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Between the lines...

A BRIEFING ON LEGAL MATTERS OF CURRENT INTEREST

KEY HIGHLIGHTS

* **Supreme Court:** Arbitration clauses in unstamped agreements enforceable, seven-judge bench overrules 'NN Global' decision.

* **Supreme Court:** Non-signatories to an arbitration agreement can be made parties to an arbitration proceeding under the group of companies doctrine.

* **Supreme Court:** An instrument which is compulsorily convertible into shares such as a compulsorily convertible debenture, is to be treated as an equity instrument and not regarded as a financial debt under IBC.

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I. Supreme Court: Arbitration clauses in unstamped agreements enforceable, seven-judge bench overrules 'NN Global' decision.

The Supreme Court, *vide* its judgment dated December 13, 2023, in the matter of ***Re: Interplay between Arbitration Agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act 1899 [Curative Petition (C) No. 44 of 2023 in Review Petition (C) No. 704 of 2021 in Civil Appeal No. 1599 of 2020 and with Arbitration Petition No. 25 of 2023]***, has held that agreements which are not stamped, or are inadequately stamped, are inadmissible in evidence under Section 35 (*Instruments not duly stamped inadmissible in evidence, etc.*) of the Indian Stamp Act, 1899 ("**Stamp Act**"). However, such agreements are not rendered void or void ab initio or unenforceable as non-stamping or inadequate stamping is a curable defect.

Background of the case

The genesis of the present judgment flows from some of the previous judgments with contradictory ratio. In the case of ***SMS Tea Estates (P) Limited v. Chandmari Tea Company (P) Limited [(2011) 14 SCC 66]*** ("**SMS Tea Estates Case**"), a two-judge bench of the Supreme Court had held that an arbitration agreement in an unstamped contract cannot be acted upon.

Thereafter, on December 31, 2015, after the recommendation of the Law Commission of India Report, 2015, in order to reduce judicial interference during the appointment of the arbitrator, Section 11(6A) was inserted in the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") by way of amendment stating that the court, while considering application for appointment of arbitrators, shall, confine to examination of existence of arbitration agreement.

Thereafter, on April 10, 2019, in the matter of ***Garware Wall Ropes Limited v. Coastal Marine Constructions and Engineering Limited [(2019) 9 SCC 209]*** ("**Garware Case**"), the Supreme Court reaffirmed the legal position that an arbitration agreement in an unstamped contract would not exist in law and therefore cannot be acted upon until the contract is sufficiently stamped.

Thereafter, in the matter of ***NN Global Mercantile (P) Limited v. Unique Flame Limited [(2021) 4 SCC 379]*** ("**NN Global 1 Case**") decided on January 11, 2021 by a three-judge bench, the Supreme Court held that the non-payment of stamp duty would not invalidate the underlying contract because it is a curable defect. Thereafter, on April 25, 2023, five-judge constitution bench of the Supreme Court decided the issue referred to by the three-judge bench in NN Global 1 Case ("**NN Global 2 Case**"). By a majority of 3:2, it was held that NN Global 1 Case does not represent the correct position of the law. Furthermore, it was held that an unstamped instrument, not being a contract and not enforceable in law, cannot legally exist. The arbitration agreement in such an instrument can be acted upon only after it is duly stamped.

Previously, on February 14, 2020, the Supreme Court relied upon SMS Tea Estates Case in the matter of ***Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram v. Bhaskar Raju and Brothers [2020 4 SCC 612]*** ("**Bhaskar Raju Case**"). Notably, Bhaskar Raju Case was pronounced prior to NN Global 1 Case. However, during the pendency of reference made by three-judge bench in NN Global 1 Case, review petitions were filed in Bhaskar Raju Case, which were dismissed on the grounds of delay as well as on merits. Thereafter, on December 7, 2022, a curative petition seeking reconsideration of Bhaskar Raju Case was filed. Thereafter, NN Global 2 Case was pronounced on

April 25, 2023. Thereafter, due to broader implications of NN Global 2 Case, the Supreme Court referred the proceedings to a seven-judge Bench.

Issue

Whether an Arbitration Agreement would be considered non-existent, invalid or unenforceable in the event the underlying contract is unstamped or insufficiently stamped.

Arguments

Contentions of the Petitioners:

The petitioners submitted that Section 11(6A) of the Arbitration Act expressly restricts the power of the referral court to the examination of the existence of an arbitration agreement and such power does not extend to examine adequacy of the stamping under Section 33 (*Examination and impounding of instruments*) of the Stamp Act. It was further contended that the majority view in NN Global 2 Case has nullified the effect of Section 11(6A) of the Arbitration Act which had restricted the jurisdiction of the court to the examination of the existence of an arbitration agreement. It was further contended that the Arbitration Act restricts the authority of referral court to examine the arbitration agreement only and not the instrument in question. It was further submitted that the arbitral tribunal has the competence to rule on its own jurisdiction on issues pertaining to stamping. It was further contended that the non-obstante clause provided under Section 5 (*Extent of judicial intervention*) of the Arbitration Act confines the scope of judicial intervention of courts in the arbitral process and must be read harmoniously with the provisions of the Stamp Act. It was further submitted that the requirement of stamping does not render an instrument void, but only makes the instrument inadmissible in evidence until the defect is cured in accordance with the provisions of the Stamp Act.

