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Between the lines...

A BRIEFING ON LEGAL MATTERS OF CURRENT INTEREST

KEY HIGHLIGHTS

- **NCLT**: A related party of the financial creditor is not barred under Section 29A of the IBC to submit a resolution plan.
- **NCLAT**: Attachment of Corporate Debtor's bank account by the Employees' Provident Fund Organization cannot continue during Moratorium.
- **NCLT**: Indemnity of obligations under an agreement is not a 'financial debt' under Section 5(8) of the Insolvency and Bankruptcy Code, 2016.
- **Supreme Court**: Appeals and Applications under the Arbitration & Conciliation Act, 1996 relating to commercial dispute of specified value, other than the international commercial arbitration, shall lie before the commercial courts established under the Commercial Courts Act, 2015 even though they are subordinate to the rank of the Principal Civil Judge in the District.

I. NCLT: A related party of the financial creditor is not barred under Section 29A of the IBC to submit a resolution plan.

The National Company Law Tribunal, Cuttack ("**NCLT**"), in the case of ***Trimex Industries Private Limited v. M/s. Sathavahana Ispat Limited and Others [I.A. No. 791/2021 in CP. (IB) No.179/HDB/2020]***, has held that a related party of the financial creditor is not barred under Section 29A of the Insolvency and Bankruptcy Code, 2016 ("**IBC**") to submit a resolution plan.

Facts

The Applicant is one among the Operational Creditors ("**Applicant/OC**") of M/s. Sathavahana Ispat Limited ("**Corporate Debtor/1st Respondent**"). The petition for corporate insolvency resolution process ("**CIRP**") was filed by M/s. Thirumal Logistics under Section 9 (*Application for initiation of corporate insolvency resolution process by operational creditor*) of the IBC, against which the Corporate Debtor was admitted by the adjudicating authority.

The entire financial debt of the Corporate Debtor was assigned to JC Flowers Asset Reconstruction Private Limited ("**2nd Respondent**") for a consideration, which was paid by it in two modes, namely, 15% by pledging security receipts to the primary and end-point allottee, namely, M/s. Siddeshwari Tradex Private Limited ("**Siddeshwari**"), via a trustee company, namely, M/s. Axis Trustee Services Limited, in respect of which a charge was created, and the balance 85% from private investors. Accordingly, the 2nd Respondent was the sole successor of the financial creditor of the Corporate Debtor, as well as, the sole member in the Committee of Creditors ("**CoC**") of the Corporate Debtor.

The Resolution Professional ("**RP**") issued an invitation for Expression of Interest ("**EoI**"). A provisional list was issued, wherein seven EoIs were submitted by different resolution applicants.

In the meantime, since the Corporate Debtor was a running concern, to cater to its repair and maintenance works, a request for proposal was issued by the interim RP. The works contract, with the approval from the CoC, was issued to the Prospective Resolution Applicant ("**PRA**"). Mr. Prithvi Raj Jindal, who is shareholder in Siddeshwari, and also a director and a key managerial person in the PRA.

Thus, it was contended that by awarding the works contract to the PRA, there existed a scheme of unitary collusion. In this situation, it was impossible for the CoC to act in a manner that exuded 'commercial wisdom' without allowing the betterment of the interests of Siddeshwari, and thereby the CoC polluted the possibility of a better outcome for the Corporate Debtor and for the other operational creditors.

Issue

Whether the CoC be restrained from considering the resolution plan of the PRA which has already been submitted by the Resolution Professional to the CoC.

Arguments

Contentions raised by the Applicant:

The Applicant had prayed to restrain the CoC from considering the resolution plan submitted to it by the PRA because the CoC and PRA are related parties. It was argued that the CoC, the PRA, Siddeshwari and M/s. Hexa Securities and Finance Company are all group companies, which have colluded with each other. The PRA was holding a key position in the latter two companies, and the said two companies funded the purchase by the CoC of the entire financial debts of the Corporate Debtor from its original financial creditors.

Thus, the PRA taking advantageous position held by the CoC as the sole successor of financial creditors and the member in the CoC of the Corporate Debtor, had submitted the resolution plan and further obtained the works contract for repairs and maintenance of the Corporate Debtor. Hence, the PRA played different roles, via its related parties, and dominated the entire CIRP against the interests of the other stakeholders of the Corporate Debtor.

It was also argued that the RP instead of proceeding with the resolution plans submitted by the other resolution applicants has considered the disputed plan of the PRA and kept silent without bothering about the delay and expiry of the resolution period. The RP failed to act in accordance with Regulation 39(1)(c) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("**Regulations**") and further failed to gather the necessary information and records pertaining to the fact that the PRA is the sole person behind the CoC who has hijacked the entire CIRP.

The OC further argued that the RP failed to act diligently, and instead has acted in a biased manner causing prejudice to the rights of the other operational creditors and stakeholders of the Corporate Debtor.

Contentions raised by the Respondents and RP:

The Respondents contended that the application is pre-mature and devoid of any merit. Even before consideration by the CoC, the OC had made assumptions and was casting aspersions with the sole intent to delay the proceedings.

The RP contended that he acted as per the provisions of the IBC. The scheme of the IBC mandates the RP to function under the umbrella of the CoC, and hence the contention of the OC that the RP can proceed with other resolution plans, while leaving the PRA is neither within the ambit of the RP nor statutorily permitted.

