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Articles

Supreme Court upholds 2014 amendment of Pension Scheme with certain caveats

By **Sudish Sharma and Ayushi Agrawal**

The Supreme Court on 4 November 2022, upheld the constitutional validity of certain amendments made to the Employees' Pension Scheme ('**EPS**') by way of the Employees' Pension (Amendment) Scheme, 2014 ('**Amendment Scheme**'). This much-awaited ruling in the matter of *Employees' Provident Fund Organisation & Another* v. *Sunil Kumar B. and Others* will impact thousands of working individuals and make the EPS more viable.

The Amendment Scheme capped the maximum salary for joining the EPS as INR 15,000 per month with effect from 1 September 2014. The litigation by the employees arose by reason of the amendment, which set a time limit of six months for the EPS members to opt for higher pension based on their actual salary, and a further six months where reasonable cause for delay existed. However, the aforesaid time limit was not communicated to the employees and the applications for higher pension received after the cut-off date were rejected.

The Apex Court, in the judgment, upheld the categorization of employees made by the statutory authorities on the basis of monthly salary of the employees and rejected the argument of the employees that employees are considered a homogenous group under pension scheme.

The Supreme Court went on to clarify that the imposition of cut-off date to a beneficial scheme such as EPS Scheme is not palatable, therefore, for the members who could not opt for higher pension, the Supreme Court has allowed an additional time of 4 months from the date of the judgement to opt for higher contribution.

As per the ruling, employees are eligible to exercise the fresh option of higher pension within the time limit prescribed by the Apex Court except employees who retired prior to 1 September 2014, without exercising their option for higher pension.

Although the Supreme Court upheld certain amendments made to the pension scheme, it provided only partial relief to the aggrieved employees. In the near future, amendments may be brought in the EPS to provide the option of higher pension to all existing EPS members.

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Company Secretary whether liable for misleading financial information given by a company

By **Manan Chhabra**

In *V. Shankar* v. *SEBI*[1], the company secretary (CS) of Deccan Chronicle Holding Limited ('**DCHL**') was absolved by Securities Appellate Tribunal ('**SAT**'), Mumbai, from the liability imposed by the Adjudicating Officer ('**AO**') of Securities Exchange Board of India ('**SEBI**') on DCHL for misleading financial statements and information given by the DCHL.

Earlier this year, SEBI had investigated the scrip of DCHL to ascertain if the company shares were fraudulently pledged without appropriate disclosures during the period October 2011 to 2012 by the promoters and directors of DCHL, against the mandate under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. The investigation evinced several irregularities committed by DCHL which *inter alia* included understatement of outstanding loans and overstating the profits in the annual reports, and carrying out buyback of securities without having adequate free reserves. From the investigation, it was specifically gleaned that the public announcement made by the company in 2011 for buying back its equity shares had mislead the investors/shareholders, and thus the AO in its order dated 22 March 2022 concluded that DCHL and its promoters and directors were in violation of the provisions of the then applicable Companies Act, 1956 ("**1956 Act**"), under Sections 68 (Penalty for fraudulently inducing persons to invest money) and 77A (Power of company to purchase its own securities).

In addition to the promoters and directors, SEBI also imposed a penalty of INR 10 lakh on Mr. V. Shankar, being the CS of DCHL, for violation of the aforementioned provisions of the 1956 Act, as he had ascribed his signatures on the public announcement for buyback of securities in capacity of a company secretary of the company. The AO held that the company secretary should have exercised utmost due diligence and checked the veracity of the buyback documents before signing the documents.

Aggrieved by the Order passed by the AO, Mr. Shankar filed an appeal before the SAT which examined the provisions of 1956 Act under Section 68 and Section 77. The former states that '*any person knowingly or recklessly makes a statement which is false, deceptive, or misleading he would be punishable with imprisonment for a term which may extend to five years or with fine or both',* and the latter states that '*if a company makes default in complying with the provision of Section 77 or any rules made under the company or any officer of the company who is in default shall be punishable with imprisonment or fine or both'*.

