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Arbitrability of disputes post execution of 'unconditional discharge vouchers' – An analysis

By **Ankit Parhar and Aditya Thyagarajan**

One of the common defenses taken by a party, facing a claim, in an arbitration is that the contract has already been discharged by performance. Sometimes, the party claiming discharge relies upon a document which may be in the form of a no due certificate, no claim certificate, final bill, full and final settlement etc. In insurance contracts, the insurer may rely upon a discharge voucher to contend that it has already discharged its obligations under the contract. On the other hand, it is not uncommon for the claimant to dispute the discharge voucher signed by it and claim that it was executed under fraud, coercion or undue influence. Based on the facts in some cases, it has been held that fraud, coercion or undue influence renders the discharge void at the instance of the party issuing the discharge voucher. When dealing with appointments of arbitrators, wherever such issues arise, the Court forms a *prima facie* view as to whether the dispute is *bona fide* and genuine before referring the same to arbitration. Hence, a bald plea of fraud, coercion or undue influence is not sufficient to seek reference of the dispute to arbitration.[1]

Issue:

The question before the Supreme Court in the case of *Oriental Insurance Co. Ltd. v. Dicitex Furnishing Ltd.*[2] was whether Dicitex had *prima facie* made out that they had executed the unconditional discharge voucher under coercion, duress or undue influence, thereby, making the dispute arbitrable.

Brief facts:

Certain stock of goods of Dicitex had been insured by Oriental Insurance for Rs. 13 Cr. Due to a fire, the entire stock was destroyed. Dicitex claimed about Rs. 14.88 Cr. while the first surveyor appointed by the Insurer valued the claim at Rs. 12.93 Cr. Dicitex requested that its claim be settled on priority stating that it was under financial distress.

Another surveyor was appointed by the Insurer. Despite requests of Dicitex to settle the claims, both the Insurer and surveyor kept delaying valuation. After 26 months of the fire, the Insurer sent Dicitex a discharge voucher, which valued the claim at Rs. 7.16 Cr. and stated that if the discharge voucher was not accepted by Dicitex, the Insurer would not make any payments.

Being under financial distress, Dicitex accepted the discharge voucher, but, raised a dispute within 12 days. The Insurer denied any further claim as Dicitex had signed an unconditional discharge voucher and refused to appoint an arbitrator. Hence, Dicitex filed a petition under Section 11(6) before the Bombay High Court seeking the appointment of an arbitrator. The High Court allowed the petition and held that the dispute was arbitrable as *prima facie* Dicitex had signed the discharge voucher reluctantly due to financial distress. The Insurer challenged the decision of the High Court before

[1] *Union of India (UOI) and Ors. v Master Construction Co.*, (2011) 12 SCC 349.
[2] 2019 (16) SCALE 242.

the Supreme Court. After a detailed analysis, the Supreme Court upheld the order of the High Court.

Analysis:

While arriving at its decision, the Supreme Court analysed the judgment in *Boghara Polyfab*[3] to examine whether a dispute is arbitrable or not in context of no objection certificates or unconditional discharge vouchers being executed and laid down the following illustrations:

(i) A claim referred to a conciliation or a prelitigation Lok Adalat after being settled through negotiation and being attested by the Conciliator/ members of the Lok Adalat cannot be referred to arbitration.

(ii) When numerous claims are made which include some undisputed ones (which are paid) and the disputed ones which are settled after negotiations with the issuance of discharge vouchers/ no claim certificates, then neither the contract nor any dispute survives. Hence, the dispute may not be referred to arbitration.

(iii) A contractor may execute work for a particular amount and the employer may admit the claim for a much-reduced sum. If the employer makes the reduced sum a "take it or leave it offer", stating no funds would be released unless the reduced payment is accepted, and the contractor is hard pressed for funds, the discharge would be under economic duress. Hence, it would not be considered voluntary discharge of the contract and there would be no bar to arbitration.

(iv) If an insured party (who is under financial difficulties) is offered a "take it or leave it" offer for an amount much lesser than the amount claimed, then the discharge voucher issued in pursuance thereof, would not be voluntary as it is issued under economic duress. The arbitration agreement can thus be invoked to refer the disputes to arbitration.

(v) A claim for a huge sum, by way of damages is voluntarily reduced by the Claimant and a full and final discharge voucher is issued in order to avoid litigation and get an early settlement. Even if the claimant might have agreed for settlement due to financial compulsions, the decision was their free choice. Therefore, the accord is valid and there cannot be any reference to arbitration.

The Court also quoted *Master Construction*[4] and *Genus Power*[5] to state that only a *prima facie* case of coercion, undue influence or financial duress in the issuing of the discharge voucher had to be established to qualify as an arbitrable dispute.

