 30,01,820.45p along with interest thereon and other charges were fixed on the Petitioners. A sixty days' time period was granted to the Petitioners to pay these outstanding amounts. Additionally, the Petitioners received summons dated September 16, 2022, under Section 25 (*Dishonour of Electronic Funds Transfer for insufficiency, etc., of funds in the account*) of the Payment and Settlement Systems Act, 2007, from a court in Calcutta.

Owing to the non-resolution of the above-mentioned dispute, the Petitioners invoked arbitration under clause 27 of the Tripartite Agreement and approached the Delhi HC for appointment of a sole arbitrator under Section 11(6) (*Appointment of arbitrators*) of the Arbitration and Conciliation Act, 1996 ("**Act**").

Issues

1. Whether the dispute arising under the Loan Agreement was integrally connected with the Tripartite Agreement.
2. Where there are two interlinked agreements containing different arbitration clauses, which of the two arbitration clauses should be invoked?
3. Whether a notice invoking arbitration under Section 21 (*Commencement of arbitral proceedings*) of the Act is a pre-requisite while invoking jurisdiction of the court under Section 11(6) of the Act.

Arguments

Contentions of the Petitioners:

The Petitioners submitted that from the terms of the Tripartite Agreement it was evident that pre-EMIs were to be subvented by Respondent No. 2 and Respondent No. 1 was to deduct the pre-EMIs for the term of the subvention, upfront from first disbursement. Furthermore, the rate of interest applicable to the home loan would be linked to Respondent No. 1's BPLR and any increase in the rate was to be borne by Respondent No. 2 during pendency of the scheme and paid upfront on the date of change of the interest for the balance subvention period of the home loan. Therefore, the Loan Agreement was inseparable from the Tripartite Agreement and the Petitioners had rightly invoked clause 27 of the Tripartite Agreement.

The Petitioners further submitted that they had filed an application seeking exemption from serving a mandatory notice invoking arbitration under Section 21 of the Act, on the ground that clause 27 of the Tripartite Agreement provided for the unilateral appointment of a sole arbitrator by Respondent No. 1, which was in violation of Section 12(5) (*Grounds for challenge*) of the Act. In the Petitioners' view, no

purpose would have been achieved by sending a mandatory notice under Section 21 of the Act, as clause 27 of the Tripartite Agreement suffered from a disability to appoint an arbitrator. Besides, even if the notice invoking arbitration under Section 21 of the Act was mandatory, the Petitioners had *vide* its e-mail dated September 13, 2022, intimated Respondent No. 2 that a third party was required to help address the concerns between the Petitioners and Respondent No. 1.

In order to support its arguments, the Petitioners relied on the judgement of the Delhi HC in ***Haldiram Manufacturing Company Limited v. SRF International [(2007) SCC OnLine Del 457]*** ("**Haldiram Case**"), wherein it was held that while the mandatory notice invoking arbitration was a pre-requisite in order to invoke the jurisdiction of a court under Section 11 of the Act, it could not have been said that there was a violation of this pre-requisite where there was no specific procedure prescribed under the arbitration clause. Reliance was also placed by the Petitioners on the judgment of ***Brilltech Engineers Private Limited v. Shapoorji Pallonji and Company Private Limited, [(2022) SCC OnLine Del 4422]***, where the Delhi HC reiterated the view taken in the Haldiram Case and held that the notice of the petition under Section 11 of the Act, when served upon the respondent, itself constitutes a notice invoking arbitration.

Contentions of Respondent No. 1:

Respondent No. 1 contended that the dispute between the Petitioners and Respondent No. 1, that is, the rectification of the BPLR from 17.75% to 18.10%, was with respect to the Loan Agreement and not the Tripartite Agreement. Moreover, the home loan was sanctioned and disbursed to the Petitioners under the Loan Agreement. This Loan Agreement contained a separate clause on arbitration, which conferred exclusive jurisdiction on the courts at Calcutta, and therefore, the Delhi HC had no territorial jurisdiction to entertain the petition filed by the Petitioners.

