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# Article

## Understanding 'Substituted Performance' under the Specific Relief (Amendment) Bill, 2018

By **Akshita Alok and Nikhil Singal**

India ranks at #164 in the world rankings for 'enforcing contracts' given by the World Bank, and at #100 in the same rankings for "ease of doing business". Certainly, this is a cause of concern and it is only natural for the Government to take steps towards improving the state of affairs pertaining to contracts' enforcement and faster dispute resolution. Several much-anticipated reforms are already in the pipeline – the Arbitration (Amendment) Bill, 2018; the Specific Relief (Amendment) Bill, 2018; an Ordinance amending the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 and so on. While it remains to be seen how all these well-intentioned legislations will pan out in the practical scenario, we herein examine one aspect of the proposed amendment to the Specific Relief (Amendment) Bill, 2018 ("**Bill**"), and how it will affect performance of contracts in India and their enforcement.

The Bill introduces a new concept of "substituted performance" by amending existing provisions of the Specific Relief Act, 1963 ("**Act**"). Briefly, the proposed provision[1], like the overall intent of the Bill, seeks to make specific performance a rule, rather than an exception. This is done by giving the promisee (the aggrieved party), a right to have the (breached) contract performed through a third party or by his own agency. The promisee can then recover the expenses and other costs incurred for such 'substituted performance' from the promisor (the defaulter). On the procedural front, the aggrieved party is first required to put the defaulter at notice to cure the default, and on expiry of the cure period, if the promise is still not performed, the aggrieved party can exercise substituted performance. Though the amendment specifically clarifies that exercising such substituted performance does not limit other rights of the aggrieved party, like claiming compensation, it conveys a clear message that specific performance should be adhered as a rule.

### *Position prior to the Bill*

The concept of "substituted performance" is not a novel one in common law, and exists in various forms. However, the term has been used for the first time in the legislations governing Indian contracts, in the Bill. Also known as the "right to cover", it ensures that the aggrieved party can obtain performance of a contract from a third party in case of non-performance (inability or breach) by the counterparty who fails to perform and the right to recover the consequent loss suffered by the performing party. "Cover costs" refer not to the price paid for the substituted goods, but rather to the costs incurred in locating the substitute and making a second transaction.

Existing contracts incorporate this in the form of "Risk Purchase", which is a right available to the buyer/purchaser of services or goods against the service provider, supplier or manufacturer. There are also some exceptions to availing this

[1] Section 10 of the Bill which seeks to replace the current Section 20 of the Act

right of Risk Purchase, i.e., when the goods or services procured or performed are of different specifications; or when the purchase is on basis of substantially different terms and conditions.

Section 73 of the Indian Contracts Act, 1872 ("**Contract Act**") deals with the consequences of breach of contracts. This Section entitles the aggrieved party to recover from the defaulter compensation for any loss or damages resulting from the breach of contract. Damages are based on the difference between the contract price and the market price. This Section also adds an Explanation, which provides that "*In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by non-performance of the contract must be taken into account.*". This implies that if the seller defaults, the buyer may have to buy the services or goods elsewhere at an additional cost, and this cost will be taken into account when calculating the extent of damages.

In various judgements, High Courts across the country have upheld the spirit of Section 73 of the Contract Act and held that it is not necessary that on default by the seller to deliver, the plaintiff should have actually purchased the goods elsewhere and only then claim the difference. The damages can be claimed based on prevailing market prices.

Thus, looking at the examples and provisions above, though the remedy of substituted performance was, in essence, already available to the aggrieved party under law (and by way of express rights in agreements between the parties), enforcement was limited and guarded strictly by the tests of foreseeability and mitigation. Losses had to be proved with certainty in order to avail benefit of the same and so merely having a remedy similar to substituted performance was essentially, not enough.

### *Need for introducing "Substituted Performance"*

A six-member Expert Committee ("**Committee**") was constituted to review the current working of the Act and address issues relating to enforcement of contracts in India. Their recommendations highlighted that the need to expressly introduce the concept of "substituted performance" or "right to cover" is a significant consideration under Indian law. A party to a contract must have the right to complete performance by himself or through a third party at the cost of the promisor, and to claim the amount he spends for this purpose.