Findings and way forward:

On facts, the Court held that Dicitex was undergoing a financial crisis. The second surveyor estimated the claim at a much lesser valuation than the first surveyor. The reduced claim was paid 27 months after the fire. The Insurer had given a final "take it or leave it offer" for a much-reduced valuation. This case, therefore, fell directly within the fact scenario envisaged under illustrations (iii) and (iv).

[3] *National Insurance Co. Ltd v. Boghara Polyfab Pvt Ltd.*, (2009) 1 SCC 267.

[4] *Union of India (UOI) and Ors. v Master Construction Co.*, (2011) 12 SCC 349.

[5] *New Indian Assurance Co. Ltd v Genus Power Infrastructure Ltd.*, (2015) 2 SCC 424.

Hence, the Court was *prima facie* convinced that the plea of coercion and economic duress was *bona fide*. Therefore, the Supreme Court upheld the decision of the High Court allowing the appointment of an arbitrator.

This case has re-emphasized the principles and provides some relief to a party that may be compelled to accept a "take it or leave it offer", particularly, in the current economic situation. If the party is able to demonstrate a *prima facie* case that the discharge voucher was signed under economic and financial distress, the dispute becomes arbitrable and the party gets an opportunity to raise its claims before the arbitrator.

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Notifications and Circulars

Government companies – New requirements notified for removal of names: The Ministry of Corporate Affairs *vide* notification dated 29-06-2020 has amended the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016 to prescribe new requirements for removal of names of government companies from register of companies. Accordingly, a duly notarised indemnity bond in Form STK-3A shall be given by an authorised representative, not below the rank of Under Secretary or its equivalent, in the administrative Ministry or Department of the Government, on behalf of the company.

Time frame to conduct board meetings through VC/OAVM extended: Ministry of Corporate Affairs has extended the time frame to conduct board meetings through Video Conferencing ("VC") or Other Audio Visual Means ("OAVM") for matters not otherwise permitted in a meeting through VC or OAVM listed under Rule 4(1), till 30-09-2020. Notification dated 23-06-2020 has been issued to notify Companies (Meetings of Board and its Powers) Second Amendment Rules, 2020 to amend the Companies (Meetings of Board and its Powers) Rules, 2014 for this purpose.

Independent directors – Time limit for inclusion in data bank extended: Ministry of Corporate Affairs has *vide* notification dated 23-06-2020 extended the time limit for independent directors appointed in a company to apply online to the institute for inclusion of his name in the data bank. As per the latest amendment, the time period is now 10 (ten) months from the date of commencement of the Companies (Appointment and Qualification of Directors) Fifth Amendment Rules, 2019 instead of the earlier requirement of 7 (seven) months.

COVID-19 – 'Scheme' for relaxation of filing forms related to creation or modification of charges under Companies Act, 2013 introduced: Ministry of Corporate Affairs has *vide* General Circular 23/2020, dated 17-06-2020 introduced the 'Scheme for relaxation of time for filing forms related to creation or modification of charges under the Companies Act, 2013' ("**Scheme**") in order to relax the timeline for making necessary filings for registration of creation or modification of charges in the

background of the pandemic COVID-19. The revised timelines are as follows:

Compliance	Creation/modification of charge is ***before*** 01-03-2020 and where time has not expired	Creation/modification of charge is ***after*** 01-03-2020
Filing of Form CHG-1 and Form CHG-9	The period between 01-03-2020 and 30-09-2020 shall not be reckoned for calculation of the time under Sections 77 and 78 of the Companies Act for filing such charge forms. The fees payable as on 29-02-2020 shall be charged in case such Charge Forms are filed on or before 30-09-2020. If such Charge Forms are filed after 30-09-2020, the applicable fees as per the Companies (Registration Offices and Fees) Rules, 2014 ("Fee Rules") shall be chargeable after adding the number of days between 01-10-2020 and the date of filing such Charge Forms, and the time period lapsed from the date of creation/modification of charge till 29-02-2020.	The period beginning from the date of creation/modification of charge to 30-09-2020 shall not be reckoned for the purpose of calculation of the time period under sections 77 and 78 of the Companies Act for filing such charge forms. The normal fees under the Fees Rules shall be charged if the Charge Forms are filed on or before 30-09-2020. If such Charge Forms are filed after 30-09-2020, the first day after the date of creation/modification of charge shall be reckoned as 01-10-2020 for the purpose of payment of fees under the Fee Rules.

