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Between the lines...

A BRIEFING ON LEGAL MATTERS OF CURRENT INTEREST

KEY HIGHLIGHTS

* **Delhi High Court:** An arbitration clause contained in a contract perishes upon its novation.

* **NCLT Hyderabad** rejects resolution plan for being incompliant with Regulation 36B 4(A) of the CIRP Regulations.

* **Madras High Court** rejects enforcement of a foreign arbitration award which was passed without considering FEMA violations and fraud in share valuations.

* **NCLAT:** NCLTs and NCLAT have the power to recall their judgments.

I. Delhi High Court: An arbitration clause contained in a contract perishes upon its novation.

The Delhi High Court ("**Delhi HC**") has, in its judgement dated June 2, 2023, in the matter of ***B. L. Kashyap and Sons Limited v. Mist Avenue Private Limited [Commercial Arbitration 190/2019]***, held that an arbitration clause contained in a contract would perish with its novation if the novated contract does not contain any arbitration clause.

Facts

B. L. Kashyap and Sons Limited ("**Petitioner**") and Mist Avenue Private Limited ("**Respondent**") entered into an undated construction contract in August, 2014 ("**Construction Contract**") for civil and structural works relating to a project known as 'MIST' in Uttar Pradesh. The estimated value of the Construction Contact was INR 229 Crores, to be executed on a bill of quantities ("**BBQ**") on an item rate basis. The Construction Contract contained an arbitration clause which provided the parties with the right to refer any dispute arising out of or in connection with the Construction Contract to a sole arbitrator, where the parties were unable to resolve such dispute amicably by way of joint discussions.

Subsequently, certain disputes arose between the Petitioner and the Respondent which were resolved mutually and its terms were recorded in a memorandum of understanding dated October 8, 2015 ("**MoU**"). The MoU recorded the terms upon which the Construction Contract would stand fully satisfied towards both the parties and was also accompanied by an annexure titled '*List of Assets Paid for*'. Notably, the MoU did not contain an arbitration clause.

The Respondent breached the MoU by failing to make payments to the Petitioner in accordance with the terms of the MoU. Consequently, the Petitioner invoked the arbitration clause in the Construction Contract and an arbitrator was appointed by the Delhi HC ("**Arbitrator**") under Section 11 (*Appointment of arbitrators*) of the Arbitration and Conciliation Act, 1996 ("**Act**").

The Petitioner lodged seven claims before the Arbitrator amounting to total of INR 35,17,69,185/-. The Respondent challenged the arbitrability of the dispute on the basis of the execution of the MoU and contended that it had paid an excess amount of INR 32,83,865/- to the Petitioner, which in fact, the Respondent was entitled to claim from the Petitioner.

The Arbitrator, while examining the claims made by the Petitioner, concluded that even though the MoU was not fully complied with, it would not lead to the conclusion that the arbitration clause in the Construction Contract stood revived. Moreover, as the parties had moved from the BBQ/item rate basis of payment to a '*cost plus*' basis of payment as set out in the MoU, there was no question of revival of the Construction Contract, even if the terms of the MoU had been breached by the Respondent.

Relying on the judgement passed by the Hon'ble Supreme Court ("**SC**") in ***Young Achievers v. IMS Learning Resources Private Limited [(2013) 10 SCC 535]*** ("**Young Achievers Case**") and the judgement of the Delhi HC in ***Ansal Housing and Construction Limited v. Samyak Projects Private Limited [2018 SCC OnLine Del 12866]***, the Arbitrator in its award dated January 7, 2019 ("**Impugned Award**") opined as follows:

> *"Once there is full and final settlement in respect of all the disputes in relation to a matter covered in the arbitration clause in the contract, such disputes or differences do not remain arbitrable and the arbitration clause cannot be invoked…Though the original contract was validly executed, the Petitioner and the Respondent had decided to put an end to it as if it never existed and substituted a new contract in its place, governing their rights and liabilities. In such a situation, the original contract is extinguished by the substituted one, the arbitration clause of the original one perishes with it."*

Aggrieved by this, the Petitioner filed a petition under Section 34 (*Application for setting aside arbitral awards*) of the Act, urging the Delhi HC to set aside the Impugned Award.

Issues

1. Whether an arbitration clause survives a supervening agreement between the parties.

2. Whether the Construction Contract stood novated by the MoU.

Arguments

Contentions of the Petitioner:

The Petitioner contended that the Arbitrator's interpretation of the Construction Contract and the MoU was arbitrary and perverse, therefore rendering the Impugned Award manifestly illegal. The Petitioner submitted that as per the MoU, the Construction Contract was to stand satisfied only upon the fulfilment of conditions enumerated therein and that the Respondent had failed to make full payment of the sum of INR 132 Lakhs to the Petitioner. Therefore, the Petitioner was entitled to claim all dues under the Construction Contract. Further, the MoU contemplated execution of a new contract on '*cost plus'* basis which was not done. For that reason, the Petitioner had submitted its claims before the Arbitrator under the Construction Contract rather than under the MoU.

The Petitioner argued that the Impugned Award would have an effect of taking away the Petitioner's right to make claims for its dues and losses under the Construction Contract, which was contrary to the terms of the MoU.