Respondent No. 1 submitted that the Petitioners had wrongfully invoked clause 27 of the Tripartite Agreement which was absolutely irrelevant to the present dispute. Besides, while the Tripartite Agreement had been invoked by the Petitioners, no relief had been sought against Respondent No. 2, which shows that no dispute had arisen under the Tripartite Agreement. Respondent No. 1 submitted that the disputes relating to the rate of interest, tenure of installments and the BPLR were only concerned and related to the Loan Agreement.

Further, Respondent No. 1 submitted that the petition filed by the Petitioners was not maintainable given that the Petitioners had failed to serve the mandatory notice of invocation arbitration under Section 21 of the Act. The Respondent No. 1 placed reliance on the judgments passed by the Delhi HC in the cases of ***Alupro Building Systems Private Limited v. Ozone Overseas Private Limited [(2017) SCC OnLine Del 7228]***, ***Shriram Transport Finance Company Limited v. Narender Singh [(2022) SCC OnLine Del 3412]*** and the Haldiram Case, wherein the Delhi HC had held that a petition cannot be entertained in the absence of issuance of the notice invoking arbitration under Section 21 of the Act.

The Respondents submitted that the Petitioners had no cause of action as the act of Respondent No. 1 was neither illegal nor arbitrary. At the time of sanctioning the home loan, the BPLR for the said home loan was erroneously mentioned in the sanction letter as 17.75% (instead of the correct BPLR of 18.10%), owing to a technical error. The Respondent No. 1 had sought to correct this error by way of its letter dated September 6, 2019, addressed to the Petitioners. Therefore, it was wrong for the Petitioners to contend that there was a unilateral modification of the contract.

Contentions of Respondent No. 2:

Respondent No. 2 argued to the limited extent of submitting that it had nothing to do with the dispute relating to the Loan Agreement as it was not a party to the said agreement and that the arbitration clause in the Tripartite Agreement could not have been invoked for reference of disputes arising out of the home loan advanced to the Petitioners.

Observations of the Delhi HC

While determining on the issue on whether the dispute arising under the Loan Agreement was integrally connected to the Tripartite Agreement, the Delhi HC observed that a substantial part of the Tripartite Agreement dealt with the terms of repayment of the home loan, albeit there was a separate Loan Agreement. Hence, the Delhi HC observed that the Tripartite Agreement was the main/ umbrella agreement between the Petitioners, Respondent No. 1 and Respondent No. 2 and that the Loan Agreement was inextricably connected with the Tripartite Agreement. Both agreements were interdependent and the payment of pre-EMIs/ EMIs and the liabilities of the Petitioners and Respondent No. 2 under the Tripartite Agreement were referable to the Loan Agreement. In Delhi HC's view, the non-payment of increased BPLR could possibly amount to breach of the Tripartite Agreement where under the unit of the Petitioners had been mortgaged in favour of Respondent No. 1 and thus both the agreements were inseparable and interconnected.

With respect to the issue on which of the two arbitration clauses were to be invoked, the Delhi HC referred to the judgement in the case of ***Olympus Superstructures Private Limited v. Meena Vijay Khetan and Others [(1999) 5 SCC 651]***, wherein the Hon'ble Supreme Court had come to a finding that when the disputes arising under the main agreement pertaining to the sale of flats were connected with the disputes arising from an interior design agreement, the arbitration clause in the main agreement would govern the parties. Hence, the Delhi HC observed that where there were two interlinked agreements, both of which contain different arbitration clauses, the two agreements should be read in harmony in order to determine the nature of the arbitral proceedings and the disputes should be resolved under the main or umbrella agreement.

