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Impact of DPDP Act on employee data

By **Sameer Avasarala and Kumar Panda**

The article analyses the impact of Digital Personal Data Protection Act, 2023 on processing of employee data by businesses for a variety of purposes, including performance assessment, extending various benefits, payroll, legal compliance and occasionally to safeguard employer's interests. It notes that though consent is not required for processing of employee data for the purposes of employment, many other obligations under the DPDP Act would continue, including additional safeguards required while handling personal data of families of employees. The article further discusses key measures like data discovery and mapping, fortifying documentation, vendor assessment, training and sanitization, which are required to be undertaken by the employers for a smooth transition for implementation of the DPDP Act. The authors highlight that at present there is lack of clarity as to whether contractual hires or employees on secondments would be considered employees for the purpose of exemption from consent, and if processing for the 'purposes of employment' would include processing for pre-employment activities. According to them, despite some conceptual similarities with the GDPR, multi-national organizations would still have to undertake certain measures to adopt a tailored approach to complying with the DPDP Act.

Impact of DPDP Act on employee data

By Sameer Avasarala and Kumar Panda

As the recently passed Digital Personal Data Protection Act, 2023 ('**DPDPA**') awaits implementation guidance from the Government, it is slated to have significant impact across all sectors and industries. As a result of the same, entities would have to reimagine data handling practices when processing personal data of customers, employees and other third parties who are individuals.

A common thread tying all types of businesses together (B2B, B2C etc.) would be the impact on processing of employee data. Unlike the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 ('**SPDI Rules**'), the DPDPA would apply uniformly to all personal data and provide a comprehensive framework for such processing, regardless of whether the information is 'sensitive'[1]. It also proposes the constitution of a Data Protection Board ('**DPB**'), which would adjudge non-compliances and impose penalties[2].

Employee data is widely processed by businesses for a variety of purposes including performance assessment, extending various benefits, payroll, legal compliance and occasionally, to safeguard employer's interests. In some instances (*such as use for group insurance*), this would also include personal data of the family members of such employees.

Do employers need to rely on consent now?

The DPDPA adopts a nuanced view by enabling the processing of personal data on the basis of 'certain legitimate uses'[3] without obtaining consent[4]. As part of the same, it permits employers to process employee data for the purposes of employment[5]. It also allows employers to process employee data for safeguarding employer from loss or liability (*such as prevention of corporate espionage, maintenance of confidentiality of trade secrets, IP or classified information*) or for providing services or benefits to employees.

[1] Rule 3, Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011
[2] Section 33, Digital Personal Data Protection Act, 2023.
[3] Section 7, Digital Personal Data Protection Act, 2023.
[4] Section 6, Digital Personal Data Protection Act, 2023.
5Section 7(i), Digital Personal Data Protection Act, 2023

It remains unclear if processing for the 'purposes of employment' would include processing for pre-employment activities such as shortlisting, interviews or for conducting background checks. The rules to be notified under the DPDPA may provide further clarity in this regard.

While employers may not be required to seek consent when processing employee data for such purposes, other obligations would continue to apply. Some of these may include:

(a) Processing of personal data by Data Processors only pursuant to a valid contract;
(b) Implementing technical, organisational and security measures to protect personal data;
(c) Ensuring accuracy and consistency of employee data, especially where such data is used to make decisions affecting employees[6];
(d) Intimating the DPB and affected Data Principals in case of a personal data breach;
(e) Erase personal data (and cause Processors to erase) once purpose of collecting is no longer served;
(f) Establish effective mechanisms for grievance redressal[7];
(g) Extending rights to data principals as provided under DPDPA[8]; and
(h) Ensuring that personal data is not transferred to a restricted territory or country[9].

Employers may be subject to certain additional safeguards in respect of handling of certain personal data of children and/or persons with disabilities. In such cases, they may be required to obtain consent of guardians and restrain from undertaking specific types of processing such as undertaking any processing likely to cause harm. This may be relevant when processing personal data of families of employees.

Transitioning to the DPDPA

As a transitionary mechanism, employers are permitted to continue processing of employee data, until consent for such data is withdrawn. However, employees must be provided with a notice containing personal data being processed, manner for exercise of rights and making complaints upon implementation of the DPDPA.

[6] Section 8(3), Digital Personal Data Protection Act, 2023
[7] Section 8, Digital Personal Data Protection Act, 2023
[8] Chapter III, Digital Personal Data Protection Act, 2023
[9] Section 16, Digital Personal Data Protection Act, 2023

A smooth transition necessitates employers to undertake certain measures with regard to processing of employee data. Some of these key measures include:

(a) ***Data discovery and mapping***: Employers may undertake data discovery and mapping exercises to determine the nature of employee data and datasets being processed by the Company and assess purposes and legal basis for processing in each such case.

(b) ***Fortifying documentation***: Employers must review and strengthen documentation, procedures and process flows to ensure that employment agreements, internal policies and frameworks governing employee data remain compliant and enable employers to process employee data for all purposes contemplated.

(c) ***Vendor Assessments***: Employers must revisit agreements with service providers (such as cloud providers, payroll processors, insurers etc.) to ensure compliance with key obligations. Additionally, employers may be safeguarded through appropriate indemnifications which may be sought from such providers.