It was also argued that Section 5(24) and proviso to Sections 21(2), 28(1)(f) and 29A of the IBC define related party only to the Corporate Debtor and restrain the RP to admit them into the CoC, and not to undertake any related party transactions without prior permission from the CoC and receipt of resolution plan, but there is no such restriction to related party in respect of the financial creditor. Hence, the RP acted in accordance with the provisions of IBC.

The RP, in accordance with Regulation 36A(10) of the Regulations, also issued the provisional list of resolution applicants to the OC and called for objections to exclude or include any resolution applicant named in the provisional list. This was never objected to by anyone, including the OC, and hence the OC is estopped from subsequently raising any objection.

The 2nd Respondent argued that it was assigned the financial debts of the Corporate Debtor by the consortium led by Canara Bank in a manner known to law, under Section 5 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002, and the Reserve Bank of India ("**RBI**") guidelines. The Applicant has no *locus standi* to question the validity of the said assignment in IBC proceedings. It is also unnecessary to the OC to know the source of the CoC to get the assignment, albeit the source of funding was furnished by it.

The relief to restrain the CoC from considering the resolution plan of the PRA amounts to restraining the CoC from carrying out its functions as provided in the IBC, and hence such a relief cannot be granted. The PRA argued that if the instant application was conceded, it would nullify the role of CoC under the IBC. The OC having missed the bus to raise any objection, when the RP called for them pursuant to issuance of the provisional list mentioning the resolution applicants, cannot now be permitted as an afterthought to file this instant application. The OC was also named in the final list of resolution applicants, which however was not considered after it failed to submit the resolution plan, evaluation matrix and information memorandum. Hence, this application was not filed with a bona fide intention, since the OC is attempting to avoid the competition indirectly, when it directly failed to qualify to be appointed as the prospective resolution applicant.

Further, all the transactions were carried out in a transparent manner and hence, the PRA is not disqualified in any manner.

Observations of the NCLT

The arguments of the Applicant were observed as unsustainable and rejected by the NCLT for the following reasons:

a. they are bereft of any tangible evidence, but only based on presumptions and apprehensions;

b. the mere fact that Mr. Prithvi Raj Jindal holds a key managerial position in Siddeshwari, which funded the assignment of the financial debts of the Corporate Debtor from the original financial creditors in favour of the CoC, does not substantiate the aforesaid allegations;

c. Siddeshwari has been duly constituted under the provisions of the Companies Act, 2013, and the debts were duly assigned in a duly conducted e–auction adopting the "swiss challenge" method;

d. the presumptions and apprehensions are beyond the ambit of this adjudicating authority under the IBC, or does not withstand legal scrutiny; and

e. in accordance with Section 21 of the IBC, the CoC as the assignee of the original financial creditors is not a related party of Corporate Debtor.

The continuing nexus, if any, as argued by the OC that originated on the date of assignment of the financial debts up to the date of order admitting the Corporate Debtor into CIRP was observed as unsustainable and rejected by the NCLT for the following reasons:

a. any such alleged, presumed and apprehended nexus cannot be challenged by the OC before

this adjudicating authority;

b. the quantum of consideration paid by the CoC towards the assignment and the mode of its payment also cannot be challenged before this adjudicating authority; and

c. the OC did not have the *locus standi*, which is conferred only upon its assignor, to question the validity of the assignment and genuineness thereof in a proceeding, before the competent authority.

Further, the NCLT stated that the proviso to section 30(5) of the IBC permits a financial creditor, who is also a member of the CoC, to submit a resolution plan. It further permits a resolution applicant to attend the meeting of the CoC and vote, if it is also a financial creditor, when its resolution plan is being considered. However, it was presumed and apprehended by the OC that in the instant case, there would be a failure to adhere to the aforesaid section due to conflict of interest since the CoC and PRA are one and the same and/or are related parties disabling the former to adhere to the regulations and enabling the latter to be a selector in the voting process. In view of the proviso to Section 30(5) of the IBC, it is only a figment of imagination by the OC to state that the related party of the financial creditor is prohibited from submitting the resolution plan, more particularly when it is not statutorily barred in Section 29A of the IBC. Hence, the allegation of collusion between the CoC and PRA on the only ground that they are related parties was observed as unsustainable by the NCLT.

Further, the argument that the present application was not premature, and was maintainable in the pre–voting stage was also observed as unsustainable and rejected by the NCLT for the following reasons:

a. patently, the application is filed only on the presumption and apprehension that CoC would approve the resolution plan submitted by the PRA and hence it was premature, and any application filed on future contingencies is unsustainable;

b. a mere contemplation or possibility that a right may be infringed without any legitimate basis, would not be sufficient to hold that the pleadings disclose a cause of action;

c. Section 30(2) of the IBC enables challenging before the adjudicating authority, the approval by the CoC of the resolution plan, if the specific requirements set out therein are complied with, and in the absence of any such compliance, there was no cause of action to grant the relief; and

d. the inherent and residuary powers conferred upon this Authority cannot supersede or nullify the specific provisions available in the IBC.

Further, IBC does not prohibit the related party to the financial creditor to submit the resolution plan, and if the prayer of the OC was granted then certain provisions of the IBC would become redundant. Section 30(2) entrusts upon the RP to examine each resolution plan and place them before the CoC for its consideration. Any interference by the adjudicating authority in this process amounts to injuncting the RP and CoC from functioning and discharging their duties and responsibilities as mandated under the IBC, which is neither envisaged therein nor under any law.