With respect to the contention of Respondent No. 1 that the petition filed by the Petitioners was not maintainable as the Petitioners had failed to serve the mandatory notice invoking arbitration under Section 21 of the Act, the Delhi HC observed that the argument of the Petitioners that since the arbitration clause in the Tripartite Agreement envisaged unilateral appointment of the arbitrator, the exercise of sending an invocation notice was futile; was unsustainable in law. The Delhi HC observed that even when the agreement provides for unilateral appointment of the arbitrator, it does not exempt a party from adhering to the notice requirement stipulated under Section 21 of the Act.

The Delhi HC further observed that the plain reading of Section 11(6) of the Act suggests that only when the agreed procedure does not lead to appointment of an arbitrator, on account of failure on the part of either party, the jurisdiction of a court can be invoked under Section 11(6) of the Act. Moreover, a reading of Section 21 of the Act makes it clear that for commencement of arbitral proceedings, either party must make a request to the other party for reference of the dispute to arbitration.

The Delhi HC observed that the Haldiram Case relied upon by the Petitioners did not support the Petitioners' argument as the said case in no way suggested that the mandatory notice under Section 21 of the Act can be dispensed with. In view of the same, the Delhi HC observed that the notice under

Section 21 of the Act could not have been dispensed with as a pre-requisite while invoking jurisdiction of the court under Section 11(6) of the Act. The Delhi HC also rejected the argument of the Petitioners that the e-mail sent by it wherein it had stated about the need for third-party assistance to resolve the dispute would tantamount to a notice invoking arbitration under Section 21 of the Act. The Delhi HC observed that a notice invoking arbitration must invoke arbitration clearly and at the very least, refer to the clause in the contract which envisages reference of the dispute to arbitration. Thus, in the absence of a notice invoking arbitration under Section 21 of the Act, the Delhi HC could not exercise jurisdiction under Section 11(6) of the Act.

Decision of the Delhi HC

In view of the entirety of the above, the Delhi HC rejected Respondent No. 1's contention that the Delhi HC lacked jurisdiction over the matter and held that the Petitioners could invoke the arbitration clause in the Tripartite Agreement for reference of disputes to arbitration.

However, the Delhi HC found merit in the objection raised by Respondent No. 1 that in the absence of a notice invoking arbitration under Section 21 of the Act, the Delhi HC could not exercise jurisdiction under Section 11(6) of the Act. Therefore, while the petition filed by the Petitioners was dismissed, the Delhi HC clarified that such dismissal would not preclude the Petitioners from invoking the arbitration clause under the Tripartite Agreement for reference of disputes to arbitration, in accordance with law.

VA View: Through this judgement, the Delhi HC has clarified that when disputes under two connected agreements have different arbitration clauses, the disputes should be resolved under the main or umbrella agreement and the arbitration clause contained therein should be given primacy over the arbitration clause contained in the other agreement.

The Delhi HC has also reiterated that for commencement of arbitral proceedings, either party must make a request to the other party for reference of the dispute to arbitration by sending a notice under Section 21 of the Act. The Delhi HC has rightly observed that only when the agreed upon procedure of an agreement does not lead to appointment of an arbitrator, on account of failure on the part of either party, the jurisdiction of a court can be invoked under Section 11(6) of the Act. Therefore, invocation of court's jurisdiction under Section 11(6) of the Act presupposes initiation of procedure agreed upon by the parties under the arbitration clause. Moreover, even when the agreement provides for unilateral appointment of the arbitrator, it does not exempt a party from adhering to the notice requirement mandated under Section 21 of the Act.

III. Supreme Court: Admission of claims after the resolution plan has been accepted by CoC would result in making CIRP prolonged and inefficacious.

The Supreme Court has, *vide* its judgement dated September 11, 2023, in the case of ***RPS Infrastructure Limited v. Mukul Kumar and Another [CA No. 5590/2021]***, held that the admission of claims after the resolution plan has been accepted by Committee of Creditors ("**CoC**") would result in making the Corporate Insolvency Resolution Process ("**CIRP**"), an endless process.

