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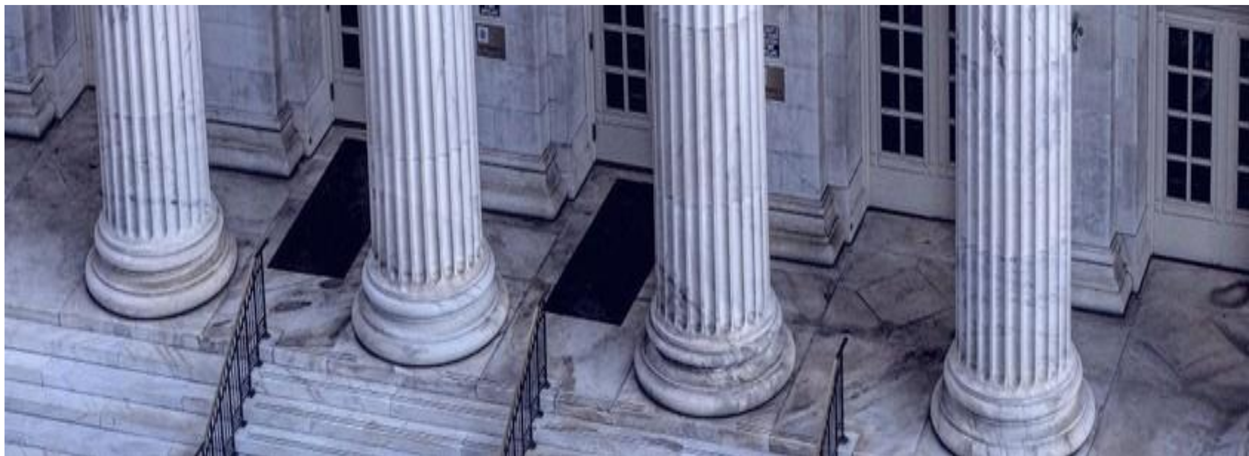
Between the lines...

A BRIEFING ON LEGAL MATTERS OF CURRENT INTEREST



KEY HIGHLIGHTS

* **Supreme Court:** Nomination process under the Companies Act, 1956/ Companies Act, 2013 does not override succession laws.
* **Supreme Court:** Statutory set-off or insolvency set-off inapplicable to Corporate Insolvency Resolution Process.
* **Bombay High Court:** High Court upholds the termination of an employee stating that freedom of speech and expression cannot be allowed beyond reasonableness.
* **NCLAT:** Liquidator is not entitled to charge any fee from a scheme proponent submitting a scheme under Section 230 of the Companies Act.

I. Supreme Court: Nomination process under the Companies Act, 1956/ Companies Act, 2013 does not override succession laws.

The Supreme Court, *vide* its judgment dated December 14, 2023, in the matter of ***Shakti Yezdani and Another v. Jayanand Jayant Salgaonkar and Others [Civil Appeal No. 7107 of 2017]***, held that the Companies Act, 1956 ("**CA, 1956**") does not deal with the law of succession nor does it override the laws of succession and the nominee does not receive absolute legal ownership of the subject matter of the nomination upon the death of the shareholder. This interpretation is applicable to CA, 1956 (and its equivalent provisions in the Companies Act, 2013 ("**CA, 2013**")) and the Depositories Act, 1996 ("**Depositories Act**").

Facts

Mr. Jayant Salgaonkar ("**Testator**"), family patriarch, executed a will on June 27, 2011 which made certain provisions for the devolution of the estates of the Testator upon the successors. Apart from the estate listed out in the will, the Testator had some fixed deposits and mutual fund investments ("**Securities**") in respect of which nominees were appointed by the Testator. A suit was filed in the Bombay High Court by Mr. Jayanand Jayant Salgaonkar ("**Respondent**") (a legal heir of the Testator who was not a nominee), wherein the administration of the properties of the deceased under the supervision of the court was claimed by the Respondent. On the other hand, Shakti Yezdani and others ("**Appellants**"), the sole nominees of the mutual funds, claimed for an absolute ownership of the Securities and the legal heirs contested their claim.

A single judge of the Bombay High Court took into consideration the provisions of CA, 1956 and the Depositories Act pertaining to nomination of securities and the rights of nominees and legal heirs and held that a nominee is not vested with the absolute ownership of the Securities and it was held by the Bombay High Court that nomination does not override testamentary or intestate succession and thus, CA, 1956 and the Depositories Act do not create a third mode of succession. Further, the division bench of the Bombay High Court also upheld the judgment of the singe judge, after hearing an appeal filed before it by the Appellants. Further, a second appeal was filed against the order of the division bench of the Bombay High Court before the Supreme Court.

Issues

1. Whether a nominee of a holder of shares or securities, appointed under Section 109A (*Nomination of shares*) of CA, 1956 read with the bye-laws under the Depositories Act, is entitled to the beneficial ownership of the shares or securities which are subject matter of nomination to the exclusion of all other persons who are entitled to inherit the estate of the holder as per the law of succession.

2. Whether a nominee is entitled to all rights in respect of the shares or securities which are subject matter of nomination to the exclusion of all other persons or whether he continues to hold the securities in trust and in a capacity as a beneficiary for the legal representatives who are entitled to inherit securities or shares under the law of inheritance.

