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Contents

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Article

SEBI's new norms for related party transactions – An overview

By **Samyukta Shetty and Astha Sinha**

In this article, we will be reviewing the changes made by Securities and Exchange Board of India ('**SEBI**') in the related party transaction ('**RPT**') regime for listed entities. On 9 November 2021, SEBI issued the SEBI (Listing Obligations and Disclosure Requirements) (Sixth Amendment) Regulations, 2021 ('**Amendment Regulations**'), vide which several material changes have been made in the corporate governance regime pertaining to RPT disclosures and approvals for listed entities. SEBI has also issued a Circular dated 22 November 2021 ('**Circular**') to prescribe the information to be placed before the audit committee and shareholders for approval of RPTs.

Amendment to the definition of related party

Previously, the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 ('**LODR Regulations**') prescribed that a promoter or promoter group would be deemed a related party only when such entity held more than 20% shareholding in the listed entity. This position is set to change with these Amendment Regulations. With effect from 1 April 2022, any individual or entity forming part of the promoter or promoter group of the listed entity, irrespective of shareholding, shall be deemed to be a related party.

Further, any person or entity holding more than 20% equity shares in the listed entity either directly or on a beneficial interest (as per Section 89 of the Companies Act, 2013) basis in the previous financial year would also be deemed as a related party w.e.f. 1 April 2022. The threshold is set to be lowered to 10% w.e.f. 1 April 2023.

Amendment to definition of RPT

The Amendment Regulations have significantly widened the ambit of RPT. Where previously, an RPT meant a transaction between just the listed entity and its related party, the scope has now been expanded to include transactions between a listed entity or its subsidiaries on one side and a related party of the listed entity or its subsidiaries on the other side. These thus, now covers transactions between listed company and its subsidiary's RPT as well as transactions between a listed company's subsidiary and a related party of the listed company.

With effect from 1 April 2023, an RPT would also include transactions by a listed entity or its subsidiary with any other party which has the *purpose and effect* of benefiting a related party of the listed entity or its subsidiary. With this change, transactions which are *prima facie* not undertaken with a related party of the entity would still require disclosure and approval if the transaction has the effect of benefiting a related party of the listed entity.

Transactions not considered to be RPT

Vide these Amendment Regulations, certain transactions have been excluded from the purview of RPT. Proviso to the definition of RPT provides that transactions of issue of specified securities on a preferential basis, as per SEBI (Issue of Capital and Disclosure Requirements) Regulations 2018, uniform offers to all shareholders of dividend, subdivision or

consolidation of securities, rights issue or bonus issue or buy-back of shares shall not be treated to be RPT. Acceptance of deposits by banks/non-banking finance companies has also been clarified as not a RPT, subject to certain conditions.

Material related party transaction

The ambit of a material RPT has also been modified with the Amendment Regulations. Previously, transactions exceeding 10 per cent of the consolidated annual turnover of the listed entity were treated as material transactions. As per the Amendment Regulations, transactions exceeding INR 1,000 crore will be considered as a material related party transaction.

Increased scope of Audit Committee approval

The Audit Committee now has the additional obligation to define 'material modification' and disclose it as a part of the policy on materiality of RPT.

Further, the Audit Committee is required to approve RPT where subsidiary company is involved, and the listed company is not. It shall also require approval of the audit committee, if the value of transaction, or multiple transactions taken together in a financial year exceeds 10% of the annual consolidated turnover, as per the last audited financials of the listed company. This threshold is set to change to 10% of the standalone turnover of the listed company from 1 April 2023.

The only exception to the approvals is if there is a transaction between a listed subsidiary and RPT, or between two subsidiaries of listed companies whose books are consolidated, or whose accounts are consolidated with such holding company and placed before the shareholders at the general meeting for approval.

Changes brought in pursuant to the Circular

The listed entities must now provide the details of loans, deposits and inter-corporate deposits made along with the purpose for which the funds will be utilized by the ultimate beneficiary to the audit committee and shareholders at the time of consideration of the RPT.

Further, the listed entity must also provide a justification of how the RPT being considered is in the interests of the listed entity.

Considering that RPTs would now include transactions by listed entities with third-parties which may have the effect of benefiting a related party, it may become cumbersome to provide a justification as to how such a transaction would be in the interests of the listed entity.

