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Articles

Dawn of the regulatory regime for Over-The-Top services

By **Prashant Phillips**

The Telecom Regulatory Authority of India (TRAI) had recently released a consultation paper on regulatory framework for Over-the-Top (OTT) Communication Services. The ever-increasing accessibility of Internet has been fuelled by a more advanced infrastructure and lower tariff costs. This has led to a number of mobile applications (or apps) that rely on this information highway for providing a wide variety of services, which range from simple communication to providing high quality media content on the go.

The scope of the present consultation paper is restricted to only communication services which may be provided using OTT services. With telecommunication services already being regulated under various statutory schemes under TRAI, the present consultation paper is an attempt to assess the regulatory measures that need to be in place for such communication services which may be provided over networks other than the convention radio telecommunication networks. The consultation paper also touches upon a possible imbalance between the obligations of conventional telecommunication service providers (TSPs) and the Over-the-Top Service Providers (referred to as OTPs).

The mobile penetration and consequent access to Internet has made it possible for masses to use Internet-based messaging services as opposed to traditional SMSs. It is reported that WhatsApp is the most preferred and used messaging app in India. Despite its popularity, WhatsApp has also been at the centre of recent controversies involving fake news and inflammatory messages being circulated on their platform. This coupled with the immense growth of such services, and their similarity with the existing communication services necessitated the need for a regulatory framework for the OTT-based communication services

The present article touches upon the above-mentioned issues and attempts to highlight some of the challenges which any OTP is likely to face.

Basic Overview of OTT Communication Services

OTT may be considered as any digital service which may be provided directly over the Internet. Examples of such services include, but are not limited to, messaging or communication over the Internet. Such services are typically provided through applications, which may be either be installed on mobile phones/communication devices or standalone computers. OTT services may again be classified under two broad headings: communication and content. One of the best examples of OTT based communication application is WhatsApp Messenger which is one of the most widely used applications for communications. WhatsApp has notably displaced native SMS and is now used as a preferred platform by the masses.

OTT-based communication services differ from the conventional communication services primarily on two fronts:

1. Platform – OTT-based communication is enabled through a software based platform, such as an application which may be

installed on a computing/mobile device. Conventional communication services such as SMS is not dependent on such a software-based platform.

2. Infrastructure – Traditional communication services require a dedicated network whereas the OTT-based communication services function on the Internet and as such do not require any dedicated network for implementing such communication services.

As also noted in the consultation paper, there is no formal definition for OTT-based communications services. However, as a notional basis, an OTT-based communication service may be considered any internet enabled communication service which may be used as a substitute for conventional/traditional communication services.

Regulatory Framework – Possibly mismatched obligations?

Broadly, the TSPs and the telecommunication services being offered fall within the scope of the Indian Telegraph Act, 1885, the Telecom Regulatory Authority of India Act, 1997 and the appropriate rules or regulations. Furthermore, the TSPs are also governed by the terms and conditions of the Unified License Agreement and/or Unified Access Service License Agreement (as per the Indian Telegraph Act), under which such TSPs are licensed to operate.

The present regulatory framework was primarily intended for providing a level playing field amongst different TSPs who intended to utilize the air-waves, and for protection of their interests along with the interest of the consumers.

On the other hand, the OTPs despite providing similar communication services (which however are provided over the Internet) are, presently, not subject to any regulatory provisions. As per the TRAI Act and the Indian Telegraph Act, a Licensee is any person who licensed to operate a 'telegraph'[1]. In the strictest sense, the OTPs do not maintain or work a 'telegraph' as they only provide the communications services over the Internet. To that extent, if the provisions of the TRAI Act and the Indian Telegraph Act are to be construed strictly, OTPs would be outside their respective purview and hence may not be obligated under the existing scheme, despite the OTPs providing services similar to that of conventional communication services.

However, it should also be noted that a number of players providing OTT-based communication services do exist presently in the market. Presence of such a number of players also ensure sufficient degree of competition and ensures that the customers receive the best quality and experience while using their applications. Furthermore, nearly all such applications are offered without any costs to customers. Moreover, customers may switch between different applications with ease. As per the consultation paper, even though a mismatch in regulatory obligations exists, it may be the case, that the competition alone may be sufficient to keep a check on the different OTPs.

Proposed Way Forward – What will work and what won't!

