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Articles

Supreme Court restates law vis-à-vis an arbitrator's power to grant interest

By **Ankit Parhar**

The Hon'ble Supreme Court has recently restated the law vis-à-vis an Arbitrator's power to grant interest under the Arbitration and Conciliation Act, 1996 ('1996 Act') in *Jaiprakash Associates Ltd. v. Tehri Hydro Development Corporation India Ltd.*[1]

The Appellant was awarded a contract to execute certain works by the Respondent. The contract contained an arbitration clause providing for the resolution of disputes by a panel of three Arbitrators. The contract also contained clauses barring interest as under:

"Clause 50.0 Interest on money due to the contractor

No omission on the part of the Engineer in charge to pay the amount due upon measurement or otherwise shall vitiate or make void the contract, nor shall the contractor be entitled to interest upon any guarantee or payments in arrears nor upon any balance which may on the final settlement of his account, be due to him.

Clause 51.0 No claim for delayed payment due to dispute etc.

No claim for interest or damage will be entertained or be payable by the corporation in respect of any amount or balance which may be lying with the corporation owing to any dispute, difference or misunderstanding between the parties or in respect of any delay or omission on the part of the Engineer-in-charge in making intermediate or final payments on in any other respect whatsoever."

The Appellant raised certain claims against the Respondent. The Respondent disputed the claims raised by the Appellant. The dispute between the parties was referred to arbitration under the 1996 Act. The Arbitrators allowed the claims raised by the Appellant. The Arbitrators also awarded the Appellant interest at the rate of 10% per annum from the date of invocation of the arbitration clause till sixty days after the award along with future interest at the rate of 18% per annum till the date of payment. The Arbitrators relied upon the judgment of the Supreme Court in *Board of Trustees for the Port of Calcutta v. Engineers-De-Space Age*[2] and held that though the said Clauses barred interest on delayed payments by the Respondent to the Appellant, they did not bar the Arbitrators from awarding interest.

The Respondent challenged the award under Section 34 of the 1996 Act before a Single judge of the Delhi High Court. The Single Judge quashed the award to the extent that it awarded interest to the Appellant. The Appellant preferred an appeal under Section 37 of the 1996 Act before a Division Bench of the Delhi High Court.

[1] Civil Appeal No. 1539 of 2019 decided on 07th February 2019

[2] (1996) 1 SCC 516

The Division Bench dismissed the appeal and upheld the decision of the Single Judge. The Single Judge and the Division Bench of the High Court took the view that the said Clauses barred the Arbitrators from awarding interest. The High Court also noted that the aforesaid clauses were on the same terms as Clause 1.2.14 and 1.2.15 of a contract which was the subject-matter of construction in *Tehri Hydro Development Corporation (THDC) Limited & Anr. v. Jai Prakash Associates Limited*[3], wherein the Supreme Court had held that the Arbitrators were barred from awarding interest.

Before the Supreme Court, the Appellant argued that the judgment in *Jayprakash Associates Ltd.* (supra) was contrary to the earlier judgment of the Supreme Court in *State of Uttar Pradesh v. Harish Chandra and Company*[4]. It was contended that the judgments in *Jayprakash Associates Ltd.* (supra) and *Harish Chandra* (supra) were by Benches comprising of three Judges. However, the judgment in *Harish Chandra* (supra) was not considered in *Jayprakash Associates Ltd.* (supra). As such, it was contended the judgment in *Harish Chandra* (supra) being prior in time should hold the field. In the alternative, it was argued that the matter should be referred to a Larger Bench.

On merits, the Appellant contended that even though the said Clauses barred interest on delayed payments by the Respondent to the Appellant, they did not bar the Arbitrators from awarding interest. It was also argued that the said Clauses were similar to the clauses in *Harish Chandra* (supra) wherein the Supreme Court had interpreted the said clauses to mean that the Arbitrators were not precluded from awarding interest.