These recommendations translated into the Bill. By way of the amendment, the procedure adopted for availing the remedy of substituted performance becomes more uniform as it mandates a condition of notice to be served on the defaulting party for a period of not less than thirty (30) days prior to carrying out the risk purchase. Additionally, it also makes the remedy easier to prove in light of essentials laid down under law, and not governed by individual agreements which lay down the parties' own remedial systems.

Furthermore, and perhaps most importantly, this introduction is well in line with the agenda of the Bill which is to increase ease of doing business in India and to ensure enforceability of contracts with greater effectiveness. In addition to the fact that damages are often an inadequate remedy in terms of the quantum of compensation, it is also well understood that damages do not fulfil the end purpose of the contract and do not effectively provide the parties what they sought out to achieve in the first place.

It is also pertinent to note that, as a rule of contracts, damages do not cover indirect losses of the parties, which may include the price in seeking and enforcing performance from a third party in lieu of the party originally envisaged, and several other costs which would not have occurred in the first place, had the contract been performed as per the contractual specifications and standards. Being able to avail substituted performance allows the aggrieved party to be restored to the position it would have been in had the breach not occurred, which may be the most effective alternative available in the event of a breach.

## *"Substituted Performance" in other jurisdictions*

Globally, there are a few examples of provisions similar to the proposed amendment under the Bill. Under the Spanish Civil Code, the remedy of specific performance is provided under Article 1098 where "*if a person obliged to do something should fail to do it, it shall be ordered to be done at his expense*". Such person can also be ordered to undo anything done. Additionally, under Article 1096, where a specific thing is to be delivered, the creditor may compel the debtor to perform delivery, and if such thing is generic or indeterminate, he may request performance of the obligation at the debtor's expense. There is a similar example under the Ethiopian Civil Code (Article 1778) which provides that "*where fungible things are due, the creditor may be authorised by the court to buy at the debtor's expense the things which the debtor assumed to deliver*".

While both the aforementioned Codes incorporate a concept of substituted performance, the focus is on the promisor meeting the expenses, that is, substituted performance at the expense of the promisor. On the other hand, under the Bill, the proposed amendment goes beyond this focus of merely expensing the promisor. The Bill elaborates a specific process for claiming substituted performance, giving notice to the promisor to perform in the absence of which performance will be substituted, while also preserving the promisee's right to damages. Thus, the Bill shifts the focus from merely expensing the promisor to a more elaborate and effective protection of the rights of a promisee and ensuring that specific performance is observed as a rule.

Though not as elaborate as the Bill, the Quebec Civil Code (Article 1602) comes close to incorporating a concept of substituted performance where the creditor (promisee) is first required to notify the debtor (promisor) of availing the right to substituted performance, which puts the debtor in default and allows the creditor to get contract performed at debtor's expense.

Other variants of this concept are contained in the Uniform Commercial Code of District of Columbia[2] (United States) which allows substituted performance if a "commercially reasonable substitute" is available. Another skeletal variant of this concept is also available under the Uniform Civil Procedure Rules of New South Wales (Australia)[3], where "if a judgment requires a person to do an act and the person does not do the act, the court may direct that the act be done by a person appointed by the court." This person can be directed to pay costs of this substituted performance as well. In the United Kingdom, the concept of (in principle) specific performance by substituted performance was introduced in common law (fairly) recently in the case of *Liberty Merican Ltd. v. Cuddy Civil Engineering Ltd.*[4] where the court ordered the defaulter to deposit in court a sum as a result of

[2] § 28:2-614;
[3] Uniform Civil Procedure Rules, 2005 – Reg 40.8;
[4] [2013] EWHC 4110 (TCC);

its failure to provide a performance bond. The court held that even though the contract requirement of providing a performance bond is not completed, depositing the amount in court would, in principle, provide equivalent rights to the aggrieved party.

In comparison to these examples from other jurisdictions, the proposed provision in the Bill is more elaborate both in procedure and substance. As noted above, the focus under the Bill is on allowing the promisee to have the contract performed, whether by himself or by having a third-party step into the shoes of the defaulter. Of course, the necessary corollary of this performance is that the costs should be borne by the defaulter, and that the aggrieved party still has the right to claim compensation.

