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Articles

Whether recovery proceedings for a debt pertaining to a period prior to approval of resolution plan can be initiated against corporate debtor?

By **Ankit Parhar**

It is now a settled position that the prime objective of the Insolvency and Bankruptcy Code, 2016 ("IBC") is resolution or revival of the Corporate Debtor; followed by maximising the value of the assets of the Corporate Debtor; and lastly to promote entrepreneurship and availability of credit. The proceedings under the IBC are not intended to substitute recovery proceedings.

One of the most litigated aspects of the IBC has been the treatment of Operational Creditors. Most Resolution Plans do not provide for the payment of Operational Debts on the basis that the Operational Creditors being unsecured creditors would not get any part of the liquidation estate in the event of the liquidation of the Corporate Debtor. As such, the understanding was that in case a Resolution Plan which does not provide for the payment of Operational Debts was approved, the Operational Creditor would be bound by the same and could not initiate recovery proceedings against the Corporate Debtor. Even Resolution Applicants understood that no recovery proceedings would be initiated against the Corporate Debtor for a debt pertaining to a period prior to the approval of the Resolution Plan.

However, in a recent decision, *Prasad Gempex & Ors*. ("Appellant") v. *Star Agro Marine Exports Pvt. Ltd*. *& Ors.* ("Corporate Debtor") being Company Appeal (AT) (Insolvency) No. 469 of 2019, decided on 02.05.2019, the National Company Law Appellate Tribunal ("NCLAT") has granted the Appellant, an Operational Creditor, liberty to initiate appropriate recovery proceedings against the Corporate Debtor for recovery of its Operational Debt pertaining to a period prior to the date of the approval of a Resolution Plan under Section 60(6) of the IBC.

The facts before the NCLAT were that the Appellant had entered in an agreement dated 05.04.2017 with the Corporate Debtor for investment in the Corporate Debtor's business. Certain disputes arose between the parties. Meanwhile, the Financial Creditors of the Corporate Debtor initiated proceedings under the IBC against the Corporate Debtor. The said proceedings were admitted by the NCLT, Chennai Bench ("NCLT") on 08.01.2018. Accordingly, a Resolution Professional ("RP") was appointed to take over the management and affairs of the Corporate Debtor and the Moratorium under Section 14 of the IBC was declared.

Subsequently, the Appellant filed its claim before the RP claiming to be a Financial Creditor. The RP rejected the contention of the Appellant that it was a Financial Creditor. However, the RP suggested that the Appellant may file its claim as an Operational Creditor. Thereafter, the Appellant filed its claim as an Operational Creditor which was also rejected by the RP.

Meanwhile, the RP invited prospective Resolution Applicants to submit their Resolution Plans for taking over the management and affairs of the Corporate Debtor. The Appellant and two other Resolution Applicants submitted their respective Resolution Plans. The Resolution Plan submitted by the Appellant was rejected by the RP vide letter dated 10.04.2018 on the ground that the Appellant had failed to demonstrate that it satisfied the eligibility criteria with regard to its net worth. The Appellant challenged the rejection of its Resolution Plan by the RP before the NCLT. The NCLT upheld the order of the RP vide order dated 22.05.2018.

The Appellant challenged the order of the NCLT before the NCLAT assailing the rejection of its claim and also the rejection of its Resolution Plan. One of the prospective Resolution Applicants also filed an appeal before the NCLAT against an order dated 23.07.2018 passed by the NCLT whereby the NCLT had upheld the decision of the RP refusing to recalculate and reduce the claims raised by the Financial Creditors and Operational Creditors.

In the meantime, a Resolution Plan submitted by the other prospective Resolution Applicant was unanimously approved by the Committee of Creditors ("COC") on 01.10.2018 and placed before the NCLT on 04.10.2018. It may be noted that the said Resolution Plan did not provide for the payment of any Operational Debts on the basis that the Operational Creditors would not get any proceeds from sale of the liquidation estate as per the waterfall mechanism provided under Section 53 of the IBC.

The appeals filed by the Appellant and the unsuccessful Resolution Applicant were disposed of by the NCLAT by a common judgment dated 01.02.2019. Relying upon the judgment of the Supreme Court in *Swiss Ribbons Pvt. Ltd. & Anr.* v. *Union of India & Ors.* being W.P. (C) No. 99 of 2018 decided on 25.01.2019, the NCLAT reiterated the position that a RP does not have adjudicatory powers. As such, the RP was correct in not recalculating the claims raised by the Financial Creditors and Operational Creditors in the manner sought by the unsuccessful Resolution Applicant.

As far as the claim filed by the Appellant is concerned, relying on its earlier decision in *Dynepro Pvt. Ltd.* v. *V. Nagarajan* being Company Appeal (AT) (Insolvency) No. 229 of 2018 decided on 30.01.2019, the NCLAT held that in view of Section 60(5) of the IBC, notwithstanding the approval of a Resolution Plan by the NCLT under Section 31 of the IBC, it is open to a party to initiate appropriate proceedings against the Corporate Debtor after completion of the Moratorium. Since the Resolution Plan of the successful Resolution Applicant had not been approved by the NCLT as yet, the NCLAT directed the NCLT to pass appropriate orders under Section 31 of the IBC.