In addition to the above provisions, the tribunal also examined the provision laid under the Section 215 (Authentication of balance sheet and profit and loss account) of the 1956 Act, which provides that every balance sheet and every profit and loss account of a non-banking company shall be signed on behalf of the Board of directors by *"its manager or secretary, if any, and by not less than two directors of the*

[1] Appeal No. 283 of 2022 (Decided on 1 November 2022)

company one of whom shall be a managing director where there is one".

Sub-Clause 3 of the said Section 215 provides that: *"The balance sheet and the profit and loss account shall be approved by the Board of directors before they are signed on behalf of the Board in accordance with the provisions of this section and before they are submitted to the auditors for their report thereon."*

In light of the above, the Tribunal held that there is a fiduciary responsibility on the Board of Directors of a company to check the veracity of financial documents before they are signed on behalf of the Board of Directors by a company secretary. Therefore, a company secretary is under no obligation to undertake utmost due diligence to check the veracity of the buyback offer before ascribing his signatures on the same. Once the balance sheet or profit and loss account is approved by Board of Directors, the role of a company secretary of signing them is merely ministerial in nature.

SAT also held that, as per SEBI (Buy back of Securities) Regulations, 1998, which provides for a company to nominate a compliance officer for compliance with the buyback regulations and to redress grievances, Mr. Shankar being the company secretary of DCHL acted as a compliance office wherein his role was only limited to the redressal of grievances of investors.

Finally, while allowing the appeal and setting aside the SEBI order, SAT also observed that just because a company secretary falls under the list of persons being 'officer in default' provided under Section 5 of the 1956 Act, a company secretary will not inevitably be liable under Sections 68 and 77A.

Conclusion:

Although this Order gives some relief to company secretaries, they cannot be completely relieved from liability if it can be established that a company secretary was responsible for the compliance in terms of Section 68 or 77A of the 1956 Act, and was responsible for misleading financial statements made in an open offer.

Thus, the Order passed by the SAT cannot be relied upon to streamline the role of a company secretary as just being ministerial in nature. NCLT earlier this year in *Technology Frontiers (India) Private Limited* v. *Global Sports Commerce Pte Ltd & Ors.* took an alternative stance and held that a company secretary is a '*Watchdog of protecting the Principles of Corporate Governance as well as the collective interest of all the stakeholders so also the Company'.* Therefore, it will largely depend on the facts of a given case, and applicable provisions of law, to determine the role of a company secretary and his liability.

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Notifications and Circulars

SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 amended: The Securities and Exchange Board of India *vide* Notification No. SEBI/LAD-NRO/GN/2022/98, dated 9 November 2022 has amended the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.

According to the notification, the earlier requirement of calculating 60 days volume-weighted average market price for determination of open offer price in case of disinvestment of public sector undertaking (PSU) companies, wherein it results in its change in control, has been dispensed with the case of disinvestment of a PSU by the Central Government or a State Government. In this regard, in regulation 8(2), after clause (d), and in 8(3), in clause (e) provisos have been inserted. Further, as per changes in Regulation 22(2), for the purpose of acquisition, the acquirer can now provide an unconditional and irrevocable bank guarantee issued in favour of the manager to the open offer by any scheduled commercial bank, subject to the approval of the Reserve Bank of India.

SEBI revises Operational Circular for issue and listing of NCS – Applicability of GST on fees remitted to SEBI: The Securities and Exchange Board of India has issued circular revising the Chapter XX of Operational Circular - applicability of GST on fees remitted to SEBI for issue and listing of Non-Convertible Securities (NCS), Securitized Debt Instruments, Security Receipts, Municipal Debt Securities, and Commercial Paper. As per Circular No. SEBI/HO/DDHS/DDHS_Div1/P/CIR/2022/0000000152, dated 10 November 2022 issued for the purpose, in Paragraph (b) of the said, the Heading 'Amount Remitted' now specifies the break-up of fee and GST. Certain other particulars like registered office address of remitter, email address, GST registration number of remitter, etc., also find their place in the new format. It may be noted that SEBI had in July 2022 stated that the fees and other charges payable to SEBI are subject to GST at the rate of 18% w.e.f. 18 July 2022.