The Respondent contended that the clauses in *Harish Chandra* (supra) and the present case were altogether different. It was contended that the present case would be governed by the law laid down in *Jayprakash Associates* (supra) which was between the same and was concerned with identical clauses. It was further contended that there was a difference between the scheme under the Arbitration Act, 1940 ("1940 Act") and the 1996 Act inasmuch as under Section 31(7)(a) of the 1996 Act an Arbitrator had no jurisdiction to award *pendente lite* interest if there was an agreement to the contrary. In this regard, reliance was placed upon the decision of the Supreme Court in *Sayeed Ahmed and Company v. State of Uttar Pradesh & Ors.*[5]

The Supreme Court referred to the Constitution Bench judgment in *Secretary, Irrigation Department, Government of Orissa & Ors. v. G.C. Roy*[6] and the judgments in *Sayeed Ahmed* (supra) *Sree Kamatchi Amman Constructions v. Divisional Railway Manager (Works), Palghat & Ors.*[7], *Sri Chittaranjan Maity v. Union of India*[8] and *Reliance Cellulose Products Limited v. Oil and Natural Gas Corporation Limited*[9]. Relying upon the said judgments, the Supreme Court restated the position that under the 1996 Act, an Arbitrator would be within his jurisdiction to award pre-reference or *pendente lite* interest unless there is an agreement to the contrary.

After restating the legal position, the Supreme Court held that the Clauses in question barred the

[3] (2012) 12 SCC 10
[4] (1999) 1 SCC 63
[5] (2009) 12 SCC 26
[6] (1992) 1 SCC 508
[7] (2010) 8 SCC 767
[8] (2015) 9 SCC 695
[9] (2018) 9 SCC 266

Arbitrators from awarding interest. The Supreme Court held that the Arbitrators erred in relying upon the judgment in *Board of Trustees for the Port of Calcutta* (supra) which was under the 1940 Act. The Supreme Court upheld the finding of the High Court that the Clauses in the present case were *pari materia* with the clauses under consideration in *Tehri Hydro Development Corporation* (supra) which were held to bar the Arbitrators from awarding interest.

As far as the argument of the Appellant regarding the judgment in *Harish Chandra* (supra) was concerned, the Supreme Court referred to the judgments in *Reliance Cellulose* (supra) and *Sayeed Ahmed* (supra) and noted that the judgment in *Harish Chandra* (supra) was under the 1940 Act and was distinguished in *Sayeed Ahmed* (supra). The Supreme Court also noted that the judgment in *Sayeed Ahmed* (supra) was consistently followed by the Supreme Court in a number of cases and held that there was no reason to deviate from the construction of the Clauses given by the High Court.

This judgment is the latest judgment added to the line of judgments on an Arbitrator's power to award interest under the 1940 Act and the 1996 Act passed by the Supreme Court. Though the position under the 1996 Act has been largely settled by these judgments, the question of how a particular clause will be interpreted by an Arbitrator or Courts would still remain.

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Issuance of shares with differential voting rights

By **Tanushree Pande**

Introduction

The recent trend in the area of corporate laws has led to the emergence of various investments tools with multiple ways and options to retain control in the company. These instruments have been brought to fore to keep in tune with the changing scenario in the area of corporate laws, the various ways to invest in a particular sector given the regulatory regime and other hurdles. In the wake of growing competition, the need for adoption of various strategies to survive by the companies has become indispensable. Today, demand for a sound capital base is growing. With companies needing more and more capital through equity and less and less interference in the management, the concept of shares with Differential Voting Rights ("DVRS") has gained momentum. Recently, the most talked about issue in the corporate industry was India's largest e-commerce market place operator Amazon which subscribed to DVRS issued by Witzig Advisory Services in order to comply with the new FDI norms which were enforced from February 1, 2019.[10]

What are DVRS[11]?

Differential voting rights in the simplest of its form means and includes ***rights as to dividend***

[10] Issued by Ministry of Commerce & Industry, Department of Industrial Policy & Promotion Press Note 2 (2018 Series)
[11] Abbreviation used for Shares with Differential Voting Rights

or voting.[12] In other words we can say that DVRS are those shares in which equity shares are allotted to the shareholders, however the 1 (one) voting right per share rule is deviated. Hence, either less than 1(one) or nil voting rights per equity shares or more than 1 (one) voting right per share is issued. It is logical to follow that the investor investing through DVRS will compromise on the voting rights only with the prospect of earning higher rate of dividends.