In the instant case, giving an opportunity to the CoC to consider the resolution plan submitted by the PRA would not in any manner, whatsoever, detract from the integrity of the IBC.

The NCLT also rejected the argument of the OC that in the event the resolution plan of the PRA is approved by the CoC, it will prejudice the stakeholders of the Corporate Debtor and it is against the principal of natural justice. The CoC is the sole successor of the financial debts and the OC and others are the operational creditors of the Corporate Debtor. The operational creditors do not have the ability to vote unless the Corporate Debtor has no financial creditors.

The NCLT stated that the OC, having failed to comply with certain formalities after being included in the provisional list of the prospective resolution applicants, is no more in the race in the CIRP of the Corporate Debtor. The provisional list was published and the OC was granted five days' time to object upon the exclusion or inclusion of any resolution professional therein, but no objection was received either from the OC or anyone. Hence, the OC has no personal interest to claim injunction as a matter of right.

Decision of the NCLT

In view of the above observations, the NCLT held that the CoC cannot be restrained from considering the resolution plan of the PRA and the present application was dismissed.

VA View:

IBC offers protection to the interests of the operational creditors. In the instant case, the parties to the resolution process have followed the prescribed procedure. However, it was apparent that the endeavor of the OC is patently to circumvent the situation. When a statute requires a thing to be done in a particular manner, it must be done in that manner or not at all, as was observed in the case of ***Nazir Ahamed v. King Emperor [A.I.R. 1963 P.C. 253]***. The OC having failed to object at the right time when called for in accordance with the IBC, filed the application bypassing the IBC under the guise of invoking the inherent powers of the adjudicating authority, which was neither encouraged nor allowed by the NCLT.

The NCLT's decision re-interprets the contours of related party transactions under Section 29A of the IBC and settles the legal position that related parties of financial creditors are not barred from submitting a resolution plan under the IBC.

II. NCLAT: Attachment of Corporate Debtor's bank account by the Employees' Provident Fund Organization cannot continue during Moratorium.

The National Company Law Appellate Tribunal, Chennai ("**NCLAT**") has in its judgment dated September 9, 2022 in the matter of ***B. Parameshwara v. Assistant PF Commissioner, Employees' Provident Fund Organization, Bommasandra II and Others [Company Appeal (AT) (Ins) No. 231 of 2021]*** held that attachment of the bank account of the corporate debtor by the Employees' Provident Fund Organization ("**EPFO**") cannot continue during the Corporate Insolvency Resolution Process ("**CIRP**") of the corporate debtor by virtue of subsistence of Moratorium imposed in respect of the corporate debtor in terms of Section 14 of the Insolvency and Bankruptcy

Code, 2016 ("**IBC**").

Facts

The Hon'ble National Company Law Tribunal, Chennai ("**NCLT**") initiated the CIRP of Easun Reyrolle Limited ("**Corporate Debtor**") by way of a common order dated May 5, 2020 passed in IBA/1045/2019 and IBA/1169/2019. Thereafter, the appointment of B. Parameshwara ("**Appellant/Resolution Professional**") was confirmed during the course of the first meeting of the Committee of Creditors of the Corporate Debtor as the Resolution Professional.

Pursuant thereto, upon reviewing the accounts of the Corporate Debtor, the Appellant came across the orders of attachment dated June 4, 2018, July 20, 2018 and August 23, 2019 ("**Attachment Orders**") issued by the EPFO Authorities for attaching the Bank Account of the Corporate Debtor maintained with the State Bank of India, Mookandapalli Branch ("**SBI**"), followed by the show cause notices dated July 13, 2018, August 30, 2018 and October 1, 2018 ("**Notices**") addressed to the SBI for non-compliance of the aforesaid Attachment Orders. Thereafter, SBI replied to such Notices, thereby inter alia stating that the Appellant has ownership over all the assets of the Corporate Debtor till the conclusion of the CIRP and therefore SBI is bound to allow operations/ withdrawals, if any, done by the Appellant in the bank account.

Thereafter, the Assistant PF Commissioner, EPFO, Regional Office, Bengaluru (Koramangala) ("**Respondent No. 2**") addressed an e-mail dated September 9, 2020 for a sum of INR 9,60,729/- (Rupees Nine Lakhs Sixty Thousand Seven Hundred and Twenty-Nine Only) for the period of default.

In view of the above, the Appellant preferred an application bearing number IA/1273/2020 before the NCLT. However, the NCLT disposed of the aforesaid application by order dated April 20, 2021 ("**Impugned Order**") with a direction to the Appellant herein to make adequate provisions in relation to the amount stated in the Attachment Orders as due towards PF dues and upon being satisfied, the EPFO authorities could remove the Attachment Orders of the bank accounts of the Corporate Debtor.

Aggrieved by the Impugned Order passed by the NCLT, the Appellant preferred an appeal before the NCLAT.

Issues

i. Whether an Attachment Orders on bank account of the Corporate Debtor imposed before the initiation of CIRP can continue during Moratorium under Section 14 of the IBC.

ii. Whether the Resolution Professional is duty bound to make adequate provisions for Provident Fund ("**PF**") even though the Corporate Debtor did not have separate PF Account.

iii. Whether the adjudicating authority can direct Resolution Professional to make provisions for PF without receiving claims for the same by the concerned authority.