In this background, the NCLAT granted the Appellant liberty to initiate appropriate recovery proceedings against the Corporate Debtor in the event that the Resolution Plan is approved and does not 'take proper care' of the Appellant or, in the event that the Resolution Plan is not approved and the Corporate Debtor is ordered to be liquidated, to file its claim before the Liquidator who shall decide the same in accordance with Section 40 of the IBC.

After the disposal of the said appeals by the NCLAT, the NCLT held that the Resolution Plan was in line with the provisions of the IBC and approved the same vide order dated 11.03.2019. The NCLT also declared that any financial

obligation of the Corporate Debtor other than those forming part of the Resolution Plan shall stand extinguished. Since the Resolution Plan did not provide for the payment of any Operational Debts, the Appellant once again came in appeal before the NCLAT.

In the appeal, the NCLAT held that since the Appellant had already been given an opportunity to initiate appropriate proceedings against the Corporate Debtor, the NCLT cannot prohibit it from initiating appropriate proceedings for recovery of its claims. Accordingly, the order of the NCLT, to the extent that it held that all claims against the Corporate Debtor in relation to any period prior to the plan approval date shall stand withdrawn and dismissed, was set aside by the NCLAT.

The interpretation of Section 60 (6) of the IBC by the NCLT is likely to be challenged on various grounds. Section 60 (6) provides that the period during which the order of Moratorium operates shall be excluded for the purposes of limitation for any proceedings by or against the Corporate Debtor. It is likely to be argued that Section 60 (6) is not an enabling provision and cannot be construed so as to mean that recovery proceedings can be initiated against a Corporate Debtor for a debt pertaining to a period prior to the approval of the Resolution Plan.

The decision of the NCLAT disturbs the understanding that has been prevailing since the enactment of the IBC and raises some serious issues that shall have far reaching implications, particularly, for Resolution Applicants and Operational Creditors. For instance, a Resolution Applicant that submits a Resolution Plan based on the assumption that the liabilities mentioned in the information memorandum are exhaustive, and such Resolution Plan having been accepted, may be in for a rude shock when it faces recovery proceedings for a debt previously unknown. The understanding that a Resolution Applicant takes over the management and affairs of the Corporate Debtor with a clean slate may no longer hold good.

On the other hand, it opens up another avenue for Operational Creditors, who are by and large kept out of most Resolution Plans on the basis that they would not get any proceeds from sale of the liquidation estate as per the waterfall mechanism provided under Section 53 of the IBC. Such Operational Creditors who are not 'taken care of' in Resolution Plans can now initiate recovery proceedings against a Corporate Debtor if and when a Resolution Plan is approved.

The NCLAT has certainly made its position regarding the interpretation of Section 60(6) of the IBC clear, however, this is not the final word on the issue as the Supreme Court is yet to consider this aspect. It remains to be seen whether the interpretation by the NCLAT will be upheld by the Supreme Court as and when it is called upon to decide the issue.

[The author is a Joint Partner in Commercial Dispute Resolution practice, Lakshmikumaran & Sridharan, New Delhi]

Effect of an unstamped agreement containing an arbitration clause

By **Siddharth Agrawal and Himanshu Setia**

Recently, the Supreme Court in *Garware Wall Ropes Ltd.* v. *Coastal Marine Constructions & Engineering Ltd.* [2019 SCC Online SC 515; Civil Appeal No. 3631 of 2019] ("*Garware Wall Ropes*") decided the effect of an arbitration clause contained in a contract which requires to be stamped and also discussed the effect of judgment of *SMS Tea Estates (P) Ltd.* v. *Chandmari Tea Co. (P) Ltd* [(2011) 14 SCC 60] ("*SMS TEA*").

The present case arose out of a sub-contract awarded by the appellant to the respondent in respect of work to be done for installation of a geo-textile tubes embankment with toe mound at a village in Odisha for protection against coastal erosion. The sub-contract agreement contained an arbitral clause. Disputes had arisen between the parties and the appellant terminated the sub-contract and subsequently, the appellant issued a notice of appointment of a sole arbitrator. However, the respondent replied by saying that it's premature to appoint a sole arbitrator as invocation of arbitration under the agreement was pre-mature. Therefore, the respondent was constrained to file a petition under Section 11 of the Arbitration and Conciliation Act, 1996 ("the Act") before the Bombay High Court for appointment of arbitrator, which was allowed.

The underlying contract which contained the arbitration clause was an unstamped document and the Court observed that the agreement as a whole has to be acted upon. The Indian Stamp Act applies to the agreement as a whole and therefore, it is not possible to bifurcate the arbitration clause contained in such agreement to give an independent existence, which can only be done for limited purposes. Further, the court observed that Section 11 (6A) of the Act does not in any manner get over the basis of the judgment in *SMS TEA* and it continues to apply even after the amendment of Section 11(6) of the Act. In *SMS TEA*, the Supreme Court held that when an arbitration clause is contained in an unstamped agreement, the Court hearing the Section 11 application is required to impound the agreement and ensure that the stamp duty and penalty (if any) are paid before proceeding with the Section 11 application.

