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By **Aman Gupta and Mayank Kumar**

Revival of the Corporate Insolvency Resolution Process ('**CIRP**') proceedings refers to the restoration of the already withdrawn CIRP by a creditor which generally happens upon the breach of the settlement agreement pursuant to which the application for CIRP also gets withdrawn. In such circumstances, rather than filing for a fresh application for initiation of CIRP, the creditor may seek reviving of the earlier application. The article in this issue of Corporate Amicus observes that the Insolvency and Bankruptcy Code 2016 and any rules or regulation framed therein do not contain any provision for seeking revival of the CIRP proceedings once it is withdrawn. Analysing various case law, the article seeks to answer the questions as to whether the liberty of the NCLT is necessary for revival of the CIRP proceedings, and as to whether the nature of the debt changes the moment the parties enter into a settlement agreement.

Revival of insolvency proceedings: Analysis and way forward

By Aman Gupta and Mayank Kumar

Revival of the Corporate Insolvency Resolution Process ('**CIRP**') proceedings refers to the restoration of the already withdrawn CIRP by a creditor which generally happens upon the breach of the settlement agreement ('**Settlement Agreement**') pursuant to which the application for CIRP also gets withdrawn. In such circumstances, rather than filing for a fresh application for initiation of CIRP, the creditor may seek reviving of the earlier application.

The Insolvency and Bankruptcy Code 2016 ('**IBC**' or '**Code**') and any rules or regulation framed therein do not contain any provision for seeking revival of the CIRP proceedings once it is withdrawn. Therefore, for seeking revival of the withdrawn CIRP, the inherent jurisdiction of the National Company Law Tribunal ('**NCLT**') can be invoked by filing an application under Section 60(5)(b) of the IBC, read with Rule 11 of NCLT Rules. In furtherance of the same, in the case of *Vivek Bansal* v. *Burda Druck India Pvt. Ltd*. [2020 SCC OnLine NCLAT 552], the Hon'ble National Company Law Appellate Tribunal ('**NCLAT**'), while recording the Settlement Agreement between the parties, allowed the withdrawal of the application filed under Section 9 of the Code by the operational creditor. It was also held that in the event of default by the Corporate Debtor whereby it does not adhere to the terms of the Settlement Agreement as regards the payment of the outstanding instalments, the operational creditor shall be at liberty to seek revival/restoration of the CIRP proceedings before the NCLT.

Whether the liberty of the Tribunal necessary for revival of CIRP proceedings:

In the case of *ICICI Bank Ltd*. v. *OPTO Circuits (India) Ltd*. [2021 SCC OnLine NCLAT 1932] decided on 28 April 2022, the NCLAT established that in such instances wherein the corporate debtor defaults on the terms of a Settlement Agreement regarding the payment of outstanding instalments, the financial creditor has the right to seek revival or restoration of the CIRP. Herein this case, the NCLT Bangalore had rejected the application of the creditor seeking liberty to revive the application and instead had held that that the financial creditors were entitled to file fresh application for initiation of CIRP. On appeal, the NCLAT held that the order passed by the NCLT granting the liberty to file a fresh application for CIRP was erroneous and was passed without application of mind and without following the principles of natural justice. The NCLAT therefore granted the financial creditors with the liberty to revive the CIRP proceedings.

At this stage, it is necessary to analyse/understand that whether it is necessary to seek the liberty of the court to revive the CIRP proceedings or can it be sought as a matter of right by invoking the inherent jurisdiction of the NCLT. This position was explained in the case of *Krishna Garg & Anr*. v. *Pioneers Fabricators Pvt. Ltd*. Company Appeal (Ins.) Nos. 92 of 2021, wherein the Hon'ble NCLAT declined to revive the CIRP

proceedings because the settlement terms were not filed, nor they were brought on record and incorporated in the order of the NCLT with liberty to revive/ restore the CIRP in the event of the corporate debtor not adhering to the terms of the settlement.

Basis the above, it appears that there exists a difference between the cases wherein the CIRP proceedings were withdrawn by mere reference of the fact of settlement and wherein the withdrawal of CIRP proceedings was materialised by bringing the Settlement Agreement on record and thereby seeking the liberty to revive the CIRP proceedings basis non-adherence of the Corporate Debtor to the Settlement Agreement.

This distinction was further reinforced in the case of *SRLK Enterprises LLP* v. *Jalan Tran solutions India Ltd, (*Company Appeal (AT) (Ins) No. 264/2021 wherein it was held that it is significant to distinguish between a simple withdrawal stating that the parties have settled and wherein the Settlement Agreement has been brought on record and had been made part of the order of withdrawal. The latter allows for the restoration of proceedings in case of default as the IBC is not a recovery proceeding where parties can repeatedly come to court due to non-payment of debt.

