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By **Aishwarya Narasimhan**

While the inclusion of interest amounts in 'financial debt', for the purposes of the Insolvency and Bankruptcy Code, 2016, is clearly provided for, the interest component in the case of 'operational debt' has always been a point of contention. Pointing out that there appears to be a deliberate difference in the language used for both terms – 'financial debt' and 'operational debt', the article also discusses many specific judgments of NCLT and NCLAT, delivered on the aforesaid quandary. It points out that the lack of an agreement amongst the parties for the liability of interest is an important reason for not awarding the interest amount as claimed by the operational creditor under a Section 9 application. Observing that an application only for recovery of an interest amount shall negate the intention of the lawmakers of the IBC and so it is not desired, the author notes that hence the interest amount alone cannot be claimed as a right, even when the documentation/ agreement between the parties with respect to liability of interest is proper and clear. According to her, this also seems to be so even when statutory interest is imposable, such as under the Micro Small and Medium Enterprises Development Act, 2006.

Interest as part of Operational Debt: A conundrum

By Aishwarya Narasimhan

While the inclusion of interest amounts in 'financial debt', for the purposes of the Insolvency and Bankruptcy Code, 2016 ('**IBC**'), is clearly provided for in the IBC, the interest component in the case of operational debt has always been a point of contention.

Definition of the term 'financial debt'[1] under Section 5(8) of the IBC expressly includes the term 'interest' to be a part of the debt that can form a part of the claim against the corporate debtor. However, the definition of the term 'operational debt'[2] under Section 5(21) of the IBC does not specifically mention the term 'interest' to be included as a part of the debt. There appears to be a deliberate difference in the language used for both terms. Accordingly, the understanding between the parties over levy of interest plays a key role while computing the amount of 'operational debt'.

Let us look at some specific judgments delivered on the aforesaid quandary below.

In the case of *Wanbury Ltd.* v. *Panacea Biotech Ltd.* (2017), the National Company Law Tribunal ('**NCLT**'), Chandigarh Bench, held that since there is no express agreement between the parties with respect to imposition of interest on delayed of payments, interest cannot be claimed by the operational creditor. Likewise, it was also held in *Swastik Enterprises* v. *Gammon India Limited* (2018) that since the applicant had not submitted any substantial document evidencing an agreement for the levy of interest, interest could be claimed. The National Company Law Appellate Tribunal ('**NCLAT**'), in the case of *SS Polymers* v. *Kanodia Technoplast Limited* (2019), confirmed the stance that interest cannot be claimed as a matter of right when there is no agreement between the parties for the same. Another point worth noting in the same case is that it was also observed by NCLAT that when the principal amount has been paid in full, an application under Section 9 of the IBC cannot be filed just for the claim of interest amount, since it goes against the very principles of the IBC. More recently, the NCLAT, in *Rohit Motawat* v. *Madhu Sharma, Propreitor Hind Chem Corporation & Anr.* (2023), has reiterated that the operational creditor cannot claim interest amount in cases where the principal amount has been paid in full by the corporate debtor and the application under Section 9 of the IBC is being filed only for the interest amount. It was also observed by the NCLAT in this latest judgment that interest cannot be claimed when the document evincing the agreement for interest has been signed by a single party (in said case, being invoices issued by the operational

[1] (8) "financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes –
(a) money borrowed against the payment of interest;
.....

[2] (21) "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority

creditor to the corporate debtor). This means that it is now necessary for an agreement to be explicitly accepted/signed by both the parties for it to have a validity for payment of interest.

Statutory imposition of interest on operational debt:

There are certain statutes that require imposition of interest. For instance, Section 16[3] of the Micro Small and Medium Enterprises Development Act, 2006 ('**MSMED Act**') directs for mandatory levy of interest on delayed payments by a buyer of goods/services, and the period of delay itself is fixed under said statute after the expiry of which interest is automatically due.