Arguments

Contentions raised by the Appellant:

The Appellant submitted that the NCLT has passed the Impugned Order by overstepping its jurisdiction. It was further submitted that it is a settled law that the NCLT should have removed EPFO attachments on the bank account of the Corporate Debtor once the Moratorium commenced.

The Appellant relied upon the decision of NCLAT in the matter of ***Mr. Savan Godiwala, Liquidator of Lanco Infratech Limited v. Mr. Apalla Siva Kumar [Company Appeal (AT) (Insolvency) No. 1229 of 2019]*** ("**Lanco Infratech**"). In the Lanco Infratech case, the NCLAT held that where no fund is created in the company for the payment of gratuity prior to the commencement of its CIRP, the liquidator should not be directed to make payment of gratuity to the workmen. Hence, the Appellant contended that where no specific fund towards PF is created in the company prior to the commencement of its CIRP, the outstanding dues cannot be put in the liquidation estate.

Contentions raised by the respondent:

The respondent submitted that there is no illegality in the Impugned Order. The respondent further submitted that the attachment of the bank accounts of the Corporate Debtor is prior to initiation of CIRP and therefore not covered under Moratorium.

In view of the above-mentioned contentions, the respondent submitted that the present Appeal should be dismissed.

Observations of the NCLAT

For deciding the issue as to whether an attachment order on bank account of the Corporate Debtor imposed before the initiation of CIRP can continue during Moratorium under Section 14 of the IBC, NCLAT observed that the Corporate Debtor did not have a separate Employees' PF in terms of Section 16A of the Employees Provident Fund and Miscellaneous Provisions Act, 1952.

Further the NCLAT observed that the Lanco Infratech decision of the NCLAT is based on similar facts as that of the present case and makes it clear that where no fund is created by a company, the liquidator should not have been directed to make provision of payment of gratuity to the workmen.

NCLAT further analysed Section 14 of the IBC, which deals with Moratorium and observed that from perusal of Section 14(1)(a) of the IBC, it can be inferred that there shall be complete embargo to continue any proceeding against the corporate debtor by any authority till the CIRP is completed and Moratorium is lifted. Hence, it was observed that attachment of bank account of the Corporate Debtor by EPFO cannot be continued when Moratorium is declared under the IBC and proceedings are required to be kept in abeyance till lifting of moratorium. However, the NCLAT clarified that EPFO can continue/ initiate proceedings against the Corporate Debtor after lifting of Moratorium and completion of the CIRP.

NCLAT further observed that Section 238 of the IBC is a "non-obstante clause" by virtue of which, in the event of any inconsistency between the provisions of the IBC and any other law for the time being in force, the provisions of the IBC shall prevail.

Further, NCLAT observed that as Section 36(4)(iii) of the IBC provides that all sums due to any workman or employee from the PF, the pension fund and the gratuity fund shall not be included in the liquidation estate assets and shall not be used for recovery in liquidation. However, NCLAT also observed that in cases where there no PF created in the Corporate Debtor prior to commencement of CIRP, the aforesaid provision shall not be applicable.

Further, for deciding the issue whether the Resolution Professional is duty bound to make adequate provisions for PF even though the Corporate Debtor did not have separate PF Account, the NCLAT relied upon the Lanco Infratech judgment and held that the direction to the Resolution Professional of the Corporate Debtor to make adequate payments towards demand of the respondents is not correct.

Hence, based on the above-mentioned observations, the NCLAT arrived at the observation that the Resolution Professional is not duty bound to make adequate provisions for PF when the Corporate Debtor did not have separate PF Account.

On the issue whether the adjudicating authority can direct Resolution Professional to make provisions for PF without receiving claims for the same by the concerned authority, the NCLAT relied upon relevant provisions from the Insolvency and Bankruptcy Board of India (Resolution Process for Corporate Persons) Regulations, 2016 and observed that it is necessary that any person having a claim over the Corporate Debtor has to prefer claim as stipulated in the aforesaid regulation.

Decision of the NCLAT

The NCLAT held that the NCLT erred in giving direction as contained in the Impugned Order and therefore allowed the Appeal and set aside the Impugned Order. However, NCLAT granted liberty to the respondents to initiate/ continue proceedings against the Corporate Debtor after completion of the CIRP and lifting of the Moratorium in accordance with law.

VA View:

Since the commencement of the IBC, there have been numerous instances of claims pertaining to PF and/or gratuity, wherein no such fund had been created in the Corporate Debtor prior to commencement of the CIRP. Also, in many instances, the claims pertaining to PF and/or gratuity are not filed within the stipulated time period. Nonetheless, the government authorities contend that as per Section 36(4)(iii) of the IBC, all sums due to any workman or employee from the PF, the pension fund and the gratuity fund shall not be included in the liquidation estate assets nor be used for recovery in liquidation.

Often, the government authorities even give effect to attachment of the assets of the corporate debtor, thereby stalling the entire insolvency and bankruptcy process of the corporate debtor. This pronouncement shall go a long way in providing the much-needed clarity on this legal issue.

III. NCLT: Indemnity of obligations under an agreement is not a 'financial debt' under Section 5(8) of the Insolvency and Bankruptcy Code, 2016.

