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Between the lines...

A BRIEFING ON LEGAL MATTERS OF CURRENT INTEREST

KEY HIGHLIGHTS

* **Bombay High Court:** NCLT has jurisdiction to direct Directorate of Enforcement to release attached properties of a corporate debtor.
* **Delhi High Court:** Designation of seat of arbitration is similar to an exclusive jurisdiction clause.
* **Bombay High Court:** Orders issued by banks and financial institutions while declaring a wilful defaulter must be reasoned orders.
* **Supreme Court:** Workers who are engaged in the performance of work which is perennial or permanent in nature would not be classified as contractual workers.

I. Bombay High Court: NCLT has jurisdiction to direct Directorate of Enforcement to release attached properties of a corporate debtor.

On March 1, 2024, the High Court of Bombay ("**Bombay High Court**") pronounced a judgment in the matter of ***Mr. Shiv Charan and Others v. Adjudicating Authority under the Prevention of Money Laundering Act, 2002 and Another [Writ Petition (L) No. 9943 of 2023]*** and ***Directorate of Enforcement, Government of India v. Mr. Shiv Charan and Others [Writ Petition (L) No. 29111 of 2023]***. The Bombay High Court has held that the Adjudicating Authority under the Insolvency and Bankruptcy Code, 2016 ("**IBC**") is well within its jurisdiction in directing the Directorate of Enforcement ("**ED**") to release the attached properties of a corporate debtor.

Facts

DSK Southern Projects Private Limited ("**Corporate Debtor**") had been undergoing corporate insolvency resolution process ("**CIRP**") under IBC since December 9, 2021. A resolution plan submitted by Mr. Shiv Charan, Ms. Pushpalata Bai and Ms. Bharti Agarwal ("**Resolution Applicants**") was approved by the National Company Law Tribunal, Mumbai ("**NCLT**") by its order dated February 17, 2023 under Section 31 (*Approval of resolution plan*) of IBC ("**Approval Order**").

Prior to the commencement of CIRP of the Corporate Debtor, on October 20, 2017, various first information reports were filed against the Corporate Debtor and its erstwhile promoters, *inter alia*, alleging offences of cheating and criminal breach of trust. Considering that the alleged offences were prima facie "scheduled offences" under the Prevention of Money Laundering Act, 2002 ("**PMLA**"), the ED filed an enforcement case information report being ECIR/01/MZBO-II/2018 dated March 8, 2018 ("**ECIR**"). As per the ECIR, the estimated "proceeds of crime" was to the tune of INR 8,522.27 Crores. Pursuant thereto, an original complaint was filed by the ED, *inter alia*, leading to attachment proceedings against the assets of the Corporate Debtor. More particularly, four bank accounts of the Corporate Debtor with an aggregate balance of INR 3,55,298/- and 14 flats constructed by the Corporate Debtor valued at INR 32,47,55,298/- were attached ("**Attached Properties**").

Initially, a provisional attachment was levied on February 14, 2019 under Section 5 (*Attachment of property involved in money-laundering*) of PMLA, which was subsequently continued by a confirmatory order dated August 5, 2019 passed by the Adjudicating Authority. The attachment continued even after the commencement of CIRP of the Corporate Debtor and further after the approval of resolution plan. Such continuation of attachment even after the approval of resolution plan led to filing of Writ Petition (L) No. 9943 of 2023 by the Resolution Applicants. The writ petition sought quashing of the ECIR, orders attaching the Attached Properties and the original complaint, in so far as they related to the Corporate Debtor and its assets, especially in light of the Approval Order. Simultaneously, the ED filed Writ Petition (L) No. 29111 of 2023, thereby challenging the authority of NCLT to pass orders invoking Section 32A (*Liability for prior offences, etc.*) of IBC in a manner which, as per the ED, negates and defeats the purpose and provisions of PMLA. Notably, the ED had not sought quashing of the Approval Order, but had sought quashing of a subsequent order dated April 28, 2023 whereby NCLT had once again directed the ED to release the Attached Properties.

Issues

(i) Whether Adjudicating Authority has the jurisdiction to direct the ED to release the properties attached under PMLA by invoking Section 32A of IBC.

(ii) Whether Adjudicating Authority had exceeded its jurisdiction under Section 60(5) (*Adjudicating Authority for corporate persons*) of IBC by traversing beyond the domain of IBC and entering upon the domain of PMLA.

Arguments

Contentions of the ED:

The ED submitted that Resolution Applicants had other efficacious remedies available to them apart from invoking the writ jurisdiction of Bombay High Court and they ought not to have filed a writ petition. On the other hand, the ED did not have any other alternative remedy and therefore the writ petition filed by the ED is maintainable. The ED further contended that the Resolution Applicants had filed the application seeking release of Attached Properties, prior to the Approval Order, which was allowed by the NCLT on April 28, 2023. Further, it was contended that the Resolution Applicants have been misusing the writ jurisdiction of Bombay High Court as an execution court.

