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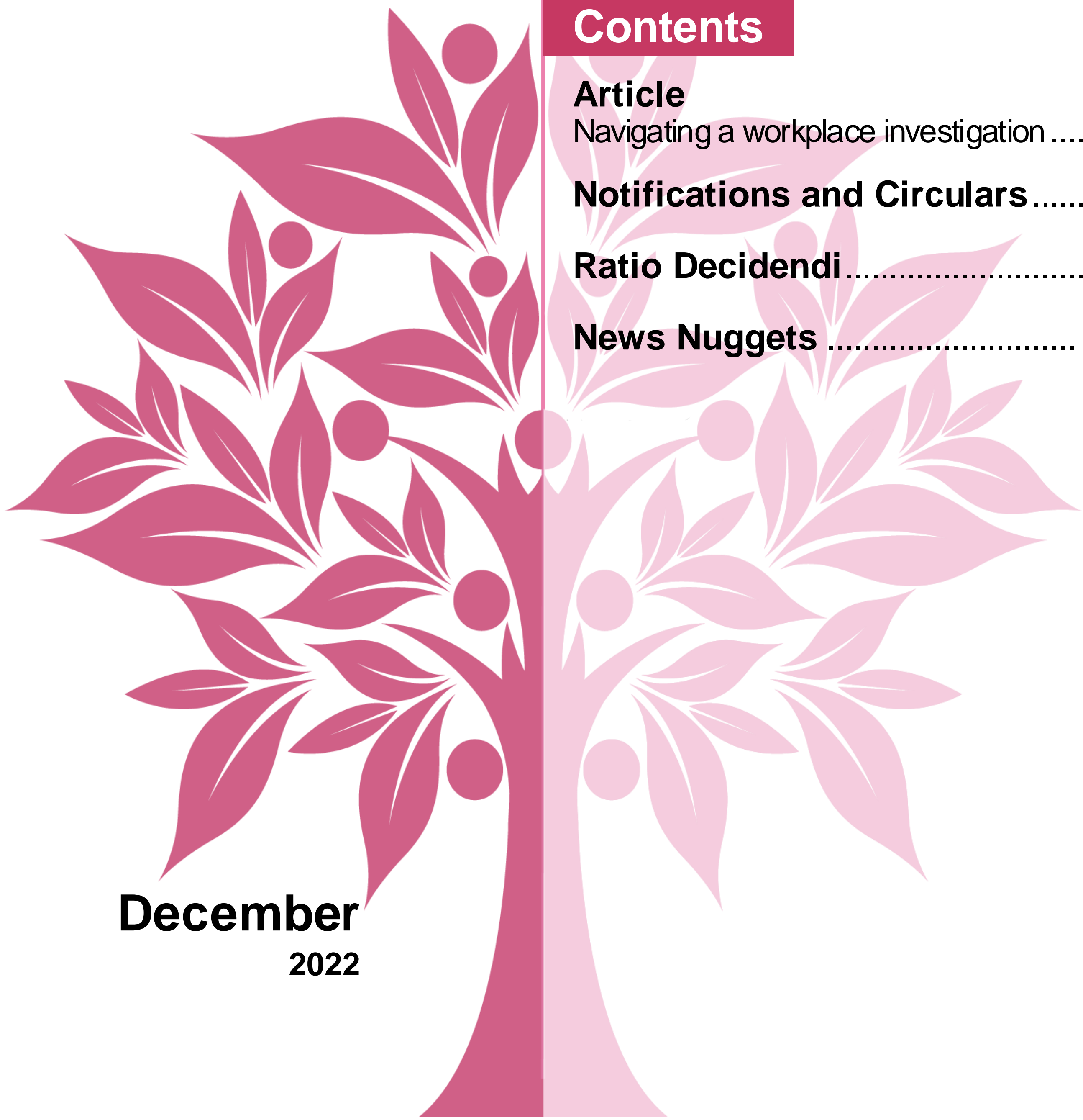

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Article

Navigating a workplace investigation

By **Sudish Sharma and Ayushi Agrawal**

While there is no legislation specifically directed at regulating workplace investigations in India, except for the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, these processes take place within an intricate framework of regulation.

When a complaint, or some evidence, of potential employee misconduct in the workplace emerges including discrimination complaints, threats against others, violation of code of conduct, one option available to the employers is conducting an investigation.

There are various reasons why an employer might, at its discretion, initiate an investigation into alleged employee misconduct. Some reasons are quite straightforward, including to establish an evidentiary basis to take disciplinary action, or mitigate legal risk or setting an example.