In order to support its contention that the Construction Contract did not stand novated by the MoU and that the arbitration clause contained in the Construction Contract survived the execution of the MoU, the Petitioner sought to distinguish the judgement in the Young Achievers Case on the basis of the decision rendered in ***Union of India v. Kishorilal Gupta and Brothers [AIR 1959 SC 1362]*** wherein the SC made a distinction between a contract which stands finally determined only on payment of the agreed amount and a contract which stands determined on the date of settlement. The Petitioner submitted that a proper interpretation of the terms of the MoU would place the instant case in the first category. Thus, the Arbitrator had missed the conditional nature of cancellation of the Construction Contract. Reliance was also placed by the Petitioner on the judgement passed in ***Lata Construction v. Rameshchandra Ramniklal Shah [(2000) 1 SCC 586]*** wherein the SC opined that an original agreement would remain enforceable if the payment under a second contract was not made.

Contentions of the Respondent:

The Respondent submitted that the Arbitrator's interpretation of the Construction Contract and the MoU was a plausible one and therefore, does not call for interference of the Delhi HC under Section 34 of the Act. Further, while the MoU permitted the Petitioner to make claims with respect to amounts that were due to it under the Construction Contract, it neither revived the Construction Contract nor resurrected the arbitration clause contained thereunder.

The Respondent further submitted that under the terms of the MoU, the Petitioner and the Respondent had arrived at a settlement by which the Construction Contract was '*cancelled*' or '*closed*'. Further, the Respondent's failure to make full payments to the Petitioner under the terms of the MoU was due to the Petitioner's failure to hand over the consumables mentioned in the annexure of the MoU to the Respondent.

In order to support its submission, the Respondent relied on the judgements passed by the SC in the cases of ***Nathani Steels Limited v. Associated Constructions [1995 Supp (3) SCC 324]*** wherein it was held that a party cannot invoke an arbitration clause after having entered into a settlement and ***Damodar Valley Corporation v. K.K. Kar [(1974) 1 SCC 141]*** wherein it was held that if a contract is put to an end, the arbitration clause, which is a part of it, also perishes along with the contract. Therefore, in light of the settlement that had been arrived at between the Petitioner and the Respondent under the MoU, it was not open to the Petitioner to invoke the arbitration clause contained in the Construction Contract and seek performance based on the terms thereunder.

Observations of the Delhi HC

While dealing with the question on whether an arbitration clause would survive a supervening agreement, the Delhi HC examined the judgements relied upon by: (i) the Arbitrator; (ii) the Petitioner; and (iii) the Respondent; and observed that the principles emerging therefrom were as follows:

1. An arbitration clause contained in an agreement which is *void ab initio* cannot be enforced as the contract itself never legally came into existence.
2. A validly executed contract can also be extinguished by a subsequent agreement between the parties.
3. If the original contract remains in existence, for the purpose of disputes in connection with issues of repudiation, frustration, breach, etc., the arbitration clause contained therein continues to operate for those purposes.
4. Where the new contract constitutes a wholesale novation of the original contract, the arbitration clause would also stand extinguished by virtue of the new agreement.

The Delhi HC observed that an application of the above-mentioned principles would require an interpretation of the MoU in order to determine whether the arbitration clause in the Construction Contract would remain enforceable.

Further, the Delhi HC observed that interference by courts with arbitral awards on the ground of patent illegality was permitted only in limited circumstances and that the findings of the arbitral tribunal were generally to be respected, unless they are found to be irrational or perverse. Moreover, in the context of arbitral awards, it is not sufficient to show that an arbitrator has committed an error if the matter falls within the jurisdiction of the arbitrator. The courts are mandated to adopt a circumspect approach, and to uphold an award, so long as the findings of the arbitrator pass the plausibility test.

While dealing with the question on whether the Construction Contract stood novated by the MoU, the Delhi HC observed that this in itself was a question of contractual interpretation and that as per Section 34 of the Act, the Delhi HC was not required to accord its own interpretation to contractual documents but only to assess whether the provisions thereof were capable of the interpretation placed upon them in the Impugned Award.

The MoU recorded the terms upon which the Construction Contract would stand fully satisfied towards both the parties. However, this did not lead to a conclusion that the Construction Contract would stand revived, if the terms thereunder were not fulfilled. Pertinently, the MoU itself referred to the Construction Contract as a '*closed contract*'. Further, the MoU incorporated an agreement between the Petitioner and the Respondent to '*cancel*' the Construction Contract. There was no express or implicit provision in the MoU stating that the Construction Contract would stand revived on account of any breach of the terms contained in the MoU.

Decision of the Delhi HC

The Delhi HC held that the contention of the Petitioner that the Impugned Award suffered from patent illegality was not acceptable. Further, the Arbitrator's conclusion that the MoU constituted a novation of the Construction Contract was unimpeachable within the limited jurisdiction of the Delhi HC under Section 34 of the Act.

Therefore, the Delhi HC did not find sufficient cause to interfere with the Impugned Award passed by the Arbitrator and dismissed the petition filed by the Petitioner.