The Scheme is not applicable in the following scenarios:

i) The charge forms have already been filed before 17-06-2020;

ii) The timeline for filing the charge forms under the Companies Act had expired prior to 01-03-2020;

iii) The timeline for filing the charge forms will expire at a future date after 30-09-2020; and

iv) Filing of Form CHG-4 for satisfaction of charges.

Deposit reserve under Section 73(2)(C) of Companies Act, 2013 and Rule 18 of Companies (Share Capital & Debentures) Rules, 2014 – Compliance date extended to 30-09-2020: Ministry of Corporate Affairs has *vide* General Circular 24/2020 extended the due date for compliance under Section 73(2) of the Companies Act, 2013 and under Rule 18 of the Companies (Share Capital & Debentures) Rules, 2014, to 30-09-2020. A company accepting deposits under Section 73(2) is required to deposit, on or before the 30th April each year, twenty per cent. of the amount of its deposits maturing during the following financial year and keep in a separate bank account to be called deposit repayment reserve account. Similarly, under Rule 18 of the Companies (Share Capital & Debentures) Rules, 2014, a company is required to invest or deposit at least 15 per cent. of the amount of debentures maturing in specified methods of investments or deposits before the 30th April. It may be noted that *vide* General Circular 11/2020, the MCA had earlier extended the due dates for aforesaid compliances till 30-06-2020 for FY 2020-21.

Stamp duty on securities – Collection by specified collecting agents from 01-07-2020: With effect from 01-07-2020, the stamp-duty on sale, transfer and issue of securities is being collected on behalf of the State Government by the collecting agents who then shall transfer the collected stamp duty in the account of the concerned State Government. No stamp duty shall be collected by the States on any secondary record of transaction associated with a transaction on which the depository / stock exchange has been authorised to collect the stamp duty. The Central Government has notified the Clearing Corporation of India Limited (CCIL) under the jurisdiction of RBI and the Registrars to an Issue and/or Share Transfer Agents (RTI/STAs) to act as collecting agents. The relevant provisions of the Finance Act, 2019 amending the Indian Stamp Act, 1899 and the Indian Stamp (Collection of Stamp-Duty through Stock Exchanges, Clearing Corporations and Depositories) Rules, 2019 were notified simultaneously on 10-12-2019 and these were to come into force from 09-01-2020. The implementation date was however first extended to 01-04-2020 and then to 01-07-2020.

Takeover – Acquisition of additional voting rights by promoters – Takeover Regulation amended: SEBI *vide* notification dated 16-06-2020 has amended SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ("Takeover Regulations"). Pursuant to the amendment, promoters who together with persons acting in concert hold shares or voting rights in a target company entitling them to exercise twenty five percent or more of the voting rights in the target company, can now acquire up to an additional ten percent of the voting rights in the target company in the financial year 2020-21 pursuant to preferential issue of equity shares by the target company without making an open offer in terms of Regulation 3(2) of the Takeover Regulations.

Further, it may be noted that according to the first proviso to Regulation 6(1) of the Takeover Regulations, in the event an acquirer or a person acting in concert with the acquirer, has acquired shares of the target company in the preceding 52 (fifty two) weeks without attracting the obligation to make a public announcement of an open offer, such acquirer will not be eligible to voluntarily make a public announcement of an open offer for acquiring shares under regulation 6(1) of the Takeover Regulations. Now, as per the latest amendments, such an acquirer shall be eligible to voluntarily make a public announcement of an open offer for acquiring shares under Regulation 6(1) of the Takeover Regulations until 31-03-2021.

Pricing guidelines revised for preferential issue of shares – ICDR Regulations amended to provide for optional pricing: SEBI *vide* notification dated 01-07-2020 has amended the SEBI (Issue of Capital and Disclosure Requirement) Regulations, 2018 ("ICDR Regulations") to insert a new Regulation 164B. A listed company making a preferential issue of shares is required to comply with the pricing guidelines under Regulation 164 of the ICDR Regulations. Now pursuant to the amendment, the issuer can opt to determine the price in case of frequently traded shares on the basis of Regulation 164 or Regulation 164B of the ICDR Regulations.

As per Regulation 164B, the price of equity shares to be allotted pursuant to the preferential issue shall not be less than the higher of: the average of the weekly high and low of the volume weighted average price of the related equity shares quoted on the recognised stock exchange during the 12 (twelve) weeks preceding the relevant date; or the average of the weekly high and low of the volume weighted average prices of the related equity shares quoted on a recognised stock exchange during the 2 (two) weeks preceding the relevant date. The pricing under Regulation 164B can be availed for preferential issues from 01-07-2020 till 31-07-2020. Shares allotted as per Regulation 164B shall be locked in for 3 (three) years.