Furthermore, the Court observed that an agreement only becomes a contract if it is enforceable by law. As observed above, an agreement which is not duly stamped does not become a contract. **Therefore, an arbitration clause in an agreement would not exist when it is not enforceable by law**. [Refer Section 11(6A) r/w 7(2) of the of the Act, Section 2(h) of the Contract Act 1872]

The Court further held that the arbitration clause contained in the sub-contract would not "exist" as a matter of law until the sub-contract is duly stamped. The Court placed reliance on *United India Insurance Co. Ltd. and Ors.* v. *Hyundai Engineering and Construction Co. Ltd. and Ors*. (2018 SCC Online SC 1045) and opined that Section 11(6A) deals with "existence" as opposed to Sections 8, 16 and 45 of the Act which deals with the "validity" of an arbitration agreement.

The Court overruled judgments of various High Courts including the Full Bench judgment of the Bombay High Court in *Gautam Landscapes Pvt. Ltd.* v. *Shailesh Sha and Ors.* [2019 SCC Online Bom 563; Arb. Pet. No. 466/2017, decided on 4 April 2019] ("***Gautam Landscapes***"). The Bombay High Court held that the Court can entertain an application under Section 9 for an interim measure as well as an

application under Section 11 (6) of the Act for appointment of arbitrator in case of an unstamped or insufficiently stamped document. In *Garware Wall Ropes*, the Supreme Court held that the Bombay High Court's judgment in *Gautam Landscapes* was incorrectly decided as regards Section 11 of the Act.

In so far as Section 11(13) of the Act is concerned, the Supreme Court held that appropriate stamp duty should be paid on an instrument before it is acted upon by any authority. The endeavour of the Court is to dispose off the application under Section 11 of the Act as soon as possible.

The Court opined that doctrine of harmonious construction of statutes is strongly imbedded in our interpretative canon. It can be done by safeguarding the revenue and the High Court must impound the instrument which has not borne the stamp duty and hand it over to the relevant authority under the Maharashtra Stamp Act who will then decide the issues regarding payment of stamp duty as expeditiously as possible and preferably within a period of 45 days. And once the duty is paid, the High Court shall expeditiously dispose the application under Section 11 of the Act and the arbitrator can decide the dispute within the time-frame under Section 29-A of the of the Act.

The Supreme Court allowed the appeal and set aside the judgment and remitted the matter back to the Bombay High Court for disposal of the same in light of the Supreme Court decision.

While the Supreme Court did not go into the question of whether an application under Section 9 of the Act for interim relief is maintainable in an arbitration that emanates out of an unstamped agreement, in view of the ratio in the *Garware Wall Ropes* it seems that such applications may not be maintainable. However, since there is no express ruling on this aspect, it is likely to be open for debate until a specific decision is given on this issue by the Supreme Court.

[The authors are Principal Associate and Associate, respectively, in Arbitration practice, Lakshmikumaran & Sridharan, New Delhi]

Class Action Suits under Companies Law – A Reality?

By **Manasa Tantravahi**

Introduction

The viability of class action suits under company law in India has been a cause for much debate, ever since Section 245 of the Companies Act, 2013 ("Act") got notified on 1st June, 2016. Section 245 of the Act permits members and/ or depositors of a company to band up and jointly proceed against said company, its directors, auditors, or advisors, on behalf of all the members/ depositors within the formed class, before the National Company Law Tribunal ("NCLT").

Soon after, the National Company Law Tribunal Rules, 2016 ("Rules") were notified to clarify the procedure for filing such suits further, within Rule 84. However, without specifying the

thresholds with respect to eligibility to initiate these proceedings, any explanation as to what constitutes 'prejudicial to the interests of the company, its members or depositors', identifiable difference between the right to bring action under section 245 as compared to action for oppression/ mismanagement under Sections 241, 242 and 244 of the Act etc., the law governing class action has created much speculation and ambiguity.

Notification of Thresholds

On 8th May, 2019, the Central Government issued the National Company Law Tribunal (Second Amendment) Rules, 2019 through which sub-rules (3) and (4) to Rule 84 were inserted, for prescribing the threshold limits to file a class action suit. In case of a company with share capital, (a) Atleast 5% of the total members/ 100 members, whichever is less, or (b) members holding atleast 5% of the issued share capital in case of an unlisted company, and holding atleast 2% in case of a listed company, may prefer the suit.

With respect to depositors, the threshold has been prescribed as (a) 5% of the total number of depositors/ 100 depositors, whichever is less, or (b) depositors entitled to 5% of the total deposits of the company (hereinafter collectively referred to as "Thresholds").

Overlaps between Sections 241 (Oppression and/ or mismanagement) and 245 (Class Action)

As per Section 245 of the Act, when the management or conduct of the affairs of the company are being conducted in a manner prejudicial to the interests of the company or its members or depositors, a suit may be filed on behalf of the class of members/ depositors aggrieved by such action.

Section 241 of the Act lays down similar criteria for bringing action for oppression and/ or mismanagement, which includes where the affairs of the company have been or are being conducted in a manner prejudicial to public interest, or in a manner prejudicial or oppressive to him or any other member or members, or in a manner prejudicial to the interests of the company, a complaint may be filed by the aggrieved member(s).