While deciding the fate of operational creditors claiming interest amounts due in terms of the MSMED Act, the NCLT Mumbai in *Govind Sales* v. *Gammon India* (2019) held that since the parties did not have a valid agreement stipulating an interest liability, it cannot be claimed by the operational creditor. It should be noted that such a view was taken even though the MSMED Act specifically states that interest shall be paid on delayed payments whether there is an express agreement or not to that effect. Prior to this case, it was also observed in the case of *Teknow Consultants & Engineers Pvt. Ltd.* v. *Bharat Heavy Electricals Limited* (2017) by NCLT Delhi that interest cannot be claimed due to lack of proper agreement between the parties, in the same scenario. However, in said case, there was also a contention with the registration status of the operational creditor as an MSME, in response to which the NCLT advised that the correct forum for the claims shall be the Micro and Small Enterprises Facilitation Council ('**MSEFC**'). Therefore, the point of law remains unsettled in the absence of confirmation from a higher forum.

Nevertheless, it should not be difficult to gauge from the aforementioned judgments that the lack of an agreement amongst the parties for the liability of interest is an important reason for not awarding the interest amount as claimed by the operational creditor under a Section 9 application. However, what is also equally noteworthy is that irrespective of the stance taken, the authorities have time and again mentioned the fact that the processes under IBC should be availed for insolvency resolution and not for recovery of debt. That is to say that an application only for recovery of an interest amount shall negate the intention of the lawmakers of the IBC and so it is not desired. This gives rise to a proposition that the interest amount alone cannot be claimed as a right, even when the documentation/ agreement between the parties with respect to liability of interest is proper and clear. This also seems to be so even when statutory interest is imposable, such as under the MSMED Act.

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[3] 16. Where any buyer fails to make payment of the amount to the supplier, as required under section 15, the buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, be liable to pay compound interest with monthly rests to the supplier on that amount from the appointed day or, as the case may be, from the date immediately following the date agreed upon, at three times of the bank rate notified by the Reserve Bank.

Notifications & Circulars

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- Services engaged in the Iron Ore Mining to be public utility services
- Norms for Scheme of Arrangement by unlisted Stock Exchanges, Clearing Corporations and Depositories notified
- Extension in compliance period of fund raising by large corporates through issuance of debt securities notified
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- Framework for contribution by eligible issuers of debt securities to the Settlement Guarantee Fund of the Limited Purpose Clearing Corporation for repo transactions in debt securities notified

Authorised Dealers Category II - Online submission of Form A2

The Reserve Bank of India (RBI) *vide* its Circular A.P. (DIR Series) Circular No. 02 dated 12 April 2023 has permitted the AD Category-II entities to also allow online submission of Form A2 under the Compilation of R-Returns: Reporting under Foreign Exchange Transaction Electronic Reporting System (FETERS) in terms of which, previously only the AD Category-I banks, offering internet banking facilities to their customers were permitted to allow online submission of Form A2. For this purpose, the AD Category-II entities shall be required to frame appropriate guidelines with the approval of their Board within the ambit of extant regulatory framework. Further, the terms and conditions mentioned in the Circular A.P. (DIR Series) Circular No. 50 dated 11 February 2016, and the relevant provisions of FEMA 1999, and 'Master Direction – Know Your Customer (KYC) Direction, 2016' as updated from time to time shall be applicable to all the authorised dealers.

Framework for acceptance of Green Deposits notified

The Reserve Bank of India (RBI) *vide* its notification DOR.SFG.REC.10/30.01.021/2023-24 dated 11 April 2023 has notified the framework for acceptance of 'Green Deposits' by regulated entities. The provisions of said framework shall be applicable to Scheduled Commercial Banks including Small Finance Banks (excluding Regional Rural Banks, Local Area Banks and Payments Banks) and all Deposits taking Non-Banking Financial Companies ('**NBFCs**') registered with the RBI under clause (5) of Section 45IA of The Reserve Bank of India Act, 1934, including Housing Finance Companies (HFCs) registered under Section 29A of The National Housing Bank Act, 1987, which will be collectively referred to as Regulated Entities ('**REs**'). The framework shall come into effect from 1 June 2023. Some of the important provisions under the framework are as follows:

- The Green Deposits shall be denominated in Indian Rupees (INR) only.
- The REs shall be required to put in place a comprehensive board-approved policy on green deposits detailing all aspects for their issuance and allocation
- The allocation of proceeds raised from the green deposits shall be based on the official Indian green taxonomy. However, until the taxonomy is finalised, the REs shall be required to allocate the proceeds raised through green deposits towards sectors such as renewable energy, energy efficiency, clean transportation amongst others mentioned in the framework
- The allocation of funds raised through green deposits by REs during a financial year shall be subject to an independent Third-Party Verification/Assurance which shall be done on an annual basis
- A review report shall be placed by the RE before its Board of Directors within three months of the end of the financial year; and
- REs shall make appropriate disclosures in their Annual Financial Statements on the portfolio-level information regarding the use of the green deposit funds.