SEBI (Issue and Listing of Non-Convertible Securities) Regulations, 2021 amended: The Securities and Exchange Board of India *vide* Notification No. SEBI/LAD-NRO/GN/2022/102, dated 9 November 2022 has amended the Securities and Exchange Board of India (Issue and Listing of Non-Convertible Securities) Regulations, 2021.

The SEBI has notified a new Chapter VIA, which deals with online bond platform providers. As per the amendment, no person shall act as an online bond platform provider without a certificate of registration from the Board as a stockbroker under the SEBI (Stockbrokers) Regulations, 1992. According to the notification, a person acting as an online bond platform provider without the certificate of registration on or prior to the date of this regulation coming into force may continue to do so for a period of three months from the date of this regulation coming into force or such other time period as may be specified by the Board.

According to the Explanation to new Regulation 51A, 'online bond platform providers' means any person operating or providing an online bond platform. 'Online bond platform' means any electronic system, other than a recognized stock

exchange or an electronic book provider platform, on which the debt securities which are listed or proposed to be listed, are offered and transacted.

SEBI (Real Estate Investment Trusts) Regulations, 2014 amended: The Securities and Exchange Board of India *vide* Notification No. SEBI/LAD-NRO/GN/2022/100 dated 9 November 2022 has amended the Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014.

According to the notification, the sponsor(s) and sponsor group(s) shall collectively hold a minimum of fifteen percent of the total units of the REIT for a period of at least three years from the date of listing of such units pursuant to initial offer on a post-issue basis, provided that any holding of the sponsor(s) and sponsor group(s) exceeding the minimum holding, shall be held for a period of at least one year from the date of listing of such units. In this regard, in regulation 11, sub-regulation (3) has been substituted. Further, as per new sub-regulation (4) in Regulation 11, the sponsor(s) and the sponsor group(s) shall continue to be liable to the REIT, trustees, and unit holders for all acts of commission or omission, representation, or covenants related to the formation of the REIT and the sale or transfer of assets or Holdco or SPV to the REIT.

Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 amended: The Ministry of Electronics and Information Technology ('**MEITY**') has on 28 October 2022 amended the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 by way of Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2022. Some of the major changes are highlighted below.

- Intermediaries are now required to publish their rules, regulations, privacy policies and user agreements in English or any other language specified in the Eighth Schedule of the Constitution.
- Intermediary is now required to make 'reasonable efforts' to cause their users not to host, display, upload, modify, publish, transmit, store or update any information that is obscene, pornographic, violative of the law or intellectual property rights of a party, deceptive or misleading.
- Intermediaries discharged of the burden of determining what is 'defamatory' or 'libellous' content.
- Intermediaries are required to respect the constitutional rights of the citizens.
- 'Grievance Appellate Committee' is to be established by the Central Government within three months. Any person aggrieved by a decision of a Grievance Officer may appeal to the GAC within 30 (thirty) days from the receipt of the communication from the Grievance Officer. The GAC is required to resolve the appeal within 30 (thirty) calendar days through an online mechanism.

E-Waste (Management) Rules, 2022 notified: The Ministry of Environment, Forest and Climate Change has on 2 November 2022 notified the E-Waste (Management) Rules, 2022 in supersession to its earlier Rules - E-waste (Management) Rules, 2016. The new Rules will come into effect from 1 April 2023. The new Rules deal with:

- Extended Producer Responsibility Framework which discusses about the responsibilities of the manufacturer, producer, refurbisher, bulk consumer,

recycler, state government or union territories

- Mandatory registration of the manufacturer, producer, refurbisher, and recycler on the portal, which is the online system developed by the Central Pollution Control Board for the purposes of these rules.
- Procedure for storage of e-waste
- Management of solar photo-voltaic modules or panels or cells
- Reduction in the use of hazardous substances in the manufacture of electrical and electronic equipment and their components or consumables or parts or spares; and
- Other miscellaneous matters such as Annual Reports, Appeals, Transportation of e-waste, Environmental Compensation, Verification and Audit and Steering Committee.