VA View:

The Delhi HC has rightly upheld the Impugned Award given that the Petitioner and the Respondent had decided to put an end to the Construction Contract and substituted it by entering into a MoU governing their respective rights and liabilities. Moreover, the MoU referred to the Construction Contract as a '*closed contract*'. In the instant case, the Construction Contract would stand extinguished by the MoU and the arbitration clause in the Construction Contract perishes with it.

Through this judgement, the Delhi HC has yet again set the legal position straight that in instances where a former contract stands novated, that is, completed or superseded by a fresh contract, the arbitration clause contained in the former contract would perish with its novation and cannot be carried over or enforced as part of the fresh contract. The judgement also serves as a reminder on how important it is for parties entering into contracts to ensure that they understand and agree to the terms set out thereunder, especially in cases where such contracts have the effect of superseding a past contract.

II. NCLT Hyderabad rejects resolution plan for being incompliant with Regulation 36B 4(A) of the CIRP Regulations.

The National Company Law Tribunal, Hyderabad ("**NCLT**"), in the matter of ***Viceroy Hotels Limited [CP (IB) No. 219/7/HDB/2017]***, *vide* its order dated June 9, 2023, has rejected the resolution plan approved by the Committee of Creditors ("**CoC**") on account of non-compliance of Regulation 36B (4A) (*Request for resolution plan*) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("**CIRP Regulations**") since the performance bank guarantee ("**PBG**") submitted by the resolution applicant expired prior to the duration of plan implementation schedule ("**Schedule**").

Facts

Dr. Govindarajula Venkata Narasimha Rao ("**Resolution Professional/ Applicant**") filed an application, I.A. No. 1343 of 2022, under Sections 30(6) (*Submission of resolution plan*) and 31 (*Approval of resolution plan*) of the Insolvency and Bankruptcy Code, 2016 ("**IBC**") read with Regulation 39(4) (*Approval of resolution plan*) of the CIRP Regulations and Rule 11 (*Inherent Powers*) of the National Company Law Tribunal Rules, 2016, seeking approval of the resolution plan submitted by Anirudh Agro Farms Limited ("**Resolution Applicant/ Anirudh**") pursuant to approval by CoC of Viceroy Hotels Limited ("**Corporate Debtor**") with 95.82% votes.

By way of background, NCLT admitted the Corporate Debtor into corporate insolvency resolution process ("**CIRP**") by order dated March 12, 2018, pursuant to Asset Reconstruction Company (India) Limited ("**ARCIL**") having filed a petition under Section 7 (*Initiation of corporate insolvency resolution process by financial creditor*) of IBC. Further, Mr. K. K. Rao ("**Erstwhile RP**") was appointed by the NCLT as the interim resolution professional of the Corporate Debtor and his appointment was confirmed by the CoC.

Pursuant to the public announcement made by the Erstwhile RP and submission of claim by various creditors, the Erstwhile RP constituted the CoC comprising of financial creditors of the Corporate Debtor. The CoC evaluated the resolution plans submitted by prospective resolution applicants, namely: (a) ARCIL; (b) Unison Hotels Private Limited; and (c) CFM Asset Reconstruction Private Limited ("**CFM**").

Subsequently, the CoC approved the resolution plan submitted by CFM with 88% voting rights and accordingly, the Erstwhile RP filed an application, I.A. No. 281 of 2019, seeking approval of the resolution plan submitted by CFM. However, it was rejected by NCLT, *vide* order dated September 1, 2021, on the ground that an asset reconstruction company would not be capable of implementing the resolution plan without prior approval sought from the Reserve Bank of India.

In view of the above-mentioned, the CoC preferred an application, I.A. No. 27 of 2022, before the NCLT, seeking directions for conducting a CoC meeting for change of the Erstwhile RP. Accordingly, by order dated March 22, 2022, the NCLT directed the Erstwhile RP to conduct a CoC meeting. In view of the aforesaid order, the Erstwhile RP conducted the 19th CoC meeting on March 28, 2022, whereby a resolution was passed to replace the Erstwhile RP with the Resolution Professional, which was subsequently confirmed by NCLT by order dated April 13, 2022.

Subsequently, the Resolution Professional preferred an application, I.A. No. 443 of 2022, seeking permission of the NCLT to issue a revised Form G inviting the prospective resolution applicants to submit their respective Expressions of Interest ("**EoI**"). The aforesaid application was allowed by the NCLT with a direction to the Resolution Professional to complete the CIRP within a period of 90 days from the date of the order, that is, June 14, 2022. Pursuant to order dated June 14, 2022 passed by the NCLT, the Resolution Professional gave effect to publishing the revised Form G on June 18, 2022, thereby inviting the prospective resolution applicants to submit their respective EoIs by July 4, 2022 and the last date for submission of resolution plan being August 8, 2022. 27 EoIs were received from various entities and they were all provided with the request for resolution plan ("**RFRP**") and information memorandum as well as access to the virtual data room. Eventually, five entities submitted their resolution plans which were placed before the CoC in the 23rd CoC meeting. Those aforesaid five entities were: (a) Innopark (India) Private Limited ("**Innopark**"); (b) Anirudh; (c) Terminus Hotels and Resorts Private Limited ("**Terminus**"); (d) Kailash Darshan Housing Development (Gujarat) Private Limited ("**KDHDPL**"); and (e) Unison Hotels Private Limited ("**Unison**"). In the meeting it was also resolved to file an application seeking extension of 60 days to complete the CIRP of the Corporate Debtor, which was allowed by the NCLT by order dated September 2, 2022, thereby extending the CIRP period until November 11, 2022.