Concluding remarks

SEBI has brought in wide changes to the RPT regime under the LODR Regulations to plug the loopholes it has observed over the past few years. It remains to be seen how listed entities will cope with the increased approval and disclosure requirements and the secretarial compliances that will follow.

What is interesting to note is that while SEBI has deemed all transactions with third-parties which have the purpose and effect of benefitting a related party as an RPT, there is no clear guidance on what this test of purpose and effect would entail. This confusion is expected to be clarified by SEBI in future circulars.

With the Amendment Regulations in place, all transactions of listed companies and their subsidiaries shall be under the scanner. Further, listed companies along with their subsidiaries shall have to be agile with respect to dealing with parties that may be related parties to either of the company. While the amendments are viewed as

a positive step towards minority rights and good corporate governance, they have significantly increased compliance on the part of listed companies and their subsidiaries and the audit committees of these companies.

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Notifications and Circulars

General permission for infusion of capital in overseas branches and subsidiaries by banks: RBI has decided that banks are not required to obtain prior RBI approval for (i) capital infusion in the overseas branches and subsidiaries and (ii) transfers (including retention/ repatriation of profits), if banks meet the regulatory capital requirements (including capital buffers). Instead, the banks shall seek approval of their boards for the same. While considering such proposals, banks shall analyse all relevant aspects including inter alia the business plans, home and host country regulatory requirements and performance parameters of their overseas centres. RBI/2021-22/136 DOR.CAP.REC.No.72/21.06.201/2021-22, dated 8 December 2021 issued for the aforesaid purpose, also states that it is applicable to all Scheduled Commercial Banks other than foreign banks, Small Finance Banks, Payment Banks and Regional Rural Banks.

RBI introduces Legal Entity Identifier for cross-border transactions: Legal Entity Identifier ('**LEI**') is a 20-digit number used to uniquely identify parties to financial transactions worldwide to improve the quality and accuracy of financial data systems. RBI has decided that AD Category I banks, with effect from 1 October 2022, shall obtain the LEI number from the resident entities (non-individuals) undertaking capital or current account transactions of INR 50 crore and above (per transaction) under Foreign Exchange Management Act, 1999. As regards non-resident counterparts/ overseas entities, in case of non-availability of LEI information, AD Category I banks may process the transactions to avoid disruptions. In India, LEI can be obtained from Legal Entity Identifier India Ltd. (LEIL), which is also recognised as an issuer of LEI by the Reserve Bank under the Payment and Settlement Systems Act, 2007. RBI A.P. (DIR Series) Circular No. 20, dated 10 December 2021 has been issued for the purpose.

Transaction in corporate bonds through Request for Quote platform by Portfolio Management Services (PMS): For enhancing transparency pertaining to debt investments by Portfolio Management Services ('**PMS**') in Corporate Bonds ('**CBs**'), SEBI has decided *vide* Circular No. SEBI/HO/IMD/IMD-I/DOF1/P/CIR/2021/678, dated 9 December 2021 that,

(i) on a monthly basis, PMS shall undertake at least 10% of their total secondary market trades by value in CBs in that month by placing/seeking quotes through one-to-one ('**OTO**') or one-to-many ('**OTM**') mode on the Request for Quote platform of stock exchanges ('**RFQ**').

(ii) in order to comply with above 10% requirement, PMS shall consider the trades executed by value through OTO or OTM mode of RFQ with respect to the total secondary market trades in CBs, during the current month and immediately preceding two months on a rolling basis.

(iii) all transactions in CBs wherein PMS is on both sides of the trade shall be executed through RFQ in OTO mode. However, any transaction entered by PMS in CBs in OTM mode which gets executed with another PMS, shall be counted in OTM mode.

(iv) PMS are permitted to accept the Contract Note from the stock brokers for transactions carried out in OTO and OTM modes of RFQ.

However, it may be noted that the Circular shall come into force with effect from 1 April 2022.

LLPs can file Form 8 without additional fees till 30 December 2021: The Ministry of Corporate Affairs ('MCA') *vide* General Circular No. 16/2021 has allowed a relaxation in payment of additional fees in case of delay in filing Form No. 8 (Statement of Account and Solvency) (Form) by Limited Liability Partnerships (LLPs), up to 30 December 2021.

All enrolled LLPs are required to submit the Form, containing their profit statements, account statements, and other financial data of their business, every year. The due date for the Form filing is 30 October of every financial year and any delay in filing the same leads to payment of fine, as prescribed.