## *Post amendment position and looking ahead*

When the Bill comes into effect to amend the Act, the discretion vested with the Courts to decree specific performance will be taken away and the amended Section will provide, as a rule, specific performance of contract by substituted performance. As a result, the aggrieved party will then have a legal remedy (and a right) to attain performance of the contract at the cost of the party committing the breach. This amendment looks promising as it is bound to result in a change in contract behaviour between parties and encourage performance of contract obligations, thereby acting as a deterrent to breach by the promisor. Once implemented, this remedy of specific performance by substituted performance can become the default remedy available to the parties as it is one of the only remedies which achieves the same result as the actual discharge of obligations of the agreement.

For the defaulter, the amendment incorporates sufficient safeguards as well. A reasonable opportunity is given to the defaulter by putting him to notice and allowing a cure period of not less than thirty (30) days. This prevents the right of substituted performance being exercised in an unfair manner by the promisee. Further, once substituted performance is sought (e.g. by a third party), the promisee can no longer ask for specific performance from defaulter. Another noteworthy change is that the aggrieved party is only allowed to recover costs of substituted performance after having actually incurred such costs, which is a shift from the earlier position where only a reference to the prevailing market costs was adequate.

The true impact of the amendment will be seen once it is adopted. While the impact will be pan-industry, industries like construction and infrastructure are likely to benefit the most, where damages often do not adequately compensate breach of contract. Once the remedy is available in law, new contracts being drafted may even prompt parties to include specific clauses identifying the procedure of achieving substituted performance. Whether parties choose to amend existing contracts remains to be seen, though even if they are not amended, in the event of a breach, specific performance (including through substituted performance), which was an equitable remedy hitherto, will become a legal remedy and be granted as a rule rather than an exception.

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# Notifications and Circulars

**Companies Act, 2013 – 28 Sections of Companies (Amendment) Act 2017 come into force from 7-5-2018:** The Central Government has notified 28 sections of the Companies (Amendment) Act, 2017 (Amendment Act) on May 7, 2018 *vide* Notification No. S.O. 1833 (E) dated May 7, 2018. Some of the key amendments which have been notified are as follows:

(a) ***Significant Influence*** - The Notification has notified the explanation to Section 2(6) of the term 'significant influence' that now provides that significant influence shall mean to having control of at least 20 percent of the total voting power or control of or participation in business decision-making.[5]

(b) ***Subsidiary Company*** - The Notification has also notified the amendment of definition of a 'subsidiary company'. The Companies Act, 2013 (Act) lays down that a company shall be deemed to be a subsidiary of another, if the holding company controls the composition of the Board of Directors or exercises or controls 'more than half of the total share capital'. The Amendment Act has amended the existing Section 2(87) of the Act to now substitute the words 'total share capital' to 'total voting power'[6].

(c) ***Sweat Equity*** - The Amendment Act provides a relief from the prohibition under the Act which stated that the issuance of sweat equity shares for a period of one year from the date of commencement of business of the company shall not be allowed. This prohibition is now not applicable.

(d) ***Special Courts*** - The Notification has also notified provisions relating to amendment of Special Courts to be set up under the Act and the qualifications of the judges therein.

(e) ***Loans to companies*** - Provisions amending the much debated amendments to Section 185 and 186 of the Act have also been notified. The Amendment Act has substituted the earlier Section 185 of the Act[7] which governed loans granted to, and security and guarantees provided on behalf of, directors and other parties in whom the directors are interested. As per the earlier provision, companies could not grant loans to, or provide loans or security on behalf of directors or entities they were interested in. Exemptions to this provision were provided to 'wholly owned subsidiaries' if such loans were utilised for the subsidiary's principal business activities. The Act also provided for exemptions for loans granted to a managing or whole-time director and to a company that provides loans or gives guarantees or securities for the due repayment of any loan in its ordinary course of business.