Further, considering that the valuation of the Corporate Debtor was carried out more than four years ago, in the 24th CoC meeting held on September 7, 2022, it was further resolved to carry out a fresh valuation, which would enable to CoC to evaluate the resolution plan, keeping in mind the current value of the assets. Accordingly, the Resolution Professional carried out a fresh valuation.

Two prospective resolution applicants, namely, Unison and Terminus backed out from the process and out of the remaining three entities, only KDHDPL and Anirudh submitted the revised resolution plans in light of modifications suggested by the CoC. Further, the CoC observed that the resolution plan of Innopark was a conditional plan and that the revised resolution plan of KDHDPL was not compliant with the RFRP. After evaluating the resolution plan submitted by Anirudh on qualitative and quantitative aspects as well as from the perspective of Section 29A (*Persons not eligible to be resolution applicant*) of the IBC, the resolution plan submitted by Anirudh was finally approved by the CoC with 95.82% voting share and accordingly, the Resolution Professional issued a letter of intent on November 10, 2022. Pertinently, Anirudh furnished a PBG of INR 16.85 Crores to the Resolution Professional as stipulated in the RFRP and as per the terms of the letter of intent.

Contour of the Resolution Plan

Anirudh provided an amount of INR 168.50 Crores to the stakeholders of the Corporate Debtor and included buy-back of equity from the assenting financial creditors at a guaranteed amount of INR 17 Crores. Further, the Resolution Plan provided for payments to be made in five tranches within the stipulated timelines. More particularly, upfront cash amounting to INR 51.50 Crores was to be paid as on the trigger date, whereby trigger date was defined under the Resolution Plan, whereas the remaining amounts were to be paid in four other tranches as per the timelines provided under the Resolution Plan.

Further, the Resolution Plan provided that the monitoring committee, which shall comprise of two representatives of the CoC and three members nominated by Anirudh, shall supervise the implementation of the Resolution Plan under the supervision of the NCLT up to the trigger date.

Compliance of mandatory contents of Resolution Plan as per IBC and CIRP Regulations

The Resolution Professional had conducted a compliance check of the Resolution Plan submitted by Anirudh in accordance with IBC as well as CIRP Regulations and accordingly submitted Form H as per Regulation 39(4) of the CIRP Regulations. Further, it was informed to the NCLT that Anirudh had submitted an affidavit declaring itself to be eligible in terms of Section 29A of the IBC.

Submissions made by the Applicant

The Applicant submitted that the Resolution Plan is in compliance with Section 30(2) of the IBC. It was submitted that the Resolution Plan provides for payment towards CIRP Cost on priority as stipulated in Section 30(2)(a) of IBC. Further, in the event the cash flow/ cash balance of the Corporate Debtor is insufficient to discharge the outstanding CIRP costs, the balance amount of the outstanding CIRP costs shall be brought in by Anirudh over and above the upfront cash. The Applicant further submitted that the Resolution Plan provides for payment to operational creditors in priority in the manner as provided under Section 30(2)(b) of the IBC. Further, it was submitted that the Resolution Plan provides for payment to the dissenting financial creditors proportionately from the upfront cash and/or the total Resolution Plan amount on priority to the payment to the assenting financial creditors in each tranche and shall not be less than the amount that would be payable to such financial creditors in accordance with Section 53(1) (*Distribution of assets*) of the IBC in the event of liquidation of the Corporate Debtor.

The Applicant also demonstrated that the Resolution Plan is in compliance of Regulation 38 (*Mandatory contents of the resolution plan*) of the CIRP Regulations. It provides for payment of 0.9% of the admitted claims of the operational creditor on priority. Further, the Resolution Plan comprises of a declaration that it has been prepared taking into consideration the interest of all stakeholders of the Corporate Debtor and the objectives behind enactment of the IBC. The Resolution Plan also had a declaration that neither the resolution applicant nor any of his related party has either failed or contributed to the failure of the implementation of any other approved resolution plan.

Issue

Whether a resolution plan approved by the CoC can be rejected/ disapproved by the adjudicating authority for non-compliance of Regulation 36B (4A) (*Request for resolution plans*) of the CIRP Regulations.

Observations of the NCLT

The NCLT observed that in the case of ***K. Shashidhar v. Indian Overseas and Others [Civil Appeal No. 10673 of 2018]***, the Supreme Court ("**SC**") held that if the CoC has approved a resolution plan, the resolution professional is obligated to place that plan before NCLT and if NCLT is satisfied that the resolution plan approved by the CoC meets the requirements of the IBC, in such a scenario, the NCLT has to approve the resolution plan, without digressing into any other aspect. Similarly, in the matter of ***Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta and Others [(2020) 8 SCC 531]***, the SC held that the limited judicial review available to NCLT has to be restricted within the purview of Section 30(2) of IBC and it cannot trespass upon a business decision of the CoC.