The ED submitted that Section 32A of IBC cannot be interpreted in a manner that defeats the special objectives behind enactment of PMLA and curtails the power of the ED to keep the properties attached under PMLA. Further, NCLT has no jurisdiction under Section 60(5) of IBC to transcend beyond the interpretation of the provisions of IBC and must refrain from venturing into other legislations.

The ED further contended that even prior to commencement of CIRP of Corporate Debtor, a provisional attachment on the assets of the Corporate Debtor was levied on February 14, 2019 under Section 5 of PMLA, which subsequently continued by a confirmatory order dated August 5, 2019 passed by the Adjudicating Authority under Section 8 of PMLA. Hence, it was in public knowledge that the Attached Properties were subject matter of attachment by the ED. As such, any person aggrieved by the aforesaid attachment had a statutory right to prefer appeal under Section 26(1) (*Appeal to Appellate Tribunal*) of PMLA and hence, efficacious remedy was already available under PMLA.

Contentions of the Resolution Applicants:

Resolution Applicants contended that Section 32A of IBC, being a non-obstante provision, would override the provisions of PMLA in the event of any inconsistency or conflict. It was further submitted that since the commencement of CIRP, the protection of moratorium will be triggered by virtue of Section 14 (*Moratorium*) of IBC. Thereafter, upon approval of resolution plan by Adjudicating Authority, jurisdiction of Section 32A of IBC would commence, as per which, no attachment can lie or continue against the property of the Corporate Debtor in relation to an offence committed prior to the commencement of CIRP of the Corporate Debtor, where such property is covered under a resolution plan approved by the Adjudicating Authority under Section 31 of IBC.

It was further contended that by virtue of Section 32A of IBC, there must be automatic vacation of attachment (if any) on the assets of the Corporate Debtor immediately after approval of resolution plan by NCLT, instead of the Resolution Applicants being compelled to knock on the doors of any forum to seek any positive grant of approval.

Resolution Applicants further contended that under the scheme of PMLA, any attachment can only be in the nature of interim measure that would enable the final measure of confiscation as provided under Section 8(5) of PMLA. However, by virtue of Section 32A of IBC, since the ultimate end of confiscation is protected, it is only natural and equitable that the interim measure of attachment must come to an end pursuant to approval of resolution plan.

Observations of the Bombay High Court

Bombay High Court examined the interpretation of Section 32A of IBC and observed that it is a non-obstante provision which comes into play only once a resolution plan is approved and such plan approval leads to a complete change in the character of ownership and control of the corporate debtor. Section 32A(1) of IBC provides that the liability of corporate debtor in respect of an offense committed prior to commencement of CIRP shall stand ceased, however not in a blanket or absolute manner, but subject change in management and control of the corporate debtor. It was further observed that even when the necessary ingredients of Section 32A(1) of IBC are met, it enables an automatic discharge qua the corporate debtor only and not qua any other person who was in management or control or was in any manner, in charge of, or responsible to, the corporate debtor for conduct of its business, or was associated with the corporate debtor in any manner, and directly or indirectly involved in the commission of the offense being prosecuted. Such others who are charged for the offense would continue to remain liable to prosecution. Further, Section 32A(2) of IBC also grants protection to the property of the corporate debtor from any attachment or restraint in the proceedings connected to the offense committed prior to commencement of CIRP. It provides that upon approval of resolution plan and a change in control and management, the property of the corporate debtor would get immunity from further prosecution of proceedings, which includes attachment, seizure, retention or confiscation of such property.

It was further observed that in the present case, NCLT had approved the resolution plan submitted by the Resolution Applicants in respect of the Corporate Debtor. Further, none of the Resolution Applicants were in charge of the Corporate Debtor or responsible for commission of alleged offence prior to the commencement of CIRP. Further, it was also not the case of the ED that Resolution Applicants were third parties who had aided or abetted the commission of alleged offences. In fact, the ED disputes the power of NCLT to rule upon the interpretation of Section 32A of IBC.

Further, Bombay High Court analyzed Section 31 of IBC and observed that proviso to Section 31(1) of IBC provides that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this sub-section, satisfy that the resolution plan has provisions for its effective implementation. Therefore, keeping in mind the aforesaid provision, NCLT is entitled to direct the ED to raise its attachment on the Attached Properties by virtue of Section 32A of IBC once resolution plan is approved. Hence, Bombay High Court dismissed the contention of the ED raising questions on the power of NCLT to direct the ED to raise its attachment on the Attached Properties after resolution plan approval.