(d) ***Training and Sensitization***: Employers must conduct periodic training and awareness programmes to sensitize employees of key obligations and ensure ground-level implementation of the requirements provided under the DPDPA.

While certain comfort has been extended under the DPDPA to processing employee data, employers are still required to reimagine their data handling practices to align with the DPDPA. Further, there is lack of clarity as to whether 'contractual hires' (i.e., agents, labourers) or employees on secondments would be considered employees and whether the said exemption from consent would apply to processing in that context.

Despite some conceptual similarities, multi-national organizations (*familiar to the GDPR*) would still have to undertake certain measures to adopt a tailored approach to complying with the DPDPA. While implementation timelines are awaited, the specification of the rules are also likely to infuse more clarity in the regime.

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Notifications & Circulars

- Companies (Prospectus and Allotment of Securities) Second Amendment Rules, 2023 notified
- Companies (Management and Administration) Second Amendment Rules, 2023 notified
- Limited Liability Partnership (Third Amendment) Rules, 2023 notified
- Exemption from IBC moratorium for transactions and arrangements relating to the aviation industry
- Foreign Exchange Management (Debt Instruments) (Second Amendment) Regulations, 2023 notified
- Centralised mechanism for reporting of demise of an investor through KYC Registration Agencies

Companies (Prospectus and Allotment of Securities) Second Amendment Rules, 2023 notified

The Ministry of Corporate Affairs ('**MCA**') *vide* Notification No. G.S.R. 802(E) has notified Companies (Prospectus and Allotment of Securities) Second Amendment Rules, 2023 ('**Amendment**'). The Amendment has inserted Rule 9(2) that requires every public company that has issued share warrants prior to the commencement of the Companies Act, 2013, which are not converted into shares, the details of such share warrants shall be reported to the Registrar of Companies ('**RoC**') within 3 months of commencement of this Amendment in Form PAS-7. Further, within six months of the commencement of the amended PAS Rules, the bearer of such pending share warrants shall surrender the share warrants to the company and dematerialise the shares in their account. The company for the purpose of dematerialisation of shares shall place a notice for bearer of pending share warrants in Form PAS-8 and publish it on their website as well as in a newspaper of an English language and a vernacular language. In case, any bearer of share warrants does not surrender the share warrants within 6 months, the company shall convert such warrants into dematerialised form and transfer it to Investor Education and Protection Fund.

Further, insertion of Rule 9B mandates every private company, except small companies, to issue securities only in dematerialised form and to facilitate dematerialisation of all its securities in accordance with the provisions of the Depositories Act, 1996 and regulations made thereunder. Every Company on which Rule 9B is applicable shall comply with the provision of this Amendment within a period of 18 months from the closure of the financial year ending on or after 31 March 2023. Further, when such company on or after the date on which it is required to comply with this Amendment, offers for the issue of any securities or buyback of securities or issue of bonus shares or rights offer shall ensure that before making any such offer, entire holding or securities of its promoters, directors, key managerial personnel has been dematerialised as per the provisions of Depositories Act, 1996. The holder of securities in the Company on which Rule 9B applies shall ensure dematerialisation of securities before making any transfer of securities and also ensure that before subscribing to securities of such companies, all his securities are held in dematerialised form. This Rule 9B is not applicable to a government company.

Companies (Management and Administration) Second Amendment Rules, 2023 notified

The MCA *vide* Notification No. G.S.R. 801(E) has amended the Companies (Management and Administration) Rules, 2014 (**'Rules'**) and notified Companies (Management and Administration) Second Amendment Rules, 2023 ('**Amendment**'). Through this Amendment, sub-rules (4) to (8) have been inserted in Rule 9. Rule 9(4) mandates every company to designate a person responsible for sharing information with Registrar of Companies ('**RoC**') or any other authorised officer in relation to the beneficial interest in shares of a company. Further, as per Rule 9(5), a company secretary ('**CS**') (only if required to be appointed by law) or key managerial personnel ('**KMP**') (other than CS), or every director in case of absence of a CS or KMP shall be designated as the person responsible for sharing information as specified under Rule 9(4). Until such designation takes place, a CS (only if required to be appointed by law), every Managing Director or Manager (in the absence of a CS), otherwise every director shall be deemed to be the designated person. The Company shall inform the details of the designated person in Annual returns. Any change of such designated person shall be intimated to the RoC in e- Form GNL-2.

Limited Liability Partnership (Third Amendment) Rules, 2023 notified

The Ministry of Corporate Affairs *vide* Notification No. G.S.R. 803(E) dated 27 October 2023 notified Limited Liability Partnership (Third Amendment) Rules, 2023 ('**Amendment**') mandating disclosure of beneficial interests in an LLP. This Amendment mandates by insertion of Rule 22A that every new LLP, and existing LLPs within 30 days from the commencement of this Amendment, shall prepare a Register of Partners in Form 4A. Further, as per new Rule 22B, any person whose name is entered in the register of partners but does not hold beneficial interest in the contribution of an LLP shall make disclosure in Form 4B and correspondingly, those persons whose name is not entered in such register but holds a beneficial interest in the contribution of an LLP shall disclose details in Form 4C. Any subsequent change in beneficial interest shall also be disclosed on Form 4B and Form 4C respectively within thirty days from the date of such change. In the event, the beneficial interest of registered partner is limited to the contribution stated against his name in the registers, but he does not hold beneficial interest in contribution against any other registered partner, then, he shall not be required to file such

declaration. The LLPs shall also record the above declarations and file returns in Form 4D, by a designated partner authorized for this purpose under Form 4 and until such designation every designated partner shall be responsible for such declaration by the LLPs. All the above compliance requirements shall be satisfied within 30 days of its applicability.