Contention of the Respondents:

Respondents contended that the requirements set out for a curative petition to be maintainable as laid down by the Supreme Court in the landmark judgment of ***Rupa Ashok Hurra v. Ashok Hurra [(2002) 4 SCC 388]*** was not adhered to. It was further contended that the examination by the court under Section 11(6A) of the Arbitration Act is not confined to mere facial existence of an arbitration agreement and that the referral court has to prima facie examine the existence as well as validity of the arbitration agreement. It was further argued that Section 33 of the Stamp Act casts a mandatory obligation on courts under Section 11 of the Arbitration Act to impound an unstamped or insufficiently stamped instrument and that the same cannot be admitted in evidence or acted upon until payment of the stamp duty and requisite penalty is paid.

Observations of the Supreme Court

With regards to the maintainability of the curative petition, Supreme Court did not deal with the same and considered it appropriate that this issue be left open for parties to raise to the appropriate bench.

It was further observed that Section 35 of the Stamp Act is significant for adjudication of the issue at hand. In a nutshell, Section 35 of the Stamp Act provides that no instrument chargeable with stamp duty shall be admitted in evidence or shall be acted upon, unless such instrument is duly stamped. However, the aforesaid section also provides that upon payment of the balance insufficient amount of stamp duty,

the instrument will be admitted in evidence. Hence, Section 35 of the Stamp Act renders a document inadmissible for evidence but not void and therefore, the ratio laid down by the five-judge bench in NN Global 2 Case is not correct as it does not appreciate the distinction between enforceability and admissibility of a document.

Further, Supreme Court examined the distinction between inadmissibility and voidness of an agreement. It was observed that the issue of admissibility means as to whether a court may rely upon a document while adjudicating a case, whereas when an agreement is void, it hits on the issue of enforceability of such agreement in a court of law.

Further, Supreme Court also analysed the concept of separability or severability of an arbitration agreement from the underlying contract and observed that an arbitration agreement is juridically independent from the underlying contract in which it is contained.

Thereafter, Supreme Court dealt with the common law concept of 'Competence-Competence' which is adopted in Section 16 (*Competence of arbitral tribunal to rule on its jurisdiction*) of the Arbitration Act. Upon consideration, Supreme Court arrived at the conclusion that the analysis of five-judge bench in NN Global 2 Case was not correct as the aforesaid analysis is contrary to the separability presumption which treats an arbitration agreement as separate from the underlying contract.

Further, Supreme Court examined the scope of judicial interference under the Arbitration Act. It was observed that upon analysis of relevant judicial pronouncements prior to insertion of Section 11(6A) of the Arbitration Act, there was high level of judicial intervention in appointment of an arbitrator. Consequently, the Law Commission of India deemed it fit to curtail the extent of judicial interference and hence, recommended the insertion of Section 11(6A) by way of amendment in the Arbitration Act.

Further, Supreme Court laid stress on harmonious construction of the Arbitration Act, the Stamp Act and the Indian Contract Act, 1872. Furthermore, Supreme Court observed that the object of the Arbitration Act is to ensure an efficacious process of arbitration and minimize the supervisory role of courts in the arbitral process. Whereas, the object of the Stamp Act is to secure revenue for the State. Hence, there is a need that provision of both the aforesaid legislations must be interpreted in a harmonious manner.

Decision of the Supreme Court

Supreme Court held that arbitration clauses in unstamped agreements are enforceable. Even though unstamped or inadequately stamped agreements are inadmissible in evidence under Section 35 of the Stamp Act, such agreements are not rendered void or void ab initio or unenforceable since non-stamping or inadequate stamping is a curable defect. Further, Supreme Court held that objection on the issue of stamping does not fall within the scope of determination under Sections 8 or 11 of the Arbitration Act. However, the concerned court must examine whether arbitration agreement prima facie exists. Further, it was held that any objection in relation to stamping of the agreement falls within the ambit of arbitral tribunal. Further, it was made clear that the decision in NN Global 2 Case, SMS Tea Estates Case and Garware Case (*to the extent of paragraphs 22 and 29 of the judgment*) stand overruled by virtue of the present judgment.

VA View: The present judgment laid down by the Supreme Court is a landmark judicial pronouncement in the regime of Arbitration Act vis-à-vis Stamp Act. Further, this judgment gives clarity on the legal position as well as distinction between admissibility of an agreement/instrument in evidence and its legal enforceability in a court of law on account of non-stamping or insufficient stamping. This judicial pronouncement is remarkable because it has settled the confusion prevailing over this issue of law, provided clarity on the scope of judicial intervention by an appropriate court at the time of appointment of arbitrator as well as harmonizes the conjoint interpretation of relevant provisions of the law pertaining to arbitration and stamping.

This judgment will give impetus to development of arbitration regime in India and will go a long way in ensuring that India becomes a preferred destination for arbitration.

II. Supreme Court: Non-signatories to an arbitration agreement can be made parties to an arbitration proceeding under the group of companies doctrine.

The Supreme Court, *vide* its judgment dated December 6, 2023, in the case of ***Cox and Kings Limited v. SAP India Private Limited [Arbitration Petition (Civil) No. 38 of 2020]***, held that non-signatories to an arbitration agreement can be bound by the arbitration agreement based on mutual intention. Consequently, the Supreme Court upheld the 'group of companies' doctrine.