In so far as jurisdiction of NCLT under Section 60(5) of IBC is concerned, Bombay High Court observed that it is a non-obstante provision and confers NCLT with wide jurisdiction and power to dispose of any question of law in relation to the resolution proceeding pertaining to a corporate debtor under the provisions of IBC. Therefore, in the present case, NCLT was entitled in terms of Section 60(5) of IBC to decide the issue pertaining to release of Attached Properties as envisaged under Section 32A of IBC. Further, Bombay High Court observed that both Sections 32A and 60(5) of IBC are non-

obstante provisions which operate notwithstanding anything contained in any other law, including PMLA. Further, it is not as if NCLT had transcended its boundaries and ventured into interpreting any provision of PMLA. On the contrary, NCLT has passed necessary orders to ensure compliance of Section 32A of IBC.

It was further observed that the jurisdiction of Section 32A of IBC commences when the protection of moratorium under Section 14 of IBC during CIRP ends, considering that the jurisdiction of Section 32A of IBC would not get attracted until resolution plan approval by NCLT. Bombay High Court observed that quasi-judicial authorities such as Adjudicating Authority under PMLA must take judicial notice of approval of resolution plan and therefore raise attachment in due compliance of Section 32A of IBC.

Bombay High Court further observed that Parliament while legislating Section 32A of IBC was fully aware of the provisions of PMLA and the legislative intent behind such enactment was that post approval of resolution plan of a corporate debtor by Adjudicating Authority under IBC, PMLA authority must raise attachment on the properties of the corporate debtor. Section 32A of IBC was introduced with effect from December 28, 2019 and the legislative intent was clear to give primacy to the provisions of IBC.

Decision of the Bombay High Court

In light of the above-mentioned observations, it was held that in the present case NCLT has the jurisdiction to direct the ED to release the Attached Properties. Further, NCLT is well within its jurisdiction to pass such an order under Section 60(5) of IBC to ensure compliance of Section 32A of IBC. It was held that upon approval of resolution plan by NCLT, the Attached Properties became free from attachment under PMLA by virtue of Section 32A of IBC. Further, the jurisdiction or effect of Section 32A of IBC commences only upon approval of resolution plan under the provisions of IBC.

Therefore, the Bombay High Court directed the ED to release the attachment in view of the approval of resolution plan. The Bombay High Court ruled that the attachment of Attached Properties by the ED came to an end in law on February 17, 2023, that is, the date of approval of resolution plan, by virtue of operation of Section 32A of IBC.

Accordingly, Bombay High Court was pleased to dispose of both the writ petitions.

VA View: Since the enactment of IBC, there have been multiple occasions and various conflicting judgments dealing with the question of primacy between the provisions of IBC and PMLA, in the event of inconsistency. However, the present judgment pronounced by the Bombay High Court is landmark and noteworthy in the sense that it explains and establishes the correct position of law in a clear and comprehensive manner.

Apart from giving a clear ruling which will go a long way in ensuring that similar questions are not put before the courts in future, this judgment explains in a lucid manner, the legislative intent behind enactment of Section 32A of IBC, which will stand defeated if a corporate debtor is not allowed to be taken over by a resolution applicant on a clean slate basis.

Therefore, this judicial pronouncement is a welcome step that will set the right precedent for quasi-judicial authorities such as the ED to automatically release attachment on the attached properties of a corporate debtor upon approval of resolution plan by virtue of operation of law, more specifically, Section 32A of IBC.

II. Delhi High Court: Designation of seat of arbitration is similar to an exclusive jurisdiction clause.

The Delhi High Court ("**Delhi High Court**"), in its judgement dated February 26, 2024, in the matter of ***My Preferred Transformation and Hospitality Private Limited v. Panchdeep Construction Limited [ARB.P. 847/2023]***, has held that the designation of seat of arbitration is akin to an exclusive jurisdiction clause. The Delhi High Court has emphasized that the clause in an agreement designating the seat of arbitration should take precedence and assume pre-eminence over the exclusive jurisdiction clause.

Facts

My Preferred Transformation and Hospitality Private Limited ("**Petitioner**") entered into a management services agreement, dated August 28, 2019, with Panchdeep Construction Limited ("**Respondent**") towards operating the Respondent's hotel in Howrah, West Bengal ("**Management Services Agreement**"). The Management Services Agreement contained an arbitration clause which referred any disputes between the parties to arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"). The clause designated New Delhi as the seat of arbitration whereas the jurisdiction clause conferred exclusive jurisdiction to the courts in Kolkata in all matters arising out of the Management Services Agreement.