In the case of *Pooja Finlease Ltd.* v. *Auto Needs (India) Pvt. Ltd. & Anr.* (Company Appeal (AT) (Insolvency) No. 103 of 2022, it was held that the order by which the NCLT accepted the withdrawal of application filed for CIRP on the basis of a Settlement Agreement containing a clause that allows for revival of CIRP in case of default will be as good as NCLT granting the liberty of revival of the insolvency proceedings in case of default or non-adherence of the Settlement Agreement. When such application was approved based on the consent terms by taking on record the Settlement Agreement, it should be considered as part of the order. In a nutshell, it implies that the creditor has the authority to revive the petition in case any default in consent terms arise.

Therefore, only in cases where the Settlement Agreement is brought on record and the liberty is granted by the NCLT, the party can seek revival of the CIRP proceedings.

Whether the nature of the debt changes post the settlement of the debt:

Recently, *vide* an order dated 4 May 2023 passed by the NCLT, Delhi, in the case of *Finsbury Global FZE* v. *M/s Uttam Sucrotech International Pvt. Ltd.,* I.A. 4081 of 2022 in C.P (I.B) No. 1013 of 2020, it was held therein that the nature of the debt changes post settlement. In this case, in order to settle the outstanding operational debt, a Settlement Agreement was entered into by the parties. The NCLT held that the moment the parties entered into the settlement agreement, the nature of debt changed from being operational debt under Section 5(21) of the Code. The debt outstanding by virtue of the Settlement Agreement loses the substratum of operational debt under the Code and merely stands to be a debt.

If the above view of the NCLT is followed, then as a natural corollary, it follows that mechanisms under IBC cannot be resorted for dues *vide* the Settlement Agreement, as a consequence of which neither the withdrawn CIRP proceedings

can be revived nor a fresh application for CIRP can be filed for non-payment of debt agreed by the settlement agreement.

A similar view was taken by NCLT Allahabad in the case of *Delhi Control Devices(P) Limited* v. *Fedders Electric and Engineering Ltd*., 2019 SCC OnLine NCLT 8030 wherein it was held that unpaid instalments as per a Settlement Agreement cannot be treated as operational debt under Section 5(21) of the IBC as the failure or breach of the Settlement Agreement cannot be grounds for triggering the CIRP against the corporate debtor under the provisions of the IBC. The appropriate remedy may lie elsewhere and not necessarily before the Adjudicating Authority/NCLT.

However, the conclusion that the nature of debt changes after Settlement Agreement, does not appear to be a correct position of law as was already clarified by the Hon'ble NCLAT in the case of *Priyal Kantilal Patel* v. *IREP Credit Capital (P) Ltd*., 2023 SCC OnLine NCLAT 51 decided on 1 February 2023. Herein this case, the financial creditor upon the breach of the Settlement Agreement filed a fresh Section 7 application, which was opposed by the corporate debtor by claiming that the breach of consent term does not constitute a Financial Debt. In this case, the NCLAT held that the breach of consent terms in an earlier company petition does not wipe out the financial debt claimed by the financial creditor, nor does it change the nature and character of the financial debt. The Hon'ble NCLAT further held that allowing such an interpretation would grant undue advantage to the corporate debtor who breached the consent terms. This appears to be the correct understanding on the subject. If the contrary interpretation that the Settlement Agreement changes the nature of debt, is allowed, it would further result in extinguishing the remedies available under the Code to the creditors, who agreed to settle the debt and consequently withdrew the CIRP proceedings.

Therefore, a settlement agreement may not alter the nature of the original debt between the creditor and the corporate debtor.

Conclusion

To the extent that the party can seek revival of the CIRP proceedings, it can be concluded that the same is possible wherein the Settlement Agreement is brought on record and the liberty is granted by the adjudicating authority. However, to the extent of change in the nature of debt is concerned, it appears to be a grey area. In *Priya Kantilal Patel* (*supra*) as decided on 1 February 2023, the NCLAT decided that nature of debt shall not change post entering into a settlement agreement however the NCLT in *Finsbury Global* (*supra*) decided on 4 May 2023, as discussed above, held to the contrary. Going forward with the decision of NCLAT, it appears that the Settlement Agreement or its breach does not change the nature of the debt and consequently remedies under IBC shall remain available with the creditor even after withdrawal of the CIRP on the basis of a Settlement Agreement.