Services engaged in the Iron Ore Mining to be public utility services

The Central Government through the Ministry of Labour and Employment, *vide* Notification S.O.1711(E) dated 13 April 2023 has extended the 'public utility service' status to the services engaged in Iron Ore Mining, which is covered under Item 16 of the First Schedule to the Industrial Disputes Act, 1947 ('**ID Act**'). The services engaged in Iron Ore Mining are now to be a public utility service for the purposes of the ID Act for a period of six months with effect from 14 April 2023.

Norms for Scheme of Arrangement by unlisted Stock Exchanges, Clearing Corporations and Depositories notified

The Securities and Exchange Board of India (SEBI) *vide* SEBI/HO/MRD/MRD-PoD-3/P/CIR/2023/45 dated 28 March 2023 has notified certain norms for the unlisted Market Infrastructure Institutions ('**MIIs**'), such as Stock Exchanges, Clearing Corporations and Depositories, desirous of undertaking scheme of arrangements or already involved in scheme of arrangements. The framework for such governance is as follows:

- The MIIs shall file the draft scheme of arrangement along with a non-refundable fee with SEBI in order to obtain an observation letter or no-objection letter before filing such scheme with any Court or Tribunal.
- The fees payable shall be 0.1% of the paid-up share capital of the unlisted or transferee or resulting company, whichever is higher, post sanction of the proposed scheme, upto a maximum of INR 5,00,000/- (Rupees Five Lakh Only).
- If the scheme is just a merger of a wholly owned subsidiary or its division with the parent company, these provisions shall not be applicable. However, such draft schemes shall have to still be filed with SEBI for the purpose of disclosures and the same shall be disseminated on the websites of the unlisted MII.
- In addition, the MIIs shall be required to submit other information such as board's approval, valuation report, audit committee report, information regarding litigations/proceedings etc.
- Upon receipt of application from the MIIs, SEBI shall endeavour to provide its observation or no-objection letter within 30 days.
- The observation letter or no-objection letter shall be valid for a period of 6 months from the date of issuance.

Extension in compliance period of fund raising by large corporates through issuance of debt securities notified

The Securities and Exchange Board of India (SEBI) *vide* SEBI/HO/DDHS/DDHS-RACPOD1/P/CIR/2023/049 dated 31 March 2023 has notified that the provision under Chapter XII of Non-Convertible Securities (NCS) Operational Circular on 'Fund raising by issuance of Debt Securities by Large Corporates', that mandates large corporates to raise minimum 25% of their incremental borrowings in a financial year through issuance of

debt securities and which further has to be met over a contiguous block of two years, is now amended to be met over a contagious block of three years.

Guidelines with respect to excusing or excluding an investor from an investment of AIF notified

The Securities and Exchange Board of India (SEBI) *vide* Circular No. SEBI/HO/AFD-1/PoD/P/CIR/2023/053 dated 10 April 2023 has notified certain guidelines for when an investor can be excluded from an participating in an investment of the Alternative Investment Fund (AIF). Accordingly, in the following situations, an investor may be excused or excluded from participating:

- If the investor, based on the opinion of a legal professional, confirms that its participation in the investment would be in violation of any applicable law; or
- If the investor, as part of contribution agreement or any other agreement signed with the AIF, had disclosed to the manager that, participation of the investor in such investment would be in contravention to the internal policy of the investor.
- An AIF may itself exclude an investor from participating in a particular investment, if the manager of the AIF is satisfied that the participation of such investor in the investment would lead to the scheme of the AIF being in violation of applicable law or it would result in material adverse effect on the scheme of the AIF.
- In case the investor of any AIF is also an AIF itself, such investor may be partially excused or excluded from participation in an investment, to the extent of the contribution of the said fund's underlying investors who are to be excused or excluded from such investment opportunity.