Exemption from IBC moratorium for transactions and arrangements relating to the aviation industry

The Ministry of Corporate Affairs *vide* Notification No. S.O. 4321(E) dated 3 October 2023 has exempted transactions, arrangements, or agreements, relating to aircraft, aircraft engines, airframes, and helicopters from the purview of moratorium as defined under Section 14(1) of the Insolvency and Bankruptcy Code, 2016. This is in light of India becoming a signatory to the Convention on International Interests in Mobile Equipment and its Protocol on Matters Specific to Aircraft Equipment. The exemption shall allow a favourable position to the lessor and creditors under the insolvency process. As per reports, now, Indian insolvency laws have been aligned with international standards and the aviation industry has been put in a favourable position from the perspective of international aviation financing.

Foreign Exchange Management (Debt Instruments) (Second Amendment) Regulations, 2023 notified

The Reserve Bank of India *vide* Notification No. FEMA.396(2)/2023-RB dated 16 October 2023 has notified amendments to the Foreign Exchange Management (Debt Instruments) Regulations, 2019 ('**Principal Regulation**') called as Foreign Exchange Management (Debt Instruments) (Second Amendment) Regulations, 2023 ('**Amendment**'). By this Amendment, sub-paragraph E has been added to para. 1 to the Schedule 1, which provides that any person resident outside India maintaining a rupee account in terms of Regulation 7(1) of Foreign Exchange Management (Deposit) Regulations, 2016 ('**Deposit Regulations**') may purchase or sell dated government securities / treasury bills, as per terms and conditions specified by the RBI. Further, two more insertions have been made: (a) Clause 4A to para. 2 provides that the amount of consideration for purchase of dated Government Securities/treasury bills by persons resident outside India shall be paid out of funds held in their rupee account maintained as per Deposit Regulations; and

(b) Clause 2A to para. 4 provides that the sale/ maturity proceeds (net of taxes, as applicable) of instruments held by persons resident outside India that maintain a rupee account in terms of Regulation 7(1) of Deposit Regulations shall be credited to the said rupee account.

Centralised mechanism for reporting of demise of an investor through KYC Registration Agencies

The Securities Exchange Board of India (SEBI) *vide* Circular No. SEBI/HO/OIAE/OIAE_IAD-1/P/CIR/2023/0000000163 has introduced a centralised mechanism for reporting the death of an investor through the KYC Registration Agencies ('**KRAs**'). It has been made mandatory for the intermediaries to obtain and verify the death certificate post intimation about the demise of the Investor from the 'Notifiers' as defined in the circular. Post verification, the intermediary shall submit a KYC modification request to KRA and block all the debit transactions in the account including non-financial transaction requests from the account of the deceased investor. Further, upon receipt of 'KYC Modification Request', KRA shall independently perform validation and verification and accordingly update the KYC record as 'Modification Rejected and Clear i.e., Validated' or 'Blocked Permanently' as the case may be. Further, upon receipt of notification of 'Blocked Permanently', intermediaries shall take necessary steps to inform about the transmission to the Notifier or the nominee within 5 days. In case, when the death certificate has not been received and the status of the KYC has been put 'on hold', transaction requests in such cases shall only be processed after conducting appropriate due diligence. The Circular also states that in order to ensure uniformity in operationalizing this Circular, a standard operating procedure (SOP) may be put in place by Stock Exchanges, Depositories and industry associations like Association of Mutual Funds in India (AMFI), Registrars Association of India (RAIN), etc.

Ratio Decidendi

- Dues arising from the SEBI order passed after the liquidation commencement date can be claimed from the said liquidation proceedings – NCLT, Mumbai

- Treating homebuyers who have availed remedy under the RERA Act differently from other homebuyers, under IBC, amounts to hyper-classification and contravenes Article 14 of the Constitution – Supreme Court

- Insolvency – Approval by Competition Commission of India prior to approval of the resolution plan by CoC is only directory and not mandatory – NCLAT, New Delhi

Dues arising from the SEBI order passed after the liquidation commencement date can be claimed from the said liquidation proceedings

According to the National Company Law Tribunal (NCLT), Mumbai, any outstanding payments that result from an adjudication order issued by the Securities and Exchange Board of India (SEBI), even after liquidation proceedings have begun, should be entertained by the Liquidator. In this case, the Hon'ble NCLT directed the Liquidator to admit SEBI claims and strictly adhere to Section 53 of the Insolvency and Bankruptcy Code, 2016.

Brief facts:

In the present case, the liquidation of Sterling International Enterprises Limited (**'Corporate Debtor')** was initiated by an order dated 18 October 2021. The liquidator invited claims from stakeholders, with the last date being 18 December 2021.