Now, the Amendment Act has bifurcated the regulatory framework into two categories:

(a) the first category, contemplating certain transactions which are still prohibited; and

(b) the second category, consisting of transactions which may be permitted, subject to (i) approval of the shareholders by way of a special resolution passed at a general meeting and (ii) the condition that the loans are utilised by the borrowing company for its principal business activities ("Conditions").

[5] Section 2 (i), Companies (Amendment) Act, 2017

[6] Section 2 (xiii), Companies (Amendment) Act, 2017

[7] Section 61, Companies (Amendment) Act, 2017.

The prohibition under the first category applies to loans, guarantees or security provided to a director of the company or a director of its holding company or any partner or relative of such director, or in any firm where such person is a partner. However, under the second category, a company may advance loan, give guarantee or provide security in connection with any loan taken by 'any person in whom any of the director of the company is interested' subject to the fulfilment of Conditions. The Amendment Act defines the expression "any person in whom any of the director of the company is interested" to mean as follows—

(a) any private company of which any such director is a director or member;

(b) any body corporate at a general meeting of which not less than twenty-five per cent. of the total voting power may be exercised or controlled by any such director, or by two or more such directors, together; or

(c) any body corporate, the Board of directors, managing director or manager, whereof is accustomed to act in accordance with the directions or instructions of the Board, or of any director or directors, of the lending company.

The explanatory statement for the general meeting is also required to contain detailed disclosures regarding the proposed transaction. The Amendment Act retains the earlier exemption in relation to the managing or whole-time directors and companies providing loans and guarantees to its wholly owned subsidiaries or in its ordinary course of business. One difference in the exemptions is in the provision relating to the "ordinary course of business" where under the earlier position of the Act such exemption could be availed of if the interest charged on the loans granted was at least equal to the bank rate declared by the Reserve Bank of India. The Amendment Act now provides for the interest to be at least at the rate of prevailing yield of one year, three year, five year or ten year Government securities, that is closest to the tenor of the loan. This amendment is expected to have a large impact on the way corporate conglomerates function in India and was much awaited.

**ECB - Reserve Bank of India relaxes guidelines for External Commercial Borrowings:** The Reserve Bank of India (RBI) has relaxed further the external commercial borrowing guidelines under the Master Direction No. 5 dated January 1, 2016 on External Commercial Borrowings (ECB), Trade Credit, Borrowing and Lending in Foreign Currency. The proposed changes are pursuant to the continuous requests made by the corporate entities to RBI to relax and liberalise the ECB regime as they are very crucial for meeting the capital needs of the companies. A.P. (DIR Series) Circular No.25 dated April 27, 2018 has been issued for the purpose.

The changes in the regulations, *inter alia*, include the following:

(a) Rationalisation of all-in-cost for ECB under all tracks and Rupee Denominated Bonds (RDBs) by stipulating a uniform all-in-cost ceiling of 450 basis points over the benchmark rate. The benchmark rate will be 6 month USD LIBOR; (or applicable benchmark for respective currency) for Track I and Track II, while it will be prevailing yield of the Government of India securities of corresponding maturity for Track III (Rupee ECBs) and RDBs;

(b) The ECB Liability to Equity Ratio has been increased, for ECBs over USD 5 million raised from direct foreign equity holder under the automatic route, to 7:1;

(c) Eligible Borrowers' list for the purpose of ECB has been expanded to include Housing Finance Companies regulated by the National Housing Bank, and Port Trusts constituted under the Major Port Trusts Act, 1963 or Indian Ports Act, 1908. Such entities shall have a board approved risk management policy and shall keep their ECB exposure hedged 100% at all times for ECBs raised under Track I. Further, Companies engaged in the business of maintenance, repair and overhaul and freight forwarding are allowed to raise ECBs denominated in INR only;

(d) The current system of having positive end-use list and negative end-use for different tracks have been done away with and has now been decided <u>to have only a negative list</u> for all tracks which will include investment in real estate or purchase of land (except when used for affordable housing as defined in Harmonised Master List of infrastructure sub-sectors notified by Government of India, construction and development of Special Economic Zones and industrial parks/integrated townships), investment in capital market and equity investment.

**Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Ordinance, 2018:** In the recent past, numerous efforts have been taken by the Government of India towards ease of doing business in India and one of the factors of achieving the same is by ensuring speedy and fast redressal of the commercial disputes. In view of the same, the Parliament had enacted the Commercial Courts, Commercial Division and Commercial Appellate Division of High Court Act, 2015 ("Act") pursuant to which commercial courts were required to be established in the country, except in the territories over which the High Courts have original ordinary civil jurisdiction. The Act has now been amended to incorporate the following:

1. ***Minimum dispute value -*** The minimum dispute value to trigger the jurisdiction of the courts has been reduced to INR 10,000,000/- (Rupees Ten Million) to INR 300,000/- (Rupees Three Hundred Thousand). Such amendment will indeed expand the pecuniary jurisdiction of the commercial courts in an exponential manner.
2. ***Hierarchy of Commercial Courts -*** The Amendment provides for establishment of commercial courts at district judge level for the territories over which concerned High Courts have ordinary original civil jurisdiction. Further, the State Governments may, after consultation with the concerned High Court, constitute commercial appellate courts. There is a bifurcation of the commercial courts into two types i.e. commercial courts at the level of a district judge and commercial court below the level of a district judge. Appeals from commercial courts at the district judge level would continue to lie before the commercial appellate court.
3. ***Pre-Institution Mediation -*** It is mandatory for the plaintiff to first undergo pre-institution mediation except in the cases where interim relief is sought under the Act. The exhaustion of the remedy of pre-institution mediation is now necessary before approaching the commercial courts. The Central Government may authorise authorities constituted under Legal Services Authorities Act, 1987 for the purpose of pre-institution mediation, who will be required to complete the pre-mediation process within a period of three months from the date of application by the plaintiff or a further extended period of two months with the consent of the parties. The settlement arrived at shall have the same status of an

arbitral award under the Arbitration and Conciliation Act, 1996.

4. ***Counter-Claim Suits -*** The provision for counter claims suits earlier provided under the Act has been deleted .

5. ***Power to make rules -*** The Amendment gives Central Government power of making rules with regard to the manner and procedure of pre-institution mediation and any other matter as may be prescribed.

# Ratio Decidendi

## Insolvency proceedings to be initiated when financial debt proven and corporate debtor having no objection

*Ratio*

Where the financial debt had been proven and corporate debtor had no objection to admission of petition filed by financial creditor under section 7, under Insolvency & Bankruptcy Code, 2016 ("IBC"), petition was to be admitted and interim resolution professional was appointed.

*Facts*

ICICI Bank Ltd, the financial creditor ("Petitioner" or "Financial Creditor"), filed an application under Section 7 of the IBC triggering the insolvency resolution process against Essar Power Jharkhand Limited ("Respondent" or "Corporate Debtor"). The Respondent is a company registered under the provisions of the Companies Act, 2013.

The Petitioner granted debt towards various facilities. The default was committed by the Respondent for the amount leading to filing of petition.

*Contentions*

The main contention before the tribunal was that when the petition is filed by the Financial Creditor before the tribunal and the same has been admitted and not objected by the Corporate Debtor, whether the petition can be admitted, and the insolvency process can be started i.e. the resolution professional can be appointed and moratorium be declared.

Further, another question before the tribunal was regarding the resolution professional and his role in the process.

*Observations and Judgement*

Firstly, NCLAT analysed Section 7 of the IBC and observed that if the essential elements of the Section 7 of the IBC are fulfilled, there is no need to prove anything else for starting the insolvency process. Section 7(2) and Section 7(5) of IBC which provide that for initiation of the corporate insolvency proceeding by financial creditor:

a. The financial creditor shall make an application in such form and manner and accompanied with such fee as may be prescribed.

b. Where the adjudicating authority is satisfied that default has occurred and the application is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application.

In the present case the application was filed on the proforma prescribed under Rule 4(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 read with Section 7 of IBC. The tribunal was satisfied with the material evidence produced on record that a (i) default has occurred, (ii) the application under sub-section 2 of Section 7 is complete, and (iii) no disciplinary proceedings are pending against the proposed interim resolution professional, and hence, the application should be admitted. The tribunal held that the application is to be admitted and the moratorium be declared.