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Notifications & Circulars

- Companies (Accounts) Second Amendment Rules, 2023 notified
- Food safety – Last date for filing annual returns extended
- Insolvency – Moratorium not applicable for contracts under Oilfields (Regulation and Development) Act, 1948
- Insolvency Professionals to Act as Interim Resolution Professionals, Liquidators, Resolution Professionals and Bankruptcy Trustees (Recommendation) Guidelines, 2023
- Expanding the scope of Trade Receivables Discounting System

Companies (Accounts) Second Amendment Rules, 2023 notified

The Central Government *vide* Notification dated 31 May 2023 has notified amendments to the Companies (Accounts) Rules, 2014 wherein a proviso under Rule 12(B) has been inserted that requires filing of Form CSR-2 i.e., the report on Corporate Social Responsibility separately on or before 31 March 2024 after filing of the AOC-4 (Filing of financial statements).

Food safety – Last date for filing annual returns extended

The Food Safety and Standards Authority (FSSAI) *vide* Order dated 9 June 2023 notified that the last date for filing FSSAI annual returns as per condition of License Number 5 has been extended till 30 June 2023. Further, it has also been reiterated that only online annual returns submitted through Food Safety Compliance System (FoSCoS) shall be accepted for this purpose.

Insolvency – Moratorium not applicable for contracts under Oilfields (Regulation and Development) Act, 1948

The Ministry of Corporate Affairs, *vide* Notification dated 14 June 2023 has notified that the Section 14(1) of the Insolvency and Bankruptcy Code, 2016 (IBC) i.e., effect of moratorium, shall not be applicable to a corporate debtor if such corporate debtor has entered into any transaction or agreement namely the Product Sharing Contracts, Revenue Sharing Contracts, Exploration Licenses and Mining Leases or any Joint Operating Agreement or such connected or ancillary transactions, arrangements or agreements made under the Oilfields (Regulation and Development) Act, 1948, and any rules made thereunder.

Insolvency Professionals to Act as Interim Resolution Professionals, Liquidators, Resolution Professionals and Bankruptcy Trustees (Recommendation) Guidelines, 2023

The Insolvency and Bankruptcy Board of India (IBBI) *vide* a Notification dated 12 June 2023 has notified the guidelines for appointment of a resolution professionals, liquidators to the panel of Insolvency Professionals (IP) from which the IP shall be appointed by the IBBI on order of the adjudicating authority. Accordingly, the guidelines include the eligibility for a person to be appointed as an IP. The guidelines also state that an expression of interest from the IP shall be required before he can be appointed by the IBBI. The other guidelines include the scoring criteria for the IPs, conditions for the IPs. Further, the guidelines also mention that the panel appointed by the IBBI will have a validity of 6 months only i.e., they shall be effective only from 1 July 2023 to 31 December 2023.

Expanding the scope of Trade Receivables Discounting System

The Reserve Bank of India (RBI) *vide* Circular dated 7 June 2023 has made certain enhancements to the Guidelines for the Trade Receivables Discounting System (TReDS). Accordingly, five

enhancements have been introduced. Firstly, insurance facility is now permitted for TReDS transactions in order to aid financiers to hedge default risks in case of low credit rated buyers. Secondly, all institutions that have been allowed to undertake factoring business under the Factoring Regulation Act, 2011, have now been permitted to participate as financiers in TReDS. Thirdly, the TReDS platform operators could, at their own discretion, enable a secondary market for the transfer of .

Factoring Units (FU) on the TReDS platform. Thereafter, operators on the TReDS platforms have been allowed to settle all FUs, whether financed, discounted, or otherwise, *via* the NACH method used for TReDS. Lastly, to bring in further transparency, the platforms can now make the details (except the name of the bidder) of the bids filed for an FU visible to other bidders.

Ratio Decidendi

- NCLAT has no power to review its own judgment, but it can recall a judgment in exercise of its inherent jurisdiction – NCLAT 5-Member Bench
- Arbitration clause in an agreement perishes with its novation – Delhi High Court
- Third-party funder who paid for proceedings of a case under a specific arrangement is not liable for an arbitral award against the person funded – Delhi High Court

NCLAT has no power to review its own judgment, but it can recall a judgment in exercise of its inherent jurisdiction

A five-member bench of the National Company Law Appellate Tribunal (**'NCLAT'**) has held that NCLAT is not vested with any power to review its own judgment, however, in exercise of its inherent jurisdiction it can entertain an application for recall of judgment on certain grounds. The Tribunal was of the view that it has an inherent jurisdiction to recall a judgement which was made with procedural lapses, *per se*, when a party affected by the judgment has not been impleaded. The Tribunal, thus, overturned its previous decisions wherein it held that it had no power to recall a judgment.