On a preliminary reading of both the sections viz., 241 and 245, there appears an overlap as to when actions under these two independent provisions may be initiated. Further qualifications under both the provisions are highlighted as under:

S. No.	Particulars	Section 241	Section 245
1.	*Who may file a suit?*	Member(s) of a company	Member(s)/ depositor(s)/ any class of members or depositors
2.	*On behalf of whom.*	Filing member, or any other member(s), class of members, Company	Class of members/ depositors.
3.	*Against whom.*	Company (NCLT may issue orders against the Board of Directors/ managers).	Company, Board of Directors, Auditors and Advisors (including experts and consultants).
4.	*Thresholds*	*Company having a share capital*:	*As per the* ***Thresholds***.

S. No.	Particulars	Section 241	Section 245
		Atleast 100 members or atleast 1/10th the total members of the company, whichever is less or member(s) holding atleast 1/10th of the Issued Share Capital of the company. *Company without share capital:* Atleast 1/5th of the total members.	

The major distinguishing factor between both the provisions viz., action for oppression/ mismanagement and a class action suit is the beneficiaries of the suits. While in case of a suit for oppression/ mismanagement, requisite aggrieved members proceed against the directors for the protection of their rights/ interests, ***in a class action suit, requisite member(s)/ depositor(s) identifying a class of such member(s)/ depositor(s) aggrieved by the actions of directors, may file a petition on behalf of such a class.***

As per section 245 of the Act, read with Rule 86 of the Rules, as soon as the petition for class action is admitted, NCLT shall issue a public notice in Form No. NCLT – 13, which includes the following:

> *"The members of the class for the purpose of this class action petition shall mean.....If you belong to the class in relation to which this Application has been filed,* ***you will be bound by the outcome of this Application, unless you decide to opt-out from the proceedings by submitting the relevant form to the following address.....subject to the Tribunal's permission****."*

Therefore, the NCLT identifies the class at the time of admitting a class action petition and the member(s)/ depositor(s) who are a part of the class are automatically a part of the suit, provided they chose to not opt-out in the manner prescribed under the Rules.

On a side note, Section 245 also allows a member(s)/ depositor(s) to proceed against auditors, the audit firm, experts, advisors or consultants, for any fraudulent conduct on their part. This sidesteps the rule of 'privity of contract' allowing members/ depositors to proceed against third parties for their acts done for the company.

Interpretation of Section 245

Though section 245 of the Act got notified in 2016, till date, no class action suit has been initiated under the Act, for obvious reasons. The Hon'ble National Company Law Appellate Tribunal ("**NCLAT**") within the Order dated 21st September, 2017 in *Cyrus Investments Private Limited & Anr.,* v. *TATA Sons Limited & Ors.*, [2017 SCC OnLine NCLAT 261], acknowledged that the court shall first assess as to whether the thresholds are fulfilled under both sections (241 and 245) and only then proceed to assess whether any conduct is prejudicial to the interests

of a class of members/ depositors, as applicable. Further, "Issued Share Capital" automatically means "Issued and subscribed Share Capital" and includes both equity and preference share capital, in context of the sections.

The NCLAT, vide an order in *Shanta Prasad Chakravarty & Ors.*, v. *M/s. Bochapathar Tea Estate Private Limited & Ors.,* [2017 SCC OnLine NCLAT 335], observed that while a petition under section 241, 242 and 244 of the Act may be preferred only against the company, board of directors, shareholders or its members, under section 245, one may proceed against the statutory auditors and/ or advisors as well.

Since the concept of 'class action' has evolved from the laws of the United States, it may be assistive to examine the procedure prescribed under their laws viz., the Federal Rules of Civil Procedure ("FRCP"), under Rule 23, which covers class action and outlines a process including: (a) complaint filed by a plaintiff on behalf of a putative (or proposed) class, (b) such class be certified by the court, (c) appointing of class representatives and class counsel, to represent the class, (d) issue of public notice to all members of the class, with an option to opt-out, and (e) final judgment from either a trial or settlement which will bind all class members who have not opted out of the class action.

Some of the recent interpretations given to Rule 23 of FRCP include the following: (a) filing a class action suit, does not extend the statutory limitation time for filing of the suit (*California Public Employees Retirement Systems* v. *ANZ Securities, Inc,* [137 S Ct 2042 (2017)]; (b) an appeal may be preferred against a wrongful class certification; and (c) evidence for such class action suits must be taken on individual basis and not common evidence for all members of the class [*Tyson Foods, Inc* v. *Bouaphakeo,* 136 S. Ct. 1036, 1045 (2016)].

Therefore, there exists developed jurisprudence in the United States with regard to class action suits. However, the abovementioned case-laws are as far as applicable to class action in India.

Class Action under other laws, if any.

While class action has been scanty with respect to companies, in the past few years, there has been a slow but steady rush of class action suits, under section 12(1)(c) of the Consumer Protection Act, 1986 ("**COPRA**"). Section 37 of the Companies Act read with sections 34-36, allows for securities class action suits for misleading statements or inclusion or omission of any matter in the prospectus. Section 53N (4) of the Competition Act, 2002 allows class action, with the permission of NCLAT. However, no such securities or competition class action suits have been preferred till date. The newly passed Goods and Services Tax, 2017, too does not disclose any provision for class action.

In the absence of specific laws providing for class action, there is always a remedy under Order 1, Rule 8 of the Civil Procedure Code, 1908, which allows for the filing of 'representative suits'. This is a generic remedy, in case the aggrieved are many, having common interest.