Operational framework for transactions in defaulted debt securities post maturity date/ redemption date introduced: SEBI *vide* Circular dated 23-06-2020 has introduced the Operational Framework effective from 01-07-2020 for transactions in debt securities where redemption amount has not been paid on maturity/redemption date (defaulted debt securities). The key provisions of the Operational Framework are as follows:

a) Stock exchange(s) shall not allow any transactions in the defaulted debt securities, two working days prior to their maturity/redemption date. On maturity/redemption date of the defaulted debt securities depositories shall temporarily restrict transactions in such debt securities from such maturity/redemption date till the time its status of payment is determined.

b) Issuer shall intimate to the stock exchanges, depositories and debenture trustee(s) the status of payment of debt securities within 1 working day of payment/redemption date. The existing defaults have to be intimated within 5 working days from the issuance of the Operational Framework.

c) The issuer has to inform the stock exchanges/depositories and the debenture trustee on or before the second working day of April of every financial year on the updated status of payment of the debt securities.

d) In case of any developments that impact the status of default of the debt securities (including restructuring, proceedings under the Insolvency and Bankruptcy Code, 2016, etc.), the issuer/debenture trustee should intimate the depositories and stock exchanges within 1 (one) working day.

e) In case the issuer fails to intimate the status of payment of the debt securities within stipulated timelines, then debenture trustee(s) shall seek status of payment from issuer and/or conduct independent assessment (from banks, investors, rating agencies, etc) to determine the same.

f) Within 2 (two) working days from the date of intimation from the issuer or debenture

trustee(s) that the issuer has defaulted on its payment obligations, the depositories in co-ordination with stock exchanges are required to update the ISIN master file and lift restrictions on transactions in such debt securities.

MSMEs – Classification criteria revised: The Ministry of Micro, Small and Medium Enterprises *vide* notification dated 26-06-2020 has notified revised criteria for classifying the enterprises as micro, small and medium enterprises and specified the form and procedure for registration. The revised criteria for MSME registration are as follows:

Classification	Micro	Small	Medium
Manufacturing (earlier threshold)	Investment in plant and machinery ≤ Rs. 25 Lakhs	Investment in plant and machinery is > Rs. 25 lakhs but ≤ Rs. 5 Crore	Investment in plant and machinery is > Rs. 5 Crore but ≤ Rs. 10 Crore
Services (earlier threshold)	Investment in equipment ≤ Rs. 10 Lakhs	Investment in equipment is > Rs. 10 Lakhs but ≤ Rs. 2 Crore	Investment in equipment is > Rs. 2 Crore but ≤ Rs. 5 Crore
Manufacturing and Services (***Revised Threshold***)	Investment in plant and machinery or equipment ≤ Rs. 1 Crore and Turnover ≤ Rs 5 Crore	Investment in plant and machinery or equipment ≤ Rs. 10 Crore and Turnover ≤ Rs 50 Crore	Investment in plant and machinery or equipment ≤ Rs. 50 Crore and Turnover ≤ Rs 250 Crore

The registration for MSME certification can be done through online in the *Udyam* Registration (udyogaadhaar.gov.in) portal, based on self-declaration with no requirement to upload documents, papers, certificates or proof and no fee for filing.

The existing enterprises registered prior to 30-06-2020, shall continue to be valid only for a period up to the 31-03-2021. All existing enterprises registered under EM–Part-II or UAM shall register again on the *Udyam* Registration portal on or after the 01-07-2020. All enterprises registered till 30-06-2020, shall be re-classified in accordance with the new classification. The expression "*plant and machinery or equipment*" of the enterprise, shall have the same meaning as assigned to the plant and machinery in the Income Tax Rules, 1962 framed under the Income Tax Act, 1961.

Ratio Decidendi

Arbitration – Test for amendment to grounds in a petition under Section 34 is whether the proposed grounds would necessitate filing of a fresh application for setting aside of the Award

The Calcutta High Court has observed that if grounds are sought to be introduced, by way of an amendment, in a petition under Section 34 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"), it must be determined if there are any new and independent grounds, which do not have a foundation in the original Section 34 petition.

Brief facts:

An arbitral award was passed in favour of the Respondent herein, after which the Applicant had filed a petition under Section 34 of the Arbitration Act. 30 (Thirty) grounds pertaining to public policy, bias, unequal treatment of the parties, unfairness of procedure, disregard of the provisions of the Arbitration Act, breach of the principles of natural justice and material illegality, etc., were taken, for setting aside of the Award. The Applicant sought to bring 26 additional grounds in support of the contention that the Arbitral Tribunal had not taken various provisions of the Sale of Goods Act, 1930 ("**Sale of Goods Act**"), into account and thereby failed to take various material facts on record. It was alleged that the said omission on part of the Arbitral Tribunal had rendered the Award perverse and patently illegal, under Section 34 of the Arbitration Act.