To minimize the possibility of bias or conflict of interest that may be present in case of investigations by HR Managers or in-house counsels, employers many a times prefer that the investigation team is an independent and external one, such as external lawyers and law firms. Besides the credibility that flows from engagement of external lawyers who would be well-equipped with similar exercises, such external lawyers are also equipped to discuss and advise concerned officials of the organization on the future course of action, as recommendation measures.

Due to subjective nature of the investigations under consideration, there is no set mechanism or strict procedure which needs to be adhered to, for conducting such investigations. In this regard, broad guidelines to aid investigation team, which are to be read along with the internal policies of the concerned organization, are as under:

(i) *Requisition* – It is of utmost importance to make a proper requisition list so that the necessary information and documents are collated.

(ii) *Review and questionnaire* – The information and documents collated be properly reviewed and basis the same, a tentative list of questions be prepared for conducting the investigation. These questions should be workable enough to attune it according to the responses received from the interviewees.

(iii) *Investigation interviews* – Inform the interviewees of the interview beforehand to ensure their presence. Interviewees would include the complainant, the person(s) against whom allegations have been levelled, the relevant witness(es) and any other person who might be aware of the matter being investigated.

(iv) *Transcripts* - Interview transcripts to be prepared and properly read/heard, prior to preparation of the investigation report.

(v) *Preparing the investigation report* - The method be founded upon the preponderance of probability and the report to clearly lay down whether an

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allegation hold substance or not along with reasons as well as the measures which can be considered.

Undoubtedly, the underlying essence of any investigation is to maintain confidentiality since the same is sacrosanct.

The onus of an organization does not end after such an investigation. Therefore, pursuant to the investigation, if an irregularity is detected, suitable actions and corrective measures would have to be decided, which may be termination or suspension of erring employees or issuance of necessary warnings or attending necessary counselling sessions. This would depend on the gravity of the misconduct, extent of involvement of the concerned persons, internal policies, and code of conduct of the organization etc.

With a view to adopt best practices, organizations need to have an eco-system in place so as to encourage employees to come forward internally. Additionally, it be noted that proper policies need to be put in place and it is to be also ensured, that the stake holders are made aware of the same, including any amendments thereto. This may not only assist in creating a better work environment but also in investigating allegations as the terms and conditions of these policies will also be considered.

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Notifications and Circulars

Foreign Investment in Alternative Investment Funds (AIFs) – Conditions specified: The Securities and Exchange Board of India (‘**SEBI**’) has, *vide* Circular No. SEBI/HO/AFD-1/PoD/P/CIR/2022/171 dated 9 December 2022 (‘**Circular’**), redefined the terms of the Securities and Exchange Board of India (Alternate Investment Funds) Regulations, 2012. Pursuant to this Circular, AIFs may raise funds from any Indian, foreign or a non-resident Indian investor through issue of units provided that:

a. the investor is a resident of a country whose security market regulator is either a signatory of the International Organization of Securities Commissions Multilateral Memorandum of Understanding, or the Bilateral Memorandum of Understanding with SEBI;

b. the investor or its underlying investors are contributing 25% or more in the corpus of the investor, or when identified on the basis of control is not a person mentioned in the sanctioned list as notified by the UN

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Security Council from time to time and is not the resident objected by Financial Action Task Force (FATF).

Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Seventh Amendment) Regulations, 2022 notified: SEBI, *vide* notification SEBI/LAD-NRO/GN/2022/109 dated 5 December 2022, has notified the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Seventh Amendment) Regulations, 2022 by amending Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 (‘**LODR Regulations**’). SEBI inserted a new sub-regulation as Regulation 102(1A) to relax the strict enforcement of the requirements laid down in this regulation, which deals with power of SEBI to relax enforcement of LODR Regulations, in favour of the investors and development of securities market, if an application is made by the Central Government in relation to its strategic disinvestment in a listed entity.

Companies (Registered Valuers and Valuation) Amendment Rules, 2022 notified: The Ministry of Corporate Affairs, *vide* Notification G.S.R. 831(E) dated 21 November 2022, has notified Companies (Registered Valuers and Valuation) Amendment Rules, 2022 for amending Companies (Registered Valuers and Valuation) Rules 2017. The amendment provides that no partnership entity or company shall be eligible to be a registered valuer if it is not a member of a registered valuers organisation. Further, Rule 7A has been inserted providing the requirement that the registered valuer shall intimate to the authority about any changes/ modifications in the partnership agreement or the Memorandum of Association that can affect the registration of the registered valuer. Rule 14A has been inserted on similar lines providing with the requirement that the registered valuer shall intimate the authority for change in composition of its governing board or its committees or appellate panel. Such intimation must be made on the payment of requisite fees mentioned in the Official Gazette.