The National Company Law Tribunal, Mumbai Bench ("**NCLT**") has in its judgement dated October 7, 2022 ("**Judgement**"), in the matter of ***Reserve Bank of India v. Reliance Capital Limited [CP. (IB) No. 1231/MB/C-I/2021]*** held that indemnity obligations under an agreement is not a 'financial debt' under Section 5(8) of the Insolvency and Bankruptcy Code, 2016 ("**IBC**").

Facts

Around April 2019, Reliance Home Finance Limited ("**RHFL**") proposed the issuance of commercial papers ("**CPs**") to raise funds in order to meet its short-term working capital requirements. Aiming to protect its interest, Axis Bank Limited ("**Applicant**") got a tripartite obligor undertaking ("**Obligor Undertaking**") executed by Reliance Capital Limited ("**Corporate Debtor**") and RHFL, to ensure that any dilution of the Corporate Debtor's stake ("**Stake Sale**") in Reliance Nippon Life Asset Management Limited ("**Reliance Nippon**") would be utilized towards the payment due under the CPs.

The Applicant agreed to subscribe to the CPs (having a face value of INR 124 Crores) issued by RHFL and the said CPs were issued to the Applicant on April 16, 2019 by the issuing and paying agent, namely, ICICI Bank Limited.

Since the execution of the Obligor Undertaking and the subsequent issuance of the CPs, the Corporate Debtor had diluted and sold its stake in Reliance Nippon, by reducing its stake from 42.88% to 4.28%. Even after realizing an amount of INR 5,500 Crores, the Corporate Debtor failed to fulfill its payment obligations arising out of the CPs.

Consequently, the Applicant addressed various letters to the Corporate Debtor for making payments under the Obligor Undertaking, but, to no avail. The Applicant also issued a legal notice dated October 10, 2019, to the Corporate Debtor for payment of an amount of approximately INR 120 Crores pursuant to the Corporate Debtor's obligation under the Obligor Undertaking.

Thereafter, the Corporate Debtor was admitted into Corporate Insolvency Resolution Process ("**CIRP**") and Mr. Nageswara Rao Y ("**Administrator**") was appointed to discharge the functions of the resolution professional.

Pursuant to the issuance of a public announcement declaring the commencement of CIRP, the Applicant submitted two Form C (*Proof of Claim submitted by Financial Creditors*) claims, in terms of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, to the Administrator seeking admission into the Committee of Creditors as a 'financial creditor'. However, both claims of the Applicant were rejected by the Administrator on the ground that the Obligor Undertaking was entered into for the purpose of utilizing money/ proceeds from the sale of Reliance Nippon shares in a certain manner and not for repayment of the financial debt of RHFL. The Corporate Debtor had not guaranteed to discharge the obligations of RHFL in case of a default.

On that account, the Applicant filed an application under Section 60(5) of the IBC, seeking admission of its claims (*amounting to approximately INR 145 Crores*) as a financial creditor of the Corporate Debtor ("**Application**").

Issue

Whether indemnity of the obligations under an agreement constitutes a 'financial debt' under Section 5(8) of the IBC.

Arguments

Contentions raised by the Applicant:

1. The Obligor Undertaking is in the nature of a guarantee towards the payments under the CPs:

The Applicant claimed that the Corporate Debtor was a guarantor under the Obligor Undertaking and that Clause 2 of the said undertaking was misread by the Corporate Debtor, in as much as, it clearly states that the Corporate Debtor had an obligation to make payments due under the CPs.

The Applicant submitted that the obligation of the Corporate Debtor, to pay under the CPs had crystallized upon the occurrence of the Stake Sale.

The Applicant further submitted that the definition of 'obligor' under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("**SARFAESI Act**") reads as "*a person liable to the originator, whether under a contract or otherwise, to pay a financial asset or to discharge any obligation in respect of a financial asset, whether existing, future, conditional or contingent and includes the borrower.*" Further, a 'financial asset' under the SARFAESI Act is defined as "*debt or receivables and includes (1) a claim to any debt or receivables or part thereof, whether secured or unsecured; or....*"

The Applicant contended that since CPs are unsecured money market instruments issued in the form of a promissory note, they should be classified as a financial debt under Section 5(8) of the IBC and the Corporate Debtor has a contingent obligation to pay the debt, either in whole or in part, depending on the value of the Stake Sale.

Responding to the Administrator's contention that there is no promise on part of the Corporate Debtor to perform or pay in case of default by RHFL, the Applicant cited Clause 2 of the Obligor Undertaking, which provided that the Stake Sale in Reliance Nippon is only a trigger event for ascertaining the due date for payment and does not absolve the Corporate Debtor from the liability to pay on account of default by RHFL.

The Applicant argued that upon materialization of the Stake Sale, the Corporate Debtor had an obligation to pay the financial debt pursuant to the Obligor Undertaking. Therefore, the Applicant should be classified as a financial creditor.

2. Due amount under the CPs is a financial debt under Section 5(8)(i) and (f) of the IBC:

The Applicant contended that the Obligor Undertaking provided for an indemnity clause, wherein the Corporate Debtor was to indemnify the Applicant against any breach of any of the terms of the Obligor Undertaking by the Corporate Debtor or RHFL. The Applicant further submitted that since RHFL has not paid any amounts under the CPs, the obligation of the Corporate Debtor to indemnify the Applicant

had arisen, considering that the Obligor Undertaking had been breached. Therefore, the obligation of the Corporate Debtor classifies as a financial debt under Clause 5(8)(i) of the IBC, which reads as "*the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clause (a) to (h) of this clause*.".