SEBI had initiated an investigation for irregular trading activity in the scrip of the Corporate Debtor. Consequently, it initiated adjudication proceedings against the Corporate Debtor for violation of certain provisions of the SEBI Act and related regulations. Upon the completion of proceedings, SEBI *vide* its adjudication order dated 17 February 2022 imposed a Penalty of INR 2,00,000/- on the Corporate Debtor. Thereafter, SEBI submitted its claim of INR 2,00,000/- in Form-C to the Liquidator on 14 December 2022

The Liquidator *vide* its communication dated 20 January 2023 rejected the claim of SEBI summarily on the technical ground of delay in the submission of the same. SEBI filed an appeal against the decision of the Liquidator before the Hon'ble NCLT for condoning the delay of 288 days in filing the Form-C- Proof of Claim and for a direction to the Liquidator to consider and admit the claim of the appellant.

The Hon'ble NCLT *vide* its order dated 7 February 2023, allowed the appeal filed by SEBI and condoned the delay with a direction to the Liquidator to independently decide the claim of the Appellant. The Liquidator, after considering the order of NCLT once again, after assessing the Form C filed by SEBI on merits, *vide* its communication dated 28 February 2023, rejected the claim of SEBI by giving the reason that the Adjudication order of SEBI, which is the basis of its claim, was passed after the commencement of Liquidation. SEBI, being aggrieved by the order of the Liquidator, has filed the present appeal.

Submission by SEBI:

- The SEBI stated that it is a statutory authority and has solely taken steps to determine the penalty to be paid by the Corporate Debtor in terms of the SEBI Act. It was also pointed out that the SEBI did not enforce a claim for the recovery of the penalty owed by the Corporate Debtor during the moratorium period under Section 33(5) of the IBC.

- Further, the Appellant relied on the IBBI Circular No. IP/002/2018 dated 3 January 2018, which *inter alia* stipulates that a Corporate Debtor undergoing the liquidation process needs to comply with provisions of the applicable laws (Act, Rules, Regulations, Circulars, Guidelines, Orders, Direction, etc.) during such process. Reliance was placed on the judgement of *Sundaresh Bhatt, Liquidator of ABG Shipyard* v. *Central Board of Indirect Taxes and Customs*, Civil Appeal No. 7667 of 2021 to contend that the liquidator must ensure that the levy of penalty is legal.

Submission by the Respondent:

- Liquidator submitted that he had considered the claim of SEBI on merits and rejected it on the ground that a claim against a Corporate Debtor must exist on the date of commencement of liquidation of the Corporate Debtor. In the present case, there was no claim against the corporate debtor on 18 October 2021. The Adjudication Order came to be passed on 17 February 2022 which was after the liquidation commencement date and hence the claim was not admissible.
- Claim of SEBI is in the nature of statutory dues which falls within the purview of Section 53(1)(e)(i). The liquidator contended that statutory dues are considered wherein the due has arisen in whole or any part of the period of two years' preceding the liquidation commencement date. However, in the instant case, the due of SEBI was informed to the Liquidator after a delay of 288 days after the liquidation commencement days.

Decision:

The NCLT observed that the Hon'ble Supreme Court in catena of cases including *Sundaresh Bhatt, Liquidator of ABG Shipyard* v. *Central Board of Indirect Taxes and Customs*, had held that it is the duty of the interim resolution professional, resolution professional, or the liquidator to ensure that the legal assessment of statutory dues such as taxes, fines, and penalties is completed. A natural corollary to this is that if determination of the statutory dues is allowed during the liquidation period, then filing of the claim arising out of such determination cannot be barred under IBC otherwise, it would amount to empty formality.

It is important to note that a belated claimant cannot disrupt the amount that has already been distributed according to the waterfall mechanism under Section 53 of the IBC. The law is clear that if a creditor files a claim after the deadline, they will only be entitled to receive funds from any remaining assets of the corporate debtor and will not have the right to disturb any distribution already made. Therefore, the Hon'ble NCLT allowed dues arising out of SEBI's Adjudication order passed by SEBI after the liquidation commencement date.

[*Securities and Exchange Board of India* v. *Vishal Ghisulal Jain*, 2023 SCC OnLine NCLT 631, dated 14 September 2023]

Treating homebuyers who have availed remedy under the RERA Act differently from other homebuyers, under IBC, amounts to hyper-classification and contravenes Article 14 of the Constitution

The Supreme Court of India has held that the homebuyers who have sought relief under the Real Estate Regulatory Authority ('**RERA**') cannot be considered a separate sub-class of homebuyers when it comes to qualifying as financial creditors under the Insolvency and Bankruptcy Code, 2016.

Brief facts:

The Homebuyers ('**Appellants**') had approached Bulland Buildtech Pvt. Ltd. ('**Respondent/ Company**') for a real estate project ('**Project**') of the Respondent. However, due to an inadvertent delay in the completion of the Project, the Appellants approached Uttar Pradesh Real Estate Regulatory Authority ('**UPRERA**') for a refund of the deposited amount along with interest, which was allowed by the UPRERA. However, in the meanwhile insolvency proceedings were initiated against the Company.

During the proceedings, a resolution plan (**'Resolution Plan'**) in consultation with the Committee of Creditors was presented to the adjudicating authority.