NBFC – Account Aggregator (Reserve Bank) Directions, 2016 amended to include GSTN as Financial Information Provider: The Reserve Bank of India, *vide* Notification DoR.FIN.REC.82/03.10.123/2022-23 dated 23 November 2022, has amended the Master Direction – Non-Banking Financial Company – Account Aggregator (Reserve Bank) Directions, 2016 to include Goods and Services Tax Network (GSTN) as a Financial Information Provider (FIP) under the Account Aggregator (AA) framework. The Department of Revenue shall be the regulator of GSTN for this specific purpose. Further, it is also directed that GST Returns i.e., Form GSTR-1 and Form GSTR-3B shall be the Financial Information.

Securities And Exchange Board of India (Procedure for Board Meetings) (Amendment) Regulations, 2022 notified: SEBI, *vide* notification SEBI/LAD-NRO/GN/2022/110 dated 9 December 2022, has notified the Securities and Exchange Board of India (Procedure for Board Meetings) (Amendment) Regulations, 2022 for amending Securities and Exchange Board of India (Procedure for Board Meetings) Regulations, 2001. Regulation 4 has been amended to include that a person intending to attend a board meeting through video conferencing mode, shall inform in advance about the same to the Chairperson or Secretary of the Board. If they fail to communicate such intent in advance, it shall be assumed that the person shall be attending the meeting in person. Pursuant to this, Schedule 1 has been inserted detailing the procedure for allowing Members to participate in Board meetings through video conferencing or other audio-visual means.

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Securities and Exchange Board of India (Prohibition of Insider Trading) (Amendment) Regulations, 2022 notified: SEBI, *vide* notification SEBI/LAD-NRO/GN/2022/108 dated 24 November 2022, has notified the Securities and Exchange Board of India (Prohibition of Insider Trading) (Amendment) Regulations, 2022 for amending the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015.

Chapter IIA has been inserted to deal with 'Restrictions on Communication in Relation to and Trading by Insiders in the Units of Mutual Funds', which shall apply: (a) Only in relation to the units of a mutual fund; and (b) All the provisions of Chapter IIIA and V shall also apply in relation to the units of a mutual fund. Various definitions with respect to the same were added in this Chapter, such as 'associate', 'connected person', 'generally available information', 'insider', 'systematic transactions', and 'unpublished price sensitive information'. Other insertions in this Chapter include regulations on 'Communication or procurement of unpublished price sensitive information and maintenance of a structured digital data base', 'Trading when in possession of unpublished price sensitive information', 'Disclosures by certain persons', 'Code of Conduct', 'Designated Person', and 'Institutional Mechanism for Prevention of Insider trading'.

Schedule B1 has been inserted under Regulation 5F of Chapter-IIA to deal with 'Minimum Standards of Code of Conduct for Mutual Funds to regulate, monitor and report trading by the Designated Persons in the units of own mutual fund schemes'.

Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Fourth Amendment) Regulations, 2022 notified: SEBI, *vide* Notification SEBI/LAD-NRO/GN/2022/107 dated 21 November 2022, has notified the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Fourth Amendment) Regulations, 2022 by amending Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018.

Regulation 25, that deals with filing of the draft offer document and offer document with SEBI, has been amended to include that the issuer shall file three copies of the draft letter document "*with the concerned regional office of the Board under the jurisdiction of which the registered office of the issuer company is located*" in place of "*with the Board*".

Chapter IIA, dealing with 'Initial public offer on the main board through the pre-filing of the draft offer document', was inserted to deal with the procedures for pre-filing of the draft offer document with the Board and Stock Exchanges; for general conditions for the same; and in relation to the interaction with qualified institutional buyers for the same. The new Chapter also introduces new Forms for such pre-filing.

Regulation 162A was inserted to deal with a Monitoring Agency, which provides that if the issue size exceeds INR one hundred crore, the issuer shall make arrangements for the use of proceeds of the issue to be monitored by a credit rating agency registered with the Board.

Regulation 173A was also inserted to provide that if the issue size, excluding the size of offer for sale by selling shareholders, exceeds INR one hundred crore, the issuer shall make arrangements for the use of proceeds of the issue to be monitored by the Monitoring Agency, as registered with the Board.