Section 43(2) of the Companies Act, 2013 ("2013 Act") read with Companies (Share Capital & Debenture Rules), 2013 ("Rules") permits the issuance of DVRS. Since these are a distinctive class of shares altogether hence, they need some extraordinary conditions to be prevailing for their issuance.

Conditions for the issuance of DVRS:

The conditions for the issuance of DVRS in India laid down under the Rules are enumerated below:

- The most important conditions for the issuance of DVRS is that the articles of association of a company desiring to issue such shares shall authorize such issuance;
- The company shall have a consistent track record of distributable profit for the last 3 (three) years;
- The company shall have obtained the approval of shareholders in General Meeting by passing ordinary.
- In the event the equity shares of the company are listed on recognized stock exchange, the issue of such share shall be approved by postal ballot.
- The company shall not have defaulted in filing financial statements and annual returns for the last 3 (three) financial years immediately preceding the financial year in which it was decided to issue such share.
- The Company shall not have defaulted in payment of declared dividend to its shareholders or repayment of its matured deposits.
- The Company shall not have defaulted in redemption of its preference shares/debentures that have become due for redemption.
- Additionally, the company shall not have defaulted in repayment of any term loan from public financial institutions or state level financial institutions or scheduled bank that has become repayable.
- No default in payment of any statutory dues relating to employees shall have been made.
- The company shall not have converted its existing equity share capital with voting rights into equity share capital carrying differential voting rights and vice versa.
- The following details need to be disclosed by the Board of Directors of the company in the Board's Report for the financial year in which DVRS issuance was completed:
  - the total number of DVRS allotted;
  - the details of the differential rights relating to voting and dividends;
  - the percentage of the shares with differential rights to the total post issue equity share capital with differential rights issued at any point of time;
  - the percentage of voting rights which the DVRS shall carry to the total voting right of the aggregate equity share capital;
  - the price at which such shares have been issued;

[12] Defined in Section 43(2) of the Companies Act, 2013

- the particulars of promoters, directors or key managerial personnel to whom such shares are issued;
- the change in control, if any, in the company consequent to the issue of equity shares with differential voting rights;
- the diluted earnings per share pursuant to the issue of each class of shares, calculated in accordance with the applicable accounting standards;
- the pre and post issue shareholding pattern along with voting rights in the format specified under the Rules.

Why DVRS?

The most imperative purpose which proves to be the biggest advantage of the issuance of DVRS is that it goes a long way in the protection of the rights of the minority stakeholders. The management of company does not get diluted by the ingress of increasing number of shareholders. The management and control remain in the hands of handful of skilled members and yet the company can satisfy its ever-increasing capital requirements without much complexity. It straightaway affects the structuring of the company in a positive manner. It prohibits any harmful impact in the skeleton of policies, rules and regulations which a company decides for its functioning, due to enlargement of the membership. Since, the administration and control of the company is in safe hands the chances of hostile takeovers and related threats are reduced.

DVRS if given a comprehensive glance, seems to be a perfect device for passive investors. It is an ideal investment strategy for those who want to earn more dividends without much painstaking. Sometimes the technicalities involved in the whole investment procedure is very difficult for any normal investor to comprehend, in such a case DVRS prove to be a boon for these credulous investors. Moreover, the holders of DVRS enjoys all other rights such as bonus shares, rights share etc., which the holders of equity shares are entitled to, subject to the differential rights with which such shares have been issued.

Securities Exchange Board of India on DVRS

Historically, Securities Exchange Board of India ('SEBI') has not commented much on the issuance of DVRS in India till yet. In 2002, SEBI primary market has made vague recommendations on certain issues including DVRS. It recommended that SEBI equity issue guidelines can apply to DVRS too. But these recommendations failed to serve the purpose as it failed to satisfy more intricate questions regarding the nature and purpose of DVRS.