The relevant arbitration and jurisdiction clauses of the Management Services Agreement are reproduced below:

"***10.1 Arbitration***: *Any dispute arising out of this Agreement and the obligation thereunder ("Dispute") shall be finally settled by arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any statutory modification or re-enactment thereof for the time being in force. The Parties agree that the Dispute shall be adjudicated by a mutually appointed single arbitrator.* ***The arbitration proceedings shall be conducted in English language and seat of arbitration shall be New Delhi****.*

10.2 Jurisdiction: subject to foregoing courts at Kolkata shall have exclusive jurisdiction in all matters arising out of this Agreement*."*

In response to the disputes that arose between the Petitioner and the Respondent, the Petitioner invoked arbitration by serving a legal notice, dated July 18, 2022, on the Respondent. The parties were unable to achieve consensus on the appointment of an arbitrator, therefore, Petitioner approached the Delhi High Court by filing an application under Section 11 (*Appointment of arbitrators*) of the Arbitration Act for the appointment of an arbitrator ("**Section 11 Petition**").

Issue

Whether the designation of New Delhi as the seat of arbitration conferred jurisdiction on the Delhi High Court to entertain the Section 11 Petition.

Arguments

Contentions of the Petitioner:

The Petitioner submitted that clause 10.1 of the Management Services Agreement clearly designated New Delhi as the seat of arbitration. The Petitioner also contended that the exclusive jurisdiction clause contained in clause 10.2 of the Management Services Agreement began with the words "*subject to foregoing*".

The Petitioner placed reliance on the decision of the division bench of the Bombay High Court ("**Bombay High Court**") in the case of ***Aniket SA Investments LLC v. Janapriya Engineers Syndicate Private Limited [2021(4) Mh.L.J.]*** ("**Aniket SA Case**"), wherein the Bombay High Court vested jurisdiction over the seat court as opposed to the court in which the parties had vested exclusive jurisdiction.

Contentions of the Respondent:

The Respondent contended that the jurisdiction to entertain the Section 11 Petition vests in the Calcutta High Court and not the Delhi High Court. The Respondent submitted that while the court having jurisdiction over the seat of arbitration would normally have exclusive jurisdiction over all matters arising from the arbitration proceedings, the jurisdiction for appointment of an arbitrator under Section 11 of the Arbitration Act is not be covered by this principle.

The Respondent relied on the judgements of the Hon'ble Supreme Court ("**SC**") in the cases of ***Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited [(2017) 7 SCC 678]*** ("**Indus Mobile Case**") and ***BGS SGS Soma JV v. NHPC Limited [(2020) 4 SCC 234]*** ("**BGS Soma Case**"), whereunder the SC held that the principle that designation of seat of arbitration is akin to an exclusive jurisdiction clause applied only to petitions for interlocutory relief under Section 9 (*Interim measures, etc., by Court*) of the Arbitration Act and for challenging arbitral awards under Section 34 (*Application for setting aside arbitral awards*) of the Arbitration Act.

The Respondent submitted that the proceedings under Section 11 of the Arbitration Act stands on a different footing as they do not deal with the '*subject matter of arbitration*' but rather merely deal with the appointment of the person tasked with resolving disputes.

The Respondent also relied upon the judgement of the Calcutta High Court in the case of ***Commercial Division Bowlopedia Restaurants India Limited v. Devyani International Limited [(2021) 1 Cal LT 138]*** ("**Commercial Division Case**") to suggest that, in any event, a forum selection clause would prevail over a seat selection clause in the context of domestic arbitration.

Observations of the Delhi High Court

The Delhi High Court observed that a plain reading of clauses 10.1 and 10.2 of the Management Services Agreement made it clear that New Delhi had been designated as the seat of arbitration. Further, the exclusive jurisdiction clause vesting exclusive jurisdiction in the courts at Kolkata commenced with the words "*subject to foregoing*". Therefore, there was no real conflict between the arbitration seat clause and the exclusive jurisdiction clause. The text of the Management Services Agreement itself made the exclusive jurisdiction clause subservient to the arbitration seat clause.

In Delhi High Court's view, the settled position of law with regard to exclusive jurisdiction of the seat court in matters arising out of an arbitration agreement applies equally to the appointment of an

arbitrator under Section 11 of the Arbitration Act and proceedings under Sections 9 or 34 of the Arbitration Act.

The Delhi High Court observed that in the Indus Mobile Case, the SC had held that unlike in a civil proceeding under the Code of Civil Procedure, 1908, the parties to an arbitration agreement have liberty to choose a neutral venue to be designated as the seat of arbitration. The SC also opined that in arbitration law, the moment the seat is determined, it would vest the seat courts with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of an agreement between the parties.