AGM meeting *via* a video conference and other audio-visual means till 30 June 2022: The MCA has directed the companies whose AGMs are due in the year 2021, to conduct their AGMs on or before 30 June 2022, in accordance with the requirements laid down in para 3 and para 4 of the General Circular No. 20/2020, dated 5 May 2020, vide the General Circular No. 19/2021, dated 8 December 2021. It is also clarified that the Circular shall not be construed as conferring any extension of time for holding the AGMs by the companies under Companies Act, 2013 and that the companies which have not adhered to the relevant timelines shall be liable to legal action under the appropriate provisions of the Act.

EGMs *via* video conference and other audio-visual means till 30 June 2022: The MCA has decided to allow companies to conduct their Extra-Ordinary General Meetings (EGMs) up to 30 June 2022 through video conference or other audio-visual means or transact items through postal ballot. General Circular No. 20/2021, dated 8 December 2021 specifying so, was issued in continuation of the Ministry's earlier circulars on the same issue.

SEBI issues Master Circular for Real Estate Investment Trusts: The Master Circular for Real Estate Investment Trusts (REITs), compiling the relevant circulars issued by SEBI up to 31 October 2021 has been issued..

The Circular has the following chapters:

(a) Online filing system for REITs;

(b) Guidelines for public issue of units of REITs

(c) Disclosure of financial information in the offer document for REITs

(d) Disclosure of financial information in offer document for REITs

(e) Continuous Disclosures and Compliances by REITs

(f) Participation of strategic investors in REITs

(g) Guidelines for issuance of debt securities by REITs

(h) Guidelines for preferential issue and institutional placement of units by listed REITs

(i) Guidelines for right issue of units by a listed REIT

(j) Encumbrance on units of REITs, and

(k) Manner and mechanism of providing exit option to dissenting unit holders.

Circulars providing temporary relaxations with regards to certain compliance requirements for REITs in the wake of the Covid-19 pandemic have not been included in the latest Master Circular.

Fit and proper person – SEBI (Intermediaries) Regulations, 2008 amended: The SEBI (Intermediaries) (Third Amendment) Regulations, 2021 has substituted Schedule II of the SEBI (Intermediaries) Regulations, 2008, which deals with 'fit and proper person' criteria. Clause 2 of the Schedule 2 of the Regulations lists out the persons to whom the 'fit and proper person' criteria shall apply. Further, clause 7 of the Schedule 2 states that 'fit and proper person' criteria shall be applicable at the time of application of registration and during the continuity of registration and the intermediary shall ensure that the persons as referred in sub-clauses (b) and (c) of clause (2) comply with the 'fit and proper person' criteria.

Public utility service status extended for another 6 months for services engaged in uranium industry: The Ministry of Labour and Employment *vide* its notification dated 8 December 2021 has extended the public utility service status to services engaged in the uranium industry, which are covered under Item 19 of the First Schedule to the Industrial Disputes Act, 1947. The Ministry had earlier *vide* its notification dated 21 June 2021 declared said industry to be a public utility service for the purposes of the said Act for a period of six months from the 19 June 2021. This has now been extended for another six months with effect from 19 December 2021.

ESIC relaxes the time limit for filing and depositing ESI contributions: The Employees State Insurance Corporation ('**ESIC**') has on 16 November 2021 relaxed the time limit for filing and depositing ESI contribution due to system breakdown in its IT system. The ESI contribution for the month of October 2021 can be remitted up to 30 November 2021 instead of 15 November 2021. Return of contribution for the period April 2021 to September 2021 may be filed up to 15 December 2021 instead of 11 November 2021.

Code on Wages (Delhi) Rules, 2021 notified by labour department of Delhi: The Labour Department of Delhi has on 26 November 2021 notified the Draft Code on Wages (Delhi) Rules, 2021 which shall extend to the whole of National Capital Territory of Delhi. The Code seeks to address the problems relating to delay in payment of wages whether on monthly, weekly or daily basis. The Code will also see that there is no discrimination between male and female as well as transgender workers in getting wages.

Delhi Shops and Establishments (Amendment) Rules, 2021 notified: The Labour Department of Delhi has on 15 November 2021 notified the Delhi Shops and Establishments (Amendment) Rules, 2021, through which the application for registration of establishment and the manner of notifying changes to registration shall be made online.