Facts

A SAP Software End User License Agreement and SAP Enterprise Support Schedule ("**Software License Agreement**") was executed between Cox and Kings Limited ("**Petitioner**") and SAP India Private Limited ("**Respondent No. 1**"). As per the terms of the Software License Agreement, certain ERP software was owned and developed by the Respondents and the licensee of the software was the Petitioner. Respondents recommended their Hybris Solution to the Petitioner, for the execution of which the arrangement was divided into three transactions: (a) Software License and Support Agreement - Software Order Form 3 dated October 30, 2015 ("**License Agreement**") (for the purchase of the SAP Hybris Software License); (b) Services General Terms and Conditions Agreement ("**GTC**") dated October 30, 2015 (containing the terms and conditions for the implementation of the SAP Hybris software), and (c) agreement for customisation of the SAP Hybris software dated November 16, 2015. The GTC contained an arbitration clause in accordance with the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") and the seat was Mumbai. The Petitioner faced some hindrances till 2016 in the effective implementation of the Hybris Solution and accordingly, SAP-SE, the German parent company of Respondent No. 1 ("**Respondent No. 2**") assisted the Petitioner.

Further, Respondent No. 2 took over the project with the aid of global experts. Respondent No. 2 rendered assistance in spite of not being a party to the GTC. Ample issues arose, such as non-fulfilment of the contracts even with the extended timelines and additional manpower, in respect of the implementation of software, which in turn led to the rescinding of the contractual obligations. The Petitioner sought refund of INR 45 crores from the Respondents that was paid towards the License Agreement as the Respondents had withdrawn their resources in respect of the implementation of the said project. Disputes arose between the parties which was followed by the commencement of the

arbitration proceedings under the GTC by the Respondent No. 1 seeking a sum of INR 17 crores from the Petitioner for the wrongful termination of the GTC. The Petitioner simultaneously filed an application under Section 16 (*Competence of arbitral tribunal to rule on its jurisdiction*) of the Arbitration Act on the grounds that each of the agreement forms a part of a composite transaction and the same should be a part of a singular proceeding.

An application under Section 7 (*Initiation of corporate insolvency resolution process by financial creditor*) of the Insolvency and Bankruptcy Code, 2016 was filed against the Petitioner by Yes Bank Limited, which was followed by appointment of an interim resolution professional by the National Company Law Tribunal ("**NCLT**"), on October 22, 2019.

Further, since corporate insolvency resolution process was initiated against the Petitioner, NCLT adjourned the arbitration proceeding between the parties on November 5, 2019. However, another notice for initiating a fresh arbitration proceeding was sent by the Petitioner on November 7, 2019 to Respondent No. 2 which made Respondent No. 2 a party to the arbitration proceedings, which was not a signatory to the agreements. However, as there was no response from the Respondents and no arbitrator was appointed by the Respondents, an application was filed by the Petitioner under Section 11 (*Appointment of arbitrators*) of the Arbitration Act before the Supreme Court, wherein the Petitioner sought the constitution of an arbitration tribunal and appointment of an arbitrator. The said application was taken into consideration by a three-judge bench of the Supreme Court which considered the group of companies doctrine ("**Doctrine**") under Indian arbitration law in the backdrop of the principles of privity of contract as well as the principle of autonomy of party. Further, the three-judge bench of the Supreme Court referred the matter to a Constitutional Bench of the Supreme Court to decide on the matter. In this case, there were four interveners, namely, Kirloskar Brothers Limited, Jindal Drilling Industries, ECom Express Limited, and Dost Hospitality Services Private Limited (collectively referred to as "**Interveners**").

Issues

1. Whether joinder of non-signatories as a 'party' is permissible under the Arbitration Act.

2. Whether the 'group of companies' doctrine is valid and applicable in Indian arbitration law and, if so, under what circumstances and conditions.

Arguments

Contentions of the Petitioner:

The Petitioner submitted that the basis for application of the Doctrine is the tacit/ implied consent by the non-signatory to be bound by an arbitration agreement. The Petitioner also submitted that the definition of 'party' under Section 2(1)(h) (*Definitions*) of the Arbitration Act should be given a wider interpretation as it cannot be restricted merely to the signatories to an arbitration agreement but should also include within its ambit non-signatories depending upon the facts and circumstances of the case.

It was contended by the Petitioner that as per Section 7 (*Arbitration agreement*) of the Arbitration Act, the legal relationship between the parties may be non-contractual as well. Additionally, Section 7(4)(b) of the Arbitration Act states that a non-signatory to an arbitration agreement could be bound by an

arbitration agreement if the said party has demonstrated his intention to be bound by the agreement by the virtue of a written communication.

The Petitioner also contended that the Doctrine should ideally be applied by the arbitral tribunal. Further, at the referral stage, the court should only restrict itself to taking a prima facie view and let the arbitral tribunal determine the requirement of joining the non-signatories to the arbitration agreement.

Contentions of the Respondents:

As per the Respondents, the applicability of the Doctrine must be examined in the context that whether a non-signatory could be made a party to the arbitration agreement and the expression 'claiming through or under' as mentioned under Sections 8 (*Power to refer parties to arbitration where there is an arbitration agreement*) and 45 (*Power of judicial authority to refer parties to arbitration*) of the Arbitration Act cannot be the premise to apply the Doctrine. The concept of 'person claiming through or under' a party depicts the notion of a derivative cause of action where the non-signatory steps into the shoes of a party rather than claiming an independent right under the arbitration agreement.

It was contended by the Respondents that the Doctrine is a consensual theory which is based on the existence of a dispute which arises from a defined legal relationship and mutual intention of the parties to be bound by the arbitration agreement. Additionally, the intention of the non-signatory to an arbitration agreement has to be ascertained from the cumulative factors which have been laid down by the Supreme Court in the case of ***Chloro Controls India (P) Limited v. Severn Trent Water Purification Incorporated [(2013) 1 SCC 641]*** ("**Chloro Controls Case**").