The Resolution Plan distinguished between two groups of homebuyers: those who had approached RERA or received a favourable order, and those who had not. The Resolution Plan provided 50% better terms to the homebuyers who did not approach UPRERA, compared to the other class of homebuyers.

The Appellants were aggrieved with the distinction made in the Resolution Plan and therefore raised their objections before the adjudicating authority. However, their plea was not considered by the adjudicating authority or in appeal by the NCLAT. Hence, they approached the Hon'ble Supreme Court.

Contentions of Appellants:

The Appellants contended that post the amendment of Section 5(8)(f), which talks about financial debt, homebuyers allottees in real estate projects were also considered as financial creditors and therefore no distinction shall be made based on sub-classes of homebuyers as stated in the Resolution Plan.

The Appellants relied on the judgment of the NCLT bench of Mumbai in the case of *Mr. Natwar Agrawal (HUF)* v. *Ms. Ssakash Developers & Builders Pvt. Ltd.*, which upheld that even in the case of an allottee in a real estate project becomes a decree holder under RERA, he shall be treated in the same class of Homebuyers.

Contentions of Respondent:

The Resolution Professional contented that the Appellants should not have the advantage of dual benefits. They cannot be treated as both decree holders under RERA and the same class of financial creditors as other homebuyers who have not approached UPRERA. The RP further stated that since the decree holders were entitled to a specific amount as a refund with interest, they must be treated as unsecured creditors. This is because they have relinquished their right under Section 18 of the Real Estate Regulatory Authority Act.

Analysis and decision of the Court:

The Hon'ble Supreme Court emphasised on the plain reading of Section 5(7) and 5(8) of the IBC, which defines 'financial creditor' and 'financial debt' along with the 2018 amendment that added Section 5(8)(f), by the virtue of which homebuyers and allotees of a real estate project were included in the class of 'financial creditors'.

The Hon'ble Court relied on the aforementioned sections and held that the plain reading of these section does not make any distinction between different classes of financial creditors for the purpose of Resolution Plan. Considering the same, the Court relied on the judgment placed by the Appellants on the case of *Mr. Natwar Agrawal (HUF)* v. *Ms. Ssakash Developers & Builders Pvt. Ltd.*

The Hon'ble Court did not concur with the argument presented by the RP that the Appellants should be classified as a different class of financial creditors because they have received a favourable order or have approached UPRERA. The Court stated that only homebuyers have the right to seek remedies under RERA, and therefore, treating some of them as a different class under IBC would be unfair.

The Hon'ble Court also referred Section 238 of IBC, 2016 and held that by the virtue of *non-obstante* clause, the provisions of IBC, 2016 have an overriding effect over RERA Act. It held that the classification by the Resolution Professional as 'hyper-classification' and violation of Article 14 of the Indian Constitution.

Therefore, the Court set aside the impugned order and held that the Appellants are to be treated as financial creditors as defined under Section 5(7) of IBC, 2016 and entitled them to be treated in the same class as other homebuyers who had not approached UPRERA in the Resolution Plan.

[*Vishal Chelani & Ors.* v. *Debashis Nanda*, – Judgment dated 6 October 2023 in Civil Appeal No. 3806 of 2023, Supreme Court]

Insolvency – Approval by Competition Commission of India prior to approval of the resolution plan by CoC is only directory and not mandatory

The National Company Law Appellate Tribunal, New Delhi, has ruled that according to Section 31(4) of the Insolvency and Bankruptcy Code of 2016, the requirement for approval by the Competition

Commission of India (CCI) is considered mandatory, but CCI's approval prior to the approval of the resolution plan by the Committee of Creditors (COC) is considered directory.

Brief facts:

In the instant case of the Corporate Insolvency Resolution Process **('CIRP')** of Hindustan National Glass & Industries Limited **('HNGIL'),** the Resolution Professional **('RP')** had received Resolution Plans from two prospective resolution applicants – Independent Sugar Corporation Ltd **('ISCL')** & AGI Greenpac Ltd **('AGI').** ISCL sought clarification from the RP about the approval of the Competition Commission of India **('CCI')** as well as the timelines for obtaining such approval, as the Request for Resolution Plan **('RFRP')** had contradictory clauses.

The RP issued a clarification considering the available jurisprudence; the RFRP granted relaxation to the Resolution Applicants to procure the CCI approval post the approval of the Resolution Plan by the CoC, but prior to the filing of the Resolution Plan before the Adjudicating Authority. The Committee of Creditors **('CoC')** approved a Resolution Plan submitted by AGI with 98 % vote share on 28.10.2022, but the CCI did not grant its approval to the combination until 15.03.2023. Soneko Marketing Private Limited, a creditor of HNGIL, challenged the approval of the Resolution Plan by the CoC, arguing that the requirement of prior CCI approval is mandatory under the IBC and that the CoC could not have approved the Plan without first obtaining such approval.

Thus, the issue that arose for consideration before the Hon'ble NCLAT was whether, as per Section 31 of the Code, the requirement of approval of the CCI before approval of the Resolution Plan by the CoC is mandatory or directory in nature.