Brief facts:

In the present case, the Corporate Insolvency Resolution Process (**'CIRP'**) was initiated after an application under Section 7 of the Insolvency and Bankruptcy Act, 2016 (**'IBC'**) which was filed by the Union Bank of India (**'Respondent'**) against Amtek Auto Ltd. (**'Corporate Debtor'**). By a majority vote, the Committee of Creditors (**'CoC'**) approved a Resolution Plan filed by the successful Resolution Applicant. The Respondent, being one of the Financial Creditors, dissented to the Resolution Plan and filed an interlocutory application seeking certain reliefs and modification of the Resolution Plan.

The National Company Law Tribunal (**'NCLT'**) on 9 August 2020 approved the Resolution Plan, while rejecting the application filed by the Respondent. Consequently, the Respondent filed an appeal before the NCLAT in which the Committee of Creditors (**'CoC'**) was not impleaded as a party. Through an order dated 27 January 2022, the NCLAT partly allowed the appeal. The Financial Creditors led by State Bank of India (**'Appellant'**) were aggrieved by the order and the same was challenged in an appeal before the Hon'ble Supreme Court. The said appeal was dismissed with the liberty to file a review application before the NCLAT.

The review application was filed before the NCLAT by the Appellant, which was dismissed on the ground that the IBC does not contain any provision of review. However, the NCLAT granted liberty to take recourse to any other remedy in accordance with law. Pursuant to this, the Appellants filed an application for recalling the order dated 27 January 2022, which was heard by a three Member Bench of NCLAT. The Bench referred the matter to a Larger Bench for adjudication on the issue whether NCLAT has the inherent jurisdiction to entertain application for the recall of judgment on sufficient grounds.

Submission by the Appellant:

- The Appellant submitted that the NCLAT has ample jurisdiction to recall a judgment by virtue of Rule 11 of the NCLAT Rules, 2016. Rule 11 provides for the NCLAT to exercise its inherent powers for meeting the ends of justice.
- It further submitted that there is distinction between the jurisdiction to review and jurisdiction to recall a

judgment. When an order has been passed with a procedural error, then the Courts and Tribunals have an inherent jurisdiction to recall the order.

- It was submitted that the CoC which has approved the Resolution Plan was not impleaded as Respondent in the Appeal. Therefore, the judgment being delivered without a necessary party before the Court, deserved to be recalled.

Submission by the Respondent:

- The Respondent, being the Union Bank of India, i.e., the dissenting financial creditor submitted that in the interlocutory application, the only party impleaded was the Resolution Professional. Hence, when challenging the order in appeal, it was not required to implead any other party.
- Moreover, the Respondent relied on two three-member bench judgments in *Agarwal Coal Corporation Pvt. Limited* v. *Sun Paper Mills Limited,* I.A. No. 265 of 2020 in Company Appeal (AT) (Ins.) No. 412 of 2019 and *Rajendra Mulchand Varma & Ors* v. *K.L.J Resources Ltd & Anr.,* I.A. No. 3303/2022 in Company Appeal (AT) (Ins.) No. 359 of 2020 to submit that NCLAT has no inherent power to review and recall its own judgment.

Judgement:

The Tribunal examined the nature and extent of the inherent powers of the NCLAT and held that in exercise of its inherent jurisdiction it can entertain an application for recall of judgment when any procedural error is committed in delivering the judgment, for instance when a necessary party was not before the Tribunal.

It held that a Court or a Tribunal exercises juridical power of the State while performing adjudicatory functions. For the exercise of this function, Courts and Tribunals are conferred upon with the inherent power to do justice. In this regard, the Tribunal relied on the Hon'ble Supreme Court's decision in *Asit Kumar Kar* v. *State of West Bengal & Ors.,* (2009) 2 SCC 703 and *A. R. Antulay* v. *R.S. Nayak & Another*, (1988) 2 SCC 602 wherein it was held that where a party has had no notice and decree is made against him or a judgment was rendered in ignorance of the fact that a necessary party had not been served at all, such party can approach the court for setting-aside the decision.

The Tribunal then discussed various decisions of the Apex Court to draw distinction between a review petition and a recall petition. It held that in a recall petition the Court does not go into the merits but simply recalls an order which was passed without giving an opportunity of hearing to an affected party. It was further discussed that the term review is used in two different senses: procedural review and review on merits. It was held that when a review is sought due to a procedural defect, the inadvertent error committed by the Tribunal must be corrected to prevent the abuse of its process, and such power is inherent in every court or Tribunal. This inherent power of NCLAT has been preserved by Rule 11 of the NCLAT Rules, 2016.