The Delhi High Court further observed that the contention of the Respondent, that the legal principle of exclusive jurisdiction being granted to the seat court was confined only to proceedings under Sections 9 and 34 of the Arbitration Act, was a wrong interpretation of the BGS Soma Case. Besides, the SC in the BGS Soma Case opined that "*pride of place is given to the juridical seat of the arbitral proceedings*." The Delhi High Court also observed that the facts of the Commercial Division Case, whereunder the Calcutta High Court had opined that in the context of domestic arbitration, a forum selection clause would prevail over a seat selection clause, did not apply to the facts of the instant case.

In Delhi High Court's view, to exempt proceedings under Section 11 of the Arbitration Act from the exclusive jurisdiction of the seat court, would be inconsistent with the concept of party autonomy and the availability of a neutral venue as the seat of arbitration. The Delhi High Court observed that to the extent that our jurisprudence recognizes that the parties can repose their faith in a seat, which would otherwise not have jurisdiction over the subject matter of the proceedings, it is imperative that the appointment of the arbitral tribunal must also be made by such a neutral court. Any other interpretation would denude the significance of the neutral venue, allowing parties to approach any court falling under the definition of "court", as defined in Section 2(1)(e) *(Definitions)* of the Arbitration Act, for the fundamental task of appointing the arbitrator.

The Delhi High Court further observed that in the Aniket SA Case, the exclusive jurisdiction clause was expressly "subject to" provisions of the arbitration clause, which designated Mumbai as the seat of arbitration and accordingly, the division bench of the Bombay High Court held that Mumbai had jurisdiction over the subject matter of the proceedings.

Decision of the Delhi High Court

In light of the above-mentioned observations, the Delhi High Court held that it had jurisdiction to entertain Section 11 Petition and referred the dispute between the Petitioner and the Respondent to arbitration to be held under the aegis of the Delhi International Arbitration Centre.

VA View: In this judgement, the Delhi High Court has rightly held that the exclusive jurisdiction of the seat court in matters arising from the arbitration agreement applies both to the appointment of an arbitrator under Section 11 of the Arbitration Act and to proceedings under Sections 9 and 34 of the Arbitration Act.

The Delhi High Court has rightly observed that as soon as the seat of arbitration has been designated, it is akin to an exclusive jurisdiction clause. This judgement has re-emphasized the well settled principle of law that an arbitration clause, pursuant to which a place has been determined as the 'seat', would vest the courts of such place with exclusive jurisdiction for the purpose of regulating the arbitral proceedings.

III. Bombay High Court: Orders issued by banks and financial institutions while declaring a wilful defaulter must be reasoned orders.

The Bombay High Court ("**Bombay High Court**"), *vide* its judgement dated March 4, 2024, in the case of ***Milind Patel v. Union Bank of India and Others [2024 SCC OnLine Bom 745]***, has held that banks and financial institutions must provide a reasoned order before declaring the occurrence of a wilful default by an entity or individual.

Facts

Mr. Milind Patel ("**Petitioner**") was a joint managing director in the whole-time employment of IL&FS Financial Services Limited ("**IFIN**"). IFIN and the Petitioner were served with a common show cause notice dated July 5, 2022 ("**SCN**") by the Union Bank of India ("**Union Bank**"), which had sanctioned credit limits to IFIN aggregating to INR 175 Crores. The SCN stated that Union Bank had formed a *prima facie* view that IFIN and the Petitioner deserved to be declared as wilful defaulters in connection with the facilities sanctioned to IFIN, alleging diversion and siphoning of funds by IFIN, amongst other reasons. There were certain references to specific amounts involved and number of instances of allegedly deviant conduct by IFIN. However, the SCN did not set out details of the Petitioner's involvement in the reasons, except for identification of the Petitioner as a noticee in his capacity as a "whole time director". No other whole time director or promoter was a noticee in the SCN.

The Reserve Bank of India ("**RBI**"), *vide* its master circular on wilful defaulters dated July 1, 2015 ("**Master Circular**"), provides that to declare a person as a wilful defaulter, the evidence of wilful default on the part of the borrower and its whole time director should be examined by an identification committee. If the identification committee concludes that wilful default has occurred, a show cause notice must be issued to the borrower and its whole-time director(s) and call for an explanation. After considering the submissions in reply, and providing an opportunity of being heard (should the identification committee feel such an opportunity is necessary), a reasoned order recording the wilful default must be issued. The order passed by the identification committee will be confirmed by the review committee. The Master Circular also states that it is 'imperative' for banks and financial institutions to put in place a transparent mechanism for the entire process so that the penal provisions are not misused and the scope of such discretionary powers are kept to the bare minimum.