Conclusion

With the notification of the Thresholds for filing class action suits under the Act, we may now look forward to class action being a preferred form of litigation against various acts of oppression/ mismanagement or general misconduct by various parties. The advantages are many, ranging from negating multiplicity of proceedings, reduction in costs, reduction in voluminous proceedings and the time taken to settle the same. More importantly, minority

investors may now rest assured on having their interests thoroughly protected through the weapon of class action, with low thresholds for bringing action under section 245 of the Act. What is left to be seen is whether the Government clarifies/ resolves the rest of the gaps within the class action law over time.

[The author is an Associate in Corporate practice, Lakshmikumaran & Sridharan, Hyderabad]

Notifications and Circulars

Default in filling of e-form ACTIVE - Director identification number of directors to be marked as "Director of ACTIVE non-compliant company": Ministry of Corporate Affairs ("MCA") with its notification dated May 16, 2019 has introduced the following new rule. 'Rule 12B of Companies (Appointment and Qualification of Directors) Rules, 2014: Director of Company required to file e-form ACTIVE'.

'ACTIVE' stands for 'Active Company Tagging Identities and Verification'. Rule 12B of the Companies (Appointment and Qualification of Directors) Rules, 2014 provides that where a company governed by Section 25A of the Companies (Incorporation) Rules, 2014 fails to file the e-Form (ACTIVE) within the period specified therein, then –

1. The Director identification number ("**DIN**") allotted to its existing directors shall be marked as 'Director of ACTIVE non-compliant company'.
2. When the DIN of a director has been marked as "Director of ACTIVE non-compliant company" such director shall take all the necessary steps to ensure that all companies governed by Rule 25A of the Companies (Incorporation) Rules, 2014, where such director has been so appointed, file the e-form ACTIVE.
3. After all the companies referred to above have filed the e-form ACTIVE, the DIN of such director shall be marked as "Director of ACTIVE compliant company".

Determination of company's name - MCA amends Rule 8 of Companies (Incorporation) Rules, 2014: As per the notification from the MCA dated May 10, 2019, the MCA has provided a rule for determining the names for a company. It has replaced the content of Rule 8 of Companies (Incorporation) Rules, 2014 completely.

It has also added various illustrations under the amendment to provide clarity regarding determining the name of a company. The amendment has introduced a new Rule 8, Rule 8A and Rule 8B of the Companies (Incorporation) Rules, 2014.

As per Rule 8A, there are various situations given when the name shall be considered undesirable. Some of them are:

1. It is prohibited under the provisions of section 3 of the Emblems and Names (Prevention and Improper Use) Act, 1950, unless a previous permission has been obtained under that Act.
2. It includes any word or words which are offensive to any section of the people.

3. The company's main business is financing, leasing, chit fund, investments, securities or combination thereof, but the proposed name is not indicative of such related financial activities, viz., chit fund or investment or loan, etc.
4. The company's name is indicative of activities such as financing, leasing, chit fund, investments, securities or combination thereof, but the company's main business is not related to such activities.
5. It resembles closely the popular or abbreviated description of an existing company or limited liability partnership.
6. Any part of the proposed name includes the words indicative of a separate type of business constitution or legal person or any connotation thereof, for example, co-operative, sehkari, trust, limited liability partnership, partnership, society, proprietor, Hindu undivided family etc.
7. The proposed name contains the words 'British India'.
8. The proposed name implies association or connection with an embassy or consulate of a foreign government.
9. It is identical with the name of a limited liability partnership in liquidation or the name of a limited liability partnership which is struck off up to a period of five years.
10. The proposed name includes the word "State", in case the company is not a Government company.
11. The proposed name is containing only the name of a continent, country, State, city such as Asia limited, Germany Limited, Haryana Limited or Mysore Limited.
12. The proposed name of a Section 8 company under the Companies Act, 2013 does not include the words foundation, forum, association, federation, chambers, confederation, council, electoral trust and the like, etc.
13. The proposed name of a Nidhi company under the Companies Act, 2013 does not have the last words "Nidhi Limited" as a part of its name.
14. The proposed name has been released from the register of companies upon change of name of a company and three years have not elapsed since the date of change unless a specific direction has been received from the competent authority in the course of compromise, arrangement or amalgamation.

As per Rule 8B, *inter-alia* the following words and combinations shall not be used in the name of a company in English or any of the languages depicting the same meaning unless the previous approval of the Central Government has been obtained for the use of any such word or expression: Board, commission, authority, undertaking, national, central, union, federal, republic, president, municipal, panchayat, governor etc.

Criteria to be fulfilled for filing an application under Section 245(1) of Companies Act, 2013 - MCA amends Rule 84 of National Company Law Tribunal Rules, 2016:

1. Sub-Section(1) of Section 245 of the Companies Act, 2013 provides that such number of member or members, depositor or depositors or any class of them, as the case may be, as are indicated in sub-Section(2) of Section 245 of the Companies Act, 2013 may, if they are of the opinion that the management or conduct of the affairs of the company are being conducted in a manner prejudicial to the interests of the company or its members or depositors, file an application before the National Company Law Tribunal on behalf of the members or depositors for

seeking the orders mentioned in Section 245 of the Companies Act, 2013.