SEBI ruling in the *Jagatjit Singh case*[13] indicates that the SEBI did not have any authority to issue any guidelines on DVRS. This case deals with issue of DVRS to the promoters. According to the members, these shares were randomly given to the promoters without following any proper procedure. Hence, this allotment DVRS to the promoters was deemed to be arbitrary and improper by the company. SEBI in this case gave a clear-cut analysis of how it came to its conclusion. The earlier provisions of issuance of DVRS under the then Companies Act, 1956 ("1956 Act") under Section 86[14] the Act were resorted to. Section 55-A[15] of the 1956 Act

[13] *WTM/TCN/01 /CFD/ APRIL /08*
[14] Section 86 (2) -: New Issue of share capital to be done with differential rights as to dividends, voting or otherwise in accordance with such rules and subjects to such conditions as may be prescribed.
[15] *Section 55-A POWERS OF SECURITIES AND EXCHANGE BOARD OF INDIA*

provided for the list of those provisions in which SEBI had a clear-cut authority. A glance to this list undoubtedly suggested that erstwhile Section 86 does not fall under the ambit of this section. A rational conclusion that was drawn was that SEBI has no authority to issue guidelines for the issue of DVRS. Hence, the absence of formal guidelines in this regard was the biggest impediment on popularity of DVRS amongst the Indian Companies.

However, the 2013 Act had cleared this confusion to a great extent. Additionally, a Consultation Paper was issued by SEBI on DVRS. It provides that the DVRS are more relevant for new technology firms with asset light models and promoter led companies. Most importantly, it provides for a system of recognizing the rights vis-à-vis the shareholder rather than in terms of shares. It further proposes 2 (two) types of DVRS that can be issued:

- Shares with superior voting rights (Superior DVRS)) and
- Shares with fractional rights (Fractional DVRS).[16]

Superior DVRS will have superior voting right when compared to ordinary shares, which shall be issued only to the promoters of the company. There are further conditions attached to the issuance of Superior DVRS including the maximum voting ratio of 10:1[17].

The Fractional DVRS allow for lower voting rights as compared to the ordinary shares. These can be issued by companies whose equity shares have been listed for at least 1 (one) year. Further there are restrictions on the class of Fractional DVRS.[18] There are other conditionalities attached including that the voting rights cannot exceed a 1:10 ratio.

Conclusion

Hence, we see that today the concept of DVRS is gaining momentum with some level of clarity provided by SEBI and the 2013 Act. What is peculiar is the timing of their emergence in the Indian markets, when we come across so many hostile takeovers strategies in the Indian corporate world. The best known recent example is the L&T bid for Mindtree which dominated the front pages of the newspapers for weeks. The increasing volatility of the Indian stock market and the fluctuating dividends and earnings of the shareholders adds to another good reason as to why it is a ripe time for entrepreneurs to resort to issuance of DVRS.

The only remaining aspect for further strengthening these instruments is to carry out corresponding amendments to the provisions of the 2013 Act, SEBI ICDR Regulations, Securities Contract (Regulation) Rules, SEBI Takeover Code, SEBI Buy Back Regulations and SEBI Delisting Regulations and other related regulations pursuant to clarity received form SEBI. Once the regulatory regime is clear and unambiguous, only then the underlying purpose behind the inception of DVRS could be completely justified and properly implemented.

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[16] Under Companies Act, 2013 both SR shares and FR shares can be issued whereas presently SEBI permits the issuance of FR shares only.

[17] For additional information please refer to https://www.sebi.gov.in/reports/reports/mar-2019/consultation-paper-on-issuance-of-shares-with-differential-voting-rights_42432.html

[18] Only one class of Fractional DVRS can be issued

Notifications and Circulars

Manufacturing activities by Limited Liability Partnership(s): The Ministry of Corporate Affairs has issued Circular No. OM No. CRC/LLP/e-Forms dated March 6, 2019 ("OM Circular") prohibiting the incorporation of Limited Liability Partnership(s) ("LLP(s)") who propose to undertake manufacturing & allied activities. The purpose of the OM Circular was to restrict business activities of LLP(s) to the service sector. The OM Circular further restricted the conversion of companies engaged in the manufacturing sector into LLP. The Institute of Company Secretaries of India made a representation to the MCA on April 8, 2019 citing the exhaustive definition of the term "*Business*" as is defined in Section 2(1)(e) of the Limited Liability Partnership Act, 2008 which includes every trade, profession, service, and occupation as well as demonstrating the contribution of LLP(s) to corporatize un-incorporated entities in India. Based on the aforesaid representation, the MCA *vide* a message posted on its website, has removed the restriction on LLP(s) to engage in manufacturing and allied activities with immediate effect from April 16, 2019.