In the present case, Union Bank did not enclose any of the material or records in the SCN. Therefore, the Petitioner sought a copy of the material available with Union Bank, *vide* a letter dated July 12, 2022. The Petitioner also made submissions on the scope of his responsibilities in IFIN to state that since March 2014, his role fundamentally changed from overseeing lending business to overseeing equity investments and advisory operations. The Petitioner did not get a response to this request, however, Union Bank issued a hearing notice to the Petitioner, giving him an opportunity of being heard. The Petitioner reiterated his request for the underlying documents, information and other material, in order to effectively deal with the allegations contained in the SCN, however, it was not responded by Union Bank. On August 5, 2022, the Petitioner participated in a personal hearing, and on August 15, 2022, filed his written submissions pursuant to the personal hearing.

On February 28, 2023, Union Bank issued the final order passed by the review committee ("**Final Order**") to confirm that the Petitioner has been identified as a wilful defaulter. The Final Order asserted that the identification committee had passed an order at its meeting held on August 5, 2022 and that

such order had been conveyed to the Petitioner on September 8, 2022. Therefore, the identification committee did not consider the detailed written submissions made by the Petitioner on August 15, 2022.

Further, *vide* a letter dated November 2, 2023, the Petitioner protested against non-receipt of the identification committee's draft order and asserted that the Final Order was in violation of the inherent safeguards contained in the Master Circular, and the basic principles of natural justice had been violated. The Petitioner, therefore, sought rescission of the Final Order, and sought an opportunity of personal hearing before the review committee, after being served with draft order of the identification committee. There was no response from Union Bank to these requests from the Petitioner.

Therefore, aggrieved by the order of the identification committee and the Final Order, the Petitioner filed a writ petition before the Bombay High Court, seeking intervention, *inter alia*, by way of a declaration that all documents referred to and relied upon in the SCN ought to be provided and seeking the quashing of the Final Order.

Issue

Whether the order passed by the identification committee and the Final Order were in accordance with the Master Circular and sustainable under law.

Arguments

Contentions of the Petitioner:

The Petitioner argued that he was not served with a copy of the draft order prepared by the identification committee and despite several requests, was not provided with underlying documents, information and other material based on which the orders were passed by the identification committee and the review committee.

Contentions of Union Bank:

Union Bank argued that it was not obligated to provide any material to prove its allegations and that the onus was on the Petitioner to prove his innocence.

Observations of the Bombay High Court

Bombay High Court, without going into the merits of whether IFIN, and thereby the Petitioner, are guilty of committing wilful defaults, observed that RBI has mandated that the evidence of wilful default must be examined by the bank. The Bombay High Court noted that in proceedings that can inflict serious civil consequences on any citizen, the noticee should be able to appreciate the case made out against him so that he may deal with the allegations to the best of his ability. The only means of doing so is to provide detailed and proper notice of the reasons for having formed a *prima facie* view when calling upon the noticee to show cause why such *prima facie* view must not translate into a final view.

Bombay High Court cited the case of ***T. Takano v. Securities and Exchange Board of India and Another [(2022) 8 SCC 162]*** ("**Takano judgement**") where the Supreme Court has summarized the relevance of disclosure of information and records underlying the allegations. The Supreme Court observed that disclosure of information serves 3 purposes; first is reliability, as it aids the courts in

determining the truth of the contentions of the parties. Second is fair trial, as it allows the parties to effectively participate in the proceedings. Third is transparency and accountability, since the principles of fairness and transparency of adjudicatory proceedings are the cornerstones of the principle of open justice. The Supreme Court has observed that as a default rule, all relevant material must be disclosed.

Bombay High Court observed that the Takano judgement throws light on how the Master Circular must be construed. The avoidance of information asymmetry and the means of ensuring transparency as outlined in Takano judgement would necessarily mean that principles of natural justice, including the need to provide the underlying material, are inherent and implicit in the process stipulated under the Master Circular. Bombay High Court noted that the objective of the proceedings initiated by issuance of a show cause notice is to arrive at the truth as to whether or not an individual in question is to be subjected to penal consequences. Bombay High Court further noted that fair and transparent symmetrical access to information would mean providing access to not only incriminating material but also exculpatory material, since all such information would be relevant for arriving at the truth.

Bombay High Court further observed that while IFIN may have been declared a wilful defaulter, there is no analysis of evidence at the relevant time demonstrating the role of the Petitioner for holding him to be individually responsible. In these circumstances, it was evident that the Final Order, which was a near-verbatim reproduction of the SCN, was against the constitutional protections available under the rule of law in India and in violation of the 'imperative' requirements of transparency stipulated by in the Master Circular.