Submissions by Applicant:

a. The grounds sought to be amended by way of the present application were only 'amplification' of the existing grounds and that they would not change the nature and character of the petition under Section 34.

b. The ground of 'public policy', as taken in the existing Section 34 Petition, subsumes any additional grounds taken by way of an amendment.

c. The Apex Court judgments of *Fiza Developers and Inter-Trade Private Limited v. AMCI (India) Private Limited*, (2009) 17 SCC 796, *Emkay Global Financial Services Limited v. Girdhar Sondhi*, (2018) 9 SCC 49 and *State of Maharashtra v. Hindustan Construction Company Limited*, (2010) 4 SCC 518 were relied upon.

Submissions by Respondents:

a. Allowing the present application would defeat the object/ the legislative intent behind the specific timelines under Section 34(3) of the Arbitration Act.

b. Grounds, now sought to be brought in by the Applicant, are completely new, which would change the very nature of the arbitration petition.

c. The Apex Court judgments of *Bijendra Nath Srivastava (Dead) v. Mayank Srivastava*, (1994) 6 SCC 117 and *Vastu Invest & Holdings Pvt. Ltd, Mumbai v. Gujarat Lease Financing Ltd., Mumbai*, (2001) 2 Mah LJ 565/ (2001) 2 Arb LR 315 were relied upon.

Decision:

a. The High Court primarily examined the legal position with respect to amendment of the pleadings, as under Order VI Rule 17 of the Code of Civil Procedure, 1908 ("**CPC**").

b. In line with the Apex Court judgment of *Hindustan Construction*, the Court held that the grounds relating to the Sale of Goods Act cannot be traced to the existing grounds and would therefore constitute new grounds in that sense (there being no causative link between both the grounds).

c. The Court was of the view that as several of the new grounds also do not have a foundational basis in the existing petition, the Applicant cannot enter through the 'amplification' route.

[*Prakash Industries Limited* v. *Bengal Energy Limited & Anr.* – Judgment dated 11-06-2020 in General Application No. 394 of 2020 in Arbitration Petition No. 684 of 2017, Calcutta High Court]

Arbitration - Delhi High Court issues series of directions to avoid multiplicity of arbitration proceedings

The Delhi High Court has held that, to the maximum extent possible, constitution of multiple arbitral tribunals to decide upon disputes arising from the same contract/ from the same series ought to be avoided. The Court further held that while hearing a petition under Section 34 of the Arbitration Act, it would be incongruous to hold that a finding in a subsequent award would render the previous award illegal or contrary to law.

Brief facts:

The Petitioner had executed a works contract with the Respondent, in 2000, to be completed by 2004. Various extensions were granted, after which various disputes arose between the parties. In line with the service agreement between the parties ("**Agreement**"), a Disputes Review Board ("**DRB**") was constituted in 2004, which failed to resolve the disputes. Thereafter, the Petitioner invoked the arbitration clause under the Agreement in 2005, which passed the final award in 2007 ("**Award No. 1**"). The said Award was challenged before the High Court, which upheld the award vide a judgment in 2017. Simultaneously, further disputes arose between the parties in 2007 and 2008, for which another two separate DRBs were constituted, and thereafter, two separate arbitral tribunals were also constituted, both in 2008. Subsequent final awards (hereinafter referred to as "**Award No. 2**" and "**Award No. 3**") were passed by the said tribunals. By way of the present Petition, the Petitioner has challenged Award No. 2 under Section 34 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**").

Submissions by Petitioners:

a. Findings in Award No. 3 to be relied upon, for setting aside of Award No. 2.

b. The claim under Award No. 2 pertains to costs and damages compensable to the Petitioners for delays caused by Respondent No. 1 *viz.,* NHAI with regard specific works. Such delay on part of NHAI was observed by the arbitral tribunal for Award No. 3 as well, and the same is binding on the present proceedings.

Submissions by Respondents:

a. Award No. 2, as passed by the arbitral tribunal, was very detailed and specific to the dispute raised between the parties and cannot be co-related with disputes raised before the other arbitral tribunals.

b. The Petitioners had multiple opportunities to present their case before the concerned arbitral tribunal.