Contentions raised by the Corporate Debtor:

1. The Obligor Undertaking is not a guarantee that attracts the definition of 'financial debt' under Section 5(8) of the IBC:

The Corporate Debtor contended that Section 126 of the Indian Contract Act, 1872 postulates that a 'guarantee' must possess the following twin essential attributes:

i. First, there must be a contract to perform or discharge the liability of a third party; and

ii. This contract to perform a third party's promise must be in case of that third party's default.

The basic ingredient of a 'guarantee', being a promise to perform in the event of a default by a third party is lacking in the instant case. Under the Obligor Undertaking, the Corporate Debtor had not promised to perform RHFL'S obligation to pay under the CPs or to discharge RHFL'S liability, in the event of RHGL'S default. Thus, the Obligor Undertaking is not a guarantee and therefore, does not attract the definition of 'financial debt' under Section 5(8) of the IBC.

The Corporate Debtor further submitted that the Obligor Undertaking was merely a contingent contract, under which the Corporate Debtor had undertaken that upon the sale of its or its affiliate shares in Reliance Nippon it would use the proceeds to either (i) purchase the CPs from the Applicant; or (ii) infuse funds into RHFL to redeem the CPs issued by RHFL. The Corporate Debtor's undertaking was not premised on RHFL'S default in serving the CPs, and thus could not be classified as a 'guarantee'.

2. The Applicant is not owed a 'financial debt' under Section 5(8) of the IBC:

The Corporate Debtor submitted that the Applicant's contention that the Obligor Undertaking and the issuance of CPs construed together is a 'financial debt' in terms of Section 5(8) of the IBC, is not legally sustainable for the following reasons:

i. The Applicant itself commercially understood that the Obligor Undertaking does not have the commercial effect of a borrowing; and

ii. In the Applicant's Form C (*Proof of Claim submitted by Financial Creditors*) claims, it specifically took the plea that RHFL was the principal borrower, and the Corporate Debtor was only a 'guarantor'.

The Corporate Debtor contended that the Applicant communicated its own commercial understanding that the Corporate Debtor was not the borrower but had acted as an assurer/security provider.

The Corporate Debtor invoked on the principle laid down in the case of ***Anuj Jain v. Axis Bank Limited and Others [2020 8 SCC 401]*** ("**Anuj Jain Case**"), wherein the Hon'ble Supreme Court ("**SC**") held that there must be a disbursal of money against time value vis-à-vis the corporate debtor in order to

constitute a 'financial debt'. However, in the present case, it was an admitted position that there was no such disbursal to the corporate debtor for consideration against the time value of money.

The Corporate Debtor also relied on ***Pioneer Urban Land and Infrastructure Limited and Another v. Union of India and Others [Writ Petition (Civil) No. 43 of 2019],*** wherein the Hon'ble SC held that for a transaction to have a commercial effect of a borrowing, money must be lent and/or received by the corporate debtor for temporary use with 'profit as the main aim'.

Observations of the NCLT

The NCLT affirmed the view of the Corporate Debtor and observed that since the Applicant had not established that the money was disbursed to the Corporate Debtor, the question of default on the part of the Corporate Debtor does not arise.

The NCLT also applied the principles enunciated in the Anuj Jain Case and observed that no 'financial debt' is owed to the Applicant under Section 5(8) of the IBC, for the following reasons;

1. There has been no disbursal to the Corporate Debtor against consideration for the time value of money;

2. Disbursal has been made to an independent juristic person, namely RHFL under the CPs;

3. There has been no borrowing by the Corporate Debtor.

4. RHFL had a 'commercial interest' in the CPs since the same was subscribed by the Applicant. The Corporate Debtor did not have a 'commercial interest' in the same.

The NCLT further observed that the Applicant's reliance on the indemnity clause of the Obligor Undertaking is also misplaced, because the said indemnity related to a breach of the Obligor Undertaking itself, and was not an indemnity issued against the CPs issued by RHFL. Plainly, it was not an indemnity that would constitute 'financial debt' under Section 5(8) of the IBC.

Decision of the NCLT

The NCLT relied on the case of ***Dr. B.V.S Laxmi v. Geometrix Laser Solution Private Limited [Company Appeal (AT) (Insolvency) No. 38 of 2017]***, wherein the Hon'ble National Company Law Appellate Tribunal stated that "*In the present case, the Appellant has failed to bring on record any evidence to suggest that disbursed money has been made against 'consideration for the time value of money'. There is nothing on the record to suggest that the Respondents borrowed the money. In absence of such evidence, the Appellant cannot claim that the loan if any given by the Appellant comes within the meaning of 'financial debt' in terms of sub-section (8)(a) of Section 5 of the 'I & B Code…*".

Since the Applicant had failed to establish that the money was disbursed to the Corporate Debtor, the question of default on the part of the Corporate Debtor did not arise. The NCLT opined that disbursement is a *sine qua non* for any debt to fall within the ambit of the definition of financial debt under Section 5(8) of the IBC.

Further, the indemnity provided by the Corporate Debtor to the Applicant, under the Obligor

Undertaking did not constitute 'financial debt' under Section 5(8) of the IBC.