Regulatory Framework for Urban Co-operative Banks ('UCBs') relating to Net Worth and Capital Adequacy revised: Reserve Bank of India ('**RBI**') *via* notification DOR.CAP.REC.No.86/09.18.201/2022-23 dated 1 December 2022 (to be applicable to all Primary

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(Urban) Co-operative Banks), has revised the regulatory framework for Urban Co-operative Banks (UCBs) with respect to its net worth, minimum Capital to Risk (Weighted) Asset Ratio (CRAR) requirement, revaluation reserves and its applicability. Tier 1 UCBs operating in a single district shall now maintain a minimum net worth of INR 2 crore, and for all other UCBs (of all tiers), a minimum net worth of INR 5 crore is to be maintained. In any case, if they fail to meet said requirement, they could achieve the same in a phased manner. However, such UCBs are supposed to achieve at least 50% of the threshold limit by 31 March 2026 and the rest of it by 31 March 2028. A minimum of CRAR of 9% shall have to be maintained by tier 1 UCBs and a minimum of 12% CRAR shall be maintained by Tier 2 to 4 UCBs, as required with reference to the risk weighted assets on an ongoing basis. Lastly, with respect to its revaluation reserves and its applicability, if it arises out of change in the carrying amount of a bank's property consequent upon its revaluation, it may then be reckoned as tier 1 capital at a discount of 55%. This is subject to various conditions such as no legal impediment in selling the property, valuations are obtained from two independent valuers, etc.

Categorization of Urban Co-operative Banks revised: The Reserve Bank of India, *vide* notification DOR.REG.No.84/07.01.000/2022-23 dated 1 December 2022, on recommendation of an expert committee, has adopted a four-tiered regulatory framework, as against the existing two-tiered framework, for categorization of UCBs. The categorization of UCBs will be based on their deposit size. Accordingly, the UCBs have been categorized into following four tiers for regulatory purposes:

a. Tier 1 - All unit UCBs and salary earners' UCBs (irrespective of deposit size), and all other UCBs having deposits up to INR 100 crore.

b. Tier 2 - UCBs with deposits of more than INR 100 crore and up to INR 1000 crore.

c. Tier 3 - UCBs with deposits of more than INR 1000 crore and up to INR 10,000 crore.

d. Tier 4 - UCBs with deposits of more than INR 10,000 crore.

Norms for classification of Urban Co-operative Banks (UCBs) as 'Financially Sound and Well Managed' revised: The Reserve Bank of India, *vide* Notification DOR.REG.No.85/07.01.000/2022-23 dated 1 December 2022, has revised the criteria for UCBs to be classified into the category of Financially Sound and Well Managed (FSWM). The revised criteria, for determining the FSWM status is as follows:

a. The Capital to Risk (Weighted) Asset Ratio (CRAR) shall be at least 1 percentage point above the minimum CRAR applicable to an UCB as on the reference date;

b. Net Non-Performing Asset (NPA) of not more than 3%;

c. Net profit for at least three out of the preceding four years subject to it not having incurred a net loss in the immediately preceding year;

d. No default in the maintenance of Cash Reserve Ratio (CRR) / Statutory Liquidity Ratio (SLR) during the preceding financial year;

e. Sound internal control system with at least two professional directors on the Board of the UCB;

f. Core Banking Solution (CBS) fully implemented; and

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g. No monetary penalty should have been imposed on the bank on account of violation of RBI directives / guidelines during the last two financial years.

It is also to be noted that the UCBs are now permitted to classify themselves as Financially Sound and Well Managed based on the given criteria.

Ratio Decidendi

Dispute regarding novation cannot be a ground to dismiss a petition under Section 11 of Arbitration and Conciliation Act, 1996

Brief facts:

The Appellant and Respondent Nos. 1 to 3 entered into a Share Purchase Agreement (**'SPA'**), whereby the Respondent Nos. 2 and 3, the promoters of the Respondent No. 1, sold their ownership in Respondent No. 1 to the Appellant, along with a power project of the Respondent No. 1. The power project had been partly financed by IFCI Venture Capital. Thereafter, the Appellant failed to clear the dues owed to IFCI Venture Capital, on account of which the SPA was terminated. Pursuant to the same, Respondent Nos. 2 and 3, IFCI Venture Capital, and Respondent No. 4, an affiliate of the Appellant and the proforma Respondent in the present matter, entered into an agreement (**'Agreement'**) to clear the dues payable to IFCI Venture Capital. Disputes arose between the Appellants and the Respondent Nos. 1 to 3, and the Appellant invoked the arbitration clause under the terminated SPA. On the Respondents' failure to nominate an arbitrator, the Appellant filed a petition under Section 11 of the Arbitration and Conciliation Act, 1996 (**'Act'**) before the High Court of Telangana seeking appointment of an arbitrator. The High Court dismissed the petition and refused to appoint an arbitrator on the ground that there was a novation of the SPA by the Agreement which did not contain an arbitration clause, and hence, the arbitration clause contained in the former cannot be invoked. The present appeal is against this order.