The Tribunal, therefore, declared that the two three-member bench judgments of NCLAT holding that there is no power to recall a judgment cannot be held to be laying down a correct

law. [*Union Bank of India (Erstwhile Corporation Bank)* v. *Dinkar T. Venkatasubramanian* – Judgement dated 25 May 2023 in Company Appeal (AT) (Ins.) No. 729 of 2020, NCLAT, New Delhi]

Arbitration clause in an agreement perishes with its novation

The Single-Judge Bench of the Hon'ble Delhi High Court ('**High Court**') has held that an arbitration clause contained in an agreement would perish with the novation of such agreement if the novated agreement does not contain any arbitration clause.

Brief facts:

The parties entered into a construction agreement ('**Agreement**') wherein certain clause provided for arbitration. Subsequently, when certain disputes relating to payment arose, the parties in order to settle such disputes entered into a Memorandum of Understanding ('**MoU**'). The MoU provided for certain payments to be provided to the petitioner who would in return hand over the assets and consumables to the respondent. It, however, did not contain any arbitration clause. When the payments stipulated under the MoU were not made and a dispute arose within the parties, the petitioner invoked the arbitration clause of the Agreement.

The invocation of the arbitration clause provided under the Agreement was contended by the respondent for the want of the jurisdiction of the Tribunal. Eventually, the Tribunal allowed the objection on the ground of non-existence of the Agreement. In this regard, the Tribunal held that the parties had, by executing the MoU expressly agreed to cancel the construction agreement which contained the arbitration clause, and since the MoU had no arbitration clause, there can be no recourse to arbitration for any dispute arising from the MoU.

Aggrieved thereby, the petitioner challenged the award under Section 34 of the Arbitration and Conciliation Act, 1996 ('**Act**').

Submissions by the petitioner:

- Execution of the MoU shall not render the Agreement as non-existent. The Agreement shall stand cancelled only upon the fulfilment of the conditions stipulated under the MoU. Since the condition of payment was not fulfilled by the respondent, the Agreement shall not stand cancelled.
- Difference between conditional novation and a normal novation should not be ignored. Conditional novation unlike the normal one, will come into existence only when the conditions are fulfilled.
- Since the conditions in the MoU were not fulfilled, the Agreement shall stand revoked thereby making the invocation of arbitration clause, valid.
- Reliance was place on the judgments of the Supreme Court in *Union of India* v. *Kishorilal Gupta,* AIR 1959 SC 1362 and *Lata Construction* v. *Rameshchandra Ramniklal Shah*, (2000) 1 SCC 586.

Contentions of respondent:

- The interpretation by the sole arbitrator was a plausible interpretation and the petitioner can only make claims under the Agreement. However, the same does not

revive the Agreement or the arbitration clause mentioned therein.

- Thorough reading of the MoU depicts that the parties arrived at a settlement by which the Agreement was 'cancelled' or 'closed'. Further, as for the fulfilment of the conditions mentioned in the MoU are concerned, respondent submits that reciprocal conditions were placed upon both the parties and the respondent's failure to make full payment thereunder is due to the petitioner not having handed over the consumables mentioned in the annexure to the MoU.
- Reliance was place on the judgments in *Nathani Steels Ltd.* v. *Associated Constructions* and *Damodar Valley Corporation* v. *K.K. Kar*.

Decision:

The High Court observed that the MoU expressly mentioned that it is being executed to cancel the Agreement which contained the arbitration clause as well. The High Court also observed that though the MoU provided for certain amount to be paid to the petitioner, however, it did not mention that failure to pay such amount would revive the Agreement.

Relying on the judgement in *Kishorilal Gupta (Supra*) *and Lata Construction (Supra)*, the High Court held that by executing the MoU, the parties expressly agreed to cancel the Agreement and with the execution of the MoU, the Agreement stood novated. Further, the High Court held that the view taken by the arbitral tribunal regarding the non-arbitrability of the dispute due to the novation of the agreement is a plausible view based on the contractual interpretation of the terms of the Agreement and thus, it does not feel the need of interference under Section 34 of the Act.

Lastly, the High Court also held that an agreement novated or superseded by another agreement will not automatically resurrect upon the failure of the fulfilment of conditions stipulated under the new agreement, unless expressly provided under the new agreement. Accordingly, the High Court dismissed the petition and upheld the award. [*B.L. Kashyap and Sons Ltd* v. *MIST Avenue Pvt. Ltd*. – Judgment dated 2 June 2023, Neutral Citation: 2023: DHC:3996, Delhi High Court]

Third-party funder who paid for proceedings of a case under a specific arrangement is not liable for an arbitral award against the person funded

The Division Bench of Delhi High Court while hearing an appeal under Section 37 of Arbitration and Conciliation Act, 1996 ('**Arbitration Act**') impugning an order passed by learned Single Judge in a petition filed under Section 9 of Arbitration Act, has held that a person who was not a party to the arbitral proceedings or the award, rendered in respect of disputes inter-se the parties to the arbitration, cannot be forced to pay the amount against a party to the arbitration.