The Respondents have put forth certain factors which must be met for the application of the Doctrine to bind the non-signatory as a 'veritable' party to the arbitration agreement. Firstly, the mutual intention of all the parties should be to remain bound by the arbitration agreement. Secondly, the absolute and unqualified acceptance by the non-signatory party to the arbitration agreement. Thirdly, the said acceptance must either be expressed or implied. However, for a non-signatory, the said acceptance would be implied and manifested in the negotiation, performance, or termination of the contract.

It was contended by the Respondents that mutual consent of the parties to refer disputes arising out of their defined legal relationship to arbitration forms an essential ingredient of an arbitration agreement. Further, binding the non-signatory to an arbitration agreement without ascertaining their consent would go against the concept of party autonomy.

It was contended by the Respondents that the Doctrine is a purely economic concept without any basis in either contract law or company law. Hence, it cannot be applied for the determination of the intention of non-signatories to be bound by an arbitration agreement and the decision of a party to not sign the arbitration agreement may form the basis to demonstrate an intent not to be bound by it. The determination of mutual intention of the parties by considering the consequential or subsequent agreements as laid down in the Chloro Controls Case is incorrect as it did not consider whether an implied consent derived from the conduct of a non-signatory satisfied the requirement of a clear intention to arbitrate. The Respondents also contended that there exists a requirement that the arbitration agreement should be in writing under Section 7 of the Arbitration Act. Hence, an arbitration agreement cannot be created on the basis of implied consent of the non-signatory to the arbitration agreement.

Contentions of the Interveners:

It was contended by the Interveners that the Doctrine constitutes a true and genuine effectuation of the real intent of the signatory and non-signatory to the arbitration agreement. The Interveners also submitted that the Doctrine is a reasonable and natural extension of the principle of piercing the corporate veil. Additionally, the application of the Doctrine is also justified in affixing responsibility when the requisite and sufficient degree of common ownership and control exists. The Interveners submitted that the intention of the parties to an arbitration agreement cannot be the only basis to join a non-signatory party to an arbitration agreement and the court may also consider the non-consensual doctrines such as piercing the corporate veil, alter ego, or tight group structure.

As per the Interveners, the adoption of the Doctrine in Indian arbitration jurisprudence is not prohibited or inhibited in Indian arbitration jurisprudence under the Arbitration Act. The Interveners submitted that the expression "any person claiming through or under" was inserted *vide* an amendment to the Section 8 of the Arbitration Act, which recognizes and codifies the reality of non-signatories acting through or under the signatory parties. It was contended by the Interveners that the onus to prove the intention of the non-signatory to be bound by the arbitration agreement lies on the party seeking to implead the non-signatory.

The Interveners also contended that an arbitration agreement has to be in writing and there cannot be an oral agreement to arbitrate according to Section 7 of the Arbitration Act. Regardless, the intention of the non-signatory to be bound by the arbitration agreement can be gathered from its conduct. The Interveners also submitted that factors such as economic convenience, justice or equity cannot be grounds for binding non-signatories to an arbitration agreement as arbitration is in the realm of private law, and a matter of choice and intent of the parties.

Observations of the Supreme Court

The Supreme Court focused on the principle of party autonomy as well as mutual consent. It was observed by the Supreme Court that the signature of a party on the agreement is the most profound expression of the consent of a person or entity to submit to the jurisdiction of an arbitral tribunal. However, the corollary that persons or entities who have not signed the agreement are not bound by it may not always be correct.

The Supreme Court opined that the consent of the parties to be bound by the terms of the contract can be determined by the acts or conduct of the parties. As per the Indian Contract Act, 1872, consent of a party to be bound by the terms of the contract can be determined by the actions or conduct of the parties to a contract which is also applicable to an arbitration agreement, which is essentially a creature of contract. Therefore, the Supreme Court, in respect of the issue pertaining to the non-signatories being bound by an agreement, made certain conclusions: (i) an arbitration agreement arises out of a legal relationship existing between or among persons/entities which may be contractual or otherwise; (ii) it is not necessary for the persons or entities to be signatories to the arbitration agreement to be bound by it and in case of non-signatory parties, the important determination for the courts is whether the persons or entities intended or consented to be bound by the arbitration agreement or the underlying contract containing the arbitration agreement through their acts or conduct; (iii) the requirement of a written arbitration agreement does not exclude the possibility of binding effect on the non-signatory parties in those situations where there is a defined legal relationship between the signatory and non-signatory parties; and (iv) once the validity of an arbitration agreement is established, the court or tribunal can determine the issue of which parties are bound by such agreement. It was held by the Supreme Court that a non-signatory party could be considered as a party to the arbitration agreement on the basis of

their role in the negotiation, performance, or termination of the underlying contract containing the arbitration agreement.

In respect of the second issue pertaining to the validity and applicability of the Doctrine, the Supreme Court analysed the Doctrine vis-à-vis its applicability under the context of Indian arbitration law. The Companies Act, 2013 has statutorily recognized a subsidiary company as a separate legal entity. However, the courts consider it appropriate to pierce the corporate veil when maintaining the separateness of corporate personality is found opposed to justice, convenience and public interests. The Supreme Court held that the arbitration law has witnessed several evolutions and development and has also adopted the Doctrine according to which it can allow or compel a non-signatory party to be bound by an arbitration agreement. The Doctrine is used in the context of companies which are related to each other by being a part of the same corporate group and for the identification of the common intention of the parties in binding a non-signatory to the arbitration agreement by emphasizing the corporate affiliation of the distinct legal entities. The Supreme Court noted that the underlying basis of the Doctrine rests on maintaining the separate legal personality of the group companies while determining the common intention of the parties for the purpose of binding the non-signatory party to the arbitration agreement.