Revised terms for classification of enterprises under the Micro, Small and Medium Enterprises Development Act, 2006 notified: The Ministry of Micro, Small and Medium Enterprises (MSME), *vide* its Notification No. S.O. 4926(E) dated 18 October 2022 has amended the earlier Notification S.O. 2119 (E) dated 26 June 2020, which notified the criteria for classifying the enterprises as 'micro', 'small' and 'medium' enterprises and specified the form and procedure for filing the memorandum i.e., Udyam Registration.

Vide the Notification, Paragraph 8 of the 26 June 2020 Notification, which deals with 'Updation of Information and transition period in classification', has been amended and sub-paragraph 5 has been substituted with: "In case of an upward change in terms of investment in plant and machinery or equipment or turnover or both, and consequent re-classification, an enterprise shall continue to avail of all non-tax benefits of the category (micro or small or medium) it was in before the re-classification, for a period of three years from the date of such upward change". Earlier, there was no specific mention of availing benefits for a period of three years but only the provision of maintaining the prevailing status till expiry of one year from the close of the year of registration.

Indian Telegraph (Amendment) Rules, 2022 notified: Ministry of Communications (Department of Telecommunications) *vide* Notification G.S.R. 810(E) dated 3 November 2022 has notified the Indian Telegraph (Amendment) Rules, 2022 to amend Rule 525(2)(iv)(a) of Indian Telegraph Rules, 1951. Rule 525(2)(iv)(a) deals with the provision of Broadband connectivity in villages in a phased manner. The amendment provides that capital and operating expenses under the Bharat Net Project, which is the world's largest rural broadband project to provide broadband connectivity to all the 2.5 lakhs gram panchayats across India, shall be funded by the Universal Service Obligation Fund (USOF) for an extended period up to 31 March 2025. The unamended Rule provided for a period of five years from the 27 March 2017 for the implementation of the provision.

Environment (Protection) Third Amendment Rules, 2022 notified: Ministry of Environment, Forest and Climate Change *vide* Notification dated G.S.R. 804(E) dated 3 November 2022 has amended the emission standards under the Serial No. 88 of Schedule I of the Environment (Protection) Rules, 1986. The emission limits for new engines up to 800 kW for power generator set application and the general conditions with respect to the have been inserted.

Ratio Decidendi

Arbitration under Section 11 of SARFAESI Act cannot be invoked in cases where Financial Institution is a 'borrower'

The Delhi High Court has held that Section 11 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('**SARFAESI Act**') provides the remedy of resolution of disputes by way of arbitration where the dispute is between the financial institution, bank, an asset reconstruction company or a qualified buyer, but does not cover the circumstances where the financial institution is merely a 'borrower' in a simple lender-borrower dispute.

Brief facts

The Petitioner is a Non-Banking Finance Company ('**NBFC**') which entered into a Rupee Facility Agreement under which the Respondent advanced a loan of INR 10 crore to the Petitioner, against security interest created in the favour of Respondent. The Rupee Facility Agreement included an arbitration clause within its terms for resolution of disputes. The account was subsequently declared a Non-Performing Asset (**NPA**), following which proceedings under Section 13 of the SARFAESI Act were initiated by the Respondent. Thereafter, a notice of arbitration was also issued. Upon failure of the parties to appoint an arbitrator, the Petitioner filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 for the appointment of an arbitrator.

Submissions of Petitioner

- It was submitted that the dispute is between the Petitioner i.e., an NBFC and the Respondent i.e., a Bank, which are the entities as mentioned under Section 11 of the SARFAESI Act and their disputes are amenable to arbitration.
- It was further submitted that despite the presence of proceedings before the Debt Recovery Tribunal (**DRT**), Jaipur, and show cause notices issued declaring the Petitioner as a 'wilful defaulter', the same cannot stand in the way of the Petitioner invoking the arbitration clause.