Determination of allotment and trading lot size for Real Estate Investment Trusts and Infrastructure Investment Trusts: Amendments to SEBI (Infrastructure Investment Trusts) Regulations, 2014 ("InvIT Regulations") and SEBI (Real Estate Investment Trusts) Regulations, 2014 ("REIT Regulations") *vide* notifications dated April 22, 2019 reduces the minimum subscription requirement and defines the trading lot (*in terms of number of units*) for publicly offered InvITs and REITs. Pursuant to the said amendments, SEBI prescribes the manner of determining minimum allotment for publicly offered InvITs and REITs in an initial offer *vide* Circular No. SEBI/HO/DDHS/DDHS/CIR/P/2019/59 dated April 23, 2019.

In the event, an allotment lot consists of 100 units, the value of such allotment lot shall not be less than INR 1,00,000 (One lakh rupees only) for InvITs and INR 50,000 (Fifty thousand rupees only) for REITs. Further, InvIT(s) having an aggregate of consolidated borrowings and deferred payments exceeding 49% shall in addition to requisite disclosures be required to disclose details such as available asset cover, debt-equity ratio, debt service coverage ratio, interest service coverage ratio, net worth, etc.

Opening of foreign currency accounts by re-insurance and composite insurance brokers: The Foreign Exchange Management (Foreign Currency Accounts by a person resident in India) (Amendment) Regulations, 2019 issued by the Reserve Bank of India *vide* Notification No. FEMA 10(R)(2)/2019-RB dated February 27, 2019 has amended existing sub-regulation (G)(2) of Regulation 4 of Foreign Exchange Management (Foreign Currency Accounts by a person resident in India) Regulations, 2015 to allow ship-manning / crew managing agencies in India and re-insurance and composite insurance brokers registered with the Insurance Regulatory and Development Authority to open and maintain non-interest bearing foreign currency accounts in India for the purpose of undertaking transactions in the ordinary course of their business. Consequently, RBI issued A.P. (DIR Series) Circular No.29 dated April 11, 2019 to update Master Direction No. 14 on Deposits and Accounts to reflect the aforesaid changes.

Ratio Decidendi

Court cannot appoint arbitrator when the contract containing arbitration clause is insufficiently stamped

Key Points:

1. An arbitration clause in an agreement would not exist when it is not enforceable by law. The arbitration clause that is contained in the sub-contract would not "exist" as a matter of law until the sub-contract is duly stamped.
2. The judgment in *SMS Tea Estates* continues to apply even after the introduction of Section 11(6A) to the 1996 Act, by which the Court is now to confine itself to the examination of the existence of an arbitration agreement. The amendment was necessitated as a result of two Supreme Court judgments in particular, namely, *SBP & Co. v. Patel Engineering Ltd*., and *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd*., by which the door was opened too wide, so that many preliminary issues which do not relate to the existence of an arbitration agreement were to be decided by the Court hearing the Section 11 application instead of by the arbitrator. The focus being on these two judgments, it is these two judgments whose basis has been removed, leaving *SMS Tea Estates* untouched.

Brief Facts:

A sub-contract dated 14.06.2013 was given by Garware Wall Ropes Ltd. ("Appellant") to Coastal Marine Constructions & Engineering Ltd. ("Respondent") in respect of work to be done for installation of a geotextile tubes embankment with toe mound at village Pentha in Odisha for protection against coastal erosion which contained an arbitration clause. A dispute arose between the parties and the sub-contract was terminated on 02.01.2015. Parties were unable to appoint arbitrator under the arbitration clause and a petition under Section 11 of the Arbitration and Conciliation Act, 1996 ("1996 Act") was filed before the Bombay High Court. The High Court allowed the Section 11 petition and appointed sole arbitrator to adjudicate the disputes. This order of the High Court was appealed before the Supreme Court.