In order to analyse the Doctrine, the Supreme Court emphasised on the Chloro Controls Case and observed that a non-signatory could be subjected to arbitration when the underlying transactions were with a group of companies and a clear intention existed between the parties to bind the signatory as well as non-signatory parties to the arbitration agreement. It was also held in the case of ***Cheran Properties Ltd v. Kasturi and Sons Limited [3 (2018) 16 SCC 413]*** that the Doctrine is an aid to decoding the layered structure involved in commercial arrangements for the purpose of unravelling the true intention of the parties to bind someone who is not formally a signatory to the contract, but has 'assumed' the obligation to be bound by the actions of a signatory.

The Supreme Court, for the purpose of determining the mutual intention, held that in case of multi-party agreements, the courts/tribunals will have to examine the corporate structure for determining whether both the signatory and non-signatory parties belong to the same group which is followed by the court/tribunal to consider the commercial circumstances as well as the conduct of the parties in order to determine the common intention of the parties to arbitrate and the party which seeks joinder of a non-signatory has to proof the satisfaction of the said factors to the satisfaction of the court/tribunal. It was noted by the Supreme Court that if a non-signatory party is involved actively in the performance of a contract and its conduct is in harmony with the other members of the group, it creates an appearance that such a non-signatory party is a 'veritable party' to the contract containing the arbitration agreement. Based on such an appearance created by the non-signatory, the other party can legitimately rely on the said appearance and believe that non-signatory was a veritable party to the contract and therefore the other party can bind the non-signatory to the arbitration agreement.

It was held that the approach of the Supreme Court in the Chloro Controls Case, which was pronounced earlier in point of time, to the extent that the phrase 'claiming through or under' under Section 8 of the Arbitration Act is inclusive of the Doctrine is erroneous as it has given a wider perspective to the Doctrine which is against the principles of commercial as well as contract law. The Supreme Court also held that the principle of single economic unit cannot form the sole basis for applying the Doctrine and the courts/tribunals must take into consideration every cumulative factor as laid down in the case of ***Oil and Natural Gas Corporation Limited v. Discovery Enterprises Private Limited [5 (2022) 8 SCC 42]*** which factors have been reproduced herein: "*.... (i) The mutual intent of the parties; (ii) The relationship*

of a non-signatory to a party which is a signatory to the agreement; (iii) The commonality of the subject-matter; (iv) The composite nature of the transactions; and (v) The performance of the contract."

It was also held by the Supreme Court that any authoritative determination given in relation to the Doctrine should not be interpreted to exclude the application of other doctrines and principles for binding non-signatories to the arbitration agreement.

Decision of the Supreme Court

The Supreme Court held that the definition of "parties" is inclusive of both the signatory as well as non-signatory parties according to the Section 2(1)(h) read with Section 7 of the Arbitration Act and the consent of the parties can be the basis for determination of their consent to be bound by the arbitration agreement. Additionally, the requirement of a written arbitration agreement under Section 7 of the Arbitration Act does not exclude the possibility of binding non-signatory parties. The Supreme Court held that the underlying basis for the application of the Doctrine rests on maintaining the corporate separateness of the group companies while determining the common intention of the parties to bind the non-signatory party to the arbitration agreement and the principle of alter ego or piercing the corporate veil cannot be the basis for the application of the Doctrine as the said Doctrine has an independent existence as a principle of law which originated from the harmonious construction of the Section 2(1)(h) read along with the Section 7 of the Arbitration Act.

The Supreme Court held that the utility of Doctrine in determination of the intention of the parties in case of complex transactions which involves multiple parties and multiple agreements should be considered and thus the Doctrine should be retained in the Indian arbitration jurisprudence. It was also held by the Supreme Court that at the referral stage, the referral court should leave it for the arbitral tribunal to decide on the issue whether the non-signatory is bound by the arbitration agreement.

VA View: The act of binding non-signatories to an arbitration agreement has been heavily debated and subjected to scrutiny by various courts/tribunals, from time to time, both nationally as well as internationally. The Supreme Court has rightly emphasised on the judgments which are contrary to each other in respect of binding the non-signatories to an arbitration agreement.

The present case is a milestone announcement in the Indian arbitration jurisprudence as it has settled the long lasting issue pertaining to validity of the Doctrine in the context of Indian legal framework. The Doctrine means to infer the mutual intentions of both the signatory and non-signatory parties to be bound by the arbitration agreement. The Supreme Court has rightly taken into its consideration the various international aspects of the said doctrine such as its applicability and validity under various global jurisdictions and thus clarified the right approach and stand of the Doctrine in the context of India.

III. Supreme Court: An instrument which is compulsorily convertible into shares such as a compulsorily convertible debenture, is to be treated as an equity instrument and not regarded as a financial debt under IBC.

The Supreme Court, *vide* its judgment dated November 9, 2023, in the matter of ***M/s. IFCI Limited v. Sutanu Sinha and Others [Civil Appeal No. 4929/2023]***, has held that as per the facts in the present

case, compulsorily convertible debentures ("**CCDs**") should be treated as an equity instrument instead of a debt instrument, since it was not stipulated that these CCDs would partake the character of financial debt on the happening of a particular event.