As per the amended Rule 3, the occupier of the establishment, within 90 days of the

commencement of work of his establishment shall apply for the registration under the Act, online on the Shop and Establishment Portal of the Labour Department. On submission of application, the registration certificate shall also be generated online in Form C under Rule 4. Further, the occupier shall notify any change in respect of any information under sub-section (1) of Section 5 of the Act within 30 days after such change has taken place, online, on the same Shop & Establishment Portal.

Ratio Decidendi

NCLT does not have residuary jurisdiction to entertain contractual disputes arising dehors insolvency of corporate debtor

The Supreme Court has held that the jurisdiction of the National Company Law Tribunal ('**NCLT**') under Section 60(5)(c) of the Insolvency and Bankruptcy Code, 2016 (**'Code'**) cannot be invoked in contractual disputes unrelated to the insolvency of the corporate debtor. While setting aside the order of the National Company Law Appellate Tribunal ('**NCLAT**') and the proceedings below as without jurisdiction, the Court held that NCLAT and NCLTs should exercise caution while intervening in contractual disputes, such as a party's right to terminate a contract. Even if the contractual dispute arises in relation to insolvency, termination of such contract should only be restrained if such termination results in the corporate death of the corporate debtor.

Brief facts

- The Appellant (Tata Consultancy Services Ltd.) and the Corporate Debtor/Respondent (SK Wheels Pvt. Ltd.) were parties to a Facilities Agreement ("**Facilities Agreement**") under which the latter provided premises, with certain specifications and facilities, to the Appellant for conducting examinations. Under the agreement, a party had the right to terminate the agreement immediately by written notice to the other party if a material breach committed by the other party was not cured within 30 days of receipt of notice.
- During the course of the agreement, the Appellant issued multiple notices raising issues of material breach and non-compliance of terms of the agreement by the Corporate Debtor. On 29 March 2019, corporate insolvency resolution process was initiated against the Corporate Debtor, on the application filed by one of its creditors. Soon thereafter, the Appellant issued notice of termination of contract dated 10 June 2019, effective immediately, to the Corporate Debtor.
- Aggrieved by the termination notice, the Corporate Debtor filed a miscellaneous application before the NCLT under Section 60(5)(c) of the Code for quashing of the termination notice. The NCLT observed that *prima facie* the agreement was terminated without serving the notice period of 30 days and granted *ad-interim* stay on the termination notice.

- The Appellant preferred an appeal before the NCLAT against the *ad-interim* stay order of the NCLT. The NCLAT in appeal held that the NCLT had correctly stayed the operation of the termination notice. In upholding the NCLAT order, it reasoned that the purpose of moratorium under Sec. 14, and the duties of resolution professional under Sec. 25 of the Code were only to keep the Corporate Debtor as a going concern. Therefore, aggrieved by the order of the NCLAT, the Appellant approached the Supreme Court in Civil Appeal.

Issues before the Supreme Court

(a) Whether the NCLT can exercise its residuary jurisdiction under Section 60(5)(c) of the Code to adjudicate upon the contractual dispute between the parties?

(b) Whether in the exercise of such residuary jurisdiction, can the NCLT impose an *ad interim* stay on the termination of the agreement between the parties?

Decision

The Supreme Court after considering the rival contentions allowed the appeal by arriving at the following findings –

- While referring to its decision in *Gujarat Urja Vikas Nigam Limited v. Amit Gupta*, 2021 SCC Online 194, the Court held that Section 238 of the Code provides an overriding effect to the provisions of the Code over any other law and any instrument that is enforceable by virtue of a law. The Facilities Agreement being an 'instrument' can be overridden by the provisions of IBC.
- While the duties of the resolution professional and jurisdiction of NCLT cannot be conflated as correctly contended by the Appellant, the resolution professional can approach the NCLT for disputes that relate to the insolvency resolution process. But if a dispute arises *dehors* such insolvency, the resolution professional must approach the relevant competent authority.
- The NCLT in its residuary jurisdiction can stay the termination of the agreement if it satisfies the criteria in *Gujarat Urja* – termination is relatable to the insolvency process *and* will defeat the CIRP. However, such intervention cannot be characterized as rewriting of the contract as contended by the Appellant as NCLT and NCLAT are vested with the responsibility of preserving the survival of the Corporate Debtor.
- In the present case, there was nothing to indicate that the termination was due to the insolvency of the Corporate Debtor. Therefore, applying the principles in *Gujarat Urja,* NCLT could have jurisdiction only if the dispute had nexus with the insolvency process. Since there was no such nexus here, the order of the NCLT staying the termination notice was without jurisdiction.
- Separately, the Court noted that the NCLT had merely relied on the procedural infirmity in the termination notice, *i.e.*, non-observance of the 30 days' notice period to order stay on its termination. Further, the NCLAT had merely held that the NCLT order preserved the 'going concern' status of the Corporate Debtor without any factual analysis as to how the termination of the agreement would lead to corporate death of the Corporate Debtor, which is not amenable to the principles laid down in *Gujarat Urja*.