Brief facts:

In the present case, Respondents 2 to 4 herein (Originally '**Claimants**') approached Tomorrow Sales Agency **('TSA/Appellant**') requesting funding for arbitration proceedings before Singapore International Arbitration Centre

('**SIAC**'). The Appellant accepted the request and entered into a Bespoke Funding Agreement ('**BFA**'). In the arbitration proceeding the tribunal awarded costs in favour of SBS Holdings ('**SBS/Respondent No. 1**'). The Claimants failed to pay the amount awarded against them in terms of Arbitral Award. Thereafter, SBS sent a letter calling upon Appellant to pay the amount in terms of the Arbitral Award. TSA denied the obligation to pay the costs as imposed on the Claimants. The Respondent No. 1 filed a petition against Appellant and Claimant be directed to disclose details of their assets and bank accounts and sought an order restraining from creating any third-party interests/right/title in respect of unencumbered movable or immovable assets. It also sought the interim measures under Section 9 of Arbitration Act to secure the amount awarded in terms of arbitral award delivered by an arbitral tribunal under rules and aegis of SIAC. The learned Single Judge ruled in favour of SBS and this was impugned by the Appellant in the present appeal.

Submissions by the Appellant:

- It was submitted by the Appellant that it was only a third-party funder and not a party to the arbitral proceedings, and it had funded the Claimants to pursue the arbitral proceedings but was not a party either to the arbitration agreement or the arbitral proceedings.
- The arbitration award was not directed against TSA and the amount awarded in favour of SBS is not against TSA. Thus, it was not liable to pay any amount to SBS and the impugned order directing it to disclose its assets and restraining it from transferring or alienating any assets, was flawed.

Submissions by the Respondent (SBS):

- It was submitted that since the arbitral proceedings were instituted with the support of funds provided by the Appellant, it was liable to pay the amount awarded by Arbitral Tribunal.
- It also submitted that Appellant had full control of the arbitral action and had funded it to derive benefits of the Arbitral Award if the Claimants were successful in their claims.

Decision:

The Division Bench of High Court did not agree with the decision of the Single Judge that the Appellant was obliged to pay costs according to the Bespoke Funding Agreement (BFA) as there was no provision in the BFA that the Appellant is obliged to fund an adverse award.

The reference made by the learned Single Judge to the case of *Gemini Bay Transcription Pvt. Ltd*. v. *Integrated Sales Service Ltd.* (2022) 1 SCC 753, was held to be misplaced. In that case the non-signatory who opposed the enforcement of an arbitral award was actually a party to the arbitral proceedings, and the award was specifically directed against that non-signatory. The controversy in that case revolved around whether a foreign award against a non-signatory could be enforced without the court examining whether the non-signatory was bound by the arbitration agreement. Therefore, the Division Bench held that the decision in *Gemini Bay* is not applicable when seeking to

enforce an award against a person who is not a party to the arbitral proceedings and has not been held liable under the award.

In the context of the Code of Civil Procedure, 1908, Order XXA deals with provisions regarding costs. Rule 2 of Order XXA specifies that the costs shall be determined according to the rules established by the High Court. However, in this case, the Hon'ble High Court has not established any rule that addresses the recovery of costs from individuals who are not directly involved as parties in the lawsuit or action.

The Court further observed that there were no existing rules applicable to the proceedings in this specific court that would allow for the imposition of costs on third parties. As a result, the Court allowed the appeal and overturned the disputed order issued by the Single Judge. [*Tomorrow Sales Agency Private Limited* v. *SBS Holdings, INC. and Ors.* – Judgement dated 29 May 2023, Neutral Citation: 2023:DHC:3830-DB, Delhi High Court]

News Nuggets

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- Competition/anti-trust law – ICAI covered under definition of 'enterprise' – CCI is not a grievance redressal forum against regulatory decisions taken by ICAI/other regulators

Insolvency – Issuance of notice to creditors at pre-admission stage of an application under IBC Section 10 is not mandatory