Facts

IVRCL Chengapalli Tollways Limited ("**ICTL**" / "**Corporate Debtor**") and the National Highways Authority of India ("**NHAI**") had executed a concession agreement dated March 25, 2010 ("**Concession Agreement**"), for giving effect to a project awarded by the NHAI. ICTL was incorporated as a wholly-owned subsidiary of IVRCL Limited ("**IVRCL**"), and secured a term loan from a consortium of lenders as part of the debt component to finance the project. The remaining funds were to be provided by IVRCL through equity infusion, with a portion to be sourced through CCDs. M/s. IFCI Limited ("**Appellant**") invested in these CCDs.

The Debenture Subscription Agreement dated October 14, 2011 ("**DSA**") required IVRCL to make coupon payments, provide security, and grant a 'put option' to the Appellant, thus allowing the latter to sell the CCDs to a third party in case of default. The project encountered financial challenges, leading to non-payment to the Appellant. Although the Corporate Debtor proposed a one-time settlement, it was subsequently revoked, prompting the Appellant to invoke the corporate guarantee provided by IVRCL, following which, both Appellant and the State Bank of India initiated the corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016 ("**IBC**").

The Appellant submitted his claim as a financial debt to the resolution professional ("**Respondent**") which was rejected by the Respondent based on the following grounds: (i) the nature of CCDs issued was recorded as an equity instrument in all the agreements executed between the parties, including the Concession Agreement and the DSA; (ii) the project cost approved by the NHAI and lenders consortium recognized the CCDs as the part of equity, and at no point in time did the Appellant sought for re-categorization of the CCDs to debt or the approval from NHAI for such conversion; (iii) the payments obligations under the DSA were that of IVRCL and the balance sheet of the Corporate Debtor also clarifies that; and (iv) the CCDs were mandatorily convertible in December, 2017.

The Appellant, *vide* IA No. 1465/2022, filed an application before the National Company Law Tribunal ("**NCLT**") against the rejection of its claim by the Respondent. NCLT, *vide* its order dated March 14, 2023, rejected the claim of the Appellant, by placing reliance on the judgment of the Supreme Court in the case of ***Narendra Kumar Maheshwari v. Union of India and Others [(1990) Suppl. SCC 440]*** ("**Narendra Kumar Case**"), wherein it was held that any instrument which is compulsorily convertible into shares is regarded as an "equity" and not a loan or debt. The said order was also upheld by National Company Law Appellate Tribunal ("**NCLAT**"), *vide* its order dated June 5, 2023.

The present appeal has been filed by the Appellant against the impugned order of NCLAT under Section 62 (*Appeal to Supreme Court*) of IBC before the Hon'ble Supreme Court.

Issue

Whether CCDs could be treated as a debt instrument instead of an equity instrument.

Arguments

Contentions of the Appellant:

The Appellant submitted that in the event the Appellant is treated neither as a shareholder nor as a financial creditor, the Appellant will be rendered remediless.

The Appellant distinguished the Narendra Kumar Case on the basis that the context in the said judgment was a public interest litigation, and has referred to the concept of the debentures which are intrinsically in the nature of debt, whereas the present case deals with the question as to the treatment of CCDs as equity or debt.

The Appellant contended that the entire principal amount along with the interest became due and payable under the CCD, since the conversion of CCDs to equity actually became impossible due to the insolvency of the Corporate Debtor. The Appellant further contended that the nature of the CCDs should be ascertained based on the status of the maturity of the CCDs and the position of the investor at the inaugural time, and this would vary in the facts and circumstances of each case.

Contentions of the Respondent:

The Respondent submitted that the concept of compulsorily convertible instruments including CCDs falls within the definition of equity as opposed to debt which has been defined as liability or obligation in respect of a claim which is due from any person. The Respondent further stated that the Corporate Debtor does not have a liability towards the Appellant, since the Appellant is an equity participant who would receive benefit on the success of a commercial venture, and would not inhere in case of the failure of such commercial venture.

The Respondent also submitted that prior written approval of lenders was required before the Corporate Debtor could issue any debentures or raise any loans, and the Corporate Debtor at no occasion has sought the approval of the lenders to issue any debentures or debt to the Appellant. The Respondent contended that the financing plan itself envisaged CCDs as part of the equity portion of the funding.

The Respondent lastly contended that if the instrument was a simpliciter debenture, it would have fallen under the category of a financial debt but the present case deals with CCDs. The primary obligations of coupon payments, buy back and security is on the part of IVRCL, resulting in no liability on the part of the Corporate Debtor towards the Appellant.

Observations of the Supreme Court

The Supreme Court analyzed the DSA which clearly defined the role of the Corporate Debtor as the special purpose vehicle, IVRCL as the sponsor company and the Appellant as the lender. The clauses also clarified the position that the Appellant was provided security under the DSA and the primary obligations such as making coupon payments, providing security were that of IVRCL, moreover, the buy-back arrangement was also entered into between the Appellant and IVRCL. The Supreme Court further observed that unless the debt is of the Corporate Debtor, the Appellant cannot seek a recovery of the amount on the basis of being a creditor of the Corporate Debtor.

The Supreme Court, placing reliance on ***Nabha Private Limited v. Punjab State Power Corporation Limited [(2018) 11 SCC 508]***, also stated that a contract means as it reads, and it is not advisable for a court to supplement it or add to it.

The Supreme Court noticed that the terms of the various agreements prohibited the Corporate Debtor from taking further debt without the consent of the assignees. Further, no approval was sought or taken from NHAI. Hence, the amount was treated as an equity alone and not as a debt.

With respect to the appellate jurisdiction of the Supreme Court under IBC, the Supreme Court clarified that the jurisdiction is restricted to a question of law, akin to a second appeal. The law does not envisage unlimited tiers of scrutiny and every tier of scrutiny has its own parameters. Thus, the dispute has to be analyzed within the four corners of the statutory jurisdiction conferred on the Supreme Court.