Accordingly, the NCLT rejected and disposed of the Application.

VA View:

The NCLT through this Judgement has reaffirmed the well settled principle that for a transaction to acquire a status of a 'financial debt', money should be disbursed and that such disbursement should be made against the 'consideration for the time value of money', which is a substantive ingredient to fulfill requirements of the expression 'financial debt'. Without proof of disbursement, an amount cannot be claimed as financial debt, as a disbursement is a *sine qua non* for any debt to fall within the ambit of the definition of financial debt.

The NCLT has also correctly observed that Applicant's reliance on the indemnity clause of the Obligor Undertaking was misplaced, considering that the said indemnity clause was regarding a breach of the Obligor Undertaking itself, not an indemnity issued in respect of the CPs issued by RHFL. Therefore, it was not an indemnity that would constitute 'financial debt' under Section 5(8) of the IBC.

IV. Supreme Court: Appeals and Applications under the Arbitration & Conciliation Act, 1996 relating to commercial dispute of specified value, other than the international commercial arbitration, shall lie before the Commercial Courts established under the Commercial Courts Act, 2015 even though they are subordinate to the rank of the Principal Civil Judge in the District.

The Supreme Court ("**SC**") in its judgment dated October 19, 2022, in the case of ***Jaycee Housing Private Limited And Others v. Registrar (General), Orissa High Court, Cuttack And Others [Civil Appeal No. 6876 of 2022]***, held that the Commercial Courts Act, 2015 ("**CCA**") has an overriding effect and shall prevail over the Arbitration & Conciliation Act, 1996 ("**Arbitration Act**"). Hence, appeals and applications under the Arbitration Act pertaining to commercial dispute of a specified value, other than the international commercial arbitration ("**ICA**") shall lie before the Commercial Courts established under the CCA, as Sections 3 and 10 of the CCA prevail over Section 2(1)(e) of the Arbitration Act.

Facts

By a notification dated November 11, 2020 ("**Notification**"), in exercise of powers conferred by Sections 3 (*Number of Courts*) and 9(1) (*Power to fix local limits of jurisdiction of Courts*) read with Section 10 (*Place of sitting of Courts*) of the Odisha Civil Courts Act, 1984 and the CCA, the State Government on the recommendation of and after consultation with the High Court of Orissa ("**OHC**"), established the Courts of Civil Judge (Senior Division) as Commercial Courts for the purposes of exercising jurisdiction and powers under the CCA.

Jaycee Housing Private Limited and a few other parties ("**Appellants**") had filed proceedings under Section 34 of the Arbitration Act in the Court of Learned District Judge. However, on establishment of the Commercial Courts under the Notification, the proceedings were transferred to the designated Commercial Courts, that is, the Court of Civil Judge (Senior Division). Therefore, the Appellants

challenged the Notification by way of writ petitions before the OHC. The Division Bench of OHC dismissed the respective writ petitions.

Feeling aggrieved with the common judgment and order dated April 12, 2022 ("**Impugned Order**") passed by the OHC, the Appellants filed the present appeals before the SC.

Issue

Whether in exercise of powers under Section 3 (*Constitution of Commercial Courts*) of the CCA, the State Government can confer jurisdiction to hear applications under Sections 9 (*Interim measures, etc. by Court*), 14 (*Failure or impossibility to act*) and 34 (*Application for setting aside arbitral awards*) of the Arbitration Act, upon Commercial Courts which are subordinate to the rank of the principal Civil Judge in the District, contrary to the provisions of Section 2(1)(e) of the Arbitration Act.

Arguments

Contentions raised by the Appellants:

The Appellants contended that there is a conflict between Section 3 of CCA and Section 2(1)(e) of Arbitration Act. Section 2(1)(e) of Arbitration Act provides that the principal Civil Court of original jurisdiction in a district shall be the 'court' in the case of an arbitration other than ICA. It specifically provides that it does not include any Civil Court of a grade inferior to such principal Civil Court. Therefore, where an application has to lie to a 'court' under CCA, it must lie to the principal Civil Court and the jurisdiction of all inferior courts is excluded.

As per the Appellants, 'court' under Section 2(1)(e) of the Arbitration Act is the superior most court in the district and as such, legislature intended to minimize supervisory role of the courts in the arbitral process. Reliance was placed on the decisions of the SC in the cases of ***State of Maharashtra and Another v. Atlanta Limited [(2014) 11 SCC 619]*** and ***State of West Bengal and Others v. Associated Contractors [(2015) 1 SC 32]***.

The Appellants contended that the Arbitration Act being a special statute vis-à-vis the CCA, shall prevail over the CCA in case of any conflict, as held by the SC in ***Fuerst Day Lawson Limited v. Jindal Exports Limited [(2011) 8 SCC 333]*** ("**Fuerst Day Case**") and ***Kandla Export Corporation and Another v. OCI Corporation and Another [(2018) 14 SCC 715]*** ("**Kandla Export Case**"). The Appellants relied on Fuerst Day Case to contend that the Arbitration Act is a self-contained code and exhaustive and therefore, the same should prevail over the CCA. With Kandla Export Case, it was argued that the said judgment has been upheld by a three-judge bench in the case of ***BGS SGS SOMA JV v. NHPC Limited [(2020) 4 SCC 234]*** ("**BGS SOMA**"). Thus, the Impugned Order was contrary to the aforesaid judgments of the SC.