3. Whether a bequest made in a will executed in accordance with the Indian Succession Act, 1925 ("**Succession Act**") in respect of shares or securities of the deceased supersedes the nomination

made under the provision of Sections 109A of CA, 1956 and bye-law no. 9.11 framed under the Depositories Act.

Arguments

Contentions of the Appellants:

It was contended by the Appellants that the nomination framework under CA, 1956 differs from that in other legislations. It was pointed out that the terms, including 'vesting', and 'to the exclusion of others', as well as a 'non-obstante clause' in CA, 1956, sets it apart from other laws. Consequently, it was argued by the Appellants that relying on judgments pertaining to nominations in other statutes such as the Insurance Act, 1939, Banking Regulation Act, 1949, National Savings Certificates Act, 1959, Employees Provident Fund and Miscellaneous Provisions Act, 1952, for interpreting the provisions of Sections 109A and 109B (*Transmission of shares*) of CA, 1956, would be incorrect. It was asserted by the Appellants that the provisions contained in other legislations cannot act as a ground for the interpretation of the term 'nomination' under CA, 1956 as they are not *pari materia* with Sections 109A and 109B of CA, 1956 (now Section 72 (*Power to nominate*) of CA, 2013).

It was argued by the Appellants that the inclusion of Sections 109A and 109B in CA, 1956 by the legislature on August 31, 1988 is explicit in conveying that a nominee, following the death of the shareholder or debenture holder, attains complete and exclusive ownership rights concerning the shares designated to them. Further, examining the hierarchy outlined in the provision, starting with shareholder in an individual capacity, followed by joint shareholders owing shares jointly, and ultimately, the nominee to whom the shares shall vest in the event of the shareholder or joint shareholders' death, it is asserted that the intention is clear that such nomination takes precedence over any disposition, whether testamentary or otherwise.

It was also contended by the Appellants that Sections 187C (*Declaration by persons not holding beneficial interest in any share*) and 109A(3) of CA, 1956 should be interpreted together, indicating that shares shall 'vest' with the nominee, excluding all other persons unless the nomination is altered or revoked. The Appellants also contended that Section 187C of CA, 1956 inherently outlines the process for varying the nomination through a suitable declaration, establishing these provisions as complete codes within themselves. When considered in conjunction, the absence of a declaration altering the nomination would imply that the intention was to confer beneficial ownership of the shares to the Appellants through the mechanism of nomination of rights. Since the will of the Testator had explicitly mentioned all other properties of the Testator except the Securities for which the Appellants were designated as nominees, it naturally implies that the ownership rights of those Securities would pass on to the nominees after the Testator's death.

Reference was made by the Appellants to the bye-law of the Depositories Act governing the transmission of securities in case of nomination. The presence of a non-obstante clause within this provision implies that the effect of nomination under the bye-law is that it would vest complete title of the shares within the nominee, irrespective of provisions in testamentary disposition(s) or nomination(s) under other laws which governs securities.

It was further pointed out by the Appellants that Regulation 29A (*Nomination*) of Securities and Exchange Board of India (Mutual Funds) Regulations, 1996 mandates asset management companies to provide the option to its unit holder to nominate a person in whom all rights of the units shall vest in

the event of the unit holder's death. It was the contention of the Appellants that when a change in nomination cannot be made without the consent of the other joint shareholder(s), the same cannot be made by way of a will or testamentary dispositions or laws of succession either.

It was asserted by the Appellants that the Bombay High Court's interpretation is inconsistent with the legislative intent behind the insertion of Sections 109A and 109B into CA, 1956. As per the Appellants, acceptance of the Bombay High Court's interpretation would undermine the legislature's intent pertaining to the ease of succession planning.

Contentions of the Respondent:

The Respondent emphasized that CA, 1956 does not deal with the law of succession and that the nominee of a share or the securities holder is not entitled to exclusive ownership of the shares or securities. The Respondent contended that the consistent view of various courts, including the Supreme Court, is that a nominee does not become the absolute owner of the estate. The Respondent stated that nomination does not affect the usual mode of succession and the legal heirs have not been excluded by virtue of the nomination.

It was argued by the Respondent that the nomination provisions do not confer absolute ownership rights to the nominees, and that the nominees do not become full owners of the estate for which they have been nominated. Additionally, the Respondent contended that the nomination provisions should not be considered as a form of 'statutory testament' that supersedes the law of succession as per the Succession Act. The Respondent also emphasized the need for a detailed judicial process to obtain letters of administration or succession certificates, as prescribed by the Succession Act, and argued that the nomination provisions do not replace the said process.

Observations of the Supreme Court

The Supreme Court, with a broad interpretation, in-depth analysed the provisions, scheme, and object of CA, 1956 as well as CA, 2013 and the amendments to it, the implication of the scheme of nomination under different statues and various judgement of different courts. The Supreme Court observed that the provisions of CA, 1956 do not deal with succession in any manner and it do not create a third mode of succession and do not override the law in relation to testamentary or intestate succession. Therefore, Supreme Court rejected the contention of nomination as a 'statutory testament.' Additionally, it was observed by the Supreme Court that there exists no material to depict that the intent of the legislature behind introducing a method of nomination through the Companies (Amendment) Act, 1999 was to confer absolute title of ownership of shares on the said nominee. Further, the Supreme Court observed that the non-obstante clause in Section 109A of CA, 1956 and bye-law no. 9.11.7 of the Depositories Act cannot be held to exclude the legal heirs from their rightful claim over the securities against the nominee. The said non-obstante clause does not contemplate a third line of succession under CA, 1956.