[*Tata Consultancy Services Limited* v. *Vishal Ghisulal Jain, Resolution Professional, SK Wheels Private Limited* – Judgment dated 23 November 2021 in Civil Appeal No. 3045/2020, Supreme Court]

Merely using the term 'fraud' without providing particulars is not 'fraud' for bar under Section 34 of SARFAESI Act, 2002

The Supreme Court, while dismissing an appeal filed against the decision of the Madras High Court, has upheld the bar imposed on civil courts to try matters under Securitisation And Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('**SARFAESI Act'**) under Section 34. Section 34 of said SARFAESI Act bars the jurisdiction of civil courts, with an exception carved in case of fraud. The Supreme Court upheld the order of the High court by stating that mere usage of the terms 'fraud' and 'fraudulent activities' without providing the particulars, will not exempt the appellant from the bar under Section 34 of SARFAESI Act.

Brief facts:

(i) Insolvency proceedings were initiated by Respondent No. 2, being a financial creditor, against Respondent No. 3 ('**Corporate Debtor'**), before NCLT Mumbai Bench. For the loan granted by Respondent No. 2, the Appellant had stood as a guarantor and had created a mortgage over its factory land in favour of Respondent No. 2.

(ii) A resolution plan was approved by NCLT thereafter ('**Resolution Plan**') and implemented. The claim of the Appellant had been included in the Resolution Plan and catered to, after which a 'No Dues Certificate' was issued in by Respondent No. 2 in favour of the Corporate Debtor. In spite of issuing such Certificate, Respondent No. 2 had executed another assignment deed with Respondent No. 2 ('**Deed**'), assigning its interest in the loan granted to the Corporate Debtor.

(iii) Respondent No. 1 proceeded with initiating proceedings under Sec. 13(2) of SARFAESI Act, against the Appellant-Guarantor, for recovery of the loan amounts and issued a possession notice under Rule 8(1) of Security Enforcement Rules, 2002, against the mortgaged land. Aggrieved by such acts, the Appellant had instituted a civil suit before the Madras High court, for declaring that Respondent No. 1 is not a secured creditor and also for declaration that the possession notice to be null. However, said was dismissed as per the bar imposed under Section 34 of SARFAESI Act on civil courts. The same was upheld in appeal by a Division Bench. Thereafter, the present appeal was preferred before the Supreme Court.

Submissions:

(i) The counsel for the Appellant submitted that the High Court erred in its order by not properly appreciating the fact that 'fraud' was pleaded and that the Deed was fraudulent, thus rendering it null and void. Since a No Dues Certificate had been issued, the legally enforceable debt no longer exists and cannot be assigned by way of the Deed.

(ii) The counsel for Respondents submitted that the mere usage of the word 'fraud'/ 'fraudulent', when there are no other particulars pleaded, does not tantamount to fraud as per Order VI Rule 4 of the Code of Civil Procedure, 1908. It was also submitted that such words were used as a part of clever drafting to get out of the bar under Section 34 of SARFAESI Act.

Decision:

The Apex court noted that except the words 'fraud' / 'fraudulent' being used, there were no particulars pleaded with respect to fraud. Therefore, the contentions of the Respondents

were upheld, basis the rule laid down in *Bishundeo Narain and Anr.* v. *Seogeni Rai & Jagernath*, MANU/SC/0059/1951. It was observed that where parties plead fraud, they should set forth full particulars of such activities, and the case can only be decided on such particulars. Thus, the Court dismissed the appeal and left it open for the Appellant to initiate proceedings before Debt Recovery Tribunal (DRT) under Section 17 of the SARFAESI Act.