Further, the Appellants contended that the objective of the Arbitration Act is to ensure speedy disposal of cases with minimal interference of courts. If the Civil Judge (Senior Division) is designated as Commercial Court, then the litigant would be provided another appeal to the High Court ("**HC**") under Article 227 of the Constitution of India even after disposal of the appeal by the District Judge, defeating the objective of the Arbitration Act.

Contentions raised by the Amicus Curiae:

The Amicus Curiae highlighted the object and purpose of enactment of the CCA, which is, establishment of Commercial Courts to facilitate speedy disposal of high value disputes/commercial disputes. A Commercial Court and a Commercial Appellate Court can be set up under Sections 3 and 3A of the CCA, respectively. As per Section 10(3) of the CCA, for arbitration other than an ICA, all applications under the provisions of the Arbitration Act that would ordinarily lie before any principal Civil Court of original jurisdiction in a district, shall be filed in, heard and disposed of by the Commercial Court exercising territorial jurisdiction over such arbitration where such Commercial Court has been constituted.

CCA being subsequent and enacted for a specific purpose of speedy disposal of the commercial disputes, the same shall prevail. When legislature in its wisdom in a later enactment has specifically provided that all applications/appeals arising out of the Arbitration Act other than the ICA would be heard and disposed of by the Commercial Court, the same shall prevail.

It was submitted that the Kandla Export Case does not imply that all the provisions of the Arbitration Act would prevail over the CCA in case of any conflict and inconsistency. Further, it was submitted that the BGS SOMA judgment is not applicable to the facts of the present case.

Observations of the Supreme Court

SC highlighted the object and purpose of establishment of the Commercial Courts and the enactment of the CCA by referring to the 253rd Report of the Law Commission ("**Report**") submitted in January, 2015 where a suggestion for expeditious disposal of the commercial disputes was proposed. Suggestions in Paragraph 3.24.4 of the Report were cited by the learned Judges:

i. In case of domestic arbitrations concerning a commercial dispute of more than INR 1 Crore, applications or appeals may lie either to the HC or a Civil Court (not being a HC) depending upon the pecuniary jurisdiction;

ii. All applications or appeals arising out of such arbitrations under the Arbitration Act that have been filed on the original side of the HC shall be heard by the Commercial Division of the HC where such Commercial Division is constituted in the HC;

iii. In the absence of a Commercial Division being constituted, the regular Bench of the HC will hear such applications or appeals arising out of domestic arbitration;

iv. If the application or appeal in such domestic arbitration is not within the jurisdiction of the HC and would ordinarily lie before a Civil Court (not being a HC) and there is a Commercial Court exercising territorial jurisdiction in respect of such arbitration, then such application or appeal shall be filed in and heard by such Commercial Court.

The SC noted that it was on the basis of the Report, that the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Bill, 2015 was introduced in Rajya Sabha which was subsequently promulgated and renamed as CCA. The object and purpose of the CCA was to provide for speedy disposal of high value commercial disputes involving complex facts and question of law by way of an independent mechanism projecting a positive image to global investors about the independent and responsive Indian legal system.

Thereafter, CCA was amended with effect from May 3, 2018, to insert Sections 3(1A) & 3A for enabling the State Governments to designate commercial Appellate Courts at District level to exercise appellate jurisdiction over the commercial courts below the District Judge level. Therefore, the SC held that the legislature in its wisdom specifically conferred this jurisdiction under Section 10 of the CCA in respect of arbitrations.

Thereafter, the SC noted that the CCA was a later Act and when it was enacted, Section 2(1)(e) of the Arbitration Act was already in existence. Therefore, it has to be presumed that while enacting the subsequent law, the legislature was conscious of the provisions of the prior law. Hence, the CCA shall prevail.

Further, as per Section 15 (*Transfer of pending cases*) of the CCA, all suits and applications including applications under the Arbitration Act relating to commercial dispute of specified value shall have to be transferred to the Commercial Court and as per Section 21 (*Act to have overriding effect*) of the CCA, the provisions of CCA are to have an overriding effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

Decision of the Supreme Court

Thus, SC concluded that Sections 3 and 10 of the CCA would prevail and all applications or appeals arising out of arbitration under the Arbitration Act, other than ICA, shall be filed in, heard and disposed of by the Commercial Courts, exercising the territorial jurisdiction over such arbitration. If the arguments of the Appellants were to be accepted, the same would render the purpose of enactment of CCA, ineffective.

Further, if the principal Court of a district was to continue exercising jurisdiction over commercial disputes as provided under Section 2(1)(e) of the Arbitration Act, the same would mean two *fora* adjudicating commercial disputes, which cannot be permissible.

In light of the above, the Notification was held to be legally valid and in consonance with Sections 3 and 10 of the CCA and the Appeals were dismissed.

VA View:

The present judgment echoes the settled position of law that in case of two special laws, the one enacted subsequently and containing a non-obstante clause shall prevail over the prior enactment. Therefore, the SC has put to rest any ambiguity that may have been created in respect of forum for proceedings emanating from commercial disputes of specified value under the Arbitration Act and CCA by voicing the objective of the enactment of CCA.

This is in line with the intention of the legislators to give impetus to the arbitration regime and for ensuring speedy disposal of the arbitration proceedings by creating a special forum, thus, boosting the confidence of the investors across the globe in the Indian judiciary.

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