Facts

M/s. RPS Infrastructure Limited ("**Appellant**") entered into an agreement with M/s. KST Infrastructure Private Limited ("**Corporate Debtor**") on August 2, 2006, for the purpose of development of land situated at Faridabad, Haryana licensed with the Appellant. However, the Appellant sought arbitration on May 2, 2011, after being aggrieved by the Corporate Debtor's alleged misconduct pertaining to the advertisement of the project under its own name and without mentioning the name of the Appellant. The arbitral proceedings resulted in an award dated August 8, 2016, in favour of the Appellant. Aggrieved by the award, the Corporate Debtor filed a petition under Section 34 (*Application for setting aside arbitral awards*) of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"), on September 26, 2016.

The Appellant filed execution proceedings in respect of the said award which was ultimately adjourned *sine die* on December 22, 2017, due to the pendency of the arbitration proceedings. The arbitration proceedings upheld the award along with some modifications, on April 25, 2019. An appeal was filed against the said order under Section 37 (*Appealable orders*) of the Arbitration Act which was pending and meanwhile, CIRP was initiated against the Corporate Debtor in respect of its 3 real estate projects by certain homebuyers who had invested in the said projects. The CIRP application was admitted by National Company Law Tribunal, Delhi ("**NCLT**") on March 3, 2019. On March 3, 2019, the interim resolution professional ("**IRP**") was appointed who invited the claims from the creditors by issuing a public announcement as per Section 15 (*Public announcement of corporate insolvency resolution process*) of the Insolvency and Bankruptcy Code, 2016 ("**IBC**") read with Regulation 6 (*Public announcement*) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("**IBBI Regulations**") on March 30, 2019. The IRP was replaced by the CoC on June 18, 2020, and Mr. Mukul Kumar ("**Respondent**") was appointed as the resolution professional of the Corporate Debtor.

The resolution plan submitted by KST Whispering Heights Residential Welfare Association was approved by the CoC by a majority vote of 80.74% on July 11, 2020, and was sent to NCLT for approval under Section 31 (*Approval of resolution plan*) of IBC on September 8, 2020. The Appellant *vide* an e-mail to Respondent dated August 19, 2020, highlighted their pending claim of INR 35,67,05,337 against the Corporate Debtor arising from the arbitral award which was confirmed with certain modifications during the proceedings under Section 34 of the Arbitration Act. The claim was rejected by the Respondent on August 25, 2020, citing that the time period for submitting the claim was within 90 days from initiation of CIRP and the Appellant was 287 days late and the resolution plan has already been approved by the CoC.

The Appellant filed an application under Section 60(5) (*Adjudicating Authority for corporate persons*) of IBC before NCLT seeking direction to the Respondent and for admission of its claim. This relief was

granted to the Appellant by NCLT *vide* an order dated November 3, 2020, on the grounds that the claim would have appeared in the Corporate Debtor's books of accounts and in case such books of accounts were not available, it was the duty of Respondent to obtain them and verify the financial position and it was likely that the Appellant would have missed the public announcement for inviting claims as it was issued through newspapers.

An appeal was filed under Section 61 (*Appeals and Appellate Authority*) of IBC before the National Company Law Appellate Tribunal, New Delhi ("**NCLAT**") against the order of NCLT on the grounds that the potential consequences of allowing such a belated claim would severely affect the CIRP. NCLAT, *vide* its order dated July 30, 2021 ("**Impugned Order**"), held that the Respondent had done proper service of inviting claims in accordance with Regulation 6 of IBBI Regulations which only mandates a pronouncement through newspaper. It was also held by the NCLAT that the Appellant failed to show that it filed its claim as soon as it came to know of the initiation of the CIRP. Additionally, if the new claims are entertained, the resolution plan as approved by CoC would be jeopardized.

Aggrieved by the Impugned Order, the Appellant approached the Supreme Court.

Issue

Whether claims can be admitted after the acceptance of the resolution plan by CoC.