In view of the above-mentioned judgments, the NCLT observed that it is fully conscious of the need to keep judicial intervention at a bare minimum while approving a resolution plan. However, the NCLT

cannot overlook the non-compliance of a mandatory provision of law by the successful resolution applicant. In this regard, the NCLT relied upon the judgment of the SC in the matter of ***M.K. Rajagopalan v. Dr. Pariasamy Palani Gounder and Another [Civil Appeal Nos. 1682-1683 of 2022]*** ("**Rajagopalan Judgment**"), whereby the SC had clearly observed that the principles underlying the decisions of the court respecting the commercial wisdom of CoC cannot be over-expanded to brush aside a significant shortcoming in the decision making of the CoC when it had not duly taken note of operation of any provision of law for the time being in force.

In the present case, basis perusal of compliance certificate (Form-H) filed by the Resolution Professional, it is clear that in compliance of the RFRP, the Resolution Applicant has submitted a PBG of INR 16.85 Crores, issued by Kotak Mahindra Bank Limited for a period of six months commencing from November 10, 2022. The NCLT observed that Regulation 36B 4(A) of the CIRP Regulations clearly provides that the PBG shall cover the Schedule. However, the PBG furnished by the Resolution Applicant did not cover the Schedule duration and Anirudh filed a clarificatory undertaking stating that Anirudh has proposed a payment to all creditors in five tranches as per the Resolution Plan and the payments made under any prior tranches are liable to the forfeited if Anirudh fails to make payments under the subsequent tranches as per the Resolution Plan. However, the NCLT was not satisfied with the above-mentioned clarification and observed that such unilateral undertaking cannot result in extending PBG beyond six months from November 10, 2022. Hence, the NCLT observed that the PBG had expired by efflux of time and the same was not extended by Anirudh. Therefore, as on date, the PBG is non-est in the eyes of law and therefore, the non-compliance of Regulation 36B (4A) of the CIRP Regulations is apparent.

Decision of the NCLT

In view of the above-mentioned findings, the NCLT held that the Resolution Plan, being in breach of statutory provision, is liable to be rejected. The NCLT observed that, as per Section 33(1)(b) of the IBC, rejection of a resolution plan can be a ground for initiation of liquidation process of the Corporate Debtor. However, the NCLT directed for continuation of the CIRP and thereby, directed the Resolution Professional to issue a fresh Form-G inviting EoIs and complete the CIRP as expeditiously as possible, but no later than sixty days from the date of the order.

VA View:

By way of pronouncing the present judgment, NCLT has set the much-needed precedent on the issue of expiry and non-renewal of performance bank guarantee. Further, this judgment makes it amply clear that strict compliance of Regulation 36B (4A) of the CIRP Regulations must be maintained and the performance bank guarantee provided in terms of the aforesaid regulation must cover the Schedule duration of the Resolution Plan. However, this issue is no more *res integra* and is now a trite law that non-compliance of Regulation 36B (4A) of the CIRP Regulations shall lead to rejection of a resolution plan.

Hence, this judgment will ensure that going forward, all the resolution applicants will be vigilant and mindful that performance security furnished by them must meet the requirement as envisaged under Regulation 36B (4A) of the CIRP Regulations and in particular that the duration of the performance security shall be no less than the Schedule duration of the resolution plan.

III. Madras High Court rejects enforcement of a foreign arbitration award which was passed without considering FEMA violations and fraud in share valuations.

In a landmark verdict, the Hon'ble Madras High Court ("**Madras HC**"), in the case of ***Aapico Hitech Public Company Limited and Another v. Sakthi Auto Component Limited [Arbitration Original Petition No. 296 of 2021]*** ("**Judgement**"), in its judgment dated February 3, 2023, has rejected enforcement of a foreign arbitration award on the ground that it was passed without considering the fraud and violations of regulation of the Foreign Exchange Management Act, 1999 ("**FEMA**"), which were not curable.

Facts

Aapico Hitech Public Company Limited is a public listed company under the laws of Thailand ("**Aapico Thailand**"), Aapico Investment Private Limited is a company under the laws of Singapore ("**Aapico Singapore**") (collectively, "**Aapico Group**"), and Sakthi Global Auto Holdings Limited ("**SGAH**") is a company formed under the laws of England and Wales (collectively, "**Petitioners**"). Sakthi Auto Component Limited ("**SACL/ Respondent**") is a public unlisted company formed under the laws of India, which is an affiliate of the Sakthi group of companies.

Around 2017, Aapico Group and SACL formed a joint venture by the name SGAH ("**JV**"), in which 74.9% shares were to be held by ABT Auto ("**ABT**"), 24.1% by Aapico Thailand, and 1% by Aapico Singapore, and SGAH was to become 70% owner SACL's subsidiary in the U.S.A. ("**SG-USA**"). Initially, Aapico Group agreed to invest $100 million into the JV - $50 million in form of equity and $50 million by way of loan agreements, secured by guarantees given by Dr. Mahalingam (*founder and controller of SACL*) and by ABT ("**Loan Agreements**"). In 2018, owing to the financial crisis faced by SG-USA, Aapico Group provided another injection of funds of $65 million - $25 million in the form of equity capital, taking Aapico Group's shareholding in SGAH to 49.99%. The said loan from Aapico Group was on the terms of an amended and restated loan agreement dated September 29, 2018 namely, shareholder's agreement ("**SHA**"). ABT had also provided a charge over its shares in SGAH (around 50.01%) dated October 1, 2018 in order to secure the amounts due under the Loan Agreements.