[*Electrosteel Castings Limited* v. *UV Asset Reconstruction Company Limited & Ors.* – Judgment dated 26 November 2021, MANU/SC/1150/2021, Supreme Court of India]

Filing for appointment of arbitrator after observing conciliation proceedings is not premature when a party refuses to conciliate for an interminable period

The Delhi High Court has allowed a petition for appointment of an Arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996 ('**Arbitration Act**'), for resolving the disputes between Respondent No. 1 and the Petitioner, by holding that objections of merely not following conciliation procedure cannot be raised to defeat the right for referring matters to arbitration.

Brief facts:

(i) A Concession Agreement ('**Agreement'**) and a Memorandum of Understanding ('**MOU'**) were executed between Respondent No. 1 and the Petitioner. In 2018, Respondent No. 1 had sent a notice intending to terminate the Agreement on the ground of its breach by the Petitioner, which allegations were refuted by the Petitioner

(ii) Thereafter, the Petitioner filed a petition in 2018 before the Delhi High Court seeking restraint against Respondent No. 1 from such termination. In the proceedings related to such petition, the Court had directed for convening of conciliation proceedings between the Petitioner and Respondent No. 1. However, the Appellant, due to the threat of termination of the Agreement invoked arbitration in October 2018 and called upon Respondent No. 1 to nominate its arbitrator.

(iii) Since conciliation proceedings were already in progress, the Petitioner had requested for the arbitration notice to be kept in abeyance before Respondent No. 2, being the Indian Council for Arbitration (ICA). In November, the parties had arrived at a Joint Action plan after conciliation, but the disputes had not been not resolved. Hence, the Petitioner sought for appointment of arbitrator by Respondent No. 1. On its failure to appoint, Respondent No. 2 was approached for nomination of arbitration on behalf of Respondent No. 1, but the same was not done. In such circumstances, the present petition was filed.

Submissions:

(i) The counsel for Respondent No. 1 submitted that the present petition is premature, as the Petitioner has failed to prove that they have followed the pre-arbitration mechanism i.e. conciliation proceedings as provided in clause 39.1 of the Agreement, and also there were no requests made during conciliation which are sought to be referred to arbitration.

(ii) The counsel for the Appellant submitted that the pre-arbitration mechanism provided under the Agreement was followed in letter and spirit. It was also contended that they had duly notified all their claims in conciliation proceedings. They further submitted that the failure of conciliation proceedings is solely attributable to Respondent No. 1.

Decision:

The court after analysing the arguments advanced by the parties and also the evidence produced before them came to the conclusion that the Petitioner had indeed complied with the pre-arbitration mechanism envisaged under the Agreement. Thus, the petition was held to be not premature. The court further held that the conciliation mechanism in the Agreement is not to defeat the option of reference to arbitration, by allowing a party to conciliate for an interminable period but, to provide for referral of disputes in event there is no amicable resolution within 30 working days of notice of disputes. The object of having conciliation mechanisms was observed as to make an attempt at expeditious and cost-effective resolution of disputes. Thus, the court allowed the petition u/s. 11(6) of the Act.

[*Millennium City Expressways Private Limited* v. *National Highway Authority of India & Ors.*- Judgment dated 24 November 2021, MANU/DE/3240/2021, High Court of Delhi]

Contractual bar on interest does not only bar the parties from claiming it but also the Arbitrator from awarding it

The Apex Court has held that where it is specifically barred in the contract, the Arbitrator cannot award any interest *pendent lite* or future interest on the amounts due and payable to a contractor under the contract. The claim of the petitioner for interest could not oppose the same, the Bench held that such interest is also not permissible and subject to a matter of challenge stating that there cannot be an estoppel against law.

Brief facts:

(i) Disputes arose between the parties with regard to three work contracts and both the parties referred the dispute to arbitration for resolution. The sole arbitrator had thereafter, awarded interest pendent lite as well as future interest at the rate of 12% and 18% respectively on the entire award amount, except earnest money and security deposits.

(ii) This order was challenged under Section 34 of the Arbitration and Conciliation Act, 1996 ('**Act'**) before a single judge bench of the Delhi High court which was dismissed. An appeal to the division bench of the High court was dismissed as well. Aggrieved by the same, the Appellant has preferred the present appeal before the Supreme Court.