Decision of the Bombay High Court

Bombay High Court ordered Union Bank to consider recalling the order of the identification committee and the Final Order, with liberty to conduct the proceedings afresh from the stage of the SCN, after providing proper access to the relevant material to the Petitioner. The Petitioner will then be at liberty to submit a fresh reply to the SCN, after which a reasoned draft order may be issued by the identification committee. Bombay High Court also ordered Union Bank to serve the draft order of the identification committee on the Petitioner. Thereafter, a reasoned final order may be passed by the review committee, if it is found that there has been a wilful default attributable to the Petitioner. Bombay High Court ruled that the banks and financial institutions that seek to invoke the Master Circular, must identify the members of the identification committee and the members of the review committee, and share the reasoned orders passed by such committees.

Further, Bombay High Court also directed the agencies who have published the name of the Petitioner identifying him as a wilful defaulter to forthwith remove such identification from publicly accessible information resources.

VA View: The Master Circular provides that it is 'imperative' for banks and financial institutions to put in place a transparent mechanism while declaring occurrence of wilful default to ensure that the penal provisions are not misused and the scope of such discretionary powers are kept to the bare minimum.

In light of the same, Bombay High Court has rightly ruled that banks should be transparent with alleged defaulters, and provide all the relevant facts that would form the basis of determination of a wilful default. The absence of transparency would render the exercise of discretion to be arbitrary. Therefore, in accordance with the rule of law, banks must pass a reasoned order in such cases.

IV. Supreme Court: Workers who are engaged in the performance of work which is perennial or permanent in nature would not be classified as contractual workers.

The Supreme Court, *vide* its judgement dated March 12, 2024, in the case of ***Mahanadi Coalfields Limited v. Brajrajnagar Coal Mines Workers' Union [Civil Appeal No(s). 4092-4093/2024]***, has held that the workers who are engaged in the performance of work which is perennial or permanent in nature would not be classified as contractual workers.

Facts

Mahanadi Coalfields Limited ("**Appellant**"), a subsidiary of Coal India Limited, floated a tender for the transportation of crushed coal and selected a successful contractor for performance of the National Coal Wage Agreement-IV ("**Agreement**") for the period of 1984-94. The contractor engaged 32 workmen for the execution of the Agreement. The Brajrajnagar Coal Mines Workers' Union ("**Respondent**") sought permanent status for the workmen engaged by the contractor and reliance was placed on clauses 11.5.1 and 11.5.2 of the Agreement, wherein it was agreed that contract labour should not be engaged by the employer with respect to those jobs which are permanent and perennial in nature. The Agreement also provided that such permanent and perennial jobs should be executed through regular employees. Following the representation of the Respondent, a notice was sent to the Appellant by the Assistant Labour Commissioner for conciliation. The conciliation process eventually culminated in a settlement dated April 5, 1997, under Rule 58 (*Memorandum of settlement*) of the Industrial Disputes (Central) Rules, 1957, wherein regularisation for 19 workers took place as their nature of work was held to be permanent and perennial in nature since they were engaged in bunker for operating chutes. 13 workers remained unregularized as the nature of their work was considered as purely casual which was not prohibited under Contract Labour (Regulation & Abolition) Act, 1970.

In view of the fact that the settlement is limited to only 19 workmen, the entire dispute was referred by the Central Government to the Industrial Tribunal, Rourkela, Odisha ("**Industrial Tribunal**"), under Sections 10 (*Reference of disputes to Boards, Courts, or Tribunals*) and (2A)(1)(d) (*Dismissal, etc., of an individual workman to be deemed to be an industrial dispute*) of the Industrial Disputes Act, 1947 ("**Industrial Disputes Act**"). The industrial dispute was allowed by the Industrial Tribunal, order dated May 23, 2002 which directed the regularization of the remaining 13 workmen and held that the work of removing spillages in the railway siding, below the bunker and operation of chutes in the bunker are regular and perennial in nature.

Aggrieved by the judgement of the Industrial Tribunal, the Appellant filed a writ petition before the Orissa High Court. Orissa High Court dismissed the writ petition and upheld the decision of the Industrial Tribunal by taking into consideration the nature of work performed by the workers. Additionally, the Orissa High Court also dismissed the review petition filed by the management. Therefore, being aggrieved by the order of the Orissa High Court, the Appellant filed the present appeal before the Supreme Court.

Issue

Whether the workers working in a perennial or permanent nature of work would be treated as contractual workers.

Arguments

Contentions of the Appellant:

It was contended by the Appellant that the award passed by the Industrial Tribunal is bad in law and the settlement was binding on the parties due to Section 18(1) (*Persons on whom settlements and awards are binding*) read with Section 36 (*Representation of parties*) of the Industrial Disputes Act and it also continues to be binding on the parties by virtue of Section 19(2) (*Period of operation of settlements and awards*) of the Industrial Disputes Act, since the said settlement was never terminated.