Aapico Group alleged defaults under the Loan Agreements on June 4, 2019 and took over complete control of the board of SGAH. Subsequently, on August 15, 2019, by enforcing the charged shares, Aapico Group appropriated 50.01% shares of ABT, thereby becoming 100% equity holder of SGAH, and a 77.04% holder of SACL, indirectly. The value of appropriated shares, based on valuation report dated July 31, 2019 tendered by FIZ Consulting LLP, was around $27 million. Aapico Group and SGAH invoked the arbitration before Singapore International Arbitration Centre ("**SIAC**") in terms of the SHA in respect of, *inter alia*, controlling and managing rights, including proportionate representation on the board of SACL, right to appoint nominee director on the board of SACL, etc. The SIAC passed its arbitration award on October 6, 2021 in favour of the Petitioners ("**Award**"). The Petitioners consequently approached the Madras HC, seeking enforcement of the Award in terms of Section 47 (*Evidence*) and Section 49 (*Enforcement of foreign awards*) of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**").

Issue

Whether the Award satisfied the conditions under the Arbitration Act to be enforced as a decree in

India.

Arguments

Contentions of the Petitioners:

Aapico Group contended that they had 100% shares in SGAH and also became the holder of 77.04% in SACL. However, despite its shareholding in SACL, Aapico Group was being prevented from exercising their management rights/ control of SACL under the SHA by the entities of Sakthi Group which was a breach of the SHA. Thus, the arbitration before SIAC was initiated and the Award was passed. Accordingly, the Madras HC should allow the enforcement of Award.

The Petitioners further contended that the Award was not contrary to the public policy of India and was in compliance of Section 47 and 48 (*Conditions for enforcement of foreign awards*) of the Arbitration Act. It was further contended that the burden of proof fell upon the party who resists the enforcement of the Award and in the present case, on the Respondent since it had resisted the enforcement of the Award. In this regard, reliance was placed on the on the judgment of the Supreme Court ("**SC**") in ***Gemini Bay Transcription Private Limited v. Integrated Sales Service Limited [(2022) 1 SCC 753]***, wherein it was held that 'unless a party is able to show that its case comes clearly within the Section 48(1) or 48(2) of the Arbitration Act, the foreign Award, must be enforced', this court cannot refuse the enforcement of the Award.

The Petitioners argued that although the Respondent brought in some new documents and raised supplementary grounds, those documents did not form part of the records of the SIAC for passing the Award. In this regard, the Petitioners placed reliance on the judgment of the SC in ***LMJ International Limited v. Sleepwell Industries [(2019) 5 SCC 302]*** to contend that the alleged non-suppression of documents is not a fraud that can be attributed against the Petitioners and further, it fell outside the purview of Section 48 of the Arbitration Act.

Contentions of the Respondent:

The Respondent contended that the enforcement of the Award was opposed to the basic notions and justice of India and was against the public policy of India. The Respondent contended that the Petitioners had suppressed various important documents, despite being asked by the SIAC tribunal, *vide* its procedural order dated June 20, 2022. The Respondent also contended that the Award was obtained by fraud on account of suppression of vital documents and on this ground only the Madras HC should reject the enforcement of the Award. In this regard, the Respondent placed its reliance on the various judgments of the SC wherein it was held that an enforcement of an Award obtained by fraud was liable to be rejected and set aside. The Respondent also contended that the Petitioners had, in the guise of being JV partners, colluded behind its back with the Portuguese executives to topple and purchase its step-down subsidiary in Portugal, thus orchestrating fraud on the Respondent, causing it a loss of around INR 1000 crores.

Observations of the Madras HC

At the outset, the Madras HC observed that generally the court will not interfere with the enforcement of a foreign award unless the same is hit by Section 48 of the Arbitration Act.

The Madras HC observed that the Respondent had borrowed a sum of INR 22,353 Lakhs from Kotak Mahindra Bank ("**KMB**") and KMB had issued a sanction letter dated September 11, 2018 ("**Sanction Letter**") which clearly stated that "…*Any change in the shareholding/ Directorship/ partnership/ ownership shall be undertaken with the prior permission of the bank*..." The said Sanction Letter was also approved by the board of SACL. No prior permission was obtained for the change of the directorship and the shareholding pattern of SACL and further that the Petitioner had suppressed this fact before the SIAC. The Award, which had the effect of allowing complete change of the directorship and the shareholding pattern of SACL, was therefore in breach and in conflict with the notion of justice in India. Thus, Madras HC observed that the Award was liable to be rejected on this ground itself and could not be allowed to be enforced under the Arbitration Act. The Madras HC also observed that it would not in blind-fold manner grant the enforcement of the Award when a plea of fraud has been brought to the notice of the court. The Madras HC observed that Aapico Group was one of the JV partners of the Respondent, and in that capacity, they had purchased the share of the step-down subsidiary of the Respondent in Portugal. The Madras HC observed that such action of the Petitioner was clearly a fraud within the meaning of Section 48(2)(b) of the Arbitration Act.