The consultation paper proposes different models based on which a regulatory framework for OTT-based communication services may be developed.

a. Similar treatment of similar services
b. Relax/reduce obligations on TSP instead of proposing equal regulations for OTP
c. No regulatory framework required for OTP

[1] Section 2(1)(e) of the TRAI Act, and Section 4(1) of the Indian Telegraph Act.

a. ***Similar Treatment of Similar Service***

There does exists an obvious mismatch in the obligations that are to be discharged by the TSP as opposed to the OTP. As mentioned above, the TSP have to comply with the different legislations and licensing conditions for implementing telecommunication services. For example, the TSP also have to make substantial capital investments in terms of license fees and towards infrastructure, an obligation that arises due to statutory requirements. On the other hand, the barriers for entry for OTP are less inhibiting, with little or no capital obligations, with such OTP providing services which are similar to traditional telecommunication services.

To such an extent, it may be argued that despite such similarity of services being provided, absence of similar obligations for OTP may amount to unequal treatment. In this regard, even though a similar treatment may be desired, it may not be possible to extend so under the present framework and a parallel regulatory mechanism may have to be developed for OTP.

However, this may have certain inadvertent impact on technological development. OTT-based services are in its nascent stage and the true potential of such services is yet to be realized. Applications like WhatsApp, which started as small businesses, would have virtually no chance of success if an immense regulatory burden is imposed for sake of parity with the conventional communication services. Any regulatory scheme which mirrors the scheme applicable to the telecom sector may throttle the technological development which OTT is experiencing.

b. ***Relaxation of Regulations for TSP***

The telecom sector in India have experienced a lot of legal disputes in its initial stages. Certain issues still persists, but the core issues pertaining to the telecom sector stand largely settled to some extent.

Relaxation in the regulatory requirements may achieve ease in regulation of OTT-based as well as traditional communication services, but it may again increase the likelihood of disputes within the telecom sector.

c. ***No regulatory mechanism for OTT-based communication services***

Considering that OTT is in its nascent stage, this may appear to be a plausible option at this stage. For example, it may be possible that over the coming years the manner in which OTT as a service is being provided evolves so dramatically, that any regulatory provisions may become outdated or inapplicable onto such services. The regulatory provisions would have to be equally extensible so they remain relevant irrespective of any technological development. For example, already we have mobile applications which in addition to providing a wide variety of e-services, also include features which enable users to chat/communicate with other users. Technologies based on IoT, Industry 4.0, AI, may substantially rely on and utilize communication over the internet through such applications. It is still unclear to what extent such regulatory mechanisms would be enforceable as new facets of technologies become evident.

Challenges which lies ahead

The regulatory framework for OTT-based communication services should be such that it implements sufficient regulatory control without inhibiting technological development within this field. The dynamic nature of the OTT technology also makes it difficult to draw a line which will cleanly segregate applications which are providing communication services. For example, applications such as LinkedIn® and Facebook® provide a social networking platform along with a communication feature. With more applications allowing such messaging related features, the regulatory burden would also increase. Greater convergence of functionality within applications will further increase such challenges.

It appears that no single legislation or regulatory framework may be sufficient to address all such concerns at the same time. A combination of different legislations may be required to sufficiently reach the desired regulatory objective for OTT-based communication services.

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Adding teeth to the corruption law in India

By **Akshita Alok**

In February 2018, the Corruption Perception Index 2017 rankings were revealed, which ranked India at #81 amongst a group of hundred and eighty countries. This ranking in the year 2016 was at #79 for India, albeit the scores in both the years were roughly the same. India was also identified as one of the "worst offenders" in the Asia-Pacific region by these rankings. This index appropriately highlights that bribery and corruption continue to be an increasing focus of the state organisations around the world. While, for the most part, India has remained woefully behind in enforcing anti-corruption laws by largely keeping its watch-dog agencies toothless in terms of powers of prosecution, the country is now working with the stakeholders to create an even-playing field for companies as it competes for more investment and business from across the globe. India is catching up to the pace of other countries at last, and in line with its objective of curbing corruption and bribery, new laws are being passed and enforcement is increasing.