The National Company Law Appellate Tribunal, New Delhi (**NCLAT**) has held that the Insolvency and Bankruptcy Code, 2016 ('**IBC**') does not contain any provisions necessitating a service of notice upon the corporate applicant's creditors at the pre-admission stage of an application under Section 10 of the IBC. In *SMBC Aviation Capital Ltd.* v. *Interim Resolution Professional of Go Airlines (India) Ltd.,* dated 22 May 2023, the corporate debtor had failed to continue his business operations for certain reasons, and therefore filed an application to initiate Corporate Insolvency Resolution Process (**CIRP**) under Section 10 of the IBC. The National Company Law Tribunal (**NCLT**) admitted the application by the corporate debtor which was contended by the creditors stating that they did not receive any notice from the corporate debtor in relation to such initiation of CIRP. Now, in an appeal against the said order of the NCLT, the NCLAT has observed that the provisions of the IBC nowhere provide that the creditors of a corporate applicant should be mandatorily provided with a notice before the initiation of a CIRP. Relying on *Krrish Realtech Pvt. Ltd.,* Company Appeal (AT)(INS) No.1008, 1009 & 1010 of 2021, it was further held that the decision whether to serve a notice at this stage is purely discretionary and shall be decided on a case-to-case basis. Therefore, the on-serving of notice at the pre-admission stage of an application under Section 10 of the IBC shall not go against the principles of natural justice.

Insolvency – Allegation of fraud in appointment of Resolution Professional cannot be a ground for rejection of resolution plan under Section 30(2)(e) of IBC

The National Company Law Tribunal, Mumbai Bench, (**NCLT**) has held that a resolution plan cannot be rejected under Section 30(2)(e) of the Insolvency and Bankruptcy Code, 2016 (**IBC**) on the grounds that the appointment of the resolution professional was done in a fraudulent manner. In the case of *Amit Sangal* v. *Kairav Anil Trivedi and Ors.,* dated 15 May 2023, the operational creditor alleged that the resolution professional was appointed in a fraudulent manner by submitting false documents and therefore the resolution plan approved by the Committee of Creditors (**CoC**) was supposed to be rejected. The NCLT observed that the operational creditor's complaint relates to a situation that happened well before the release of FORM G (*Invitation for Expression of Interest by Resolution Professional*) and therefore, under Section 30(2)(e) of the IBC, 2016, such grounds cannot be taken into account for rejecting the resolution plan. Further, it also stated that the Insolvency and Bankruptcy Board of India (**IBBI**) is the proper authority to handle the situation in relation to the resolution professional's unlawful conduct and therefore the resolution plan cannot be set aside on such grounds.

Insolvency – Delay in filing appeal under IBC Section 42 is condonable vide powers conferred under Section 5 of Limitation Act, 1963

The National Company Law Appellate Tribunal (**NCLAT**) has held that a delay in filing an appeal under Section 42 of the Insolvency and Bankruptcy Code, 2016 (**IBC**) can be condoned *via* the exercise of power under Section 5 of the Limitation Act, 1963 (**Limitation Act**). In *Canara Bank* v. *Commercial Tax Department* [dated 22 May 2023], the Tax Department being one of the claimants against the corporate debtor made an interest claim to the liquidator after the acceptance of the initial claim. However, such interest claim was made after a delay of 19 days. Therefore, the liquidator refused to admit the interest claim of the Tax Department citing the delay in submission of the claim. The Tax Department filed an appeal against the order of the liquidator before the National Company Law Tribunal (**NCLT**) wherein the NCLT ordered the liquidator to reconsider the claim. Against such order of the NCLT, the present appellant filed an appeal in the NCLAT. The NCLAT has observed that the initial claim was admitted by the liquidator and the rejection of interest claim on the ground of delay of 19 days is not correct. Further, the NCLAT held that the delay in appeal by the Tax Department was condonable as per the powers exercised under Section 5 of the Limitation Act, which allows for extension in the prescribed period on reasonable grounds.

Arbitration – Where there is no novation and the parties have only extended the period of an agreement through written communication, the arbitration clause in such agreement shall continue to be operative

The Hon'ble High Court of Delhi (**High Court**) has held that if both the parties have extended the duration of an agreement through written communications, the arbitration clause that was a part of the initial agreement would continue to be in effect as there is no novation of the agreement. In *Unique Décor (India) Pvt. Ltd.* v. *Synchronised Supply Systems Ltd.,* dated 30 May 2023, the parties had entered into a rent agreement with the validity of one year containing in itself an arbitration clause. However, the parties in writing agreed to extend the period of the said agreement for another year. Subsequently, when a dispute in relation to the security deposit arose between the parties, the appellant filed a petition for invoking arbitration for resolution of the dispute. The petition was rejected by the court stating that the agreement between the parties had expired and so, the arbitration clause that was a part of such expired agreement cannot be invoked now. In this regard, the High Court while hearing an appeal observed that though the agreement was valid only for an year, the parties decided in writing to extend the period of validity of the agreement. Further, there was no other change to the agreement and neither did the parties superseded the initial agreement with a new one. Since, there was no novation of the agreement, and there was no new agreement in place of the initial agreement,

it was held that the arbitration clause of the initial agreement shall continue to be operative.