Submissions of Respondent

- It was submitted that the dispute is a simple debtor-creditor dispute and, even though the Petitioner is a 'Financial Institution', it is also covered under the ambit of a 'borrower' within the meaning of section 2(1)(f) of the SARFAESI Act. The remedy available to the Petitioner against such proceedings when the security interest is invoked, would lie before the DRT, Jaipur.
- It was further submitted that Section 11 of the SARFAESI Act omits the word 'borrower' from its ambit. If said Section is interpreted to provide that every dispute between a lender and a borrower, one or both of which are financial institutions seeking enforcement of a security interest, become arbitrable, then the entire mechanism of DRT and SARFAESI would fail, and no action can be brought before the DRT against a financial institution that has offered security as a borrower.
- It is further submitted that since the Petitioner has participated in the proceedings before DRT, it cannot now resort to arbitration. This amounts to the Petitioner exercising 'Doctrine of election' i.e., selection of arbitration as alternative

mechanism, which is against the terms of law as laid down in *Vidya Drolia* v. *Durga Trading Corporation*, (2021) 2 SCC 1.

- It is further submitted that there is no territorial jurisdiction in Delhi since the Agreement confers exclusive jurisdiction to the courts in Jaipur even if there is an arbitration agreement. Further, there is no covenant with respect to "seat" of arbitration within the Rupee Facility Agreement.

Decision

The High Court further noted that the remedy of arbitration provided in Section 11 of the SARFAESI Act cannot override the special remedies stipulated under the set of special laws i.e., the SARFAESI Act and the Recovery of Debts and Bankruptcy Act, 1993 (**RDB Act**) with respect to recovery of debt by financial institutions, and therefore, even statutory arbitration cannot derogate from a remedy available to a lender for enforcing a security interest. It was held that the "doctrine of election" is simply not available. The High Court of Delhi relied on *Transcore* v. *Union of India,* (2008) 1 SCC 125, which states that *Doctrine of election to select arbitration as a dispute resolution mechanism by mutual agreement is available only if the law accepts existence of arbitration as an alternative remedy and freedom to choose is available,* to adjudicate the case.

The High Court noted that for the purpose of present *lis* between the parties, the Petitioner dons the hat of a *borrower* within the meaning of Section 2(1)(f) of the SARFAESI Act, and therefore, the recovery from such borrower can be done in terms of the aforesaid special remedies. Accordingly, the claims covered by such Acts are non-arbitrable, as there is a prohibition against waiver of jurisdiction of the DRT by necessary implication.

[*Bell Finvest India Limited & Ors.* v. *A U Small Finance Bank Limited* – Judgment dated 4 November 2022 in ARB.P. 453/2021, Delhi High Court]

'Trade usages' under the ambit of Section 28 of the Arbitration and Conciliation Act, 1996 are not to be applied by the Arbitrator against the express understanding of the parties

The Calcutta High Court held that 'trade usages' cannot be applied by an Arbitrator to adjudicate a dispute in circumstances where there is an express understanding of the Parties to the interpretation of the contract and in respect to such trade usages.

Brief facts

The Petitioner, being the Kolkata Port Trust ('**KoPT**'), had floated a tender for supply, operation, and maintenance of cargo handling equipment, for which the ceiling rate was INR 52 per ton. The Respondent, being the successful bidder entered into an agreement with a general escalation clause in the rate. The tender incorporated usage of Schedule of Rates ('**SoR**') issued by the Tariff Authority of Major Ports (**TAMP**) to determine the amount payable to the Respondent by the Petitioner for the services availed. The arrangement was that KoPT can pay for services availed to the Respondent and the amount shall be charged from the end user of the services by KoPT. Subsequently, a revised SoR was issued by TAMP on Respondent's representation, even after which the Respondent was paid INR 51.91 per ton by the KoPT as per the tender amount. However, the end user was charged the revised increased amount. The difference between both the amounts was considered by KoPT as the 'trade usage' by KoPT. Pursuant to the same, the Respondent initiated arbitration proceedings against the Petitioner. The arbitration award contemplated that the 'trade usage' must be calculated in

accordance with the terms of the contract and timely revision in the rates i.e., SoR in favour of the third parties. It was held that, in the absence of such method, it can amount to discrimination by the State. The TAMP rates along with its revisions were concluded to be the applicable rate. Thereafter, an application under Section 34 of the Arbitration and Conciliation Act, 1996 (**Act**) was filed by the Petitioner to challenge the above award.