The most significant recent change in this regard has been the Prevention of Corruption (Amendment) Act, 2018 ("Amendment Act"), which was brought into effect from July 26, 2018 with its publication in the official gazette. Five years into the pipeline, this Amendment Act was introduced as the Prevention of Corruption (Amendment) Bill, 2013 ("Bill") in the Rajya Sabha in August 2013. Thereafter, the Bill was considered by the Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, in its 69th Report and the Law Commission of India in its 254th Report and was also examined by the Select Committee of Rajya Sabha, which submitted its report on the Bill to the Rajya Sabha in August 2016. These recommendations were considered by the Central Government and official amendments were made to the Bill. The Bill was then passed by the Rajya Sabha and Lok Sabha in July 2018. These amendments to the Prevention of Corruption Act, 1988 ("POCA") demonstrate India's commitment to the UN Convention

Against Corruption, 2005 ("UNCAC") which India ratified in 2011.

We provide here an outline of the key provisions of the Amendment Act, which will affect all corporations doing business in India.

I. **Definition of Commercial Organisation**: The definition of a "commercial organisation" includes "(i) a body which is incorporated in India and which carries on a business, whether in India or outside India; (ii) any other body which is incorporated outside India and which carries on a business, or part of a business, in any part of India; (iii) a partnership firm or any association of persons formed in India and which carries on a business whether in India or outside India; or (iv) any other partnership or association of persons which is formed outside India and which carries on a business, or part of a business, in any part of India." The term "business" includes a trade or profession or providing service.

   Multinational companies whether incorporated in India or outside, carrying on business in India, are now under the purview of the POCA and can be punished with fine if any person on their behalf indulges in perpetrating any act of corruption. The offences also apply to partnership firms in India or abroad, carrying on business in India.

II. **Recognising offences relating to bribing a public servant by commercial organisation**: Section 9 of the amended POCA attempts to punish the commercial organisation if any person associated with such commercial organisation gives or promises to give any undue advantage to a public servant either with the intention of obtaining or retaining business or to obtain or retain an advantage in the conduct of business.

   The term "undue advantage" includes any gratification other than legal remuneration paid or payable to the public servant in his service. A "person associated with the commercial organisation" is widely defined to mean any person who performs services for or on behalf of the commercial organisation and includes any employees, agent or subsidiary. These far-reaching definitions show that the commercial organisations are required to closely monitor the actions of its associates to ensure that no corruption is being carried on their behalf which could be traced back to the commercial organisation.

III. **Introduction of 'Adequate Procedures' defence**: Similar to the U.K. law on anti-corruption, i.e. the U.K. Bribery Act, Section 9 of the amended POCA also allows the company to raise a defence of having in place a robust compliance program which would essentially involve demonstrating that the company had in place adequate procedures in compliance of such guidelines as may be prescribed to prevent persons associated with it from undertaking any conduct which would be punishable under the POCA. The effect of this provision is that the companies now need to evaluate their procedures of preventing and detecting bribery and corruption. It further allows the companies to avoid prosecution if it can prove that it had good policies and procedures and an overall corporate environment that was built to prevent such acts.

IV. **Guidelines by the Central Government**: The Section 9 of the amended POCA also provides for certain guidelines to be drafted and notified by the Central

Government, in consultation with the stakeholders, which would be aimed at preventing any persons associated with the commercial organisations from bribing any public servant. Once notified, the companies would have to ensure strict adherence of such guidelines.

V. **Person responsible for offences by commercial organisation**: If the offence committed under the Section 9 of the amended POCA is proved to have been committed with the knowledge or connivance of any director, manager, secretary or other officer of the commercial organisation, such director, manager, secretary or other officer shall be guilty of the offence and shall be proceeded against. The punishment prescribed ranges from imprisonment for three years to seven years in addition to levy of a fine. In the case of a firm, the term director shall mean the partner of such firm.

Conclusion

The Amendment Act brings about many more welcome changes such as (i) prescribing a maximum timeline of four years for trial under the POCA; (ii) including as an offence both the giving or taking of an undue advantage and abetting in the same; (iii) introducing provision of attachment and forfeiture of property; and (iv) making reasonable exceptions where so required.

Considering the rampant effect of corruption on the way business is conducted in India, the only solution to tackling the issue is by way of a methodical, systemic change in governance and legal measures such as the aforesaid framework. The Amendment Act has been much awaited and provides a lot of hope that steps are being taken in the right direction. With increased onus on the commercial organisations, it remains to be seen whether the amended POCA is able to translate into a success story for the country. For commercial organizations, it would be incumbent to have appropriate policies in place like “Anti-bribery Policy” and “Whistle-blower Policy” in place to address the situations of dealing with third-parties and/or government departments, schedule training sessions for employees to create awareness regarding the policies and have a committee to oversee the effective implementation.