The nomination under these provisions does not grant absolute title over the subject property for which the nomination has been made in respect to the ownership in favour of the nominee, and it is not intended to restrict the law of succession in any manner. Further, the court also observed that the term 'vesting' does not confer absolute ownership of the securities in favour of the nominee which is also a well settled position under various other *pari materia* legislations. The object of addition of nomination facility in the Companies (Amendment) Act, 1999 was only to provide an impulsion to the investment

climate and ease the burdensome process of obtaining various letters of succession, from different authorities upon the shareholder's death.

Decision of the Supreme Court

The Supreme Court dismissed the appeal, upheld the decision of the Bombay High Court and held that a nominee does not attain absolute title over the property for which the nomination has been made and it does not override testamentary or intestate succession. The Supreme Court also laid emphasis on the need for consistency in interpreting settled principles of law and the significance of maintaining certainty in legal decisions. The Supreme Court also held that the same principles that apply to nomination in estate planning and succession laws should also apply to the devolution of securities. Thus, it was held by the Supreme Court that nomination must be considered as ordinarily understood by a reasonable person making nominations, with respect to their movable/immovable properties.

It was also held by the Supreme Court that the non-obstante clause under Section 109A(3) of CA, 1956 and bye-law no. 9.11.7 of the Depositories Act should be interpreted keeping in mind the intent with which the provisions for facilitating nomination for securities was introduced in the scheme of CA, 1956, that is, to enable smooth functioning of a company pursuant to the death of a shareholder.

VA View: The present case is a landmark ruling which settles the long pending and complex debate, followed by a series of contradictory judicial pronouncements by the courts of different jurisdictions, pertaining to the rights of the successors and nominees of an individual in relation of the shares or securities.

The Supreme Court has rightly clarified that the nomination process does not override the laws of succession as the purpose of the nomination process is merely simplification of the transfer of securities and protection of the subject matter of the nomination until the legal heirs can establish their right of succession. Therefore, the Supreme Court has in an appropriate manner brought a harmonious construction and given due consideration to both the laws of nomination as well as succession laws.

II. Supreme Court: Statutory set-off or insolvency set-off inapplicable to Corporate Insolvency Resolution Process.

The Supreme Court, *vide* its judgment dated January 3, 2024, in the matter of ***Bharti Airtel Limited and Another v. Vijaykumar V. Iyer and Others [Civil Appeal Nos. 3088-3089 of 2020]***, has undertaken an in-depth analysis of various types of set-offs recognized under law and their applicability during Corporate Insolvency Resolution Process ("**CIRP**") of a company under the provisions of Insolvency and Bankruptcy Code, 2016 ("**IBC**").

Facts

In April 2016, Bharti Airtel Limited and Bharti Hexacom Limited ("**Airtel Entities**" / "**Appellants**") executed eight spectrum trading agreements ("**Agreements**") with Aircel Limited and Dishnet Wireless Limited ("**Aircel Entities**") towards purchase of right to use spectrum to Aircel Entities in the 2300

MHz band. The aforesaid agreements were subject to approval of the Department of Telecommunications ("**DoT**"). DoT demanded bank guarantees in light of past dues from Aircel Entities towards license dues and spectrum usage. Aircel Entities challenged the aforesaid direction before the Telecom Disputes Settlement and Appellate Tribunal ("**TDSAT**"). On June 3, 2016, TDSAT passed an interim order directing Aircel Entities to submit the bank guarantee. Since Aircel Entities were not in a financial position to procure and submit bank guarantee for approximately INR 453.73 crores ("**Bank Guarantee**"), Aircel Entities approached Airtel Entities to do the same on their behalf. Both the entities entered into three letters of understanding for the aforesaid purpose.

Airtel Entities were obligated to pay INR 4,022.75 crores to Aircel Entities under the eight Agreements. Airtel Entities were to deduct INR 586.37 crores from consideration payable to Aircel Entities under the Agreements. Upon Aircel Entities subsequently replacing the Bank Guarantees furnished by Airtel Entities and Airtel Entities receiving back the Bank Guarantees, INR 411.22 crores were payable by the Airtel Entities to the Aircel Entities. Thereafter, on January 9, 2018, TDSAT held that the demand of Bank Guarantee was not tenable and directed DoT to return the Bank Guarantees ("**TDSAT Order**"). However, DoT did not accept the TDSAT Order and preferred appeal before Supreme Court in 2018. Cross-appeals were filed by Aircel Entities. By order dated November 28, 2018, Supreme Court held that at the interim stage, the TDSAT Order, in so far as Bank Guarantees are concerned, shall be given effect to. However, DoT did not return the Bank Guarantees. Pursuant thereto, Airtel Entities approached the bank seeking confirmation of cancellation of Bank Guarantee. Since banks were reluctant, Airtel Entities approached the Supreme Court, which passed an order dated January 8, 2019 directing that Bank Guarantees shall be cancelled and not be used for any purpose whatsoever.

Thereafter, Airtel Entities made a payment of INR 341.80 crores on January 10, 2018. However, the remaining amount of INR 145.20 crores was set-off by the Airtel Entities stating that the aforesaid amount was owed by Aircel Entities to Airtel Entities towards net amount payable for operation charges, SMS charges and interconnect usage charges to Airtel Entities.