Tribunal further found that initially appointed resolution professional was biased, and his opinion was clouded and held it was one of the illegality *vide order* dated 16.01.2018. Thereafter, another resolution professional was appointed.

*Analysis*

NCLT has provided a wider interpretation to Section 7 of IBC thereby increasing the overall scope and effectiveness of IBC. Such interpretation is inclined more towards protecting the interest of the creditors. From the order, it becomes very clear that only the essentials under Section 7 of the IBC are needed to be proved for the initiation of the insolvency proceedings. Further, when the corporate debtor does not have any objection regarding the acceptance of an application, steps should be taken immediately for initiation of the proceedings.

Secondly, the tribunal observed that the interim resolution professional is required to perform all his functions religiously and strictly which are contemplated, *inter-alia*, under Sections 15, 17, 18, 19, 20 and 21 of IBC. He must follow best practices and principles of fairness which are to apply at various stages of corporate insolvency resolution process. His conduct should be independent, and he should work with utmost integrity and honesty. [*ICICI Bank Ltd.* v. *Essar Power Jharkhand Ltd.* (Company Petition) (Insolvency) IB-25(PB)/2018– Order dated April 5, 2018, National Company Law Tribunal, New Delhi]

## Reference to arbitration when one of the agreements not containing arbitration clause

*Brief Overview*

In this case, several agreements and contracts were executed between various parties through their involvement in a single commercial project of a solar plant. Among the 4 agreements executed between parties, 3 contained an arbitration clause. Supreme Court in this case held that when a commercial transection is integrally connected and is for the same purpose, the matter can be referred to arbitration even if one of the agreement does not contain an arbitration clause provided all the agreements are inter-connected.

*Facts*

The respondents executed the following agreements in furtherance of the project:

1. Agreement with Juwi India to purchase power generating equipments dated 01.02.2012; (“Equipment and Material Supplies Contract”)
2. Agreement with Juwi India for engineering, installation and commission of the solar power plant at Jhansi dated 01.02.2012; (“Engineering, Installation and Commissioning Contract”)
3. Agreement with Aston Renewables Pvt. Ltd. (“Astonfield”) for purchasing CIS photovoltaic products to be leased to Dante Energy Pvt. Ltd. (“Dante Energy”) for energizing solar plant installation at Jhanis dated 05.03.2012; (“Sale and Purchase Agreement”) and
4. An agreement with Dante Energy wherein Dante Energy leased equipment(“Equipment Lease Agreement”)

The appellant in the case, Mr. Ameet Lalchand Shah, is the promoter and controls both Astonfield as well as Dante Energy. The Sale and Purchase Agreement did not contain an arbitration clause whereas all other agreements had an arbitration clause.

Dispute arose between the parties and the respondents alleged that Dante Energy had defaulted in payment of lease rent and Astonfield committed fraud by inducing the respondents to purchase the photovoltaic products by investing huge amounts. The respondents have also alleged that appellants had committed misrepresentation and criminal breach of trust so far as the equipment procured and leased to Dante energy. An FIR was filed by the respondents in this regard.

*Contentions*

Appellants sought for reference to arbitration of all four agreements by contending that the sale and purchase agreement is the main agreement and the other three agreements are interconnected as they are executed between the same parties and the obligations and the performance of the terms of agreements are inter-connected viz. commissioning of the photovoltaic solar plant at Dongri, Raska, District Jhansi U.P.

The respondents resisted the application to refer the matter to arbitration by contending that the suit is for declaration that the agreements are vitiated due to fraud and misrepresentation and while so the matter cannot be referred to arbitration.

*Observations*

The present case was appealed to the Hon'ble Supreme Court against the order of the Delhi High Court dismissing the application to refer the matter to arbitration under Section 8 of the Arbitration and Conciliation Act, 1966.

*Judgment*

The Hon'ble Supreme Court held that even though there are different agreements involving several parties, if the agreements are in relation to a single commercial project, the matter can be referred to arbitration even if one of the agreements does not contain an arbitration clause. However, it is sine qua non that the agreement that does not contain an arbitration clause must be integrally connected with the commercial project.