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Notifications and Circulars

Companies (Registered Valuers and Valuation) Fourth Amendment Rules, 2018 come into effect from 13-11-2018: The Central Government has notified the Companies Registered Valuers and Valuation) Fourth Amendment Rules, 2018 (“Valuation Amendment Rules”). The key changes made to the Companies (Registered Valuers and Valuation) Rules, 2017 (“Valuation Rules”) are as follows:

(i) A new Sub-Rule (3) has been inserted which states that the Rules shall apply for valuation in respect of any property, stocks, shares, debentures, securities or goodwill or any other assets or net worth of a company or its liabilities under the provision of the Companies Act, 2013 or these Rules. The explanation to sub-Rule (3) provides that conduct of valuation under any other law other than the Companies Act, 2013 or the Valuation Rules by any person shall not be affected by virtue of coming into effect of the Valuation Amendment Rules.

(ii) An explanation (Explanation III) has been added to Rule 4 (*Qualifications and experience*) of the Valuation Rules, which states that for the purposes of this rule and Annexure IV, the term 'equivalent' shall mean professional and technical qualifications which are recognised by the Ministry of Human Resources and Development as equivalent to professional and technical degree".

(iii) Rule 10 (*Functions of a Valuer*) of the Valuation Rules has been amended. Pursuant to the Valuation Amendment Rules, a valuer shall conduct valuation required under the Act as per these Valuation Rules.

(iv) A new Annexure 4 has been added to the Valuation Rules which provides the eligibility qualification and experience for registration as valuer, in relation to the following asset classes: (a) plant and machinery; (b) land and building, and; (c) securities or financial assets.

SEBI lays down norms for transfer of securities in physical mode: The norms for transfer of securities in physical mode (for listed companies) is governed by Regulation 40 and Schedule VII of the Listing Obligation and Disclosure Requirements Regulations, 2015 ("LODR"). The Securities and Exchange Board of India ("SEBI") vide its notification number SEBI/HO/MIRSD/DOS3/CIR/P/2018/139 dated 6 November 2018 has standardized the documentation and procedure in this regard. The key provisions regarding the same are as under:

(i) The transfer deeds executed prior to notification of LODR may be registered with or without the permanent account number ("PAN") of the transferor.

(ii) In case of mismatch name in PAN card vis-à-vis name on share certificate/transfer deed, the transfer shall be registered on the submission of copies of any of the following four documents: (a) passport; (b) marriage certificate; (c) gazette notification regarding change in name, or; (d) aadhar card.

(iii) In case of major mismatch/non-availability of transferor's signature, the following procedure/documentation shall be followed for registration of transfer of securities:
   (a) RTA[2]/company shall follow the procedure as laid down in Para (B)(2) of Schedule VII of LODR for major difference or non-availability of signature of the transferor(s).
   (b) RTA shall make efforts to contact the transferor by (A) checking the dividend history and obtaining the current contact details from the bank where dividend was encashed; (B) from the address, e-mail IDs and phone numbers, if any, available with the depositories/KRA[3].
   (c) In case of non-delivery of the objection memo to the transferor or non-cooperation by/inability of the transferor to provide the required details to the transferee, company/RTA shall register the transfer after undertaking the following: (A) collecting an indemnity bond from the transferee in the format

[2] 'RTA' refers to registrar and transfer agent, please see the Securities and Exchange Board of India (Registrars to an Issue and Share Transfer Agents) Regulations, 1993 for details regarding 'registrar to an issue' and 'share transfer agent'.
[3] 'KRA' refers to know your client registration agency registered with SEBI.

annexed to the notification; (B) copy of address proof - passport/aadhar card/driving license of the transferee, and; (C) an undertaking that the transferee will not transfer/demat the physical securities until the lock-in period specified under the notification is completed.

(d) Companies/RTAs shall publish an advertisement on the company's website and in at least one English language national newspaper and in one regional language newspaper published in the place of registered office of the listed entity, giving notice of the proposed transfer and seeking objection, if any, to the same within a period of 30 days from the date of advertisement.

(e) Transfer shall be effected only after the expiry of 30 days from the newspaper advertisement. The securities so transferred shall bear a stamp affixed by the company/RTA stating that these securities shall be under lock-in for a period of 6 months from the date of registration of transfer.