Points for consideration:

i. What is the effect of an arbitration clause contained in a contract which requires to be stamped?

Held: When an arbitration clause is contained "in a contract", it is significant that the agreement only becomes a contract if it is enforceable by law. Under the Indian Stamp Act, an agreement does not become a contract, namely, that it is not enforceable in law, unless it is duly stamped. Therefore, even a plain reading of Section 11(6A), when read with Section 7(2) of the 1996 Act and Section 2(h) of the Contract Act, would make it clear that an arbitration clause in an agreement would not exist when it is not enforceable by law. The arbitration clause that is contained in the sub-contract would not "exist" as a matter of law until the sub-contract is duly stamped.

ii. Whether Section 11(6A), which has been introduced by way of the Arbitration and Conciliation (Amendment) Act, 2015, has removed the basis of the judgment in SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd., (2011) 14 SCC 66 ("SMS Tea Estates"), so that the stage at which the instrument is to be impounded is not by the

Judge hearing the Section 11 application, but by an arbitrator who is appointed under Section 11?

Held: *SMS Tea Estates* has taken account of the mandatory provisions contained in the Indian Stamp Act and held them applicable to judicial authorities, which would include the Supreme Court and the High Court acting under Section 11. A close look at Section 11(6A) would show that when the Supreme Court or the High Court considers an application under Section 11(4) to 11(6), and comes across an arbitration clause in an agreement or conveyance which is unstamped, it is enjoined by the provisions of the Indian Stamp Act to first impound the agreement or conveyance and see that stamp duty and penalty (if any) is paid before the agreement, as a whole, can be acted upon. It is important to remember that the Indian Stamp Act applies to the agreement or conveyance as a whole. Therefore, it is not possible to bifurcate the arbitration clause contained in such agreement or conveyance so as to give it an independent existence, as has been contended for by the respondent.

The independent existence that could be given for certain limited purposes, on a harmonious reading of the Registration Act, 1908 and the 1996 Act has been referred to in *SMS Tea Estates* when it comes to an unregistered agreement or conveyance. However, the Indian Stamp Act, containing no such provision as is contained in Section 49 of the Registration Act, 1908, has been held by the said judgment to apply to the agreement or conveyance as a whole, which would include the arbitration clause contained therein. It is clear, therefore, that the introduction of Section 11(6A) does not, in any manner, deal with or get over the basis of the judgment in *SMS Tea Estates*, which continues to apply even after the amendment of Section 11(6A).

Order:

The appeal was allowed and the judgment of the Bombay High Court set aside. The matter was remitted to the Bombay High Court to dispose of the same in the light of this judgment.

[*Garware Wall Ropes Ltd.* v. *Coastal Marine Constructions & Engineering Ltd.* - Civil Appeal No. 3631 of 2019, decided on 10-4-2019, Supreme Court]

Shareholders can file application to approve settlement with creditors even after appointment of Official Liquidator

Key Points:

Liquidator is only an additional person and not exclusive person who can move application under Section 391 of the Companies Act 1956 when the company is in liquidation. NCLAT noted that it was unable to support the view taken by NCLT that the Ex-Chairman and shareholder of the company in liquidation could not have filed the Petition under Section 391 of the old Act.

Brief Facts:

The Company was incorporated in 1954 and there was a reference of the Company to the Board of Industrial and Financial Reconstruction (BIFR) as a sick company in April, 1993. After due procedure, BIFR referred the Company to winding up before the Hon'ble High Court of Bombay in 1998 and High court admitted the winding up petition. The order of the High Court recorded that rehabilitation and revival of the Company is not possible and therefore, in the public interest, the company should be wound up. Accordingly, the order was passed to wind up the Company and Official Liquidator attached to

the High Court was directed to take charge of all the affairs, assets and properties of the Company and the winding up proceedings started. Order of the High Court dated 14th February, 2008 mentioned assets still available at the site and the High Court gave certain directions to the Official Liquidator with respect to sale of movable assets and for the purpose to issue advertisement in newspapers. The Appellant (Ex. Chairman and shareholder of Amar Dye Chem Limited (In Liquidation)) proposed to the High Court that Appellant along with co-investors was in a position to revive the Company. For this, the Appellant is relying on para – 4 of the order dated 14th February, 2008 where it was observed: "*It is also made clear that it will be open to the Mr. Mardia to submit revival scheme, if he so desires, which request will be considered on its own merits.*" The Appellant is relying on these observations of the High Court to claim that he had locus to submit the scheme and his locus has now been wrongly held against him in the Impugned Order of the NCLT, Mumbai.