In March 2018, CIRP of Aircel Entities was initiated. Mr. Vijaykumar V. Iyer ("**Respondent**" / "**Resolution Professional**") was appointed as the interim resolution professional in respect of both the Aircel Entities. Bharti Airtel Limited ("**Bharti Airtel**") filed claim on account of interconnect charges as well as on behalf of Telenor (India) Communications Private Limited ("**Telenor**") in view of merger of both the aforesaid companies. Bharti Hexacom Limited also filed a claim. Total claim filed by Airtel Entities was INR 203.46 crores. However, Airtel Entities also owed INR 64.11 crores towards interconnect charges to Aircel Entities.

Resolution Professional admitted claims of Airtel Entities to the tune of INR 112 crores. Claim of Telenor was not accepted. Thereafter, on January 12, 2019, the Resolution Professional addressed a letter to Bharti Airtel stating that they had *suo moto* adjusted INR 112.87 crores from INR 453.73 crores payable by Airtel Entities to Aircel Entities. Resolution Professional called upon Bharti Airtel to pay INR 112.87 crores failing which he would be obligated to take legal recourse. In response thereto, Airtel Entities objected on various grounds and also claimed set-off of the amount due to them by the Aircel Entities from the amount payable by them to the Aircel Entities. However, Resolution Professional rejected their reply and claim for set-off.

Thereafter, Airtel Entities approached the National Company Law Tribunal, Mumbai ("**NCLT**") which passed an order dated May 1, 2019 and held that Airtel Entities were entitled to set-off INR 112.87 crores from the payment, which was due and payable to Aircel Entities. Resolution Professional

challenged the NCLT order before the National Company Law Appellate Tribunal, New Delhi ("**NCLAT**") wherein NCLAT held that set-off is violative of basic principles and protection provided to a corporate debtor under CIRP under the provisions of IBC. Aggrieved by the NCLAT order, the Airtel Entities approached the Supreme Court.

Issue

Whether set-off done at the behest of any entity against a company undergoing CIRP for a period prior to commencement of CIRP is violative of the basic principles and provisions of IBC.

Arguments

Contentions of the Appellants:

It was contented by the Appellants that they were entitled to approach NCLT under Section 60(5) (*Adjudicating Authority for corporate persons*) of IBC which confers jurisdiction to NCLT to entertain and dispose of any application or proceeding by or against corporate debtor.

Placing reliance on definitions of "claim" and "debt" as provided in sub-sections (6) and (11) of Section 3 (*Definitions*) of IBC, Appellants argued that the concept of set-off derived from common law principles is automatic and self-executing. Appellants further contended that the amount in question with respect to set-off does not form part of the assets of the corporate debtor and therefore the question of violation of Section 14 (*Moratorium*) of IBC does not arise.

It was further contended by the Appellants that Section 30 (*Submission of resolution plan*) of IBC seeks to ensure that assets and liabilities of corporate debtor as recorded in the resolution plan correspond to the liquidation estate of corporate debtor in liquidation, whereby Section 36(4) (*Liquidation estate*) of IBC provides for assets which do not form part of the liquidation estate and permits the Insolvency and Bankruptcy Board of India to specify assets which could be subject to set-off on account of mutual dealings between the corporate debtor and the creditor.

Observations of the Supreme Court

Supreme Court observed that there are five aspects of set-off: (a) statutory or legal set-off; (b) common law set-off; (c) equitable set-off; (d) contractual set-off; and (e) insolvency set-off. It was observed that contractual set-off arises out of agreement between parties, whereby parties mutually and consensually decide the terms of set-off as long as it is not against the purview of legality and public policy. In ascertaining the applicability of contractual set-off, courts need to ascertain intention of the parties. Right of contractual set-off may be explicitly set out in the clauses of the agreement or can be interpreted from existence of oral or implied agreement. Statutory or legal set-off is created by virtue of a statute. Pertinently, Order VIII Rule 6 of the Code of Civil Procedure, 1908 ("**CPC**") provides that where a suit for recovery of money is filed, the defendant can claim set-off against the plaintiff's demand for a sum of money legally recoverable, subject to not exceeding pecuniary limits of the jurisdiction of the court. Equitable set-off is a common law principle which flows from the judicial precedents for an unascertained sum of monies being payable as damages. Certain jurisdictions such as United Kingdom recognize the principle of insolvency set-off, which is essential at the stage of liquidation process.

Pertinently, Section 173 (*Mutual credit and set-off*) of IBC and Regulation 29 (*Mutual credit and set-off*) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 ("**Liquidation Regulations**") deal with set-off. However, the aforesaid provision relates to liquidation process and not CIRP. Further, Section 36(4) of IBC permits the Insolvency and Bankruptcy Board of India to specify assets which could be subject to set-off on account of mutual dealings between the corporate debtor and the creditor. However, Supreme Court made it clear that the aforesaid provisions pertain to liquidation process and have been analyzed for the purpose of legal understanding only and are not applicable to the present case.

Thereafter, Supreme Court analyzed the expression "mutual dealing". In this regard, Supreme Court referred to various judgments pronounced in foreign as well as Indian jurisdiction and arrived at the conclusion that the expression "mutual dealings" in Regulation 29 of the Liquidation Regulations is wider than statutory set-off contemplated under CPC as well as equitable set-off under common law prevailing in Indian legal jurisdiction. It was further observed that insolvency set-offs are applicable only where demands are between the same parties, that is, there must be commonality of identity between the person who has made the claim and the person against whom the claim exists.