The Madras HC also observed that there were serious violations of FEMA and the Foreign Exchange Management Transfer or Issue of any Foreign Security Regulations, 2004 ("**Transfer Regulations**"), which were not curable. The Madras HC observed that Regulations 16 (*Transfer by way of sale of shares of a JV/WOS outside India*) and 18 (*Pledge of shares of Joint Ventures (JV), and Wholly Owned Subsidiary (WOS) and step down Subsidiary (SDS)*) of the Transfer Regulations, *inter alia*¸ mandated prior approval of the Reserve Bank of India before enforcement of any rights of transfer of shares by virtue of pledge. In this regard, reliance was placed on the judgment of the SC in the case of ***Vijay Karia v. Prysmian [(2020) 11 SCC 1]*** wherein it was, *inter alia,* observed that any loss of foreign exchange to the country affected the public and economy at large and amounted to breach of fundamental policy of India, when the violations of FEMA was not curable. The Madras HC observed the Petitioners had caused the exchequer a loss of sum of around INR 822 Crores.

Decision of the Madras HC

The Madras HC held that the enforcement of the Award was liable to be rejected under Section 48 of the Arbitration Act for the reason that it was orchestrated and also there was violations of FEMA and Transfer Regulations coupled with the commission of fraud on the part of the Petitioner in valuing the SGAH shares, which was not curable in nature and the Award was passed without taking in consideration the said commission of fraud and violations of FEMA and the related regulations.

VA View:

The Madras HC refused to allow the enforcement of the Award as a decree since it was against the public policy of India. Madras HC has categorically demonstrated as to how the Petitioners orchestrated fraud against the Respondent and how the Petitioners also flouted the provisions of the FEMA, which was incurable in nature. The SIAC tribunal had failed to consider the fraud coupled with the violations of the FEMA.

The Madras HC has rightly given primacy to public interest over private interest. Whenever, there is loss of foreign exchange to the nation due to fraud, there is a dent on the economy which in turn hampers the public interest of the nation. Where such violations are incurable, such Award which are passed without considering such violations should not be allowed to be enforced as a decree in India.

IV. NCLAT: NCLTs AND NCLAT HAVE THE POWER TO RECALL THEIR JUDGMENTS.

A five-member bench of the National Company Law Appellate Tribunal, Principal Bench, New Delhi ("**NCLAT**") in the case of ***Union Bank of India v. Dinkar T. Venkatasubramanian [Company Appeal (AT) (Ins.) No. 729 of 2020]***, in its judgment dated May 25, 2023, held that NCLAT can recall its judgments by the virtue of inherent power vested in the NCLAT under Rule 11 (*Inherent Powers*) of the National Company Law Appellate Tribunal Rules, 2016 ("**Rules**") in case of a procedural error while delivering the earlier judgment.

Facts

Corporate Insolvency Resolution Process ("**CIRP**") was initiated against Amtek Auto Limited ("**Corporate Debtor**") by an application filed by Union Bank of India ("**Appellant**") under Section 7 (*Initiation of corporate insolvency resolution process by financial creditor*) of the Insolvency and Bankruptcy Code, 2016 ("**IBC**") and thereafter a resolution plan was approved by the Committee of Creditors ("**CoC**") by majority voting share of 70.07% on January 11, 2020 ("**Resolution Plan**").

An interlocutory application was filed by the resolution professional seeking the approval of the Resolution Plan. Further, Appellant while praying for modification of the Resolution Plan filed an interlocutory application. The National Company Law Tribunal, Chandigarh ("**NCLT**"), *vide* an order dated July 9, 2020 ("**Order**"), approved the Resolution Plan by allowing the interlocutory application filed by the resolution professional and dismissed interlocutory application filed by Appellant.

Appellant filed an appeal against the Order, wherein the Appellant did not implead the CoC as one of the parties which was partly allowed by NCLAT, *vide* its judgement dated January 27, 2022 ("**NCLAT Order**"). Consequently, the financial creditors filed an appeal in the Supreme Court of India ("**SC**") against the NCLAT Order, which was dismissed by the SC, *vide* an order dated April 1, 2022 ("**SC Order**"), as '*withdrawn with liberty to file a review application*'.

After the SC Order, a review application was filed by the financial creditors which was dismissed by NCLAT vide an order dated September 2, 2022, and it was held that there exists no provision under IBC for a review and thus the application is not maintainable before the NCLAT. The NCLAT also noted that the financial creditors may take recourse to its other remedy in accordance with law against the NCLAT Order. Pursuant to the aforesaid, the present appeal was filed before the NCLAT to recall the NCLAT Order ("**Appeal**").

The case was first heard by a three-member bench of the NCLAT, which referred this matter to a five-member special bench. During the proceedings before the three-member bench of NCLAT, the bench relied on the judgement wherein it was held that no jurisdiction lies with NCLT and NCLAT for any review or recall of their judgments.