Decision:

a. Arbitration Act envisages that disputes can be raised at different stages, for contracts, and there can be multiple arbitrations in respect of a single contract for parties seeking adjudication of disputes as and when they arise, by looking at the language of Section 7(1), 8(3) and 21 of the Arbitration Act. However, the practice of constitution of multiple tribunals is inherently counter-productive.

b. Every award would have to be tested as on the date when it was pronounced, on its own merits, and not on the basis of subsequent findings which may have been rendered by a later Arbitral Tribunal. Thus, the present petition was liable to be dismissed.

c. Multiple arbitrations can be of various categories:

   (i) Arbitration proceedings between the same parties under the same contract.

   (ii) Arbitration proceedings between the same parties arising from a set of contracts constituting one series, which bind them in a single legal relationship.

   (iii) Arbitration proceedings arising out of identical or similar contracts between one set of entities, wherein the other entity is common.

d. Following guidelines ought to be kept in mind, while instituting multiple arbitrations:

   (i) In c(ii) above, the solution proposed by the Apex Court in *Dolphin Drilling Ltd. Vs. ONGC*, AIR 2010 SC 1296, to draft arbitration clauses in a manner so as to ensure that claims are referred at one go and none of the claims are barred by limitation, to be borne in mind. Any further disputes which arise in respect of the same contract or the same series of contracts, ought to ordinarily be referred to the same Tribunal. The Arbitral Tribunal may pronounce separate awards in respect of the multiple references.

   (ii) If a dispute and a claim thereunder has arisen as on the date of invocation and is not mentioned, either in the invocation letter or in the terms of reference, such claim ought to be held as being barred/waived, unless permitted to be raised by the Arbitral Tribunal for any legally justifiable/sustainable reasons.

   (iii) In c(iii) above, where common/overlapping issues arise, an endeavor could be made as in *In Re Indian Railway Catering & Tourism Corporation Limited*, ARB.P. 745-51/2019, to constitute the same Tribunal. If that is however not found feasible, at least challenges to the Awards rendered could be heard together, if they are pending in the same Court.

   (iv) At the time of filing of petitions under Section 11 or Section 34 or any other provision of the Arbitration Act, specific disclosure ought to be made by parties as to the number of arbitration references, Arbitral Tribunals or court proceedings pending or adjudicated in respect of the same contract and if so, the stage of the said proceedings.

[*Gammon India Limited & Anr.* v. *National Highways Authority of India* – Order dated 23-06-2020 in OMP 680/2011 & I.A. 11671/2018, Delhi High Court]

News Nuggets

Insolvency – Threshold for initiating CIRP – Notification dated 24-03-2020 increasing threshold, held retrospective: The Delhi High Court has stayed an Order passed by the National Company Law Tribunal **("NCLT")** wherein proceedings were initiated against an MSME under Section 9 of the Insolvency & Bankruptcy Code, 2016. While holding that there was a *prima facie* case in favour of the Petitioner (Promoter of the Corporate Debtor), the Single Judge Bench relied upon the notification dated 24-03-2020 as per which the threshold for initiating a Corporate Insolvency Resolution Process by the NCLT was increased to INR 1 Crore. The Court in its Order dated 23-06-2020 in *Pankaj Aggarwal v. Union of India* observed that *prima facie*, there was an error by the NCLT, as the notification dated 24-03-2020 was clearly applicable. It may be noted that the concerned petition before the NCLT, in the present proceedings, was filed in 2019, i.e., prior to the concerned notification. It is also relevant to note that *vide* various recent orders passed in *Foseco India Limited v. Om Boseco Rail Products Limited*, CP No. IB/1735/KB/2019 and *Arrowline Organic Products (P) Ltd. v. Rockwell Industries Limited*, IA/341/2020 in IBA/1031/2019, various NCLT Benches have held that the notification dated 24-03-2020 is prospective.

Passing of ordinary and special resolutions through VC or audio visual means – Framework extended till 30-09-2020: MCA *vide* General Circulars 14/2020 and 17/2020 had provided clarifications for passing of ordinary and special resolutions through video conferencing or other audio-visual means or transact items through postal ballot. The said framework was applicable till 30-06-2020. Now pursuant to General Circular 22/2020, the said framework has been extended till 30-09-2020.

Standard Operating Procedure in the cases of Trading Member /Clearing Member leading to default: SEBI *vide* Circular dated 01-07-2020 has laid down standard operating procedure in cases of Trading Member (TM) / Clearing Member (CM) defaults to harmonise the actions taken by Stock Exchanges (SE) and Clearing Corporations (CC). Once the Member is disabled or Show Cause Notice (SCN) is issued for declaration of defaulter to TM /CM (whichever is earlier), no further Investor Grievance Redressal Committee (IGRC) / Arbitration meetings shall be conducted. Default proceedings shall take place as per bye laws / rules / regulations of the SE/ CC. If the member is also a depository participant, depositories shall take action as per its bye laws for termination / transfer of its participant-ship, based on record. SEs shall not expel the TM immediately until the default proceedings are completed. The TM shall provide a list of all its bank accounts to the SEs /CCs and the SEs /CCs shall obtain an undertaking from the TM within 90 days from the date of issuance of this Circular, undertaking that the SEs / CCs shall be empowered to instruct the bank(s) of the TM to freeze the bank account(s) for debits. The said Circular is effective from 01-08-2020.