Submissions by the Appellant:

- The High Court erred in giving a finding of implied/deemed novation of agreement in a petition under Section 11 of the Act. It cannot examine complicated questions where a decision on merits is necessary. Further, the Agreement came into existence only to satisfy the dues of the Appellant towards Respondent No. 1 and the Agreement was never to substitute the SPA.
- The Agreement does not have any clauses which deal with *inter se* rights and obligations of the parties and was only entered into for the purpose of protecting the interests of the creditors of the Respondent No. 1. Therefore, the Agreement was incapable of novating the

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SPA. Moreover, the Agreement does not mention that it will be substituted in place of the SPA.

Submissions by Respondents No. 1 to 3:

- The High Court was correct in holding that the Agreement novated SPA. The SPA was terminated because Respondent No. 4 did not clear dues as agreed. It was contended that the Agreement was entered into 4 months after the termination of the SPA to assist the Appellant in recovering the part payment made by it to the Respondents. Further, since the Agreement is substantially different from the SPA, the Agreement had novated the SPA.
- The High Court was well within its jurisdiction under Section 11 of the Act to look beyond the mere existence of an arbitration agreement and decide on novation. The cases of *Vidya Drolia v. Durga Trading Corporation* (2021) 2 SCC 1 and *Indian Oil Corporation Ltd. v. NCC Ltd.* 2022 SCC OnLine SC 896, were relied upon.
- The High Court rightly held that the Agreement, which introduced new parties, had no provision for arbitration. The cases of *Union of India* v. *Kishorilal Gupta and Bros*. (1960) 1 SCR 493, *Young Achievers* v. *IMS Learning Resources Pvt. Ltd.* (2013) 10 SCC 535 and *M.B.S Impex Pvt. Ltd.* v. *Minerals and Metals Trading Corporation* (2020) 5 ALD 185, were relied upon, which state that once the original agreement which contains an arbitration clause is novated by a subsequent agreement, then the subsequent agreement will prevail and the clauses in the original agreement, including the arbitration clause, will not survive.

Decision:

The Apex Court held that the High Court was not right in dismissing the petition under Section 11 of the Act by giving a finding on novation of SPA, as said aspect would have a bearing on the merits of the controversy between the parties. Therefore, it must be left to the arbitrator to decide the merits of the case. For the decision, the Court relied on its cases of *National Insurance Co. Ltd.* v. *Boghara Polyfab Pvt. Ltd.*, (2009) 1 SCC 267 and *Vidya Drolia Case (Supra)*, where three categories of issues to be identified with in an application under Section 11 (6) of the Act were laid down. The third category deals with issues being in the exclusive jurisdiction of the arbitral tribunal, which includes *"merits or any claim involved in the arbitration"*. This is to be applied, except in exceptional circumstances. The Court further observed that interference at the referral stage is justified only if it is manifest that the claims are ex-facie time-barred and dead, or there is no subsisting dispute. The Court also relied on *Damodar Valley Corporation v. K.K. Kar* (1974) 1 SCC 141 to hold that even if the performance of the contract has come to an end, the contract can still be in existence for certain purposes in respect of disputes arising under it or in connection with it. In light of these decisions, the Apex Court set aside the judgement of the High Court and appointed an arbitrator for the adjudication of the disputes between the parties.

[*Meenakshi Solar Power Pvt. Ltd.* v. *Abhyudaya Green Economic Zones Pvt. Ltd. and Ors*. – Judgment dated 23 November 2022 in Civil Appeal No. 8818 of 2022, Supreme Court]

IBC does not provide any look-back period for fraudulent transactions under Section 66

Brief facts:

The Appellant was a suspended director of the Corporate Debtor and also the director and

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majority shareholder in Respondent No. 3 company. During the Corporate Insolvency Resolution Process (CIRP), the Resolution Professional (RP) found certain irregular business activities in the factory and the registered office of the Corporate Debtor. Alleging that the Respondent No. 3 Company bought the assets of the Corporate Debtor in a fraudulent manner in 2015, with an intention to defraud the creditors of the Corporate Debtor, the RP moved an application before the National Company Law Tribunal (NCLT), Kochi Bench, under Section 66 of the Insolvency and Bankruptcy Code, 2016 (IBC), for declaring the impugned transaction of selling the assets of the Corporate Debtor to the Respondent No.3 company as fraudulent and to make such contribution to the asset of the company to makeover the losses. Since the Appellant did not present his case before the NCLT, an ex-parte order was passed where it held with appropriate directions. Further, the NCLT held that the Appellant was personally liable for deliberate and wilful default and ordered him to make good the losses caused to the creditors of the Corporate Debtor under Section 67 of the IBC. Aggrieved, the Appellant filed the present appeal before the National Company Law Appellate Tribunal (NCLAT), Chennai Bench.