Framework for contribution by eligible issuers of debt securities to the Settlement Guarantee Fund of the Limited Purpose Clearing Corporation for repo transactions in debt securities notified

The Securities and Exchange Board of India (SEBI) *vide* Circular No. SEBI/HO/DDHS/DDHS-RACPOD1/CIR/P/2023/56 dated 13 April 2023 has notified a framework for upfront collection of amounts as charges from eligible issuers at the time of allotment of debt securities. Accordingly,

- The eligible issuers shall be notified by the Limited Purpose Clearing Corporation (LPCC) as per its risk management policy.
- An amount of 0.5 basis points of the issuance value of debt securities per annum based on the maturity of the debt securities shall be collected by the stock exchanges and the same shall be placed in an escrow account prior to the

allotment of the debt securities. This amount shall be applicable in cases of a public issue or private placement of debt securities under the SEBI (Issue and Listing of Non-convertible Securities) Regulations, 2021.

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- Pursuant to the same, the stock exchanges shall transfer the collected amounts to the bank account of the LPCC within 1 working day from the receipt of such amount and inform the details of the same to the LPCC. These details shall also be disclosed on the website of the stock exchanges.

Ratio Decidendi

- No bar under IBC against continuation of Section 138 proceedings under Negotiable Instruments Act, 1881 parallel to CIRP proceedings – Supreme Court
- Once a resolution plan is approved by the Committee of Creditors, no modifications are permissible – Supreme Court
- MSMED Act being a special legislation would have precedence over general law, but it would not eclipse and nullify the jurisdiction clause agreed upon between the parties – Delhi High Court

No bar under IBC against continuation of Section 138 proceedings under Negotiable Instruments Act, 1881 parallel to CIRP proceedings

The Supreme Court, in a Criminal Appeal, has settled the understanding the scope of the proceedings undertaken under the Negotiable Instruments Act, 1881 ('**NIA**') and the Insolvency and Bankruptcy Code, 2016 ('**IBC**') is quite different and that the two Acts would not intersect with each other. The Court was of the view that the proceedings that have to be kept in abeyance under Section 14 of the IBC do not include criminal proceedings, such as the proceedings under Section 138 of the NIA. The Apex Court, thus, rejected the plea that because Section 138 of the NIA proceedings arise from a default in debt, the proceedings under Section 138 should be taken as akin to civil proceedings rather than criminal proceedings.

Brief facts:

M/s. Rainbow Papers Limited ('**Corporate Debtor**'/ '**Company**') sought loans from a public financial institution, Tourism Finance Corporation of India Limited ('**Respondent**') to fulfil its various corporate requirements. Later, a post-dated cheque of INR 25,47,945/- was issued by the Appellant towards the instalment of the loan, which was returned by the concerned Banker citing the reason of "Account Closed". Thereafter, the Respondent issued a notice under Section 138 of the NIA and proceedings were initiated before the jurisdictional Metropolitan Magistrate Court. Meanwhile, an application under Section 9 of the IBC for initiation of Corporate Insolvency Resolution Process (CIRP) was admitted against the Corporate Debtor, and accordingly, the moratorium in terms of Section 14 of the IBC came into effect. Thereafter, the Respondent filed its claim before the Resolution Professional, which was also the subject matter of NIA.

Meanwhile, the Magistrate Court opined that the proceedings under Section 138 of the NIA could be continued, inspite of the initiation of the CIRP proceedings. The application for discharge filed by the Appellant, being the signatory of the cheque on behalf of the Corporate Debtor, before said Court was dismissed and subsequently the Criminal Revision Petition was also dismissed. Hence the present appeal challenging the order passed by the High Court was filed before the Apex Court.

Contentions of the Appellant:

- It was submitted that the trigger of Section 138 of the NIA, is the non-payment of legally enforceable debt. Once the debt is extinguished, either under Section 31 of the IBC or in the process from Sections 38 to 41 and 54 of IBC, the basis of Section 138 of the NIA disappears.
- It was argued that the nature of the proceedings under Section 138 of the NIA is primarily compensatory, and the punitive element is incorporated into enforcing the compensatory provisions. Therefore, once recovery is made partly by the receipt of money and partly by waiver, Section 138 of the NIA should not be permitted to be continued.
- Further, it was stated that if the debt of the company is resolved, then the payment would be governed under the

Resolution Plan. If the debts are not resolved, then the assets of the company are to be distributed in terms of Section 53 of the IBC.