RBI – Oversight Framework for Financial Market Infrastructures ("FMIs") and Retail Payment Systems ("RPSs"): Reserve Bank of India *vide* notification dated 13-06-2020 has introduced a new oversight framework for

FMIs and RPSs, replacing earlier framework issued in June 2013. The revised policy was necessitated as the extant framework only dealt with FMIs and not RPSs. Pursuant to the new framework, RBI will carry out oversight activity through (i) monitoring existing and planned systems; (ii) assessment of the FMIs and RPSs against the oversight objectives; and (iii) inducing change for improvements, where necessary. In the background of growing importance of NPCI, it has been designated as a System Wide Important Payment System (SWIPS) and would be accessed against the Principles for Financial Market Infrastructures adopted by RBI.

Loans on exorbitant interest rates covered under Extortionate Credit Transactions: Observing that the short-term loans advanced by few Appellants on exorbitant rates of interest (40% to 60% per annum) were covered under Extortionate Credit Transactions as prohibited under Section 50(1) of the Insolvency and Bankruptcy Act, 2016, the NCLAT has set aside the entire transactions as illegal and void and held them as not entitled to any relief. Regarding other appellants, where similar transactions were prior to 2 years preceding the insolvency commencement date, the Appellate Tribunal was of the view that though technically these may not be covered under Section 50(1), the claim of exorbitant rates of interest was extortionate regarding interest and thus illegal. It however held that these appellants can make their claims for principal amount as Unsecured Creditors. The NCLAT earlier observed that the said advancement of loans by the individuals may be at the behest of Directors in collusion with the individuals as no reasonable person would agree to such transaction. Relying on Section 60(5) of IBC, the NCLAT in the case *Anamika Singh v. Shinhan Bank* [Judgement dated 24-06-2020] also rejected the plea that since neither the RP nor the liquidator made any application for avoidance of such transactions to the Adjudicating Authority, Section 50(1) will not be attracted.

Liquidation – Relinquishment of security interest – Decision of majority secured creditors binding on dissenting secured creditor: Observing that the secured creditors which had 73.76% shares in value had already relinquished the security interest into the liquidation estate, NCLAT has held that it would be prejudicial to stall the liquidation process at the instance of a single creditor having only 26.24% share (in value), in the secured assets. The Appellate Tribunal was of the view that Section 13 of the SARFAESI Act will be applicable in this case to end the deadlock, and that the decision of the majority secured creditors shall also be binding on the dissenting secured creditors, i.e. Respondent (Secured Operational Creditor) who, based on an Arbitral Award, had been granted lien over the equipment and goods lying at the site of the Corporate Debtor (Secured Assets). It may be noted that the Secured Assets, on which the Respondent was granted lien or a charge, was the one which was already hypothecated to other Secured Creditors *vide* a Hypothecated Deed and soon after the arbitral award, CIRP was started against the Corporate Debtor. The NCLAT in the case *Srikanth Dwarakanath (Liquidator) v. Bharat Heavy Electricals Limited* [Judgement dated 18-06-2020] also observed that Respondent was also a Secured Creditor at par with the remaining other Secured Creditors and did not hold a superior charge from the rest.

CIRP cost when to be borne by Committee of Creditors: In a case where the order of admission of application under Section 7 of the IBC was set aside by the NCLAT earlier on an appeal by the erstwhile Director of the Corporate

Debtor, the Appellate Tribunal has upheld the Adjudicating Authorities jurisdiction to provide for the resolution costs while closing the case. The Appellate Tribunal in the case *Kotak Resources v. Dharmendra Dhelaria* [Order dated 26-06-2020] was of the view that the Corporate Insolvency Resolution Process ("CIRP") costs had necessarily to be borne by the Committee of Creditors as it was indisputable that the Corporate Debtor could not be saddled with the liability.