(f) Names of the transferor, transferee and number of securities transferred under this procedure shall be disclosed on the company's/stock exchange website for a period of 6 months from the date of transfer.

(g) In case of non-availability of any document required for transfer and if the transferor is not cooperating or is not traceable, companies/RTA shall register the transfer by following the procedure as specified in case of major mismatch/non-availability of transferor's signature, as specified in the notification.

(h) In case the bank attested address of the transferor differs from the records available with the company/RTA, companies/RTAs shall register the transfer by updating the concerned company's address to be the same as the new address as attested by the bank.

National Financial Reporting Authority Rules, 2018 effective from 13-11-2018: The Central Government has notified National Financial Reporting Authority ("NFRA") Rules as on 13 November 2018, under sub-sections (2) and (4) of Section 132, sub-Section (1) of Section 139 and sub-Section (1) of Section 469 of the Companies Act, 2013. Key aspects specified by the NFRA rules are as follows:

(i) As per Sub Rule (1) of Rule 3 (*Classes of companies and bodies corporate governed by the Authority*) the NFRA shall have power to monitor and enforce compliance with accounting standards and auditing standards, oversee the quality of service under sub-section (2) of section 132 or undertake investigation under sub-section (4) of section 132 of the Companies Act, 2013 of the following classes of companies and bodies corporate:

 (a) companies whose securities are listed on any stock exchange in India or outside India;

 (b) unlisted public companies having paid-up capital of not less than rupees five hundred crores or having annual turnover of not less than rupees one thousand crores or having, in aggregate, outstanding loans, debentures and deposits of not less than rupees five hundred crores as on the 31st March of immediately preceding financial year;

 (c) insurance companies, banking companies, companies engaged in the generation or supply of electricity, companies governed by any special Act for the time being in force or bodies corporate incorporated by an Act in accordance with clauses (b), (c), (d), (e) and (f) of sub-Section (4) of Section 1 of the Companies Act, 2013;

(d) any body corporate or company or person, or any class of bodies corporate or companies or persons, on a reference made to the NFRA by the Central Government in public interest; and

(e) a body corporate incorporated or registered outside India, which is a subsidiary or associate company of any company or body corporate incorporated or registered in India as referred to in clauses 3 (a) to (d) of the Rules, if the income or net worth of such subsidiary or associate company exceeds twenty per cent. of the consolidated income or consolidated net worth of such company or the body corporate, as the case may be, referred to in clauses 3 (a) to (d) of the Rules.

(ii) As per sub-Rule 2 of Rule 3 of the NFRA Rules, every existing body corporate other than a company governed by the NFRA Rules shall inform the NFRA within thirty days of the commencement of the NFRA Rules, in Form NFRA-1, the particulars of the auditor as on the date of commencement of the NFRA Rules.

(iii) As per Sub Rule (1) of Rule 4 (*Functions and Duties of the Authority*) the NFRA shall protect the public interest and the interests of investors, creditors and others associated with the companies or bodies corporate under Rule 3 by establishing high quality standards of accounting, auditing and exercising effective oversight of accounting functions performed by the companies and bodies corporate auditing functions performed by auditors.

(iv) As per sub-Rule 2 of Rule 10 (*Power to Investigate*) if during an investigation, the NFRA has evidence to believe that any company or body corporate has not complied with the requirements under the Companies Act, 2013 or rules which involves or may involve fraud amounting to rupees one crore or more, it shall report its findings to the Central Government.

(v) As per Sub Rule 1 of Rule 11 (*Disciplinary Proceedings*) based on the reference received from the Central Government of findings of its monitoring or enforcement or oversight activities, or on the basis of material otherwise available on record, if the NFRA believes that sufficient cause exists to take actions permissible under sub-section(4) of section 132 of the Companies Act, 2013, it shall refer the matter to the concerned division, which shall cause a show-cause notice to be issued to the auditor concerned.

Companies (Amendment) Ordinance, 2018 notified: The Companies Act, 2013 ('Companies Act') was amended in the year 2017 in order to liberalise and correspond compliance requirements with other laws in force. The Ministry of Law and Justice has come up with the Companies (Amendment) Ordinance dated 2nd November 2018 ('Ordinance'), further amending various provisions of the Companies Act. These changes were brought about by the recommendations of the Committee to Review Offences ('Committee') as formed by the Ministry of the Company Affairs ('MCA'). The Ordinance promotes the intent of the government on encouraging ease of doing business. Further, it re-categorises certain punishable acts found in the category of compoundable offences to acts having civil liabilities.