In so far as the contention raised by Airtel Entities that Section 30 of IBC seeks to ensure that assets and liabilities of corporate debtor as recorded in the resolution plan correspond to the liquidation estate of corporate debtor in liquidation, Supreme Court observed that basis perusal of Section 30(2)(b)(ii) of IBC, it is clear that legislature has neither intended nor provided for any such analogy.

Further, it was observed that in the matter of ***Swiss Ribbons Private Limited and Another v. Union of India and Others [(2019) 4 SCC 17]***, which refers to a claim for set-off being considered by the resolution professional during resolution process, such set-off is a rarity.

In so far as the contention raised by Airtel Entities on maintainability of the application to NCLT under Section 60(5) of IBC, Supreme Court observed that the aforesaid legal provision is to aid and assist the corporate debtor throughout CIRP and not for the purpose of allowing a creditor/debtor to claim set-off during CIRP of the corporate debtor.

In so far as the contention raised by Airtel Entities that the concept of set-off derived from common law principles is automatic and self-executing, Supreme Court rejected this argument and observed that there is no such provision in IBC to suggest that insolvency set-off is automatic or self-executing.

The relationship and nature of identity of the corporate debtor undergo a change on the commencement of CIRP. Set-off of dues payable by corporate debtor for a period prior to CIRP cannot be made, and is not permissible in law, from the dues payable to the corporate debtor post the commencement of CIRP. Hence, on account of the aforementioned reason, this will not meet the mandate of mutual dealing and will be contrary to equity and would amount to misuse of the provision of insolvency set-off. Further, it was observed that such insolvency set-off puts the creditor, even an operational creditor, in a better position as compared to other creditors, to the extent of set-off. Hence, it violates the doctrine of *pari passu* which is recognized in common law. Though the principle of *pari passu* is not expressly stipulated in IBC, however, it is apparent in Section 53 (*Distribution of assets*) read with Section 52 (*Secured creditor in liquidation proceedings*) of IBC. Further, such set-off also violates the principle of anti-deprivation, which in simple words, means that a person cannot contract to obtain a more beneficial position in the event of bankruptcy than what the law otherwise provides.

Further, Supreme Court observed that provisions of set-off provided under CPC or the Liquidation Regulations cannot be applied to any corporate debtor undergoing CIRP. However, the aforesaid rule would be subject to two exceptions. The first exception would be where a party is entitled to contractual set-off on the date which is effective before or on CIRP commencement date. The second exception would be equitable set-off when the claim and counter claim in the form of set-off are linked and connected on account of one or more transactions that can be treated as one.

In so far as the contention raised by Airtel Entities that set-off does not violate moratorium as envisaged under Section 14 of IBC, Supreme Court observed that amounts in question have become payable post the commencement of CIRP and hence rejected the contention of Airtel Entities that by not allowing set-off, new rights are created and that Section 14 of IBC will not be applicable.

Decision of the Supreme Court

Supreme Court held that statutory set-off or insolvency set-off is inapplicable to CIRP under the provisions of IBC. In light of the aforesaid ratio, Supreme Court observed that there is no merit in the present appeals and dismissed the same.

VA View: Since the enactment of IBC, there have been multiple instances of set-off done at the behest of various creditors during CIRP and such set-offs have taken place during the CIRP towards pre-CIRP dues. Consequently, multiple applications filed by various resolution professionals are pending adjudication before the Adjudicating Authority.

This judgment is the first landmark pronouncement after the enactment of IBC which makes an in-depth analysis of various kinds and principles of set-off recognized in common law and thereafter analyses the concept of set-offs under the provisions of IBC and rules and regulations thereunder. Further, this judgment makes it clear that statutory set-off or insolvency set-off is inapplicable to CIRP. Also, this judgment settles the legal provision once and for all that set-off done at the behest of any entity against a company undergoing CIRP for a period prior to commencement of CIRP is violative of the basic principles and provisions of IBC.

III. Bombay High Court: High Court upholds termination of an employee stating that freedom of speech and expression cannot be allowed beyond reasonableness.

The Bombay High Court ("**HC**"), *vide* its judgement dated December 12, 2023, in the matter of ***Hitachi Astemo Fie Private Limited v. Nirajkumar Prabhakarrao Kadu [2023 SCC OnLine Bom 2652]***, while upholding the termination of an employee on account of inciting hate against the company, has held that the freedom of speech and expression cannot be allowed to be transgressed beyond reasonableness.

Facts

Hitachi Astemo Fie Private Limited ("**Petitioner**" / "**Company**") had appointed Mr. Nirajkumar Prabhakarrao Kadu ("**Respondent**") to work in the assembly section of the Company in 2003. The Respondent was an office bearer of a recognized union ("**Union**") in the Company. In 2017, a dispute arose between the Union and the Company regarding wage settlement and the office bearers of the

Union resorted to hunger strikes and rallies to pressurize the Petitioner. A settlement was arrived at between the parties after approximately twenty months. However, before the settlement, the Respondent posted two posts on his Facebook account ("**Posts**"), wherein he warned the management to not exploit the workmen, failing which the workmen will destroy the Company and its management. The Posts were alleged by the Petitioner to be defamatory towards the Petitioner and its management and were posted with the intention to incite the workmen during the dispute.