Contentions of the Respondent:

- It was contended that the Appellant, on behalf of the Corporate Debtor, deliberately and with *mala fide* intention gave the cheque to defraud the Respondent to take a loan from it, and subsequently usurp the loan amount, and it was only because of this that it closed the bank account after issue of the cheque. The Appellant, being the signatory, was directly liable along with the Corporate Debtor/ accused company.
- It was submitted that none of the provisions of the IBC bar the continuation of criminal prosecution initiated against the corporate debtor and/ or their directors or officials.

Decision:

The Hon'ble Supreme Court, in order to decide that there shall be no bar under IBC against the continuation of the criminal proceedings under a different legislation, went into length to discuss second proviso of Section 32A(1) of the IBC, which provides that an officer who is default or was in any manner in charge of, or responsible to the corporate debtor for the conduct of its business shall continue to be liable to be prosecuted and punished for such an offence committed by the corporate debtor notwithstanding that the corporate debtor's liability has ceased under this sub-section. The Court relied on *P. Mohanraj and Others* v. *Shah Brothers Ispat Private Limited* (2021) to hold that Section 32A only protects the corporate debtor and not the signatories/directors etc. It was held that the prosecution against the signatories/directors would continue. The court established that the first proviso, which discharges the corporate debtor from any liability once the resolution plan is approved, establishes the clean slate doctrine according to which there shall be total extinguishment of criminal liability of the corporate debtor once the new management enters. It was held that, however, this does not exclude the criminal liability of any officer in default or responsible person as per second proviso. Accordingly, the court held that the moratorium period only casts a shadow on the criminal proceedings under Section 138 of the NIA and upon approval of resolution plan, the proceedings that had already commenced with the Magistrate Court shall continue and if the company gets dissolved, the signatories/directors cannot escape from their penal liability under Section 138 of the NIA by citing its dissolution. It was observed that what is dissolved, is only the company, not the personal penal liability of the accused covered under Section 141 of the NIA. [*Ajay Kumar Radhey Shyam Goenka* v. *Tourist Finance corporate India Ltd.* – Judgment dated 15 March 2023 in Crl.A. No.-000172-000172 / 2023, Supreme Court]

Once a resolution plan is approved by the Committee of Creditors, no modifications are permissible

The Supreme Court has held that once the Committee of Creditors ('**CoC**') approves a resolution plan, no modifications are permissible. The National Company Law Tribunal ('**NCLT**) had declared Deccan Chronicle Holdings Private Limited ('**Corporate Debtor**') to be the owner of the trademarks 'Deccan Chronicle' and 'Andhra Bhoomi' (collectively '**Trademarks**'), even

though the approved resolution plan only vested the perpetual right to use the Trademarks with no ownership with the Corporate Debtor, which was set aside by the NCLAT. On appeal, the Supreme Court thus held that declaring Corporate Debtor as the owners of the Trademarks amounts to modification of the approved resolution plan which is not permissible.

Brief facts:

In the instant case, the Appellant was a Successful Resolution Applicant ('**SRA**') of the Corporate Debtor, whose Resolution Plan was approved by the CoC by 81.39% voting share. Thereafter, it was conditionally approved by the NCLT. The approval by NCLT was conditional subject to the outcome of an Interim Application ('**IA**') which was filed for the declaration of the ownership of Trademarks in favour of the Corporate Debtor. Subsequently, the NCLT in the aforementioned IA held that the Corporate Debtor has ownership over the Trademarks along with the exclusive right to use them. This order was challenged before National Company Law Appellate Tribunal ('**NCLAT**') wherein the order of NCLT was set side and it was held that the declaration made by NCLT with respect to the ownership of Trademarks amounts to modification/alteration of the approved resolution plan by CoC, which is not permissible. It was further held that such modifications amount to transgression of the jurisdiction of NCLT. The SRA/ Appellant, being dissatisfied with the judgement of NCLAT, filed the present appeal.