Submission by the Appellant:

- The appellant submitted that AGI failed to obtain mandatory approval of the CCI before the approval of the Plan by the CoC. It submitted that approval by CCI after the approval of the Resolution Plan by the CoC is a violation of the RFRP and instructions of the RP.
- The learned Counsel relied on the judgment of this Tribunal in *Bank of Maharashtra* v. *Videocon Industries Ltd.* [Company Appeal (AT) (Ins.) No. 503 of 2021] where the approval of the CCI was not obtained before the approval of the Resolution Plan by the CoC, the same was held to be not valid.
- It was also submitted that the use of the word 'shall' in an ordinary sense signifies the mandatory nature of the provision. There is no basis to change the word 'shall' used in the proviso to 'may'. According to the appellant. interpreting the

word 'shall' as 'may' in proviso to Section 31(4) will make the word 'shall' otiose, and interpreting the proviso as being 'directory' would be contrary not only to the plain language but also to the law laid down by the Supreme Court.

Submission by the Respondent:

- CoC submits that this Tribunal in *Arcelor Mittal India Pvt. Ltd.* v. *Abjijit Guhathakurta* case held that proviso to Section 31(4) is a 'directory'. It is submitted that no penalty/ consequences are provided in Section 31(4) on the basis of which, it can be said that proviso is 'mandatory'. It is submitted that approval by the CCI is mandatory and not the timeline and approval by the CCI can be prior to the approval by the Adjudicating Authority.
- Successful Resolution Applicant contends that Appellant(s) have no locus to file the Appeal(s). Learned Senior Counsel has referred to Section 40A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 **('CIRP Regulations')** and submits that according to the timeline provided in Regulation 40A, the CoC has only 30 days to approve or reject a Resolution Plan, whereas under the Competition Act, the CCI has 210 days period for approval of the combination and if it is held that approval of CCI is mandatorily and has to be obtained prior to the approval of CoC, the timeline in the Code shall render the whole process redundant, which cannot be said to the intention of the legislature.
- Hence, what is mandatory is approval and not the timeline. It is further submitted that timelines under the Code mention 135 days for receipt of the Resolution Plan and 165 days for the CoC to decide on the Plan. Proceedings before NCLT cannot be frozen till the combination approval is granted by the CCI. Hence, the proviso will nullify the entire scheme of the Code. A company cannot wait indefinitely.

Judgement:

The Hon'ble NCLAT held that the requirement of CCI approval is mandatory, but that it is not necessary for the CCI to grant its approval prior to the approval of the Resolution Plan by the CoC. The NCLAT reasoned that the timeline provided in the IBC for the CIRP is very tight and that requiring the CoC to wait for CCI approval before approving the Plan would be impractical and would unduly delay the resolution process.

The Hon'ble NCLAT also held that the proviso to Section 31(4) of the IBC, which states that the CCI shall grant or refuse approval to a combination within 210 days of receiving an application, is directory and not mandatory. This means that the CCI is not bound to grant or

refuse approval within 210 days, and its failure to do so does not invalidate the Resolution Plan approved by the CoC.

The Appellate Authority held that the RP had subsequently clarified that approval can be obtained even after the approval by the CoC, which was in accordance with the prevalent legal position as settled by the NCLAT in *Arcelor Mittal India Pvt. Ltd.* v. *Abjijit Guhathakurta* wherein the Hon'ble NCLAT had held that the proviso to sub-section (4) of Section 31 of the IBC which relates to obtaining the approval from the CCI under the Competition Act, 2002 prior to the approval of such Resolution Plan by the COC is directory and not mandatory.

Further, the NCLAT held that it is open to the COC, which looks into the viability, feasibility and commercial aspects of a Resolution Plan to approve the Resolution Plan subject to such approval by the Commission, which may be obtained prior to approval of the plan by the Adjudicating Authority under Section 31 of the Code. Further, the Appellate Authority held that Section 31, sub-section (4) proviso has to be read to mean that the approval by the CCI is 'mandatory', and the approval by the CCI prior to the approval of CoC is 'directory'.

[*Soneko Marketing Private Limited* v. *Girish Sriram Juneja & Ors.* – Judgment 18 September 2023 in Company Appeal (AT) (Insolvency) No. 807 of 2023 & I.A. No. 2721 of 2023, NCLAT, Principal Bench, New Delhi]

News Nuggets

- Arbitration – Absence of arbitration clause in main agreement is not material when there is a specific incorporation of another agreement containing an arbitration clause
- Arbitration – Absence of a concluded contract does not deprive contractor from a reasonable remuneration for the work performed
- Insolvency – 'Doctrine of election' not prevents financial creditor from initiating CIRP against a corporate debtor – IBC provisions can be invoked even after issuance of recovery certificates by DRT
- Insolvency – Only the parties who have benefitted from the preferential transaction can be directed to make reverse contributions to the corporate debtor
- Insolvency – Limitation to file appeal commences from date of pronouncement of order in presence of counsel, which can be deemed to be constructive knowledge of the order

Arbitration – Absence of arbitration clause in main agreement is not material when there is a specific incorporation of another agreement containing an arbitration clause