A charge-sheet was issued against the Respondent for uploading the Posts, alleging an act of 'misconduct' against him under Clauses 24(d) (*Theft, fraud or dishonesty*), 24(k) (*Drunkenness, riotous disorderly or indecent behaviour*) and 24(l) (*Act subversive of discipline or good behaviour*) of the Model Standing Orders ("**Charge Sheet**"). A domestic enquiry was conducted against the Respondent and he was found guilty of misconduct which led to termination of his services.

Respondent raised an industrial dispute to challenge his termination and dismissal which was referred to the 1st Labour Court, Pune ("**Labour Court**"). The Labour Court, after hearing the parties to the dispute on the two preliminary issues, concluded that the Charge Sheet and the enquiry conducted was illegal and not proper and the findings of the enquiry officer were perverse. Petitioner challenged the order of the Labour Court in the present writ petition.

Issues

1. Whether the enquiry conducted against the Respondent is proper, legal and in accordance with the principles of natural justice.

2. Whether the finding of enquiry officer is based on acceptable evidence.

Arguments

<u>Contentions of the Petitioner</u>:

The Petitioner submitted that the findings of Labour Court were incorrect since the Respondent had participated in the entire domestic enquiry with the assistance of an advocate, without raising any grievance regarding the procedure of the enquiry. The Petitioner stated that the Labour Court committed a gross error while holding that the Posts were not of a violent nature and did not amount to indecent behaviour.

It was contended by the Petitioner that the Posts, if read verbatim, incited and invoked hatred for committing offensive acts against the management of the Petitioner during the tense period of negotiations between the parties. The Petitioner submitted that no workman enjoys immunity from committing an act which is offensive and goes beyond reasonableness and therefore the findings of the Labour Court that the Posts were in the realm of freedom of speech and expression is a perverse finding.

It was contended that the findings of the Labour Court, that the act committed by the Respondent was not committed on the premises of the Company or in its vicinity and therefore charges levelled in the Charge Sheet could not be applied to the Respondent's act, is completely erroneous since the Respondent had incited and invoked hatred which could have led to disastrous consequences against the management of the Petitioner, which would have been irreversible in nature.

The Petitioner also submitted that the Respondent had initially denied having published the Posts and took the defence that his Facebook account may have been hacked but failed to produce any evidence of his Facebook account having been hacked so as to disown the publishing of the Posts.

The Petitioner therefore submitted that the act committed by the Respondent squarely fell within the provisions of 'commission of misconduct' under Clauses 24(d), 24(k) and 24(l) of the Model Standing Orders.

Contentions of the Respondent:

The Respondent submitted that the Petitioner, in order to pressurize and harass the active members of the Union, has issued the Charge Sheet and suspension letter to the Respondent. He further argued that his act led to no disorderly conduct or violent atmosphere or any other act that could be classified as an imminent result of the Posts, thereby disturbing the peace in the Company.

The Respondent contended that the Posts were uploaded from outside the premises of the Petitioner and therefore the Respondent did not commit an act subversive of discipline or good behaviour on the premises of the Company which would attract the applicability of Clauses 24(d), 24(k) and 24(l) of the Model Standing Orders.

The Respondent also submitted that the Posts were in light of his fundamental right of freedom of speech and expression under the Constitution of India. The Respondent stated that passion for violence incited after reading the Posts cannot be equated with any violent act or any riotous or disorderly behaviour when in fact no such act or incident has occurred which was admitted by the witness of the management of Petitioner. The Posts were just a form of demonstration or agitation.

Observations of the HC

The HC observed that the Respondent failed to produce any evidence to the effect that his Facebook account was hacked and that he was not the author of the Posts. In that background, the HC held that it was an admitted position that the Posts were uploaded by the Respondent. The HC stated that the evidence clearly pointed out to the fact that the entire atmosphere in the Company was sensitive and agitations were being held against the Company in different forms. The Union was planning to fast until death and rally across the city. Therefore, the Posts uploaded in such a scenario could have led to any disorderly act.

The HC noted that discipline is the hallmark of any employee and regulation of behaviour of an employee is essential for the peaceful conduct of industrial activity. The HC observed that a Facebook account can be more conveniently accessed through a mobile phone and hence the submissions made by the Respondent that Respondent did not have a computer for uploading the Posts nor he was on the premises of the establishment is not proved.

The HC held that the Posts clearly amounted to misconduct when the aforementioned clauses of the Model Standing Orders are broadly interpreted. To a certain extent, commission of an act that may lead to a disorderly or riotous incident is covered by Clause 24(k) of the Model Standing Orders. Similarly, Clause 24(l) of the Model Standing Orders clearly covers the act of Respondent for having uploaded the Posts. The HC also observed that while Clause 24(d) of the Model Standing Orders may not apply to the act committed by Respondent, the word 'dishonesty' in Clause 24(d) of the Model Standing

Orders has a wide connotation with respect to the employer's business/property. The HC stated that in the present case, merely because no untoward incident took place, it cannot be a ground for discharging the act of posting the defamatory and provocative Posts. The Posts were directed against the Petitioner with a clear intent to incite hatred and were provocative. Further, the provocation was immediately seen in the form of likes and comments on the Posts and one such comment incited the passion to such an extent that it threatened to physically assault the management.

The HC also held that freedom of speech and expression cannot be allowed to be transgressed beyond reasonableness as it can lead to disastrous consequences. The HC noted that one cannot and should not wait for the consequences to occur in such cases.