The following were the key changes as brought about by the Ordinance:

(i) **Re-categorisation of offences:** In accordance with the Ordinance, certain offences have been re-categorised as carrying civil liabilities to bring them under an in-house adjudication mechanism. The key provisions amended are: Prohibition on issue of shares at a discount (Section 53(3)); Non-filing of annual return within 60 days (Section 92(5)); Failure or delay in filing financial statement with the registrar (Section 137(3)); Failure by director to comply with DIN requirements (Section 159); Failure or delay in filing certain resolutions (Section 117); Failure/ delay in filing statement by the auditor after resignation (Section 140); Managerial remuneration (Section 197); Failure to annex statement of 'material facts' to notice of general meeting (Section 102(5)).

(ii) **Reducing the burden on the National Company Law Tribunal ('NCLT'):** With the intent to reduce the burden on the NCLT, applications for conversion of a company from public to private and changes in financial year are to be dealt by the Central Government. Additionally, the power to rectify the register of charges has been delegated to the Regional Director. However, applications submitted prior to the Ordinance are to be dealt by the NCLT. The pecuniary jurisdiction of the Regional Director has been enhanced from INR 5 lakhs to INR 25 lakhs.

(iii) **Registration of Charges:** In cases where charges are created before the enforcement of the Ordinance, the registrar, on an application by the company, may allow registration of the charge, within a period of 300 days of such charge creation. If the registration of such charge is not made within 300 days, the registration of the charge can be made within six months from the date of commencement of the Ordinance. An additional period of 60 days is made available for charges created that are not registered after the enforcement of the Ordinance, on payment of an *ad valorem* fees.

(iv) **Conditions on commencement of Business:** Section 11 of the Act was omitted in 2015 and has now resurfaced as Section 10A. Section 10A lays down that no company having a share capital can commence any business or exercise any borrowing powers, unless:

(a) a director files a declaration with 6 months of incorporation stating that every subscriber to the memorandum has paid the value of shares to be taken by him

(b) a verification has been filed by the Company of its registered office within 30 days of incorporation in terms of Section 12(2) of the Act.

Where a director fails to file a declaration, the registrar, has been empowered to initiate the process for striking the name of company off the register.

(v) **Beneficial Ownership:** Section 90 has been revamped and a new concept of 'significant beneficial owner' and related reporting requirements (by companies and shareholders) has been introduced.

Earlier, a duty was cast on natural persons being significant beneficial owners to disclose the nature of interest and register themselves with the company. Now, under the Ordinance, a duty has also been cast on each company to give notice to persons considered as significant beneficial owners to come forward and register themselves. In the event a response was not received, companies were empowered to apply to the NCLT, for an order seeking restrictions on transfer and suspension of all rights attached to the shares by such unregistered beneficial owners.

Under the Ordinance if no person approaches the NCLT within one year, the shares will now be automatically transferred to the Investor Education & Protection Fund. In addition, non-compliance of Section 90 now carries a year's imprisonment as a discretionary component of the punishment.

(vi) **Business to be carried on at the registered office:** Section 12(9) has been inserted in the Ordinance, according to which if a registrar has a *reasonable cause* to believe that business is not being carried on by a company at its registered office, he may carry out an inspection and initiate the process for striking the name of company off the register.

Ratio Decidendi

IBC – Rejection of resolution plan by CoC when not correct

Facts and Background:

(i) Arising out of the order dated 28 February, 2018 passed by the NCLT, Kolkata in the 'Corporate Insolvency Resolution Process' initiated against 'Binani Cement Limited' - ("Corporate Debtor"), a flagship subsidiary of the appellant - 'Binani Industries Limited' had preferred an appeal against the judgment of the NCLT, Kolkata.

(ii) In the 'Corporate Insolvency Resolution Process' against the Corporate Debtor, various resolution plans were submitted pursuant to an invitation by the resolution professional, including by Rajputana Properties Private Limited ("Rajputana") and Ultratech Cement Limited ("Ultratech"). The committee of creditors ("CoC") refused to consider an improved offer submitted by Ultratech on 8 March 2018. However, the revised resolution plan of Rajputana (which had been submitted on 7 March 2018) was approved on 14 March 2018.