Arguments

Contentions of the Appellant:

It was contended by the Appellant that the award was a contingent claim as the proceedings under Section 37 of Arbitration Act was pending before the High Court of Punjab and Haryana. The Appellant also submitted that there ought to be a provision for contingent claims in the resolution plan, as held in the case of ***State Tax Officer v. Rainbow Papers Limited [Civil Appeal No. 1661 of 2020]***.

It was also contended by the Appellant that the timeline provided under Section 12 (*Time-limit for completion of insolvency resolution process*) of IBC is directory in nature. Further, since the resolution plan has not been approved by the Adjudicating Authority, the claim of the Appellant should have been included by the Respondent as a contingent liability.

The Appellant also put forth its lack of awareness as the Corporate Debtor did not disclose the commencement of CIRP, either during the pendency of the proceedings under Section 34 of the Arbitration Act or in the appeal under Section 37 of the Arbitration Act.

Contentions of the Respondent:

It was contended by the Respondent that the Appellant had deemed knowledge of the CIRP since the applicable procedure for inviting claims under IBC and IBBI Regulations were followed.

The Respondent also contended that the floodgates of litigation would be opened if the Appellant's belated claim was allowed. In order to substantiate its argument, the Respondent relied on the case of ***Committee of Creditors of Essar Steel India Limited through Authorised Signatory v. Satish Kumar Gupta and Others***, ***[Civil Appeal No. 8766-67 of 2019]***, wherein it was held by the Supreme Court that

a successful resolution applicant cannot be faced with undecided claims after the resolution plan has been accepted.

It was urged by the Respondent that no arrangement for contingent claims should be made as the preparation of the resolution plan has been done in line with the information memorandum which is comprehensive and takes due care of the claims of the homebuyers.

Observations of the Supreme Court

The Supreme Court observed that there was no fault on the part of the Respondent except that the Respondent should have made effort to locate the liabilities pertaining to the said award from the records of the Corporate Debtor.

As the Corporate Debtor is a commercial entity, it was also observed by the Supreme Court that the pendency of litigation against the Corporate Debtor is an undoubtable fact. Therefore, the Appellant should have been vigilant to identify if the Corporate Debtor was undergoing CIRP.

The Respondent did the needful what could be done to procure the Corporate Debtor's records and even moved an application under Section 19 of IBC. A public announcement of CIRP through newspaper is mandated under Section 15 of IBC and Regulation 6 of the IBBI Regulations and it would result in constituting deemed knowledge of the Appellant. Therefore, the plea of not being aware of newspaper pronouncements does not stand valid.

Decision of the Supreme Court

In view of the entirety of the above, it was held by the Supreme Court that after the acceptance of the resolution plan, the fresh claim cannot be admitted and the hydra-headed monster of undecided claims cannot be unleashed on the resolution applicant.

VA View: CIRP is a time-bound process which may be extended in certain circumstances and varies from case-to-case based on the different facts and circumstances of the case. In the present case, the claim filed by the Appellant was 287 days late which depicts the lapses on the part of the Appellant.

This judgement has led to the establishment of a much-needed precedent which contemplates that no admission of claims should take place once the resolution plan has been accepted by CoC as admission of further claims would make the CIRP perpetual. This judgment makes it clear that the potential consequences of allowing such a belated claim after the approval of the resolution plan by the CoC would set the clock back on the CIRP and thus making the entire CIRP, never ending and inefficacious.

IV. Supreme Court: No absolute or unfettered discretion on the part of liquidator to cancel an auction which is otherwise valid.

The Hon'ble Supreme Court of India ("**SC**") has, by its judgment dated September 6, 2023, in the matter of ***Eva Agro Feeds Private Limited v. Punjab National Bank and Another***, held that the mere expectation of the liquidator, that a higher price can be attained, can be no good ground to cancel an otherwise valid auction and go for another round of auction.