Decision of the HC

The HC held that the adjudication on the two preliminary issues as concluded by the Labour Court cannot be accepted merely because the act of misconduct has not had any adverse effect on the peaceful working of the Company.

The HC held that the enquiry conducted and the findings returned by the enquiry officer against Respondent were absolutely fair and proper. The act committed by the Respondent stands squarely covered by Clauses 24(d), 24(k) and 24(l) of the Model Standing Orders. Therefore, the impugned order passed by the Labour Court was quashed and set aside by the HC.

VA View: The present judgement by the HC strikes a balance between the employees' right to freedom of speech and expression and their responsibilities towards the company. The HC has rightly upheld that freedom of speech and expression cannot be allowed to be transgressed beyond reasonableness and acts that are directed towards tarnishing the image of a company or inciting hate against a company should be nipped in the bud. The present ruling will also have a deterrent effect against misconduct by employees which unduly hampers the functioning of a company and its management.

IV. NCLAT: Liquidator is not entitled to charge any fee from a scheme proponent submitting a scheme under Section 230 of the Companies Act.

The National Company Law Appellate Tribunal, Principal Bench, New Delhi ("**NCLAT**"), in its judgement dated December 8, 2023, in the matter of ***CA Jai Narayan Gupta v. Radhasiriya Properties Private Limited [Company Appeal (AT) (Insolvency) No. 1473 of 2023]***, has held that a liquidator is not entitled to charge any fee from a scheme proponent who has submitted a scheme under Section 230 (*Power to compromise or make arrangements with creditors and members*) of the Companies Act, 2013 ("**Companies Act**") read with Regulation 2B (*Compromise or arrangement*) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 ("**Liquidation Regulations**").

Facts

On January 24, 2022, the liquidation process of M/s. Barcle Enterprises Limited ("**Corporate Debtor**") was initiated and CA Jai Narayan Gupta ("**Appellant**") was appointed as the liquidator in terms of

Section 33(2) (*Initiation of liquidation*) of the Insolvency and Bankruptcy Code, 2016 ("**IBC**"). Pursuant to this, Radhasiriya Properties Private Limited ("**Respondent**") sent an intimation to the Appellant expressing its interest to submit a scheme of compromise and arrangement. On March 15, 2022, the Respondent submitted the scheme to the Appellant, and the scheme was accepted by the Appellant on May 12, 2022. An interlocutory application was filed by the Appellant before the National Company Law Tribunal, Kolkata ("**NCLT**") seeking directions from NCLT for conducting a meeting of the creditors of the Corporate Debtor in terms of Section 230 of the Companies Act read with Regulation 2B of the Liquidation Regulations.

Thereafter, the Appellant sent several reminders to the Respondent demanding payment towards the cost and fee incurred by the Appellant, and for depositing the estimated amount under the scheme. Upon various requests, the Respondent paid the Appellant an amount equal to INR 23,88,280/- for the time period between April 20, 2022 to February 28, 2023.

On February 17, 2023, the Appellant convened a meeting of the creditors of the Corporate Debtor, wherein the Respondent's scheme was rejected. Consequently, the Respondent filed an application before NCLT to direct the Appellant to refund the amount of INR 23,88,280/- paid by the Respondent towards the Appellant's fee and liquidation costs ("**Application**"). The Appellant in his reply to the Application, attempted to justify the payments received by him from the Respondent, and pleaded that he was entitled to receive his fees amounting to INR 23,88,280/- for the period of compromise and arrangement in terms of the Liquidation Regulations.

The NCLT, *vide* its order dated October 3, 2023 ("**Impugned Order**"), held that the Appellant was not entitled to receive any fee from the Respondent given that the creditors of the Corporate Debtor had rejected the Respondent's scheme. NCLT therefore directed the Appellant to refund the entire amount of INR 23,88,280/- to the Respondent.

Owing to the above, the Appellant filed the present appeal to NCLAT challenging the Impugned Order by relying on the provisions of Regulation 4(2)(a) (*Liquidator's fee*) read with the proviso to Regulation 2B(3) of the Liquidation Regulations.

Issues

1. Whether the Appellant's claim to retain the amount received from the Respondent towards the Appellant's fee and liquidation costs was justified.

2. Whether the NCLT had committed any error in directing the Appellant to refund the said amount to the Respondent.

Arguments

<u>Contentions of the Appellant</u>:

The Appellant submitted that the liquidation fees had been charged by him in accordance with Regulation 4(2)(a) read with the proviso to Regulation 2B(3) of the Liquidation Regulations. The Appellant contended that Regulation 2B of the Liquidation Regulations had been enacted to encourage only serious proposals of compromise or arrangements, and where such compromise or arrangement

was not sanctioned by the adjudicating authority, the scheme proponent of such compromise or arrangement (the Respondent in this case) ought to have been burdened with the cost.

The Appellant further contended that if such liquidation fee and costs were not imposed on the Respondent, several non-serious parties or parties with vested interest and *mala fide* motives would propose schemes for compromise and arrangement, thereby halting the liquidation process without any pecuniary consequences on them.

The Appellant submitted that he was not required to work free of cost during the period of consideration of the scheme of compromise and arrangement, and it was the Respondent who was liable to bear the liquidation fee. Therefore, NCLT was utterly unjustified in depriving the Appellant of his legitimate fee and passing the Impugned Order against the provisions of IBC and the Liquidation Regulations.