The Appellant moved First Motion Application in 2010 for convening the meeting of shareholders and creditors which was allowed by the High Court. The Appellant subsequently filed Second Motion Petition before the High Court and while it was pending, 'The Companies (Transfer of Pending Proceedings) Rules, 2016' (Rules) were notified and the proceedings were transferred to NCLT, vide office letter dated 07.01.2017. When the matter came up before NCLT, the NCLT, referred to Section 391(1) of the old Act and concluded that once the Company was in liquidation, it was the liquidator alone who was authorized to file the Company Petition either for compromise or arrangement in respect of the Company in liquidation. This Impugned Order of the NCLT, Mumbai was appealed against by the Appellants before the NCLAT.

Points for consideration:

i. Whether, once the Company was in liquidation, it was the liquidator **alone** who was authorized to file the Company Petition either for compromise or arrangement in respect of the Company in liquidation?

   Held: The NCLT reads the word "alone" in the provision which word has not been used by the legislature and concluded that when Official Liquidator has been appointed in winding up Order, nobody has locus to represent the company save and except the Liquidator appointed in that Company because the statute has given a mandate since winding up Order has been passed, Official Liquidator is the sole authority and custodian on behalf of such Company.

   The Judgement in the matter of *National Steel & General Mills v. Official Liquidator* makes it quite clear that Liquidator is only an additional person and not exclusive person who can move application under Section 391 of the old Act when the company is in liquidation. Looking to these Judgements, the NCLAT held that it was unable to support the view taken by NCLT that the Appellant could not have filed the Petition under Section 391 of the old Act.

ii. Whether the Company Court would have jurisdiction for adjudicating the application?

   Held: Relying on *Sunil Gandhi and Ors. v. A.N. Buildwell Private Limited and Ors.*, the NCLAT observed that considering the facts of the present matter, the NCLT could not exercise jurisdiction for adjudicating the application for scheme of compromise/arrangement which had been moved by the Appellant, in liquidation proceeding on being divorced from the liquidation/winding up proceeding. The present proceedings in NCLT should remain stayed giving opportunity to the Appellant to move

the Hon'ble High Court to ensure that Scheme filed in Liquidation/winding up proceeding and Liquidation/winding up proceeding should be before same forum. A scheme of compromise and arrangement can be filed even when liquidation proceeding is pending but if such application/petition is filed, it would be a proceeding relating to the winding up going on and the same has to be in the same forum.

Order:

Impugned Order of NCLT was set aside and TCSP 1 of 2017 was restored with a further direction that the NCLT will give one opportunity to the Appellant to move the Hon'ble High Court of Bombay – Company Court to ensure that the Scheme and Liquidation/winding up proceedings are before one and same forum. If the Hon'ble High Court passes Order on the judicial side, NCLT will act as per the Order of the Hon'ble High Court as may be passed. If the Appellant does not take benefit of this opportunity, NCLT will proceed to reject the TCSP for reasons discussed, in this Judgement.

[*Rasiklal S. Mardia* v. *Amar Dye Chem.* - Company Appeal (AT) No.337 of 2018, decided on 8-4-2019, NCLAT]

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News Nuggets

Last date for filing form ACTIVE postponed till 15-6-2019

Last date for filing e-Form ACTIVE (Active Company Tagging Identities and Verification), under Rule 25A of the Companies (Incorporation) Rules, 2014, has been extended to 15-6-2019. As per provisions after amendments by Companies (Incorporation) Fourth Amendment Rules, 2019, issued on 25-4-2019, where a company files e-Form ACTIVE, on or after 16th June, 2019, it shall be marked as ACTIVE Compliant, on payment of fee of ten thousand rupees. Amendment has also been made in Companies (Registration Offices and Fees) Rules, 2014.