Facts

Huvepharma Sea (Pune) Private Limited filed an application against M/s. Amrit Feeds Limited ("**Corporate Debtor**") under Section 9 (*Application for initiation of corporate insolvency resolution process by operational creditor*) of the Insolvency and Bankruptcy Code, 2016 ("**Code**"). The National Company Law Tribunal, Kolkata Bench ("**NCLT**") approved the application, allowing the corporate insolvency resolution process to begin. Eva Agro Feeds Private Limited ("**Appellant**") submitted a bid for the subject property of the Corporate Debtor, which included lands measuring total of 105,250.40 sq. ft. ("**Subject Property**").

The Appellant who was the successful auction purchaser received an E-auction certificate on July 20, 2021 from the liquidator of the Corporate Debtor ("**Respondent No. 2**") certifying that the Appellant had won the auction for the Subject Property. Further, Mr. Vijay Kumar Ghidia, a director and principal shareholder of the Appellant, is also the maternal uncle of Mr. Harish Bagla who is the director of Appellant. He was also an ex-managing director of the Corporate Debtor.

On July 21, 2021, the Appellant received another e-mail from Respondent No. 2 regarding the cancellation of the E-auction certificate dated July 20, 2021 under clause 3(k) of the disclaimer clause of the E-auction - Process Information Document ("**E-auction Sale Notice**") thereby informing that the auction of the Subject Property will be done by a fresh E-auction. Aggrieved by the cancellation of the E-auction, the Appellant filed an application with NCLT under Section 60 (*Adjudicating Authority for corporate persons*) and related provisions of the Code and the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 ("**Regulations**"). On August 12, 2021, NCLT disposed of the application by directing Respondent No. 2 to send a communication to the Appellant requiring them to deposit the balance sale consideration within the specified time.

The Appellant deposited the balance of consideration money with Respondent No. 2 and received a sale certificate from Respondent No. 2. Pursuant to which Punjab National Bank ("**Respondent No. 1**") filed an appeal before the National Company Law Appellate Tribunal, New Delhi ("**NCLAT**") under Section 61 (*Appeals and Appellate Authority*) of Code against the order dated August 12, 2021 passed by the NCLT.

NCLAT, *vide* its order dated November 20, 2021, set aside the order dated August 12, 2021 passed by the NCLT and gave liberty to Respondent No. 2 to initiate the fresh E-auction process ("**Impugned Order**").

Aggrieved by the Impugned Order, the Appellant filed an appeal before the SC under Section 62 (*Appeal to Supreme Court*) of the Code.

Issues

1. Whether Respondent No. 2 can cancel the E-auction certificate before the completion of the actual sale, without giving proper reasoning.

2. Whether the promoter of the Appellant, who was the co-founder of the Corporate Debtor but resigned a decade ago, can fall within the ambit of a 'related party' under the Code.

Arguments

Contentions of the Appellant:

The Appellant submitted that Respondent No. 2 had cancelled the auction sale without giving any proper reasoning or justification, which is arbitrary. The Appellant was the sole and the highest bidder and its bid amount matched the reserve price mentioned in the E-auction Sale Notice. Respondent No. 2 cannot go for a fresh auction keeping the reserve price at the same amount of INR 10 crores which was the bid offered by the Appellant and accepted by Respondent No. 2.

The Appellant further submitted that Respondent No. 1 construed clause 3(k) of the E-auction Sale Notice to suggest that because the full amount had not been paid, it was entitled to use the clause and terminate the offer. Given the entire structure of the Regulations, such a claim is completely implausible. Respondent No. 2 provided no explanation for cancelling the auction procedure.

Further, the promoter of the Appellant retired from the Corporate Debtor in the year 2011 and was no longer connected or associated with the Corporate Debtor or involved in the affairs of the Corporate Debtor and therefore does not fall within the definition of the 'related party' as defined under the Code. The Appellant has placed reliance on the judgement of ***Swiss Ribbons Private Limited and Another v. Union of India and Others, [(2019) 4 SCC 17]*** in which the court had held that in order to attract disqualification under Section 29A (*Persons not eligible to be resolution applicant*) of the Code, the relationship must be proximate. Therefore, the Appellant is not disqualified under Section 29A of the Code.