2. As per the notification from the MCA dated May 08, 2019, the MCA has inserted a new sub-Rule (3) into Rule 84 of the National Company Law Tribunal Rules, 2016 ("NCLT Rules"), which provides that in case of a company having share capital, the requisite number of member or members to file an application under Section 245(1) of the Companies Act, 2013 shall be:
   (a) At least five per cent. of the total number of members of the company; or
   (b) one hundred members of the company, whichever is less; or
   (c) member or members holding not less than five per cent. of the issued share capital of the company, in case of an unlisted company;
   (d) member or members holding not less than two per cent. of the issued share capital of the company, in case of a listed company.

The requisite number of depositors to file an application under sub-section Section 245(1) of the Companies Act, 2013 shall be -

   (e) at least five per cent. of the total number of depositors of the company; or
   (f) one hundred depositors of the company, whichever is less; or;

depositor or depositors to whom the company owes five per cent. of total deposits of the company.

Ratio Decidendi

Claim under Section 70 of Indian Contract Act, 1872 cannot be raised when parties have entered into a binding contract

Brief Facts:

The impugned contract was a purchase order amongst Mahanagar Telephone Nigam Limited ("MTNL") and Tata Communication Limited ("TCL"). The purchase order restricted liquidated damages to 12% of the purchase value in case of a breach. TCL did not fulfil its obligations under the purchase order and as a result MTNL suffered losses. Subsequently, MTNL deducted certain amounts of money from the invoices raised by TCL.

TCL initiated a suit against MTNL in the Telecom Disputes Settlement and Appellant Tribunal ("TDSAT"), arguing that the monetary amounts subtracted by MTNL were not in consonance with the monetalry amounts mentioned in the impugned purchase orders. MTNL argued stating that such sums are due under '*quantum meruit*' (compensation '*quantum meruit*' is awarded for work done or services rendered, when the price thereof is not fixed by a contract). TDSAT passed an order to return the '*quantum meruit*' claim, which was beyond 12% liquidated damages, since it was separately charged by MTNL without MTNL clearly establishing that it had suffered any losses warranting the '*quantum meruit*' claim. MTNL accordingly approached the Supreme Court to appeal the decision of the TDSAT.

Issues for consideration:

The Hon'ble Supreme Court of India ("Supreme Court") in this judgment analyzed if commitments resembling contractual commitments may be construed as a part of contract which already contains a provision regarding the breach of its terms. The Supreme Court analyzed if a claim

in '*quantum meruit*' would be allowable in the event the concerned parties have entered into a contract.

Held:

Chapter V of the Indian Contract Act, 1872 ("ICA") pertains to "certain relations resembling those created by contract". The aforesaid chapter pertains to circumstances where no contract exists between parties. The chapter contains provisions regarding duties arising comparable to a contract between the parties.

Chapter VI of the ICA however pertains to remedies in the event of breach of a contract, like damages that arise due to the breach. The chapter also covers penalties and compensation.

Section 70 of the ICA is under Chapter V of the ICA. It pertains to circumstances in which a non-gratuitous act by a person leads to the formation of commitments on another party who benefits as a result of such an act. Section 70 is not dissimilar to '*quantum meruit*'.

The Supreme Court, while analyzing Section 70 of the ICA relied on its previous decisions, in which it had held that Section 70 of the ICA does not apply to cases where there exists an express contract.

The Supreme Court accordingly held that the money subtracted by MTNL was a claim of '*quantum meruit' and such a claim was not maintainable due to the existence of the aforesaid purchase orders*. The remedy for breach of a contract is as per Section 74 of the ICA, which states that where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. The Supreme Court accordingly held that MTNL can claim only the sum stipulated in the purchase order.

[*Mahanagar Telephone Nigam Ltd.* v. *Tata Communications Ltd.* – AIR 2019 SC 1233]

Amendment to Section 148 of Negotiable Instruments Act has retrospective application

Key Points:

While considering the objects for the amendment to Section 148 of the Negotiable Instruments Act, 1881 ("NI Act") and the interpretation of Section 148 of the NI Act, the Supreme Court held that Section 148 of the NI Act as amended, shall be applicable in respect of appeals against the order of conviction and sentence for an offence under Section 138 of the NI Act, even in a case where the criminal complaints for the offence under Section 138 of the NI Act were filed prior to the amendment to the NI Act coming into force, i.e., September 01, 2018.

Brief facts:

Criminal complaints were filed against Surinder Singh and others ("Appellants") for an offence under Section 138 of the NI Act. The said criminal complaints were filed prior to August 02, 2018. The trial court had convicted the Appellants for an offence under Section 138 of the NI Act and sentenced them to undergo imprisonment of 2 years and to pay cheque amount + 1% as interest and litigation expenses as fine.

Feeling aggrieved and dissatisfied with the order of conviction passed by the learned trial court, the Appellants preferred criminal appeals before the first appellate court - learned Additional Sessions Judge, Panchkula. Feeling aggrieved by the order passed by the first appellate court, learned Additional Sessions Judge, Panchkula directing the Appellants to deposit 25% of the amount of compensation/fine awarded by the trial court, the Appellants approached the High Court of Punjab and Haryana by way of revision application/s.