Submissions of Petitioner

- It was submitted that the present circumstances of the case i.e., application of SoR for determination or revision of the rate is not envisaged in the contract and therefore in the absence of a specific clause providing for escalation charges, the arbitrator cannot award any such amount.
- It was further submitted that not even Courts can re-write the contractual terms by relying on Article 14 of the Constitution of India and as such even the Arbitrator cannot do the same for negotiating the contractual terms.
- It was further submitted that Section 28(3) of the Act mandates the Arbitrator to consider such terms of the contract and any award in contrary to the agreed terms shall be set aside.

Submissions of Respondents

- It was submitted that the tender at specific places provides for applicability of SoR by TAMP and therefore petitioner cannot selectively choose the provisions and since the Arbitrator has decided on its applicability, interference with the same would tantamount to re-appreciation of evidence, which is barred as per the law laid down in *Ssangyong Engineering and Construction Company Limited* v. *NHAI*, ([2019] 15 SCC 131).
- It was further submitted that the Arbitrator was correct in considering the general trade usage and market practice, as Section 28(3) of the Act clearly provides for taking them into account. The amended Section 28(3) provides more leeway to decide in terms of overall facts and circumstances.

Decision

The Calcutta High Court while referring various decisions such as *ONGC* v. *Saw Pipes,* 2003 (5) SCC 705*, Hindustan Linc Ltd.* v. *Friends Coal Carbonisation* (2006) 4 SCC 445*, Ssangyong Engineering and Construction Company Limited* v. *NHAI,* ([2019] 15 SCC 131), *PSA Sical Terminals Private Limited* v. *The Board of Trustees of V.O. Chidambranar Port Trust, Tuticorin & Others* (MANU/SC/0485/2021)*, V.G. George* v. *Indian Rare Earths* ([1999] 3 SCC 762) held that the Arbitrator is the ultimate authority of law and facts. Trade usage can be used to pass awards on certain aspects even if the agreement between the parties is silent on said aspect. For example, the award can allow mobilisation costs, even if the agreement is silent on it, unless the agreement clearly excludes it. However, trade usage can never be used to undermine explicit understanding between the parties.

In the present case, after perusal of the terms and conditions of the contract, it was observed that the applicability of SoR by TAMP shall be on such works which are not covered under the scope of the general escalation clause of the Agreement, or which are specifically ousted. In the present case, the TAMP rates and their revisions cannot be applied to the actual scope of work, since there is a presence of an absolute understanding between the parties with respect to the same.

The High Court further noted that the amended Section 28(3) of the Act as followed in *Associate Builders* v. *DDA*, (2015) 3 SCC 49, provides that

the construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take.

The High Court further noted that the arbitrators cannot apply the rights envisaged under the fundamental rights of the Constitution of India or equity while granting arbitral awards, and if they do, such awards must be set aside as being patently illegal under Section 34(2A) of the Act. The arbitrator could not have applied constitutional rights or principles of equity to grant relief.

[*The Chairman Board of Trustees for Shyama Prasad Mookherjee Port Kolkata* v. *Universal Sea Port Private Ltd.* – Judgment dated 3 November 2022 in AP/288/2020 IA NO. GA/1/2020 and EC/98/2022 - High Court of Calcutta]

News Nuggets

Provisions of MSMED Act will prevail over Arbitration Act – Presence of independent arbitration agreement is not material

The Supreme Court has held that Chapter-V of the Micro, Small, and Medium Enterprises Development Act, 2006 ('**MSMED Act**'), dealing with delayed payments to micro and small enterprises, would override the provisions of the Arbitration and Conciliation Act, 1996 ('**Arbitration Act**'). The Court in *Gujarat State Civil Supplies Corporation Ltd.* v. *Mahakali Foods Pvt. Ltd.* [Judgment dated 31 October 2022] also ruled that no party to a dispute with regard to any amount due under Section 17 of the MSMED Act, would be precluded from making a reference to the Micro and Small Enterprises Facilitation Council, even though an independent arbitration agreement existed between the parties.