Contentions:

The contentious points observed and discussed by the NCLAT were as follows:

(i) Did the CoC discriminate between the eligible resolution applicants while considering the resolution plan of Rajputana?

(ii) Was Rajputana's resolution plan discriminatory?

Observations of the NCLAT:

(i) NCLAT noticed that the CoC voted in the meeting held on 14 March 2018 with 99.43% in favour of the plan submitted by Rajputana. However, 10.53% of the CoC were forced to vote in favour of the resolution plan and recorded protest note(s) alleging that they had not been dealt with equitably when compared with other financial creditors who were corporate guarantee beneficiaries of the Corporate Debtor.

(ii) To force financial creditors to vote for a resolution plan (because if they were not to vote in favour of such a resolution plan, such financial creditors would get liquidation value, which is almost nil), is not a basic principle of the Insolvency and Bankruptcy Code, 2016 ("IBC") and contrary to its spirit.

(iii) Rajputana in its plan made it clear that those who don't vote in favour of its resolution plan will be paid liquidation value.

(iv) The NCLT, Kolkata had held that the resolution plan submitted by Rajputana was discriminatory and contrary to the scheme of the IBC.

(v) The resolution plan submitted by Ultratech, including revised offer were not properly considered by the CoC for the wrong reasons. Ultratech had submitted its revised resolution plan well within the time limit prescribed.

(vi) The NCLAT observed that Section 25(2)(h) of the IBC provides for invitation to put forth a 'Resolution Plan' and submission of a revised offer (Ultratech had submitted a revised offer) is in continuation of a plan already submitted and accepted by the resolution professional.

(vii) CoC took the plea that the offer of Ultratech was merely an e-mail, did not follow the process laid down by the CoC and was beyond the time stipulated under the IBC.

(viii) If operational creditors are ignored and provided with liquidation value regarding their credit, no creditor would supply their goods/services on credit to any corporate debtor.

(ix) The role of financial creditors as CoC members: The NCLAT observed that the liabilities of all creditors who are not part of the CoC must also be met in the resolution since the IBC aims at promoting availability of credit, which comes from both financial and operational creditors. One stakeholder or a set of stakeholders cannot benefit unduly at the cost of another.

(x) Preferential treatment to one class of creditors, will lead to disappearance of the other class and thus defeat the objective of promoting availability of credit and balancing of interests of and value maximisation for all stakeholders;

(xi) The dues of operational creditors must, thus, get at least similar treatment as compared to the dues of financial creditors.

(xii) Neither IBC nor any regulations under it prescribe differential treatment between similarly situated operational creditors or financial creditors on one or the other grounds.

(xiii) The NCLAT observed that there is no settlement mechanism regarding the corporate insolvency resolution process ("CIRP") under the IBC. The CIRP once initiated can be terminated only if some illegality is demonstrated or if it is without jurisdiction or for some other valid reason.

Analysis:

(i) IBC does not prescribe differential treatment between operational creditors and financial creditors.

(ii) Rajputana's resolution plan favoured some financial creditors who were equally situated and did not balance the other stakeholders, such as operational creditors.

(iii) The CoC had failed to safeguard the interest of the stakeholders of the corporate debtor as it had accepted Rajputana's resolution plan and rejected Ultratech's revised resolution plan (which provided maximum amount to all stakeholders of the corporate debtor).

(iv) The CoC had taken note of the revised offer given by Rajputana on 7 March 2018 but refused to notice the revised offer submitted by Ultratech on 8 March 2018, which was prior to the decision of the CoC (14 March 2018). Ultratech's offer was INR 203.1 crores more than Rajputana's.

(v) Ultratech's resolution plan provided maximization of assets of the corporate debtor while infusing working capital as well. It ensured all the financial and operational creditors are paid 100% of their dues except the related parties. Further, Ultratech had agreed to pay further interest at 10% per annum quarterly to the rest of the financial creditors for the entire resolution period till the date of payment.

Decision:

(i) The NCLAT concluded that the CoC ignoring Ultratech's resolution plan amounted to non-application of mind and discriminatory behavior.

(ii) In the above circumstances, the NCLAT directed the NCLT, Kolkata to constitute a monitoring committee in this regard for the implementation of the revised approved plan submitted by Ultratech. The same was upheld by the Supreme Court of India.

[*Rajputana Properties Private Limited* v. *Ultratech Cement Limited* - Civil Appeal Number 10998 of 2018 decided on 19-11-2018, Supreme Court]

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