The case of the Appellants was that Section 148 of the NI Act as amended (the aforesaid Section had been amended on September 01, 2019) shall not be applicable with respect to criminal proceedings already initiated prior to the amendment of the NI Act. The High Court of Punjab and Haryana turned down the said contention and upheld the order passed by the appellate court, Panchkula. This led to the appeal in the Supreme Court.

The aforesaid amendment proposed to amend the NI Act with a view to address the issue of undue delay in final resolution of cheque dishonour cases to provide relief to payees of dishonoured cheques and to discourage frivolous and unnecessary litigation which would save time and money. The Supreme Court held that the proposed amendments will strengthen the credibility of cheques and help trade and commerce in general by allowing lending institutions, including banks, to continue to extend financing to the productive sectors of the economy. New Section 148 in the NI Act seeks to provide the following: that in an appeal by the drawer against conviction under Section 138 of the NI Act, the appellate court may order the appellant to deposit such sum which a minimum of shall be twenty per cent of the fine or compensation awarded by the trial court.

Issue for consideration:

Whether Section 148 of the NI Act as amended shall be applicable with respect to criminal proceedings already initiated prior to the aforesaid amendment?

Held:

While considering the objects for the amendment to Section 148 of the NI Act and the interpretation of Section 148 of the NI Act, the Supreme Court held that Section 148 of the NI Act as amended, shall be applicable in respect of appeals against the order of conviction and sentence for an offence under Section 138 of the NI Act, even in a case where the criminal complaints for the offence under Section 138 of the NI Act were filed prior to the amendment coming into force, i.e. September 01, 2018.

The submission on behalf of the Appellants that amendment in Section 148 of the NI Act shall not be made applicable retrospectively and more particularly with respect to cases/complaints filed prior to September 01, 2018 shall not be applicable has no substance and cannot be accepted, as by amendment in Section 148 of the NI Act, no substantive right of appeal has been taken away and/or affected. The NI Act had been amended from time to time so as to provide, *inter alia*, speedy disposal of cases relating to the offence of the dishonoured of cheques. Due to delay tactics by the unscrupulous drawers of the dishonoured cheques due to easy filing of the appeals and obtaining stay in the proceedings, an injustice was caused to the payee of a dishonoured cheque who has to spend considerable time and resources in the court proceedings to realise the value of the cheque and having observed that such delay has compromised the sanctity of cheque transactions, the Parliament has thought it fit to amend Section 148 of the NI Act. Accordingly, such a purposive interpretation would be in furtherance of the objects and reasons of the amendment in Section 148 of the NI Act and also Section 138 of the NI Act.

Accordingly, the Supreme Court dismissed the appeal and upheld the judgment of the Punjab & Haryana High Court.

[*Surinder Singh Deswal and Ors.* v. *Virender Gandhi* - Criminal Appeal Nos. 917944 of 2019, decided on 29-5-2019, Supreme Court]

News Nuggets

International Arbitration Centre – Delhi High Court vacates its Stay Order

Delhi High Court has on 16-5-2019 allowed review petition filed against the stay earlier granted by it against New Delhi International Arbitration Centre Ordinance, 2019. Allowing the review, Court vacated the order staying operation of the order dated 2-3-2019 passed by Dy. Secretary, GoI. Relying on the Supreme Court decision in the case of *Krishan Kumar*, Court took into consideration material placed on record by Union of India to show that circumstances did exist making it necessary to take immediate action. It held that the act of the Union *prima facie* cannot be faulted with.

High Court to reappoint arbitrator if the one appointed earlier under Section 11(6) withdraws

Bombay High Court has held that once rights of party are forfeited regarding appointment of arbitrator, same does not resurrect if arbitrator appointed by the High Court under Section 11(6) withdraws. Court in *SAP India v. Cox and Kings* observed that substitution of arbitrator is postulated in combined reading of Sections 11, 14 and 15 of the Arbitration and Conciliation Act which mandates method of appointment as per which if Court had appointed arbitrator, on vacancy, court is to be approached. It observed that judicial recourse taken under Section 11(6) cannot be extinguished merely on vacancy of arbitral tribunal.

Arbitration – Section 34 amendments in 2015 are prospective

Supreme Court has reiterated that Arbitration s.34 as amended in 2015, will apply only to s.34 applications that have been made to the Court on or after 23-10-2015, irrespective of the fact that the arbitration proceedings may have commenced prior to that date. The Court in *Ssangyong Engineering v. NHAI* was of the view that even in cases where, for avoidance of doubt, something is clarified by way of an amendment, such clarification cannot be retrospective if the earlier law has been changed substantively.

Arbitration – International commercial arbitration – Jurisdictional error

Supreme Court has held that if an arbitrator is alleged to have wandered outside contract and dealt with the matters not allotted to him, this would be a jurisdictional error which could be corrected on the ground of 'patent illegality', which would not apply to international commercial arbitrations that are decided under Part II of the Arbitration Act. Court in *Ssangyong Engineering v. NHAI* observed that to bring in by backdoor grounds relatable to Section 28(3) to be matters beyond scope of submission to arbitration under Section 34(2)(a)(iv) would not be permissible.