Contentions of the SRA/Appellant:

- It was submitted that the NCLAT had misinterpreted certain clauses of the Resolution Plan which categorically stated that the Appellant holds unfettered and exclusive rights to the Trademarks without any financial implications, and with these unforeseen commercial consequences, if it only reserves the right to use the trademark, the resolution plan is a non-starter.
- It was submitted that the NCLT order in the IA is nothing but the approval of the resolution plan, and the finding of NCLAT that it amounts to alteration of the approved resolution plan is a manifest error and needs to be interfered by the Supreme Court.

Contentions of the Respondent:

- It was submitted that the Resolution Plan, particularly, with reference to the right to trademarks was only confined to the perpetual exclusive right to use the Trademarks, without any financial implications for the purpose of running its business. Accordingly, the act of bestowing ownership of the Trademarks to the Respondent, by way of the order in the IA, amounts to alteration or modification of the approved resolution plan, which was outside the scope of Section 60(5) or Section 238 of the Insolvency and Bankruptcy Code, 2016 ("IBC').
- It was submitted that declaration of title over a trademark by NCLT is impermissible in law and such declaration could only be claimed by the aggrieved person under Section 134 of the Trademarks Act, 1999.

Decision:

The Hon'ble Supreme Court observed that the resolution plan approved by the CoC vested only the perpetual right to the exclusive use of Trademarks and it nowhere indicated that the

Corporate Debtor would have ownership over the Trademarks. It was held that, hence, the NCLT transgressed its jurisdiction when it went on to adjudicate the ownership of the Trademarks, which effectively amounted to alteration/modification of the approved resolution plan. The Supreme Court in this case relied on its earlier judgment in the case of *Ebix Singapore Private Limited* v. *Committee of Creditors of Educomp Solutions Limited & Another* (2022) to hold that withdrawal or modification of the approved resolution plan is impermissible. The Court clarified that once the resolution plan stands approved, no alterations/modifications are permissible. It was held that the plan is either to be approved or disapproved, but the plan, after approval of the Resolution Plan by the CoC based on its commercial wisdom, is not open for judicial review, unless it is found to be not in conformity with the mandate of the IBC. [*SREI Multiple Asset Investment Trust Vision India Fund* v. *Deccan Chronicle Marketeers & Others* – Judgment dated 17 March 2023, Civil Appeal No (S).1706 of 2023, Supreme Court]

MSMED Act being a special legislation would have precedence over general law, but it would not eclipse and nullify the jurisdiction clause agreed upon between the parties

The Hon'ble Delhi High Court has held that the statutory arbitration under the Micro, Small and Medium Enterprises Development Act, 2006 ('**MSMED Act**') would override the dispute resolution clause agreed between the parties by operation of Section 18 of the MSMED Act. It was held that, however, once the arbitration award is made, and there is an exclusionary clause of jurisdiction agreed upon between the parties, the challenge to the award will lie only before the Court upon which the parties agreed to place exclusive jurisdiction.

Brief facts:

The Respondent was registered under the provisions of the MSMED Act. Pursuant to the non-payment against a purchase order for supply by the Appellant, the Respondent had lodged its claim/ referred with dispute with the Micro and Small Enterprises Facilitation Council (Facilitation Council), at Kanpur. The conciliation process failed, whereafter the matter was referred to arbitration. Subsequently, the Facilitation Council passed an award in favour of the Respondent. Said award was challenged by the Appellant before the District Judge at Karkardooma, Delhi, under Section 34 of the Arbitration and Conciliation Act, 1996 ("ACA") since the agreement between the parties gave exclusive jurisdiction over disputes to Courts in Delhi. The District Court dismissed said petition on the ground of lack of jurisdiction stating that the Courts in Kanpur shall have the jurisdiction to entertain a challenge against the award rendered by the Facilitation Council at Kanpur, as per Section 19 of the MSMED Act. Thereafter, the Appellant preferred the present appeal before the Hon'ble High Court.

Contentions of the Appellant:

- Relying on the judgment of *Gujarat State Civil Supplies Corporation Ltd.* v. *Mahakali Foods Pvt. Ltd. (Unit 2) and Another* (2022), the Appellant contended that the MSMED Act overrides the agreement only with respect to the conduct of proceedings and does not affect the jurisdiction of the Courts in Delhi to entertain a challenge against the arbitral award under Section 34 of the ACA, as the parties

have agreed to provide the exclusive jurisdiction to the Courts in Delhi in the agreement.