Submissions by the Appellant:

- It was submitted that the limitation for actions under the IBC, including under Section 66 of the IBC, is three years they are covered by the Limitation Act, 1963. In the present case, the impugned activity dated back to 5 years. Therefore, the present case is covered by the look-back period and is barred by limitation.
- It was also submitted that 'Fraud' must be established beyond doubt. Mere suspicion, however strange the coincidences, can never be a 'proof of evidence'.
- It was submitted that the order of NCLT was a non-speaking order devoid of any findings to arrive at a conclusion that the Appellant had done any fraudulent act. It was further submitted that there was no investigation done nor any report filed to prove that indeed there was any fraud committed by the Appellants.

Submissions by the Respondent:

- It was submitted that the Appellant and his wife were the Directors and 100% Shareholders of the Respondent No. 3 Company.
- It was submitted that the land on which the manufacturing unit of the Corporate Debtor is located has been handed over along with its Plant and Machinery to Respondent No. 3 causing loss to the Corporate Debtor.

Decision:

The NCLAT, Chennai Bench held that Section 66 of the IBC does not provide for any look-back period as far as fraudulent transactions are concerned. Section 66 of the IBC envisages that the losses caused to the creditors are recovered in the event of liquidation under IBC and that the directors who caused such losses are made liable to make good such losses.

It noted that especially when there is sufficient material on record to establish the commission of a fraudulent transaction in order to deceive the creditors, there is no scope for a look-back period. In this regard, it noted that while the IBC provides for a look-back period for certain types of transactions, that is not the case for fraudulent transactions in light of Section 66 of the IBC. Accordingly, the NCLAT dismissed the appeal and upheld that order of the NCLT, Kochi Bench.

[*Thomas George* v. *K. Easwara Pillai & Ors.* – Order dated 5 December 2022 in Company Appeal (At)(Ch) (Insolvency) No. 293 of 2021, NCLAT, Chennai Bench]

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Contractual clause enabling recovery of 'charges' does not automatically include the right to recover charges incurred towards demurrages

Brief facts:

The Appellant entered into a road transport contract, whereby the Respondent was obligated to provide trucks to enable the Appellant to carry out transportation of foodgrains, as received from railway wagons. After over a year after the discharge of the contract, the Appellant demanded the Respondent to reimburse the amount it had incurred for demurrages imposed on it by the concerned Railways authorities, since the contract provided for payment of "charges" by the Respondent. Aggrieved, the Respondent filed a writ petition before the High Court of Tripura for quashing the actions of the Appellant. The High Court of Tripura held that the Appellant was only entitled to recover losses incurred due to the Respondent's dereliction of duties under the contract, and that this right does not include the right to recover the losses causally distant from the Respondent's obligations under the contract. The Appellant filed a writ appeal against such order, which was dismissed. The present appeal is against this dismissal order.

Submissions by the Appellant:

- It was submitted that the "charges" under the contract such as in the present case includes demurrages. The cases of *Raichand Amulakh Shah* v. *Union of India,* (1964) 5 SCR 148 and *Trustees of the Port of Madras* v. *Aminchand Pyarelal*, (1976) 3 SCC 167, were relied.
- Further, it was submitted that the handbook used by the Appellant demonstrates that the term "charges" includes demurrages.
- It was further submitted that the interpretation proposed by the author of the tender document must be considered in the construction of contractual terms. The case of *Agmatel India Pvt. Ltd.* v. *Resoursys Telecom*, (2022) 5 SCC 362, was relied upon for the same.

Submissions by the Respondent:

- It was submitted the actions of the Appellant show that they have acted arbitrarily and have failed to follow the due process of law to determine the liability under a contract. The Respondent was not responsible for the loading and unloading of foodgrains from railway wagons, but merely for providing trucks for the purpose. Therefore, any demurrages arising from the delay in completion of the loading and unloading are not within the scope of the Respondent's liabilities.
- It was further submitted that many of the earlier contracts entered between the Appellant and other parties specifically included the term "demurrages" as a liability imposed on the contractors.
- It was further submitted the Appellant cannot be a judge in its own case by unilaterally determining the liability with respect to demurrages. The cases of *State of Karnataka* v. *Shree Rameshwara Rice Mills*, (1987) 2 SCC 160, *BSNL* v. *Motorola India (P) Ltd.*, (2009) 2 SCC 337, and *J.G. Engineers (P) Ltd.* v. *Union of India*, (2011) 5 SCC 758, were relied.