Foreign Portfolio Investors allowed investment in municipal bonds

Foreign Portfolio Investors (FPI) are now permitted to invest in municipal bonds. Such investment in municipal bonds will however be calculated within the limits set for FPI investments in State Developmental Loans. Other existing conditions for investment by FPIs in the debt market remain unchanged. As per A.P. (DIR Series) Circular No. 33 dated 25-04-2019 Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017 has been amended by Notification No. FEMA 20 (R)(4)/2019-RB dated 18-4-2019.

IBC – Trade Union can be considered as an operational creditor

Trade union can be considered as an operational creditor for the purpose of Insolvency and Bankruptcy Code, 2016. Supreme Court while holding so, observed that a trade union is established under the Trade Union Act and would fall within the definition of 'person' under Section 3(23) of IBC. Relying upon various provisions of Trade Union Act, Court in *JK Jute Mill Mazdoor Morcha v. Juggilal Kamlapat Jute Mills Company* observed that filing individual petitions by each workman would be burdensome. NCLAT's

view that trade union is not operational creditor as no services are rendered to corporate debtor, was rejected.

High Court can appoint arbitrator as per Articles 4 and 6 of UNICTRAL Rules

Bombay High Court has held that High Court has authority to appoint arbitral tribunal under Section 11(6) of the Arbitration and Conciliation Act as per Articles 4 and 6 of UNICTRAL Rules which allows any of the parties to designate institutions for appointing the tribunal. Court in *Tech. Mahindra v. Tata Communications Transformation* held that respondent erroneously read para 1 of Article 6 of UNICTRAL Rules and failed to suggest an authority itself under para 2(a) to 2(f) of Rules. It observed that only on exhausting options can Permanent Court of Arbitration be asked to serve as appointing authority.

Person ineligible to act as arbitrator cannot appoint another arbitrator

Supreme Court has reiterated that person ineligible to act as an arbitrator in light of Section 12(5) read with Schedule VII to Arbitration and Conciliation Act, cannot appoint another arbitrator. It held that in such a case Section 14(1)(a) gets attracted since arbitrator becomes *de jure* unable to perform his functions. Court in *Bharat Broadband Network v. United Telecoms* also set aside High Court Order which held that person appointing arbitrator is estopped from challenging such appointment. It observed that in all Section 12(5) cases, there is no challenge procedure.

Certain provisions of Competition Act held unconstitutional – Court directs CCI to formulate regulations

Delhi High Court has declared Section 22(3) of the Competition Act (except proviso), relating to meetings of the Commission, as unconstitutional and void. Section 53E, in respect of COMPAT, as it stood before the amendment by the Finance Act, 2017 was also held to be unconstitutional. Observing that there should not be any addition, deletion or substitution in the composition of the bench during the course of final hearing, the court also directed the CCI to formulate regulations for hearing and for passing of orders. Court in the case of *Mahindra Electric Mobility v. CCI* also directed the Central Govt. to take steps to fill vacancies in CCI. Presence of judicial member, was also mandated by the High Court while it observed that parties should, in their written submissions, also indicate why penalty should not be awarded.

RBI Circular triggering IBC on debtors in general, declared ultra vires

Supreme Court has declared the RBI Circular dated 12-02-2018, by which the RBI promulgated a revised framework for resolution of stressed assets, *ultra vires* Section 35AA of the Banking Regulation Act. It declared all actions proceeded against debtors, triggered under Section 7 of the Insolvency Code, as a result of the said circular as *non-est*. The Court however held that the Banking Regulation (Amendment) Act, 2017, which inserted Section 35AA, i.e., provisions which give the RBI certain regulatory powers, is not manifestly arbitrary. The Court in *Dharani Sugars & Chemicals Ltd. v. UoI* observed that directions issued by RBI to call for insolvency of a debtor can only be done for specific defaults by specific debtors and such directions cannot be issued for debtors in general. It noted that it is a particular default of a particular debtor that is the subject matter of Section 35AA.

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