Decision of the Supreme Court

The Supreme Court upheld the order of NCLAT opining that the issue has been correctly crystallized as to whether CCDs could be treated as a debt instead of an equity instrument. Treating the CCDs as debt would tantamount to breach of the Concessional Agreement and the common loan agreement. The investment was clearly in the nature of debentures which were compulsorily convertible into equity and nowhere is it stipulated that these CCDs would partake the character of financial debt on the happening of a particular event.

VA View: The present judgment clarifies the treatment of compulsorily convertible instruments as equity. It has become a settled position of law that when an investment is made in the nature of debentures which are compulsorily convertible into equity and nowhere is it stipulated that the CCDs would partake the character of financial debt on the happening of a particular event, the CCDs are to be treated as equity.

The Supreme Court further limited the powers of the court to interpret any commercial contract. It held that a contract means as it reads, and it is not advisable for a court to supplement it or add to it. The Supreme Court also deduced its appellate jurisdiction under IBC to hold that law does not envisage unlimited tiers of scrutiny and every tier of scrutiny has its own parameters and the jurisdiction of the Supreme Court under Section 62 of IBC is restricted to a question of law, akin to a second appeal.

IV. Delhi High Court: Petition under Section 34 of the Arbitration Act dismissed twice for non-prosecution, court denies benefit under Section 14 of the Limitation Act citing lack of diligent prosecution.

The Delhi High Court ("**Delhi HC**"), in its judgement dated December 12, 2023, in the matter of ***U.P. Jal Vidyut Nigam Limited v. C.G. Power and Industrial Solutions Limited [FAO(OS) (COMM) 120/2019]***, has held that the benefit under Section 14 (*Exclusion of time of proceeding bona fide in court without jurisdiction*) of the Limitation Act, 1963 ("**Limitation Act**") would not be available to a petitioner who, through lack of diligence, allowed its petition under Section 34 (*Application for setting aside arbitral awards*) of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") to be dismissed twice for non-prosecution.

Facts

U.P. Jal Vidyut Nigam Limited ("**Appellant**") had notified tenders for the execution of power house electrical equipment at Saharanpur district, which was awarded to C.G. Power and Industrial Solutions Limited ("**Respondent**") and a contract dated September 28, 1988 was executed between them. Subsequently, disputes arose between the Appellant and the Respondent, and it was referred to arbitration. On March 15, 2001, the arbitral tribunal pronounced an award for INR 95,74,733 in favour of the Respondent ("**Arbitral Award**").

Aggrieved by the Arbitral Award, the Appellant filed an application challenging the Arbitral Award under Section 34 of the Arbitration Act ("**Section 34 Petition**") before the Civil Judge, Saharanpur on July 2, 2001, that is, after a lapse of 110 days from the Arbitral Award. The Section 34 Petition faced procedural challenges, including transfers between different courts and dismissals on 2 occasions. Resultantly, the Respondent filed an execution petition before the District Judge, Saharanpur for execution of the Arbitral Award. In the meantime, an application for the stay on execution was filed by the Appellant before the District Judge, Saharanpur, and the same was rejected by the District Judge, Saharanpur, *vide* its order dated January 6, 2018 ("**Order**"). With a view to challenge the Order, the Appellant filed a petition ("**Restoration Application**") under Article 227 (*Power of superintendence over all courts by the High Court*) of the Constitution of India before the Allahabad High Court ("**Allahabad HC**"), in order to restore the application filed for the stay of execution proceedings. By an order dated February 19, 2018, the Allahabad HC allowed the Restoration Application and directed the Appellant and Respondent to refrain from seeking adjournment till the Restoration Application was adjudicated upon. In the meantime, the proceedings filed by the Respondent before the District Judge, Saharanpur for execution of the Arbitral Award was to also remain in abeyance.

On March 14, 2018, a trial court in Allahabad allowed the Restoration Application filed by the Appellant, thereby reviving the Section 34 Petition. Subsequently, the Appellant filed an application before the District Judge, Saharanpur for the withdrawal of the Section 34 Petition with liberty to file the same before a court of competent jurisdiction. This was allowed by the District Judge, Saharanpur *vide* its order dated May 3, 2018. Owing to the aforementioned events, the Section 34 Petition was pending adjudication in the courts at Saharanpur for more than 15 years.Thereafter, the Appellant filed the Section 34 Petition before the District Judge, Patiala House Court, New Delhi ("**Patiala House Court**") on May 8, 2018, which petition was returned by the Patiala House Court to be filed before a single-judge bench of the Delhi HC, in view of the fact that the Patiala House Court lacked pecuniary jurisdiction to entertain the Section 34 Petition. Consequently, the Appellant proceeded to file the Section 34 Petition before a single judge bench of the Delhi HC on August 25, 2018. Hence, the Section 34 Petition was filed before the Delhi HC after more than 17 years from the date of the Arbitral Award. This Section 34 Petition was accompanied by an application under Section 14 of the Limitation Act seeking the exclusion of 6,263 days which had been spent in the proceedings before the courts at Saharanpur. The single judge of the Delhi HC, *vide* its order dated April 12, 2019 ("**Impugned Order**") dismissed the Appellant's application filed under Section 14 of the Limitation Act and the Section 34 Petition.

Aggrieved by the Impugned Order, the Appellant filed the present appeal under Section 37 (*Appealable orders*) of the Arbitration Act before the Division Bench of Delhi HC to set aside the Impugned Order.