Decision:

The Court held that 'charges' does not automatically include a right to recover demurrages. The Court first examined the liability clause under the contract, which stipulates that liquidated damages of the Respondent includes "costs, damages, registration, fees, ***'charges'***, and expenses suffered or incurred by the

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Appellant due to the Respondent's negligence and unworkmanlike performance of any services under the contract and due to any failure to carry out the work under the contract". The Court referred to its judgements such as *Bihar State Electricity Board, Patna* v. *Green Rubber Industries*, (1990) 1 SCC 731, and *Provash Chandra Dalui* v. *Biswanath Banerjee*, 1989 Supp (1) SCC 487, where the Court emphasized on interpreting a contract with reference to its object and taking into consideration the whole of its terms. It was held that contractual terms must not be interpreted in their ordinary sense because the context of the terms may indicate their use to not be in their ordinary sense, and that contractual terms must be read structurally and in its context as their ordinary meaning may vary with their contractual setting. The Court also referred to *BESCOM* v. *E.S. Solar Power Pvt. Ltd.*, (2021) 6 SCC 718, where it was held that in case a contractual term is ambiguous and has two possible meanings, the meaning which is more in accord with the underlined purpose and intent of the contract is to be chosen over the other meaning. In that background, the Court referred the obligations of the Respondent, which clearly established that they were limited to the supply of adequate and sufficient number of trucks for the transportation of the food grains. Therefore, the obligations did not extend to the loading/unloading of the foodgrains, which are essential to invite the possibility of demurrages. Therefore, the Court dismissed the Appellant's appeal.

[*Food Corporation of India and Others* v. *Abhijit Paul* – Decision dated 18 November 2022 in Civil Appeal Nos. 8572-8573/2022, Supreme Court]

News Nuggets

NCLT does not possess the power to declare the provisions of IBC as illegal or *ultra vires*

The Delhi High Court has held that the NCLT does not have the power to declare any of the provisions of the Insolvency and Bankruptcy Code as illegal or *ultra vires*. The Court in *Insolvency and Bankruptcy Board of India* v. *State Bank of India* [Judgment dated 28 November 2022] stated that the NCLT does not have the power to declare Regulation 36A of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 as being *ultra vires* merely on the ground that the two-stage process provided in it i.e., of inviting an expression of interest first and then the financial bids, would be contrary to the speedier resolution envisaged under the Insolvency Resolution Process. The Court clarified that the power of NCLT under the Insolvency and Bankruptcy Code, 2016 is limited to adjudication of an application or proceedings

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instituted before it, and in matters concerning insolvency resolution and liquidation proceedings. The Court relied upon the NCLAT case of *Mohan Gems and Jewels Pvt. Ltd.* v. *Vijay Verma and Anr.,* CP (IB) No. 849 of 2020, where the Appellate Tribunal had held that judicial intervention or innovation by it or by the NCLT should be kept at its bare minimum and should not disturb the fundamental principles of the Insolvency and Bankruptcy Code, 2016, to arrive at the decision.

Jurisdiction to determine matter relating to title of shares issued fraudulently vests with the Civil Courts

The Calcutta High Court has held that only civil courts across the State are vested with the authority to adjudicate/enquire in matters concerning fraud with reference to transfer and title of issued shares under Section 58 and 59 of the Companies Act, 2013. The Court in *Mukesh Jaiswal* v. *Phool Chand Gupta and Ors*. [Judgment dated 5 December 2022] stated that the NCLT does not have the jurisdiction to enquire into the allegation of fraud.

The Court, in this regard, held that the NCLT is vested with the power to inquire into (i) fraudulent initiation of proceedings as well as (ii) fraudulent transactions, when it comes to proceedings under the IBC. The Court noted that Section 65(1) of the IBC deals with a situation where the Corporate Insolvency Resolution Process is initiated fraudulently ‘for any purpose other than for the resolution of insolvency or liquidation’. The Court emphasised, however, that the jurisdiction of the NCLT and the NCLAT is limited only to the cases permitted under the IBC.

Suit challenging actions taken by secured creditor under Section 17 of SARFAESI Act cannot bar arbitration proceedings

The Delhi High Court has held that any ongoing proceedings under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2022 (‘**SARFAESI Act**’) does not bar initiation of arbitration proceedings. The Court, in the case of *Hero Fincorp. Limited* v. *Techno Trexim (I) Pvt. Ltd. & Ors*, [Judgment dated 18 November 2022], stated that, even if a petition was filed before the Debt Recovery Tribunal (DRT) under Section 13(4) of said Act, it would still not bar the initiation of arbitration proceedings in any form, while dealing with a petition filed under Section 11 of the Arbitration and Conciliation Act, 1996, seeking appointment of an arbitrator. The Petitioner had relied on the judgment of the Supreme Court in the case of *Vidya Droliya* v. *Durga Trading Corporation*, (2021) 2 SCC 1 wherein it was held that matters covered under the Recovery of Debts and Bankruptcy Act, 1993 are not arbitrable.