- It was submitted that the interpretation by the District Court to hold that Section 19 of the MSMED Act does not grant territorial jurisdiction is without any basis and suffers from a flaw of interpretation. In this context, the Appellant submitted that the words 'any court' inserted by Section 19 of the MSMED Act is not a surplusage.

Contentions of the Respondent:

- It was submitted that since the Respondent is located in Kanpur and the Facilitation Council rendered the award at Kanpur, the seat of arbitration would be Kanpur. Hence, any challenge against an award passed must also be preferred before the Courts at Kanpur.
- It was submitted that for the cause of action, having arisen in the jurisdiction of Kanpur, the courts of Kanpur which will have the jurisdiction to entertain the challenges against the arbitral award.

Decision:

It was held by the Court that the challenge initiated by the aggrieved party under the ACA will lie only before the court in which the parties have agreed to place exclusive jurisdiction, even if it is against an award made by the Facilitation Council of another region under the MSMED Act. The Hon'ble High Court relied upon the judgment of the Division Bench of the High Court in the case of *Indian Oil Corporation Ltd.* v. *FEPL Engineering (P) Ltd. & Ors.* (2019), wherein it was held that the jurisdiction of Facilitation Council, which is decided on the basis of the location of the supplier, would determine the 'Venue', and not the 'seat' of arbitration. Therefore, the place/ seat of arbitration for the purpose of entertaining a challenge to an arbitral award continues to be the place in which the concerned Court has been conferred with exclusive jurisdiction, as agreed between the parties. The High Court in this regard expressed disagreement with the recent judgment of a Single Judge of Delhi High Court dated 30 January 2023, in the case of *Ahluwalia Contracts (India) Ltd.* v. *Ozone Research & Applications (I) Pvt. Ltd. and Ors.* (2023), wherein it was held that the seat of the arbitration will be the place where the Facilitation Council is situated.

The Court further held that the MSMED Act, despite being a special legislation, would only obliterate the procedure for the constitution of the Arbitration Tribunal, as held in the case of *Gujarat State Civil Supplies Corporation Ltd.* v. *Mahakali Foods Pvt. Ltd. and Anr.* (2022). It was held that the same does not eclipse and nullify the jurisdiction clause agreed upon between the parties. It means, post-rendering of the arbitral award by the Facilitation Council, the exclusive jurisdiction clause entered between the parties shall not be affected.

Keeping in mind the above the High Court set aside the impugned order of Ld. District Court rejecting the petition filed under Section 19 of the MSMED Act and Section 34 of the ACA. It further directed that the District Court restore the petition and adjudicate the matter on merits in accordance with law. [*IRCON International Limited* v. *Pioneer Fabricators Pvt. Ltd.* – Judgment dated 27 March 2023, FAO (COMM) 200 of 2022, Delhi High Court]

News Nuggets

- Insolvency – Minimum threshold limit of default – Date of filing and not date of registration of petition is important
- Insolvency – No scope of condonation of delay beyond 15 days under Section 61 of IBC
- Arbitration – Limitation period starts once there is failure in amicable settlement of the dispute
- Arbitration – Arbitral Tribunal's order rejecting the application for impleadment of a party is not an 'interim award' and cannot be challenged u/s. 34 of the Act

Insolvency – Minimum threshold limit of default – Date of filing and not date of registration of petition is important

While dealing with an appeal filed against the order of rejection of an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 ('**IBC**'), the National Company Law Appellate Tribunal, Principal Bench, New Delhi ('**NCLAT**') held that the requirement of threshold limit for filing an application under the IBC should be considered for the date on which the application was filed and not on the date on which the petition got registered. In the case of *Royal Manpower Services* v. *Faridabad Autocomp System Pvt. Ltd*. [Judgment dated 6 April 2023], the Appellant had challenged the order of NCLT which had rejected the application under Section 9 of the IBC stating that when the petition was up for registration, the minimum default under IBC was INR 1 crore and since the default amount under said petition was below the minimum stipulated amount, it could not be admitted. The NCLAT while setting aside said order of NCLT held that the petition was filed in 2019, when the minimum default amount was INR 1 lakh only, and therefore, even if the petition came up for registration only in 2021 when the minimum default amount was amended to be INR 1 crore, taking the date of filing the petition into consideration, the application was maintainable.