Arbitration – Mere reference to arbitration, in an agreement, as possible option for resolution of dispute cannot be construed as a valid arbitration agreement

The Hon'ble Calcutta High Court (**High Court**) has held that a clause in an agreement that simply makes a provision for a possibility of arbitration is not an enforceable arbitration agreement. In the case of *Blue Star Limited* v. *Rahul Saraf*, dated 8 June 2023, the parties had signed a contract in which the petitioner promised to offer the respondent operation and maintenance services. In pursuance of the same, an agreement was entered into by the parties wherein certain clause specified that the performance of the agreement should continue even in instances wherein there is any dispute between the parties or the pendency of any litigation or arbitration. Subsequently, when a dispute arose between the parties over the respondent's failure to pay an amount that was due, the petitioner invoked the clause 7 of the agreement and asked for appointment of an arbitrator which was contended by the respondent. Observing that said clause 7 of the agreement merely proposed / provided an option of dispute resolution through either litigation or arbitration, the High Court held it cannot be deemed to be a binding arbitration agreement. The High Court while relying on *Jagdish Chander* v. *Ramesh Chander,* (2007) 5 SCC 719, also observed that for arbitration to be binding upon the parties, the agreement should clearly showcase that the parties are referring the disputes to arbitration, and that the intention to be bound by the decision of the tribunal should be clear. The Court also observed that the agreement did not depict anywhere that the parties were willing to submit themselves to arbitration in case of any disputes. According to the Court, the wordings in the agreement made arbitration a mere possibility and not an obligation.

Arbitration request cannot be made by a constituent of a Joint Venture who is not party to the agreement

In a case involving arbitration agreement between a Joint Venture and a State Enterprise, the Patna High Court has rejected the petition for appointment of an arbitrator, filed by one of the constituents of the JV. The Court in this regard observed that since the JV had not initiated the arbitration request, one of the constituents of the JV cannot be considered as a 'party' to the agreement enabling such 'party' to make a request for arbitration. The Court noted that the joint venture was conferred with the status of a separate legal entity, distinct from its constituents. Contention that the other constituent of the JV had in fact executed a power of attorney in favour of the Managing Director of the present requestor to initiate an arbitration, was also rejected by the Court while it observed that the power conferred or the resolution made was not by the JV. The Court in *REW Contracts Pvt. Ltd.* v. *Bihar State Power Transmission Co. Ltd.* [Judgement dated 12 April 2023] also noted that the power conferred was not on the requestor but on an individual.

Competition/anti-trust law – ICAI covered under definition of 'enterprise' – CCI is not a grievance redressal forum against regulatory decisions taken by ICAI/other regulators

The Delhi High Court has held that Institute of Chartered Accountants of India (ICAI) falls under the definition of 'enterprise' under Section 2(h) of the Competition Act, 2002 because the functions performed by ICAI, in respect of providing education to its chartered accountants or to students, cannot be termed as 'sovereign functions'. The High Court further in this regard observed that ICAI cannot be considered the Government and, therefore, even if it carries on regulatory functions (regulation of a profession), it is not excluded from the wide definition of the term 'enterprise'. The Court further found unpersuasive the contention that since ICAI does not carry on any business, it is excluded from the scope of the Competition Act. According to the Court, the fact that ICAI is not an organization for profit and its activities fall within the scope of 'charitable purposes' as defined under Section 2(15) of the Income Tax Act, 1961, it does not mean that ICAI does not carry out any economic activity.

However, according to the Court, the Competition Act does not contemplate the Competition Commission of India (CCI) to act as an appellate court or a grievance redressal forum against decisions taken by other regulators, in exercise of their statutory powers and which are not interfaced with trade or commerce. Setting aside the decision of the CCI, the Court in *Delhi High Court Judgement in Institute of Chartered Accountants of India* v. *Competition Commission of India* [Judgement dated 2 June 2023] observed that ICAI being a statutory body and charged with taking the necessary powers to take decisions regarding the conduct of the CPE program for enrolling as a chartered accountant as well as for maintaining the standards of the profession; its decisions in this regard cannot be a subject matter of review by the CCI. It held that the regulatory powers are not subject to review by the CCI.

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