Submissions:

(i) The counsel for the Appellant submitted that, as per Clause 16(2) of General Conditions of Contract ('**GCC'**) which govern the contract between the parties, there is a bar against payment of interest. Therefore, no interest is payable upon the earnest money or security deposit or amounts payable to contractor under the contract, being the Respondent. It was submitted that the arbitrator has no power to impose interest after the parties agreed expressly not to do so. It is submitted that the expression 'amounts payable to contractor under the contract' cannot be read with 'earnest money deposit' or 'security deposit' by applying the principle of *ejusdem generis,* as clause 16(2) of GCC used the word 'or' with clear intention to cover different situations. This is also in line with sec. 31(7)(a) of the Act.

(ii) The counsel for the Respondent vehemently opposed the appeal and submitted that an entire reading of clause 16 of GCC makes it evident that it pertains to earnest money and security deposits only and it cannot be

interpreted to imply a bar on *pendent lite* interest or future interest. It is submitted that the arbitrator has power to award interest pendent lite, reliance was placed by respondent on the case of *Secretary, Irrigation Department, State of Orissa* s *G.C. Roy,* MANU/SC/0142/1992 and *Raveechee & Co.* v. *UOI*, MANU/SC/0674/2018.

Decision:

(i) The Supreme Court rejected the contention of the Respondent that the bar was on parties from claiming interest on security deposits and not on the arbitrator from awarding it. The court held that the arbitrator, being a creature of the contract, has no power to award interest contrary to the agreement and contrary to clause 16(2) of GCC. Reliance was placed on the case of *UOI* v. *Bright Power Projects Ltd*, (2015) 9 SCC 695 where the above rule was upheld by the court.

(ii) The Supreme Court also rejected the contention of *ejusdem generis* being applicable to clause 16(2) of the GCC, since the word 'or' was used in the clause between different situations to highlight the difference. Merely because the Appellant claimed interest, the contractor shall not be entitled to interest pendente lite. Hence, the Arbitrator's order was held to be wrong in law and was set aside.

[*Union of India* v. *Manraj Enterprises* - Judgment dated 18 November 2021, MANU/SC/1082/2021, Supreme Court of India]

News Nuggets

Limitation – Sending reminders for payment not extends limitation for claims

The Delhi High Court has reiterated that repeatedly sending reminders to the respondent for making said payment would not in any manner extend the period of limitation for the claims. Dismissing the appeal filed against the arbitration award, which had also rejected the claims as barred by limitation, the Court rejected the contention that since the amounts remained outstanding, the petitioner's cause of action continued. The petitioner had contended that the cause of action continued, as the lease agreement provided for interest on the delayed payments, and secondly because the goods continued to be owned by the petitioner as the respondent had not paid the transfer sale price. While rejecting said contentions, the Court in *Renewable Energy Systems Ltd.* v. *Bharat Sanchar Nigam Ltd.* [Judgment dated 16 November 2021] also noted that the petitioner's claim was for a quantified amount.

Proceedings initiated under Section 138 of Negotiable Instruments Act, 1881 is not maintainable against the Corporate Debtor if natural persons are not included in proceedings

The Supreme Court, in the case of *Nag Leathers Pvt. Ltd.* v. *Dynamic Marketing Partnership & Ors.*, while quashing proceedings initiated against a Corporate Debtor under Section 138 of the Negotiable Instruments Act, 1881 has observed that a complaint filed only against the corporate entity and none of the natural persons who are in charge of the affairs of the company is not maintainable. The court came to this conclusion by differentiating the law laid down by the Court in *P. Mohanraj & Ors.* v. *Shah Brothers Ispat Private Ltd*., AIR 2021 SC 1308, where proceedings under Section 138 were allowed to be continued against corporate debtor. In said case, the complaint had been made against natural persons as well, who were in charge of the affairs of the company, which was the key point of distinction.

Guidelines on internal governance for investment firms issued by European Banking Authority

The European Banking Authority has on 22 November 2021 issued guidelines on internal governance for investment firms. The guidelines consider the principle of proportionality, by specifying the tasks, responsibilities and functioning of the management body, and the organisation of investment firms, including the need to create transparent structures that allow for the supervision of all their activities. According to the guidelines, risks need to be managed across all three lines of defence. While the business needs to manage its risks, the guidelines stress on the responsibilities of the second line of defence (the independent risk management and compliance function), and also the third line of defence (the internal audit function). The guidelines clarify that identifying, managing, and mitigating money laundering and financing of terrorism risks, is part of sound internal governance arrangements and investment firms' risk management framework. It also states that investment firms should take into account environmental, social and governance risk factors within their risk management framework.

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