Insolvency – Contract termination notice by service recipient after initiation of CIRP against service provider, not sustainable: NCLAT has upheld the Order of the NCLT staying the notice for termination of agreement by the service recipient (appellant) subsequent to the admission of the initiation of the Corporate Insolvency Resolution Process ("CIRP") against the Corporate Debtor/service provider. The Appellate Tribunal in the case *Tata Consultancy Services Limited v. Vishal Ghisulal Jain* [Judgement dated 24-06-2020] observed that it was the duty of the Resolution Professional and the main objective of the IB Code to keep the Corporate Debtor as a going concern and hence there was no illegality in the order of the Adjudicating Authority staying the termination of notice with the direction to the Appellant to adhere to the terms of the contract without fail. The appellant had sought for termination of contract alleging that the Corporate Debtor had failed to remedy contractual breaches.

Statutory dues cannot be claimed from acquiring company if not presented before approval of resolution plan: NCLAT has dismissed the claim of the Excise and Taxation department of State of Haryana, against the Corporate Debtor, filed after the approval of the resolution plan by the adjudicating authority. Relying on the Supreme Court decision in the case of *Essar Steel India Limited Vs. Satish Kumar Gupta & Ors.,* the Appellate Tribunal observed that the successful resolution applicant is not to be burdened with undecided claims at the stage of implementation of the Resolution Plan. Reiterating that statutory dues are operational debts, the Appellate Tribunal held that and once a resolution plan is approved by the NCLT, the treatment of all stakeholders, including Operational Creditors, is to be determined as per the terms of the approved Resolution Plan and that the Operational Creditors hava no rights against the acquiring company relating to the period, before the effective date. The Tribunal in the case *State of Haryana v. Uttam Strips Ltd.* [Judgement dated 23-06-2020] also noted that the resolution plan had accounted for contingent liabilities/claims or any creditors who had failed to file any claim under CIRP, and the same were given NIL value.

Reference to arbitration in insolvency petition – NCLT allows interim application: NCLT (Mumbai Bench) has referred the parties to arbitration under Section 8 of Arbitration and Conciliation Act, 1996. Company Petition was filed by Kotak India Venture Fund-I (Financial Creditor) under Section 7 of the IBC, seeking to initiate CIRP against the Corporate Debtor claiming that it had failed to redeem the Optionally Convertible Redeemable Preference Shares **("OCRPS")** on or before a particular date in terms of the Share Subscription and Shareholders Agreement **("SSSA")**. The OCRPS could not be converted due to disputes on valuation. The SSSA contained arbitration clause for resolution of disputes. The Corporate Debtor argued that Section 8 of the Arbitration Act, which provides for the power of a judicial authority to refer parties to

arbitration, is mandatory in nature. NCLT noted that it is settled law that '*generalia specialibus non derogant'* and held that Courts have a mandatory duty to refer the parties to arbitration where an arbitration clause exists. Dismissing the application of the Financial Creditor and allowing the interim application filed by Corporate Debtor, the NCLT in its judgement dated 09-06-2020 held that the disputes that form the subject matter of the underlying Company Petition, *viz.*, valuation of shares, calculation and conversion formula and fixing of QIPO date were all arbitrable.

Pension and other post-retirement benefits are sacrosanct rights, plea of lack of funds is legally untenable: The Guwahati High Court has held that pension and other post-retirement benefits are sacrosanct rights earned by an employee by working for a long tenure in a particular organization. Therefore, the plea of lack of funds though may be correct, is not legally tenable. The Petitioner, in the case *Nagen Chandra Das v. State of Assam & Ors.,* had raised a grievance against Assam State Housing Board. The High Court held that, in case of lack of funds, the Housing Board has all the powers and means to approach the State Government to make available such amount of funds to meet the day-to-day functioning and to make payments to its retired employees and other entitlement of the employees. The High Court in its Order dated 01-06-2020, gave a period of 4 months for provision of the accruable benefits, after which an interest of 6% was held to be applicable.

Chairman/Director of company cannot be prosecuted under Section 138/141 of Negotiable Instruments Act, 1881 without impleading the company as accused: The Madhya Pradesh High Court has reiterated that only if a Company is impleaded as an accused to the proceedings under Section 138/141 of the Negotiable Instruments Act, 1881, the Directors/ Chairman of said Company can be held vicariously liable. Accordingly, it was held that the notices required under Section 138 must be served against the Company as well as its officers accused under Section 141, and the Company must also be proceeded against, especially in cases where a business relationship was established between the complainants and the Company. The Supreme Court judgments in *Himanshu v. B. Shivamurthy and Anr.*, (2019) 3 SCC 797 and *Aneeta Hada v. Godfather Travels and Tours Private Ltd*., 2012 (5) SCC 661 were relied upon in the Judgement dated 09-06-2020, in the case *Bhupendra Suryawanshi v. Sai Traders*.

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