The Calcutta High Court has held that the absence of an arbitration clause in the main agreement shall not be material when the main agreement specifically provides for incorporation of another agreement whereunder there is an arbitration clause. In *Power Mech Projects Limited* v. *BHEL* [dated 17 October 2023], the parties had executed an agreement pursuant to the petitioner being issued a Letter of Intent (**LoI**) and a Work Order in its favour. While the duly stamped final agreement had no arbitration clause, the unstamped LoI and the Work Order issued before the final agreement contained almost similar arbitration clauses. When disputes pertaining to payments arose between the parties, the petitioner invoked the arbitration clause under the LoI and approached the court for appointment of an arbitrator. However, the respondent contended that the final agreement executed between the parties did not contain any arbitration clause and the LoI on which the reliance was placed for invocation of arbitration was unstamped and hence inadmissible. The High Court held that the LoI and Work Order formed part of the same transaction that the final agreement was executed for and hence if one of the documents (in the present case, the final agreement) was appropriately stamped, then the other documents forming part of the same correspondence will be deemed to be duly stamped thereby being admissible as per the proviso under Section 35 of the Indian Stamp Act, 1879. Further, the High Court also held that since the final agreement executed between the parties made a specific reference to the LoI and the Work Order, the arbitration clause mentioned thereunder may be incorporated by reference as per Section 7(5) of the Arbitration and Conciliation Act, 1996.

Arbitration – Absence of a concluded contract does not deprive contractor from a reasonable remuneration for the work performed

The Delhi High Court has held that a party that has carried out any work at the instance of the other party shall be liable to be compensated for the work performed even in cases where a final purchase order is not issued in its favour. In the case of *BSNL* v. *Vihaan Networks Limited* [dated 3 October 2023], the respondent was declared a successful bidder of the invitations for work sought by the petitioner. Subsequently, the respondent was directed to carry out certain preparatory actions which resulted in the respondent

incurring certain costs. Thereafter, an Advance Purchase Order (**APO**) and the respondent started deploying its resources for the performance of the intended project. However, the petitioner, eventually did not issue any Purchase Orders and also withdrew the APO. In this regard, when a dispute arose between the parties, the arbitral tribunal decided partly in favour of the respondents stating that though there was no concluded contract between the parties, the respondent shall be entitled to recover the expenses incurred. The High Court concurred with the understanding of the arbitral tribunal wherein it had held that while there was no concluded contract between the parties and the withdrawal of the APO by the petitioner was also valid, however, the respondent who had commenced preparation activities at the instance of the petitioner issuing the APO, shall be entitled to reasonable reimbursement of the expenses. Further, the High Court observed that the arbitral tribunal's finding was based on appreciation of evidence and that the arbitral tribunal had taken a plausible view which shall not call for interference of the High Court within the limited scope under Section 34 of the Arbitration and Conciliation Act.

Insolvency – 'Doctrine of election' not prevents financial creditor from initiating CIRP against a corporate debtor – IBC provisions can be invoked even after issuance of recovery certificates by DRT

The Supreme Court has held that the 'doctrine of election', stemming out of the law of evidence that bars prosecution of the same right in two different fora based on the same cause of action, cannot be applied to prevent a financial creditor from approaching the adjudicating authority for initiation of Corporate Insolvency Resolution Process against a corporate debtor. In the case of *Tottempudi Salalith* v. *State Bank of India & Ors.* [dated 18 October 2023], the State Bank of India had extended certain credit facilities to the corporate debtor. When the corporate debtor failed to pay the loan, SBI filed for recovery under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('**SARFAESI Act**') before the Debt Recovery Tribunal. The DRT issued recovery certificates against the corporate debtor in the years 2015 and 2017. However, upon defaulting on the payment towards the recovery certificates by the corporate debtor, SBI filed a petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 which was admitted by the adjudicating authority. Against the admission and its allowance by the adjudicating

authority and the first appellate authority, the appellant filed a further appeal before the Apex Court. In this regard, the Apex Court held that, while 'doctrine of election' bars prosecution of the same right in two different fora arising out of the same cause of action, in the present case the recovery proceedings had commenced even before the Insolvency and Bankruptcy Code, 2016 had come into force. Further, while laying reliance on *Kotak Mahindra Bank Limited* v. *A. Balakrishnan and Anr.*, the Apex Court observed that SBI had a right to invoke the provisions under IBC, even after the issuance of recovery certificates by the DRT, as a valid legal recourse.

Insolvency – Only the parties who have benefitted from the preferential transaction can be directed to make reverse contributions to the corporate debtor