Insolvency – No scope of condonation of delay beyond 15 days under Section 61 of IBC

While adjudicating an appeal filed in *Diwakar Sharma* v. *Anand Sonbhadra* [Judgment dated 28 March 2023], the National Company Law Appellate Tribunal, Principal Bench, New Delhi ('**NCLAT**') has held that it has no jurisdiction for condonation of delay beyond 15 days as prescribed under the Insolvency and Bankruptcy Code, 2016 ('**IBC**'). NCLAT placed reliance on *National Spot Exchange Limited* v. *Mr. Anil Kohli,* (2021) wherein the Hon'ble Supreme Court had held that when statutory provisions provide that delay beyond 15 days in preferring the appeal is non-condonable, the same cannot be condoned. The NCLAT also observed that Section 61(2) of the IBC also provides for a condonation of delay in filing appeal with a proviso that the delay can be further condoned for a maximum of 15 days only on showing sufficient cause. It was noted that, however, there is no window for further extension of condonation of delay beyond the said 15-day period and accordingly, it was held that there is no scope for NCLAT to do the same.

Arbitration – Limitation period starts once there is failure in amicable settlement of the dispute

The Calcutta High Court has held that the period of limitation shall start from the date it is clear that any further attempts of amicable settlement of the dispute by the parties would be a futile exercise and only lead to delay in settlement. In this case, Bharat Heavy Electricals Limited ('**Respondent**') issued a works contract in favour of Zillon Infraprojects Pvt. Ltd. ('**Petitioner**') in October 2010. Subsequently, disputes arose between the parties. From 2013 to 2017, the parties shared several email communications regarding their contentions, however, due to futile attempts, the Petitioner invoked the arbitration clause contained in the contract, and approached the Hon'ble High Court for appointment of an arbitrator. The court, in the case of

Zillon Infraprojects Pvt. Ltd. v. *BHEL* [Judgment dated 29 March 2023], held that even though the initial cause of action arose in 2013, subsequently, the parties struggled for amicable settlement and only upon failure of which the Petitioner invoked arbitration in January 2019. The court, relied on *Geo Miller & Company Private Ltd.* v. *Rajasthan Vidyut Utpadan Nigam Ltd.*, (2019), which held that in order to determine the start of limitation, it is necessary to consider the negotiation history and accordingly fix a breaking point which would be treated as the date on which the cause of action arose, for the purpose of limitation. Therefore, in the present case, January 2019 (date for issue of arbitration notice) and July 2021 (date for filing of Section 11 petition for appointment of arbitrator) were held as the breaking points in this case and it was held that the case can be referred to arbitration, being within the limitation period.

Arbitration – Arbitral Tribunal's order rejecting the application for impleadment of a party is not an 'interim award' and cannot be challenged u/s. 34 of the Act

While deciding an appeal from the order of a Single Judge Bench of the Delhi High Court, the Division Bench of the Court has held that an order of an arbitral tribunal rejecting the application for impleadment of a third party shall not be considered as an interim award which can be challenged under Section 34 of the Arbitration and Conciliation Act, 2015 ('**A&C Act**'). In the case of *Goyal MG Gases Pvt Ltd* v. *Panama Infrastructure Developers Pvt Ltd & Ors.* [Judgment dated 29 March 2023], the Division Bench while relying on *Chrolo Controls India Pvt Ltd* v. *Severn Trent Water Purification Inc. & Ors.* (2012) and *Rhiti Sports Management Pvt. Ltd.* v. *Power Play Sports & Events Ltd.* (2018), held that a party who is a non-signatory to the agreement can be impleaded as a necessary party in the arbitration proceedings, but that any order passed considering the same must be deciding a substantive dispute between the parties. It was held by the Court that only the orders passed by an arbitral tribunal that decide 'matters of moment' or dispose of any substantial claims raised by the parties to the agreement shall constitute an 'interim award'. In the present case, the sole arbitrator rejected the impleadment application stating that the third parties were neither necessary nor proper parties for the disposal of the claims, which was challenged u/s. 34 of the A&C Act. Therefore, the Division Bench held that the order of the sole arbitrator did not decide any substantive claim, nor was it relating to the merits of the case and so, it is not an 'interim award' that can be challenged under Section 34 of the A&C Act.

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