The Appellant submitted that the nature of works being performed by the workers was verified before reaching to the settlement. It was found that 19 workers were performing perennial and permanent work and the work of the remaining 13 workers was 'casual' in nature.

It was contended by the Appellant that the only provision under which regularization could be claimed would be Section 25F (*Conditions precedent to retrenchment of workmen*) of the Industrial Disputes Act, which would have no application in the present case since the workmen worked under the supervision of a contractor and not the Appellant.

It was also contended by the Appellant that the Industrial Tribunal had wrongly directed the Appellant to disburse back-wages to the 13 workers as it is contrary to the settled principle which states that the grant of back-wages can never be automatic or a natural consequence of regularization. The Appellant relied on the judgement in the case of ***J.K. Synthetics Limited v. K.P. Agrawal and Another [(2007) 2 SCC 433]*** to support its contention that the workers who are seeking regularization and back-wages had an onus to prove that they were not gainfully employed.

Contentions of the Respondent:

It was contended by the Respondent that all 32 workers were engaged in works which were similar in nature and the workers were arbitrarily deprived of regularization, wherein certain workers from the bunker and the plant were left out of the settlement without any reason. Additionally, it was also argued that the work which was performed by the workers in the railway siding was perennial and regular in nature and similar to the work performed in the bunker.

The Respondent also relied on the evidence of the personal manager and the project officer in the Appellant company who admitted that the removal of spilled coal from the railway siding, the bunker and the coal handling plant was regular and perennial in nature. Therefore, the 13 workers who were not regularised also actively participated in tasks deemed regular and perennial.

The Respondent submitted that since there was no resolution of the claim of regularization of similarly placed workers, they have the right to pursue the remedy under the Industrial Disputes Act. It is submitted that Rule 58 of the Industrial Disputes (Central) Rules, 1957, under which the settlement occurred, nowhere posed a legal obstruction to the remedy.

The Respondent also submitted that the 13 workmen who were not regularised suffered without any fault of theirs and therefore an order of regularisation must naturally lead to grant of consequential back-wages.

Observations of the Supreme Court

The Supreme Court observed that the regularised employees and the remaining workers stand on the same footing, and the non-regularised workers were wrongly not made part of the settlement. Further, it was observed by the Supreme Court that there existed no grounds for the artificial distinction between the 19 workers who were regularized and the 13 workers who were left out. The Supreme Court noted that out of the 19 workers who were regularized, 16 worked in the bunker, and 3 worked in the coal handling plant. However, 3 workers from the same bunker and 3 workers from the same coal handling plant were not regularised. The Appellant failed to establish any distinction between the two sets of workers. Therefore, the Industrial Tribunal was justified in holding that the nature of the duties performed by the remaining 13 workmen is also perennial and regular in nature.

It was observed by the Supreme Court that even if a settlement was arrived at with respect to some of the workmen, the Industrial Tribunal was tasked to examine the entire reference and give independent findings on the dispute. Hence, the Industrial Tribunal was justified in giving its award on the reference made by the Central Government. This answers the objection raised by the Appellant about the jurisdiction of the Industrial Tribunal.

It was also observed by the Supreme Court that in the present case, the denial of regularisation of the 13 workers was wrongful and the workmen had no fault in it. The Supreme Court upheld the order of the Industrial Tribunal for regularizing the workmen and observed that said workmen are entitled to back-wages with a modification to the order of the Industrial Tribunal and confining the calculation of the back-wages from May 23, 2002, that is, the date of the order of the Industrial Tribunal as the Supreme Court took into consideration the public interest as well the litigation between the parties which has been pending since a long period of time, thereby causing an adverse impact on the Appellant as well as the workmen.

Decision of the Supreme Court

The Supreme Court, while dismissing the appeals, upheld the decision of the Industrial Tribunal and regularised the remaining 13 workers. The Supreme Court also ordered that there would be no order restricting the wages of the said workers. Further, the Supreme Court ordered the calculation of back-wages for the workers from May 23, 2002, that is, from the date of the order of the Industrial Tribunal.

VA View: The Supreme Court has rightly held that the workers who perform any work which is permanent or perennial in nature would not be considered as a contract worker and therefore, ordered the regularization of the said workers.

The decision of the Supreme Court has provided relief to the workers who are arbitrarily considered as contractual labourers in spite of being engaged in work of permanent or perennial nature. The observation of the Supreme Court emphasizes that such workers should not be deprived of the opportunity of job regularization. By way of this judgment, the Supreme Court has protected and uplifted the spirit of the labour legislations which are regarded as welfare legislations, by ensuring that the workers are not discriminated and deprived of their statutory rights.

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