Arbitration award upholding unilateral alteration to contract, wrong

The Supreme Court has set aside majority arbitral award observing that unilateral addition/alteration of a contract was foisted

upon, which is contrary to ethos of Section 34 of the Arbitration and Conciliation Act, 1996Supreme Court in *Ssangyong Engineering v. NHAI* held that majority award created a new contract by applying a workable formula under agreement by another formula. It held that a circular unilaterally issued by a party cannot bind the other. Supreme Court invoked power under Article 142 of the Constitution and upheld the minority award that which awarded the appellant its claim based upon the formula mentioned in the agreement between the parties.

Arbitration – Section 2(1)(e) Court can have territorial jurisdiction for enforcement

Clarifying Supreme Court decision in *Sundaram Fasteners*, the Bombay HC has held that its ratio does not operate to strip the Section 2(1)(e) Court of its jurisdiction but only says that a successful claimant is not compelled to come to said Court only to then have to detour to a local court for enforcement. It held that Bombay High Court has jurisdiction to execute the award. Court in *Global Asia Venture v. Arup Parimal* observed that Section 36 of the Arbitration and Conciliation Act which uses language that equates an award with a decree cannot be divorced from its legislative intent.

Landing of notice even in junk folder of email is service of notice

NCLAT has held that service of notice *via* email which landed in the junk folder of the corporate debtor cannot be an excuse to admit that notice was not served properly. NCLAT in *Amanpreet Singh Bawa v. Kandla Inter. Container Terml.* held there was no infirmity in NCLT order regarding admission of application under Section 9 of IBC. Tribunal found indisputable that service through email is legally recognized mode of service. It noted that fact that corporate debtor claimed that it would have settled demand had it noticed email shows that default was not disputed.

Insolvency – Computation of 270 days – Exclusion of time for change of Resolution Professional

NCLAT has set aside the NCLT order of liquidation and one not allowing application by Resolution Professional (RP) for exclusion of time elapsed on account of replacement of the RP. Tribunal in *Daiyan Ahmed Azmi v. Rekha Kantilal Shah* thus excluded 35 days for counting period of 270 days so as to ensure 'successful resolution process' in terms of Section 12A of the IBC. It directed the RP to conduct CoC meeting immediately and stated that if CoC did not accept the application in terms of Section 12A with 90% voting shares, then only, NCLT will pass order for liquidation.

Insolvency – Taking over of assets – DRAT not powerless to modify its own order

Setting aside the Debt Recovery Appellate Tribunal's Order and recalling the appointment of the two Court Commissioners who took over control of the assets of the corporate debtor, as directed by the DRAT earlier, Delhi High Court has observed that the DRAT was not powerless to modify its own order. Court in *Amira Pure Foods v. Canara Bank* upheld the plea that since the Insolvency Resolution Professional has been appointed by NCLT, it is in the interest of the corporate debtor that its assets are managed efficiently by IRP.

NEW DELHI
5 Link Road, Jangpura Extension,
Opp. Jangpura Metro Station,
New Delhi 110014
Phone : +91-11-4129 9811

B-6/10, Safdarjung Enclave
New Delhi -110 029
Phone : +91-11-4129 9900
E-mail : lsdel@lakshmisri.com

MUMBAI
2nd floor, B&C Wing,
Cnergy IT Park, Appa Saheb Marathe Marg,
(Near Century Bazar)Prabhadevi,
Mumbai - 400025
Phone : +91-22-24392500
E-mail : lsbom@lakshmisri.com

CHENNAI
2, Wallace Garden, 2nd Street
Chennai - 600 006
Phone : +91-44-2833 4700
E-mail : lsmds@lakshmisri.com

BENGALURU
4th floor, World Trade Center
Brigade Gateway Campus
26/1, Dr. Rajkumar Road,
Malleswaram West, Bangalore-560 055.
Ph: +91(80) 49331800
Fax:+91(80) 49331899
E-mail : lsblr@lakshmisri.com

HYDERABAD
'Hastigiri', 5-9-163, Chapel Road
Opp. Methodist Church,
Nampally
Hyderabad - 500 001
Phone : +91-40-2323 4924
E-mail :lshyd@lakshmisri.com

AHMEDABAD
B-334, SAKAR-VII,
Nehru Bridge Corner, Ashram Road,
Ahmedabad - 380 009
Phone : +91-79-4001 4500
E-mail : lsahd@lakshmisri.com

PUNE
607-609, Nucleus, 1 Church Road,
Camp, Pune-411 001.
Phone : +91-20-6680 1900
E-mail :lspune@lakshmisri.com

KOLKATA
2nd Floor, Kanak Building
41, Chowringhee Road,
Kolkatta-700071
Phone : +91-33-4005 5570
E-mail : lskolkata@lakshmisri.com

CHANDIGARH
1st Floor, SCO No. 59,
Sector 26,
Chandigarh -160026
Phone : +91-172-4921700
E-mail :lschd@lakshmisri.com

GURGAON
OS2 & OS3, 5th floor,
Corporate Office Tower,
Ambience Island,
Sector 25-A,
Gurgaon-122001
phone: +91-0124 - 477 1300
Email: lsgurgaon@lakshmisri.com

ALLAHABAD
3/1A/3, (opposite Auto Sales),
Colvin Road, (Lohia Marg),
Allahabad -211001 (U.P.)
phone . +91-0532 - 2421037, 2420359
Email:lsallahabad@lakshmisri.com