Issue

Whether for the purposes of calculating limitation under Section 34(3) of the Arbitration Act, the delay of 6,263 days can be excluded and condoned in terms of Section 14 of the Limitation Act.

Arguments

Contentions of the Appellant:

The Appellant contended that it was entitled to the exclusion of the period during which it was prosecuting the Section 34 Petition before the courts at Saharanpur and the Patiala House Court, as the same was due to wrong legal advice received by the Appellant. Further, the Appellant submitted that it was pursuing the instant case in a *bona fide* and diligent manner, and that the Section 34 Petition was wrongly filed before the Patiala House Court instead of the Delhi HC due to incorrect legal advice.

The Appellant submitted that the applicability of Section 14 of the Limitation Act was not excluded under Section 34(3) of the Arbitration Act, and that Section 14 of the Limitation Act should be interpreted and adopted liberally to advance the cause of justice. In order to support this argument, the Appellant relied on the judgment of the Hon'ble Supreme Court ("**SC**") in the case of ***Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department and Others [(2008) 7 SCC 169]*** ("**Consolidated Engineering Case**"), wherein the SC had held that Section 14 of the Limitation Act would be applicable to proceedings under Section 34(3) of the Arbitration Act.

Contentions of the Respondent:

The Respondent submitted that the Section 34 Petition was initially filed before the Civil Judge, Saharanpur, which was dismissed twice due to non-prosecution. Even upon the withdrawal of the Section 34 Petition from the court of the Additional District Judge, Saharanpur, the Appellant had wrongly filed the Section 34 Petition before the Patiala House Court, albeit being fully aware of the fact that the Patiala House Court lacked pecuniary jurisdiction to entertain the said petition. The Respondent also contended that the Appellant had prosecuted the Section 34 Petition filed before the Patiala House Court despite an objection for lack of jurisdiction of court being raised by the Respondent. Besides, the Appellant had taken steps towards filing the Section 34 Petition before the Delhi HC only after a lapse of 63 days after the Patiala House Court allowed the Respondent's objection for lack of jurisdiction of the Patiala House Court.

The Respondent relied on several judgements pronounced by the SC, including the case of ***Madhavrao Narayanrao Patwardhan v. Ramkrishnagovind Bhanu and Others [(1959) SCR 564]*** ("**Madhavrao Narayanrao Case**"), in order to support its submission that the Appellant had failed to demonstrate due diligence and good faith while prosecuting the case.

Observations of the Delhi HC

The Delhi HC observed that Section 14 of the Limitation Act had been enacted to exempt a period covered by litigious activity and to protect a litigant against the bar of limitation, where a proceeding is dismissed on account of a technical defect instead of being decided on merits. Therefore, the intent of the legislature is to prevent a litigant from being saddled with an adverse decision, which is, on account of the fact that a court did not have the jurisdiction to entertain the case.

The Delhi HC observed that, in the Consolidated Engineering Case, the SC, while elaborating on the principles laid down in the Madhavrao Narayanrao Case, had detailed the pre-conditions which must co-exist and ought to be satisfied for application of the benefit under Section 14 of the Limitation Act, which pre-conditions have been reproduced below:

"21……

(1) Both the prior and subsequent proceedings are civil proceedings prosecuted by the same party;

(2) The prior proceeding had been prosecuted with due diligence and in good faith;

(3) The failure of the prior proceeding was due to defect of jurisdiction or other cause of like nature;

(4) The earlier proceeding and the latter proceeding must relate to the same matter in issue and;

(5) Both the proceedings are in a court…."

The Delhi HC observed that Section 2(h) of the Limitation Act defines the term 'good faith' as "*nothing shall be deemed to be done in good faith which is not done with due care and attention*". The Delhi HC further observed that the SC, while discussing the term '*due care and attention*' in the context of Section 14 of the Limitation Act, in the Madhavrao Narayanrao Case, had held that what ought to be considered is whether a plaintiff had brought on record any evidence to show that he was prosecuting the previously instituted suit with due diligence. The measure of due diligence and prosecuting in good faith would have to be decided based on the facts of each case.

The Delhi HC observed that sequence of the events in the instant case demonstrated a complete absence of due diligence on the part of the Appellant. The Appellant had not provided an explanation for either the transfers or pendency of the Section 34 Petition or for the dismissals thereof. Moreover, the Appellant had also failed to provide an explanation as to why the Section 34 Petition was filed before the Patiala House Court which lacked jurisdiction to entertain such a petition. Furthermore, the Appellant was completely devoid of any reasons why the Section 34 Petition was pending adjudication in the courts at Saharanpur for more than 15 years. The Delhi HC observed that the conduct of the Appellant clearly established that the prior proceedings were not being prosecuted diligently or in good faith. Further, the 5 pre-conditions for allowing the application under Section 14 of the Limitation Act did not co-exist.

Decision of the Delhi HC

In view of the above, the Delhi HC found no reason to interfere with the Impugned Order and dismissed the appeal filed by the Appellant.

VA View: The Delhi HC has rightly observed that the Petitioner's conduct, at the time of prosecuting the prior proceedings before the courts at Saharanpur and Patiala House Court, failed to demonstrate due diligence and good faith.

Through this judgement, the Delhi HC has emphasized that due diligence and good faith are essential pre-requisites for invoking the benefit under Section 14 of the Limitation Act, which exempts a period covered by litigious activity and protects a litigant against the bar of limitation when a proceeding is dismissed on account of a technical defect instead of being decided on merits. Therefore, an application under Section 14 of the Limitation Act would not be available to a petitioner who, through its lack of diligence, allowed its petition to be dismissed twice for non-prosecution.

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