Contentions of the Respondents:

The contention of the Respondent No. 1 was that as per Clause 3(k) of the E-auction Sale Notice, the Respondent No. 2 has the absolute right to accept, reject, adjourn, postpone, or cancel any bids at any stage without assigning any reason. There has been no bar under the Code or the Regulations which restrains the Respondent No. 2 from cancelling an auction sale before the completion of the actual sale.

Respondent No. 2 decided to cancel the E-auction certificate in order to explore the possibility of further price enhancement of Subject Property. It was also submitted by the Respondent No.1 that the promoter of the Appellant was also the founding promoter of the Corporate Debtor so the sale of the Subject Property could not be conducted in favour of a related party of the Corporate Debtor as per Section 29A of the Code.

Observations of SC

SC held that a mere expectation of the Respondent No. 2, that a still higher price may be obtained, can be no good ground to cancel an otherwise valid auction and go for another round of auction. SC observed that as per the provisions of Schedule-I, more particularly paras 1(11) to (13) of the Regulations, a view may be taken that ordinarily the highest bid may be accepted by the Respondent No. 2 unless there are statutory infirmities in the bidding or the bidding is collusive in nature or there is an element of fraud in the bidding process.

Respondent No. 2 must apply his mind to the relevant factors if he does not want to accept the bid of the highest bidder and such application of mind must be visible or manifest in the rejection order itself. SC emphasized the importance and necessity of furnishing reasons while taking a decision affecting the rights of parties, since it is incomprehensible that an administrative authority can take a decision without disclosing the reasons for taking such a decision.

Furthermore, after considering Sections 5(24) (*Definitions*) and 29A(g) of the Code, SC stated that it is obvious that a person who is a relative of the individual or a relative of the individual's spouse would be a 'related party' in relation to that individual. Aside from that, a 'related party' in respect of an individual is a private or public firm in which the individual is a director and possesses more than 2% of its share capital or paid-up share capital with relatives. Furthermore, according to the explanation, both maternal and paternal uncles would fall within the concept of 'related party'.

While relying on the judgement in ***Swiss Ribbons Private Limited and Another v. Union of India and Others, [(2019) 4 SCC 17],*** the SC further held that the terms 'related party' and 'relative' in the defining sections must be understood in conjunction with the groups of people stated in Explanation I under Section 29A of the Code. As a result, it would only contain those associated with the resolution applicant's firm. As a result, the term 'connected person' would also include someone who manages or controls the Corporate Debtor's business during the resolution plan's implementation.

Thus, SC also observed that the disqualification sought to be attached to the Appellant is without any substance as the promoter of the Appellant had ceased to be at the helm of affairs of the Corporate Debtor more than a decade ago and he was not in charge of the Corporate Debtor or an influential member of the Corporate Debtor when the Appellant had made its bid pursuant to the E-auction Sale Notice.

Decision of SC

It was held that NCLAT was not justified in setting aside the order of the NCLT dated August 12, 2021. Consequently, SC set aside the Impugned Order and restored the order of NCLT dated August 12, 2021. The appeal was accordingly allowed.

VA View:
SC has upheld the order of the NCLT and further held that there were no objective materials before the Liquidator to cancel the auction process and to opt for another round of auction.

It is in an administrative framework governed by the rule of law that there can be no absolute or unfettered discretion of the Liquidator to cancel an auction which is otherwise valid. Further, as the Liquidator is vested with a host of duties, functions, and powers to oversee the liquidation process in which he is not to act in any adversarial manner, while ensuring that the auction process is carried out in accordance with law and to the benefit of all the stakeholders. Merely because the Liquidator has the discretion of carrying out multiple auctions, it does not necessarily imply that he would abandon or cancel a valid auction fetching a reasonable price and opt for another round of auction process with the expectation of a better price.

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