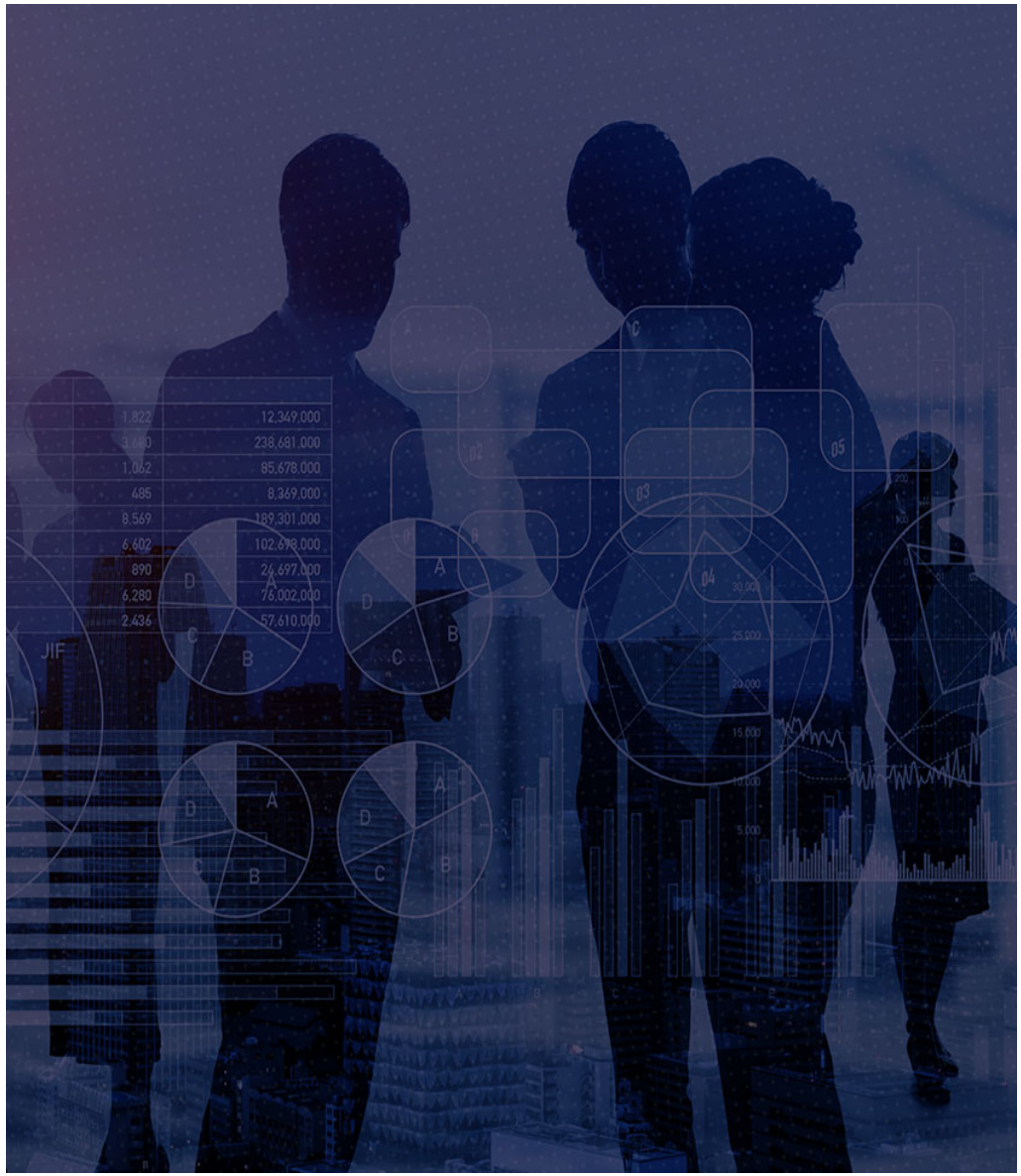
The National Company Law Appellate Tribunal, New Delhi Bench ('**NCLAT**') has held that under Section 44(1)(d) of the Insolvency and Bankruptcy Code, 2016, a direction to contribute to the assets of the corporate debtor can be given only to those persons who have received benefits from the corporate debtor. In the case of *Mr. Saptarshi Nath & Anr.* v. *Kapil Dev Taneja* [dated 18 September 2023], the corporate debtor was admitted into Corporate Insolvency Resolution Process (**CIRP**) and the Transaction Audit Report revealed that the corporate debtor had entered into certain preferential transactions with some of its creditors. The Resolution Professional filed an avoidance application and prayed for the erstwhile directors of the corporate debtor to pay a certain sum to the corporate debtor in terms of Section 44(1)(d) of the IBC. The adjudicating authority held that the erstwhile directors had entered into preferential transactions and thus directed them to pay the sum towards the assets of the corporate debtor. Now, in an appeal against the said decision, the NCLAT has held that under Section 44(1)(d), the adjudicating authority may only direct those persons to make contribution to the corporate debtor who have directly benefited from the preferential transactions with the corporate debtor. Therefore, it was held that since the erstwhile directors received no benefit from the preferential transactions, they shall not be liable to make any contribution to the assets of the corporate debtor.

Insolvency – Limitation to file appeal commences from date of pronouncement of order in presence of counsel, which can be deemed to be constructive knowledge of the order

The National Company Law Appellate Tribunal, Principal Bench, New Delhi ('**NCLAT**'), has held that the limitation period for filing of an

appeal does not commence on the date when the appellant became aware of the contents of the order, but it shall commence when the order was pronounced. In *Raiyan Hotels and Resorts Pvt. Ltd.* v. *Unrivalled Projects Pvt. Ltd.* [dated 11 October 2023], the appellant had contended that it was neither provided with a copy of order nor the order was uploaded on the website of the adjudicating authority.

The NCLAT, while dismissing the appeals, observed that the order was passed by the adjudicating authority in accordance with the Statutory Rules i.e., the National Company Law Tribunal Rules, 2016, in the presence of the counsel for the appellant. Therefore, it could not be contended that the appellant did not have knowledge of the content of the order. NCLAT further stated that knowledge of an order should be constructive knowledge and the pronouncement of the order can be deemed to be constructive knowledge of the order for the aggrieved party.



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