The Court further held that Micro and Small Enterprises Facilitation Council can itself take up the dispute for arbitration and act as an arbitrator, even when the council had conducted the conciliation proceedings under Section 18(2) of the MSMED Act. It noted that the bar under Section 80 of the Arbitration Act would stand superseded by the provisions contained in Section 18 read with Section 24 of the MSMED Act. It also clarified that the provisions of the Arbitration Act would apply to the proceedings conducted by the Facilitation Council only after the process of conciliation initiated by the council under Section 18(2) fails. The Court added that such Facilitation Council would also be competent to rule on its own jurisdiction as also the other issues in view of Section 16 of the Arbitration Act.

Past tax liabilities, not a part of the Resolution Plan, stand extinguished

The NCLT Bench at Mumbai has held that all the past liabilities arising out of any levies/tax dues to any government authorities, etc. which are not part of the Resolution Plan and pertaining to the Corporate Insolvency Process period shall stand extinguished from the date of approval of the Resolution Plan. Observing that the authorities must file the claim before the RP before the approval of the Resolution Plan by the CoC, the Tribunal in *Subodh Kumar Agrawal* v. *Taguda PTE Limited* [Order dated 14 October 2022] waived off the income tax and GST liabilities of the Corporate Debtor that had accrued after the initiation of CIRP. The NCLT was of the view that the Resolution Applicant cannot be burdened with the liabilities that had arisen before the approval of the Resolution Plan. Furthermore, the Tribunal waived off the income tax liability on notional income arising on implementation of the Resolution Plan due to writing back of the unpaid dues to creditors in the books of the Corporate Debtor.

Standard with which case of pre-existing dispute under IBC is employed cannot be equated with the principle of preponderance of probability

The Supreme Court has held that the standard with reference to which a case of a pre-existing dispute under the Insolvency and Bankruptcy Code, 2016 must be employed cannot be equated with the principle of preponderance of probability which guides a civil court at the stage of finally decreeing a suit. The Court in *Rajratan Babulal Agarwal* v. *Solartex India Pvt. Ltd.* [Judgment dated 13 October 2022] heard an appeal challenging the order of NCLAT which had upheld an order of the NCLT allowing an application for initiation of the CIRP.

On facts, there were two sale agreements between the parties related to the supply of coal. Later, the Corporate Debtor directed the Operational Creditor to discontinue the supply of coal as the coal did not conform to the terms of the purchase order. In 2018, the Operational Creditor issued a demand notice to the Corporate Debtor under IBC and raised a claim. The Corporate Debtor responded to the Demand Notice and in turn demanded a certain amount from the Operational Creditor, as damages. Thereafter, the Corporate Debtor also filed a suit against the Operational Creditor claiming damages. Later, in 2020, the Operational Creditor filed a petition under Section 9 of IBC, seeking initiation of CIRP against the Corporate Debtor. The NCLT initiated CIRP against the Corporate Debtor upon the premise that there was no pre-existing dispute.

The Apex Court held that the order passed by NCLAT upholding the NCLT order merited interference as it erred in its finding about the pre-existing disputes. According to the Supreme Court, mere acceptance of the goods by the buyer may not prevent the buyer from still contending that there has been a breach of conditions. It treated the quality of the coal with reference to certain standards as conditions, and not warranty, to be fulfilled by the seller.