Issues

1. Whether NCLAT possesses power to entertain an application for recall of its judgment.

2. Whether judgment of NCLAT in the case of ***Agarwal Coal Corporation Private Limited v. Sun Paper Mill Limited and Another [Company Appeal (AT) (Ins.) No. 412 of 2019]*** ("**Agarwal Coal Case**") and ***Rajendra Mulchand Varma and Others v. K. L. J Resources Limited and Another [Company Appeal (AT) (Ins.) No. 359 of 2020]*** ("**Rajendra Mulchand Case**") can be read to mean that there is no power vested in NCLAT to recall a judgment and thus, lay down the correct law.

Arguments

Contentions of the Appellant:

It was contended by the Appellant that the inherent power of NCLAT is preserved by virtue of Rule 11 of the Rules. Further, NCLAT can use its inherent power to recall a judgment in appropriate case. The Appellant also submitted that a judgment delivered by NCLAT can be recalled wherein the necessary party was earlier not present before the NCLAT. Additionally, it was contended by the Appellant that an order passed without giving an opportunity of hearing to an affected party violates the principles of natural justice and thus, deserves to be recalled.

It was submitted that the judgment of NCLAT in the cases of Agarwal Coal Case and Rajendra Mulchand Case, wherein it was held that NCLAT cannot exercise its jurisdiction to review or recall its judgement, does not lay down the correct law as NCLAT has jurisdiction to recall a judgment on the grounds of being satisfied that there exists a procedural error in delivery of a judgment by the NCLAT.

In order to substantiate its arguments, the Appellant relied upon the following judgements of the SC: (a) ***A. R. Antulay v. R. S. Nayak and Another [(1988) 2 SCC 602]***, wherein the SC has put forth various grounds to set-aside judgments: (i) if a party has had no notice and decree is made against him, he can approach the court for setting-aside the decision on proof of the fact that there was no service, (ii) if a judgment was rendered in ignorance of the fact that a necessary party had not been served at all and was shown as served or in ignorance of the fact that a necessary party had died and the estate was not represented, or (iii) a judgment was obtained by fraud; (b) ***Asit Kumar Kar v. State of West Bengal and Others [(2009) 2 SCC 703]***, the SC had drawn the distinction between review and recall petition. It was noted by the SC that "*…while in a review petition the Court considers on merits where there is an error apparent on the face of the record, in a recall petition the Court does not go into the merits but simply recalls an order which was passed without giving an opportunity of hearing to an affected party…*"; (c) ***Indian Bank v. M/s Satyam Fibres India Private Limited [AIR 1996 SC 2592]***, wherein it was held that the courts have inherent power to recall and set aside an order if it is obtained by fraud practised upon the court, or when the court is misled by a party, or when the court itself commits a mistake which prejudices a party; (d) ***Kapra Mazdoor Ekta Union v. Birla Cotton Spinning and Weaving Mills Limited and Another [(2005) 13 SCC 777]***, the SC noted the nature of power of review and held that the power of court or quasi-judicial authority to review its judgment must be conferred by law expressly; (e) ***SERI Infrastructure Finance Limited v. Tuff Drilling Private Limited [(2018) 11 SCC 470]***, wherein it was held that every tribunal has an inherent power of review where such review is sought for a procedural defect.

Contentions of the Respondent:

Mr. Dinkar T. Venkatasubramanian ("**Respondent**") submitted that the Respondent was the only party impleaded in the interlocutory application filed by the Appellant before the NCLAT. Therefore, it was

contended by the Respondent that when the Order was challenged by Appellant for rejecting the said interlocutory application, Appellant was not required to implead any other party to the Appeal.

It was also contended by the Respondent that the NCLAT Order which the Appellant sought to be recalled contains no error as it was delivered post hearing all the parties to the Appeal.

Observations of the NCLAT

It was observed that power to recall is not to rehear the case to find out any apparent error in the judgment. However, NCLAT while exercising its inherent jurisdiction can entertain an application for recall of judgment based on sufficient grounds of procedural errors. The NCLAT while deciding the present case took into consideration the judgements in Agarwal Coal Case and Rajendra Mulchand Case and observed that the judgments lay down an incorrect law. It was observed that the power to recall a judgment is an inherent power of the NCLAT as enshrined under Rule 11 of the Rules.

Decision of the NCLAT

In the present case, it was held by NCLAT that in case of any procedural errors, NCLAT has the power to recall its judgement.

Further, NCLAT held that the judgments of NCLAT in the Agarwal Coal Case and Rajendra Mulchand Case does not lay down the correct law and therefore, these two judgements were partly set aside by the NCLAT to the extent that NCLAT does not have the power to recall its orders/ judgments and upheld the said judgments in respect to the portion wherein it observed that the NCLAT was not vested with the power of review.

VA View:

This is a positive interpretation as it would ultimately reduce litigation on account of procedural errors. The power to recall a judgement was already permitted by Rule 11 of the Rules, which has been strengthened by NCLAT in the present case. This judgment would help to reduce the number of appeals filed in NCLT/ NCLAT and put an end to the review applications being filed by fraudulent litigants, masquerading as recall applications.

This judgement strengthens the power of a tribunal (NCLT as well as NCLAT) to recall its judgements.

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