Indemnity of obligations when cannot be considered as financial debt

Observing that the ‘Obligor Undertaking’ lacked a covenant/promise to perform in case of borrower's default in servicing the commercial paper, the NCLT Mumbai has held that the undertaking is thus not a guarantee and does not attract the definition of 'financial debt' under Section 5(8) of the Insolvency and Bankruptcy Code. The Tribunal noted that the undertaking was merely a contingent contract. Further, observing that the obligations under the Undertaking did not attract the definition of ‘financial debt’, the Tribunal held that as a fortiori, an indemnity of the obligations under the Agreement will equally not constitute a ‘financial debt’ under Section 5(8) of the Code.

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The Tribunal in the case of *Axis Bank Ltd.* v. *Nageshwara Rao* observed that without proof of disbursement, an amount cannot be claimed as financial debt, as disbursement is *sine qua non* for any debt to fall within the ambit of definition of financial debt. According to the Tribunal, the Financial Statements should reflect the liability therein under 'Commercial Paper' or 'Obligator Undertaking'.

Insolvency – No stay for any future liability or obligation under Section 96(1)(b)

The NCLAT, New Delhi has held that Section 96(1)(b) of the Insolvency and Bankruptcy Code, 2016, providing for interim moratorium, does not contemplate stay of any future liability or obligation. The Tribunal in *Ashok Mahindru and Anr.* v. *Vivek Parti* [Order dated 29 November 2022] declined to stay the proceedings under Section 19(2) and Sections 66-67, initiated against the suspended Directors of the Corporate Debtor. The Tribunal observed that under Section 96(1)(b) read with the definition of 'debt' in Section 3(11), what is contemplated to be stayed is the proceeding relating to debt, which means a liability or obligation in respect of a claim which is due from any person. Further, the NCLAT noted that interim moratorium shall be for such proceedings which relate to a liability or obligation due i.e. due on date when interim moratorium has been declared, and not any future liability or obligation.

Insolvency – No bar for a trust to become a resolution applicant

Observing that under Section 3(23)(d) of the Insolvency and Bankruptcy Code, 2016 a 'Person' is defined and it includes a Trust, the NCLAT Bench at Chennai has held that there is no fetter/embargo or a legal impediment, for a trust to be a resolution applicant. The Tribunal in Aswathi Agencies v. Bijoy Prabhakaran Pulipra relied upon the Supreme Court decision in the case of *Sole Trustee Loka Shikshana Trust* v. *Commissioner of Income Tax.* The NCLAT was dealing with the plea of the Appellant that a Resolution Applicant, cannot be a Charitable Public Trust, and further that, the act of acquiring the Corporate Debtor, under the Resolution Plan, cannot be placed under any of the purview of Charitable Purpose.

Insolvency – Assignee not prohibited from continuing a pending Section 7 application

The NCLAT Bench at New Delhi has held that there is no prohibition in the Insolvency and Bankruptcy Code, 2016 or any of the Regulations from continuing the proceeding by an assignee. According to the Appellate Tribunal, Section 5(7) of the IBC which defines 'Financial Creditor' also includes a person to whom such debt has been legally assigned or transferred to. The Tribunal in the case of *Siti Networks Ltd.* v. *Assets Care and Reconstruction Enterprises Ltd. & Anr.* [Order dated 13 December 2022] also held that Order of the Bengaluru Bench NCLT dated 26 August 2019 on which reliance has been placed by the Appellant cannot be said to be laying down a correct law to be followed as a precedent. The NCLAT in this regard also noted that Section 5(4) of the SARFAESI Act, 2002 contemplates continuation of all proceedings after acquisition of financial assets by assignee.

Arbitration Section 9 cannot be used to claim final relief

The High Court of Jammu and Kashmir has stated that the petitioner cannot seek final relief of extension of the tender period by seeking waiver of licence fees as an interim measure through a Section 9 petition, because this falls under the ambit of final relief of an adjudicator or court. The Court noted that it is

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a trite principle that an interim injunction of this nature amounting to the grant of main relief cannot be granted. The Court in *Doon Caterers Dehradun* v. *Union of India and Ors.* further emphasized on the Doctrine of "Approbate and Reprobate" which states that a person cannot be allowed to accept and reject the same thing, and, thus, one cannot blow hot and cold. In this case, the petitioner tried to take advantage of the agreement for an extension of the tender period without paying the licence fees. The petitioner was awarded the contract to operate, manage, and supply catering services at Katra railway station for a period of 5 years. They entered into a Master Service Agreement that has a Force Majeure Clause. The petitioner incurred huge expenses to maintain the refreshment rooms during the Covid pandemic. The petitioner by invoking Section 9 was seeking to extend the contract and waive the license fees.

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