*Analysis*

The Hon'ble Court has adopted a very broad approach in allowing the parties to refer the matter to arbitration. Such approach towards speeding up the procedure for disposal of commercial disputes will only improve the overall health of the economic sectors. [*Ameet Lalchand Shah and Others* v. *Rishabh Enterprises and Another* - Civil Appeal No. 4690 of 2018 arising out of SLP(C) No. 16789 of 2017, decided on 3-5-2018, Supreme Court]

### Cognisance of foreign decree in insolvency proceedings

*Brief Overview*

The case involves a loan agreement between parties and an *ex-parte* decree made in favour of the petitioner/financial creditor by the Queen's Bench, London. Since the respondent neither defended their case nor appeared before the bench in London; they were estopped from making a plea again before the competent authority in India.

*Facts*

The entire issue arises out of loan agreements entered into between the petitioner, Stanbic Bank Ghana Limited ("Financial Creditor") and respondent, Rajkumar Impex Private Limited ("Principal Guarantor"). Each of these loan agreements contained exclusive jurisdiction clause conferring jurisdiction to the courts of England and Wales. M/s. Rajkumar Impex Ghana Ltd. ("Principal Borrower") is a wholly owned subsidiary of the Principal Guarantor and had borrowed money from the Financial Creditor. Subsequently, the Principal Borrower failed to repay the said amount as per the terms and conditions of aforementioned loan agreements. Petitioner filed a suit before the court of Ghana and the same is pending for disposal. Suit against Principal Guarantor was also filed at High Court of Justice, Queen's Bench Division, Commercial Court, London and the said court passed a decree in favour of the petitioner.

*Contentions*

The Respondent argued that the petition under Insolvency and Bankruptcy Code, 2016 ("IBC") is not maintainable on the grounds that the Financial Creditor, not being an Indian company within the meaning of Companies Act, 2013, cannot invoke the provisions of IBC and prefer a petition styling themselves to be a Financial Creditor. Further, the Respondents contended that the order made by Queen's Bench, London is not conclusive as the same was not based on merits. The Respondents have also disputed the amount claimed by the Petitioner/Financial Creditor before the High Court in Ghana. Since a civil proceeding is pending, the Respondents claimed that the application invoking the provisions of IBC is not maintainable.

The Financial Creditor submitted that liability of the Principal Guarantor is co-extensive with that of the Principal Borrower and there is no law which prevents the creditor to proceed against both the Principal Borrower and the Principal Guarantor independently. Financial Creditor contended that it does not necessarily have to exhaust the remedies against the Principal Borrower before proceeding against the Principal Guarantor. It also argued that the IBC does not prohibit filing a petition by foreign creditor and further, Rule 23 of the National Company Law Tribunal Rules, 2016 read with form 1 permits an authorized representative to present an application or petition before the tribunal and the authorized representative includes an authorized agent.

*Observations*

The Tribunal observed that the respondent did not appear before the Queen's Bench in London despite due service of notice and therefore, it is estopped from making such plea before the adjudicating authority. The Tribunal noted that it is a well settled law that the courts need not go beyond a decree made in favour of a party and in this case, a decree made by the Queen's Bench, London. Since the respondent failed to defend its case before the Queen's Bench, the Tribunal observed that now the respondent cannot contend that the said order is not on merits. Further, the Tribunal observed that the respondent has not proved that either they have filed an application to set aside the order or filed an appeal against the said order before the appropriate court.

*Judgment*

In view of the above observations, the petition was admitted as the Financial Creditor had made out a *prima facie* case as per the Tribunal. The Tribunal further held that it has no jurisdiction to enforce a foreign decree, however, there is no bar in it taking cognizance of the foreign decree. The English Commercial Court is recognized under Section 13 and 44A of the Code of Civil Procedure, 1908 and thus, the Tribunal ordered for the commencement of the Corporate Insolvency Resolution Process and also appointed an interim resolution professional proposed by the applicant. [*Stanbic Bank Ghana Limited* v. *Rajkumar Impex Private Limited* – Order dated 27-4-2018 in CP/670/IB/2017, NCLT, Chennai]

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