<u>Contentions of the Respondent</u>:

The Respondent contended that the amount of INR 23,88,280/- was paid by it upon being pressurised to do so at the insistence of the Appellant. Moreover, even upon the scheme being rejected by the creditors of the Corporate Debtor in their meeting held on February 17, 2023, the Appellant accepted such amount from the Respondent.

The Respondent submitted that as per Regulation 2B(3) of the Liquidation Regulations, the costs in relation to the compromise and arrangement is to be borne by the parties who propose such compromise and arrangement. The term ‘cost’ only indicates costs incurred by the liquidator in respect of such compromise and arrangement, and no other cost as sought to be asserted by the Appellant could have been paid. Further, in cases where the scheme of arrangement submitted by the scheme proponent is rejected, then the scheme proponent would be liable to contribute towards the expenses in relation to such compromise or arrangement. The Respondent contended that the Appellant would be entitled to his fee as per the provisions of Section 34(9) (*Appointment of liquidator and fee to be paid*) of IBC, for conducting the liquidation proceedings, out of the proceeds of the liquidation estate. The Respondent submitted that the Appellant had incorrectly and inaptly interpreted Regulation 2B of the Liquidation Regulations, and had wrongfully withheld the amount remitted by the Respondent. Hence, the appeal filed by the Appellant was liable to be dismissed by the NCLAT.

Observations of the NCLAT

The NCLAT observed various provisions of IBC and the Liquidation Regulations governing the payment of fees and costs of liquidation. From a reading of Sections 34(8) and 34(9) of IBC, it was clear that the liquidator’s fee for conducting the liquidation proceedings ought to be paid from the proceeds of the liquidation of estate assets. Further, the proviso to Regulation 2(1)(ea) (*Definitions*) of the Liquidation Regulations, which defines the term ‘liquidation cost’, clearly provides that any cost incurred by a liquidator in relation to compromise or arrangement under Section 230 of the Companies Act does not form part of the liquidation cost.

The NCLAT further observed that Regulation 2B(3) of the Liquidation Regulations provides that any costs incurred by a liquidator in relation to compromise or arrangement is to be borne by the corporate debtor, where such compromise or arrangement is sanctioned by the adjudicating authority under Section 230(6) of the Companies Act, and in cases where such compromise or arrangement is not sanctioned by the adjudicating authority under Section 230(6) of the Companies Act, such costs are to

be borne by the parties who proposed the compromise or arrangement. Thus, the statutory provision is clear that the Appellant could have claimed for costs only from the parties who proposed the compromise or arrangement. The NCLAT observed that while Regulation 2B of the Liquidation Regulations deals with the costs incurred by a liquidator in relation to a compromise and arrangement, Regulation 4 of the Liquidation Regulations deals with the liquidator's fee. The rule making authority is fully aware of the difference between the terms cost and fee. Moreover, Regulation 2B of the Liquidation Regulations does not indicate that liquidator's fee can be charged from a scheme proponent.

The NCLAT observed that the Appellant was entitled to claim fee as per the statutory provisions of Sections 34(8) and 34(9) of IBC read with Regulation 4 of the Liquidation Regulations. No fee could have been charged from the Respondent, who has submitted the scheme under Section 230 of the Companies Act read with Regulation 2B of the Liquidation Regulations.

With respect to the Appellant's contention that if the fee was not imposed on the Respondent, the same would lead to the submission of compromise and arrangement proposals by non-serious scheme proponents intended to halt the liquidation process, the NCLAT observed that Regulation 2B of the Liquidation Regulations mandates that the consideration of the scheme of compromise or arrangement must be completed within 90 days from the order of liquidation. Since the statutory provision itself provides a period for completion of the compromise or arrangement, a delay could not be caused by misuse of the provisions. Hence, the submission of the Appellant that the Respondent ought to be saddled with the liquidation fee was contrary to the statutory scheme of the Liquidation Regulations.

In NCLAT's view, the Appellant was not entitled to claim any liquidation fee from the Respondent for the period during which the compromise and arrangement scheme was under consideration, and was only entitled to receive, at the highest, the expenses that the Appellant had incurred towards the compromise and arrangement. The NCLAT observed that the NCLT had rightly directed the Appellant to refund the amount which was wrongfully claimed from the Respondent.

Decision of the NCLAT

In view of the above, the NCLAT modified the refund amount payable to the Respondent and ordered the Appellant to refund an amount of INR 22,77,108 /- in favour of the Respondent, after deducting the expenses incurred by the Appellant towards the compromise and arrangement. The NCLAT found no other reason to interfere with the Impugned Order and dismissed the appeal filed by the Appellant.

VA View: In this judgement, the NCLAT has rightly observed that while Regulation 2B of the Liquidation Regulations specifies that if the compromise or arrangement is not sanctioned by the adjudicating authority, the costs in relation to compromise or arrangement has to be borne by the parties who proposed the compromise or arrangement, it does not make reference to any fee that can be charged by the liquidator from the scheme proponent.

The NCLAT, has emphasized on the distinction between the cost incurred under: (i) Regulation 2B of the Liquidation Regulations; and (ii) the fee of the liquidator payable under Sections 34(8) and 34(9) of IBC and Regulation 4 of the Liquidation Regulations payable out of the proceeds of the liquidation estate. Hence, the NCLAT has rightly held that Appellant was not entitled to claim any fee from the Respondent for the period during which the scheme of compromise and arrangement was under consideration.

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