Adjudicating Authority cannot enquire into justness of rejection of resolution plan by Committee of Creditors

The National Company Law Appellate Tribunal ('**NCLAT**') Bench Chennai, while adjudicating an appeal, has observed that if a rejected Resolution Plan is placed before the Adjudicating Authority by the unsuccessful Resolution Applicant, the Adjudicating Authority cannot modify or interfere with the same in respect to the merits of the plan. The

NCLAT Bench in *Dr. C. Bharath Chandran* v. *Ms. Sabine Hospital and Research Centre & Ors.,* Company Appeal (AT) (CH) (Ins) No. 320 of 2022 & IA Nos.677 (Order dated 19 October 2022) has decided that, since Section 33(1) of the Insolvency and Bankruptcy Code, 2016 ('**IBC**') provides that if the Resolution Plan is not received by the Adjudicating Authority in accordance with Section 30(6) of the IBC i.e., approved by the Committee of Creditors, an order for liquidation shall be passed in such cases, an attempt to analyse or evaluate the justness of such decision cannot be done by the Adjudicating Authority. This has been held as applicable especially when the Appellant-Resolution Applicant has been given all possible opportunities to submit the Resolution Plan, including extension of time, replacement of co-applicant and opportunity to submit joint 'Resolution Plan' with the other Resolution Applicant.

Not being assets of the Corporate Debtor, Provident Fund dues are to be paid in full

The National Company Law Appellate Tribunal, Principal Bench, while adjudicating an appeal, has observed that the claim submitted by the Appellant-Creditor in relation to the dues with respect to Provident Fund Contribution, Provident Fund Contribution Cost, Interest for Delay, etc. shall be paid in full, it being not categorized as assets of the company. The Principal Bench in *Assam Tea Employees Provident Fund Organization* v. *Mr. Madhur Agarwal & Anr.*, Company Appeal (AT) (Insolvency) No. 262 of 2022 (Order dated 2 November 2022) while relying on *Regional P.F. Commissioner* v. *Ashish Chhawchharia, Resolution Professional for Jet Airways (India) Ltd. & Anr.,* Company Appeal (AT) Ins. No. 987 of 2022, has held that the provident fund dues are not assets of the Corporate Debtor, and therefore they have to be paid in full. This is because Section 36(4)(a)(iii) of IBC specifically excludes provident fund, the pension fund and the gratuity fund from the ambit of liquidation estate assets, and further the provident fund dues are also not subject to distribution under Section 53(1) of the IBC.

Once the Committee of Creditors has decided to proceed with liquidation, appeal against initiation of CIRP stands infructuous

The National Company Law Appellate Tribunal (**NCLAT**) Principal Bench, while adjudicating an appeal, observed that the appeal filed challenging the order of initiation of Corporate Insolvency Resolution Process (CIRP) is infructuous, in light of the subsequent decision of the Committee of Creditors (CoC) to proceed with liquidation of the Corporate Debtor. The Principal Bench in *Rakshit Dhirajlal Doshi* v. *IDBI Bank Limited,* Company Appeal (AT) (Insolvency) No. 296 of 2022 (Order dated 7 November 2022), held that since the CoC has already decided to liquidate the Corporate Debtor, and an application for the same is pending before the Adjudicating Authority, then in such case, the commercial wisdom of the CoC has to be considered, and the appeal pending against initiation of CIRP is rendered infructuous.

Court cannot set aside an award, whether in whole or in part, unless there is a patent illegality and without a finding as to its severability

The High Court of Uttarakhand while dealing with an appeal under Section 34 of the Arbitration and Conciliation Act, 1996 ('**Act**'), observed that the lower courts have set aside certain claims in relation to an award without deciding on the existence of any patent error or on the severability of such claims from the award.

The High Court in *Ravindra Kumar Gupta and Sons* v. *Union of India & Ors.*, Appeal from Order No. 174 of 2020 (Judgment dated 21 October 2022), held that the 'recourse' as mentioned under Section 34 implies enforcement of right, and where the right in itself is a truncated one, then any application under this section can be made only to set aside the award. The powers of the Court under Section 34 of the Act do not include the power to modify an award. Also relying on *Project Director, NHAI* v. *M Hakeem & Anr.,* arising out of SLP (CIVIL) No.13020 OF 2020 (Judgment dated 20 July 2021), the High Court reiterated that under Section 34 of the Act, the Court can either set aside an award or remand the matter back to the Arbitral Tribunal, unless there is patent illegality.

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