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Key Highlights

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I. Moratorium applicable not only to the assets of the corporate debtor but also to the assets of the personal guarantor

In case of ***State Bank of India v. Mr. V. Ramakrishnan and Others*** *(decided on February 28, 2018),* the National Company Law Appellate Tribunal (**"NCLAT"**) held that the moratorium will not only be applicable to the assets of the corporate debtor but also to the assets of personal guarantor.

Facts:

State Bank of India (**"Creditor"**) had advanced a loan to M/s. Veesons Energy Systems Private Limited (**"Corporate Debtor"**) for which a personal guarantee was given by one of the directors of the said Corporate Debtor, Mr. V Ramakrishnan (**"Personal Guarantor"**). Subsequently, the Corporate Debtor defaulted on the repayment of the loan, which prompted the Creditor to invoke its right and issue a notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002, (**"SARFAESI Act"**) against the Personal Guarantor for recovering the outstanding dues. This notice was challenged by the Corporate Debtor before the Madras High Court, which dismissed it. Thereafter, the Creditor issued a 'Possession Notice' under Section 13(4) of the SARFAESI Act and took symbolic possession of the secured assets.

The Corporate Debtor filed an application under Section 10 of the Insolvency and Bankruptcy Code (**"IBC"**) before National Company Law Tribunal, Chennai (**"NCLT"**). The NCLT passed an order of moratorium and an 'Interim Resolution Professional' was appointed. However, the Creditor continued to proceed against the property of the Personal Guarantor by issuing a 'Sale Notice' under SARFAESI Act even after the declaration of the moratorium.

Aggrieved by the act of the Creditor, the Personal Guarantor filed an application before the NCLT for stay of proceedings under the SARFAESI Act. The NCLT passed an order restraining the Creditor from proceeding against the Personal Guarantor till the period of moratorium was over. Being aggrieved by the decision of the NCLT, the Creditor filed an appeal with the appellate body National Company Law Appellate Tribunal (**"NCLAT"**) and following issue came up for determination:

Issue: Whether the Creditor can proceed against the assets of the Personal Guarantor while the Corporate Debtor is undergoing a corporate insolvency resolution process?

Arguments:

The Creditor argued that the NCLT order in respect of the moratorium would not apply to the assets of the Personal Guarantor. On the other hand, the Corporate Debtor argued that in view of Sections 14(1)(b) and 31(1) of the IBC, the Creditor could not proceed even against the assets of the Personal Guarantor.

Observations of the NCLAT:

The NCLAT first examined Part II of the IBC which deals with 'Insolvency Resolution and Liquidation for Corporate Persons' and observed that as per Section 5 of the IBC, insolvency resolution and liquidation proceedings can be initiated only against the corporate persons and not against an individual, including the Personal Guarantor. The NCLAT then examined Part III of the IBC and observed that as per Section 60 of the IBC, where proceedings have been initiated against the corporate debtor, if simultaneous proceedings are to be initiated against the personal guarantor for bankruptcy proceedings, an application relating to the insolvency resolution or bankruptcy of a personal guarantor of such corporate debtor is required to be filed before the same adjudicating authority.

The NCLAT also examined Section 14 of the IBC which deals with moratorium and observed that the commencement of moratorium period not only prohibited institution of suits, continuation of pending suits or any proceedings against the corporate debtor but also prohibited transfer, encumbrance, alienation or disposal of any of the assets of the corporate debtor and/or *any legal right or beneficial interest therein*. It further noted that Sections 14(1)(c) and 14(1)(d) prohibited recovery or enforcement of any security interest created by the corporate debtor in respect of its property including the property occupied by it or in the possession of the said corporate debtor.

On a combined reading of Sections 30 and 31 of the IBC which deal with the approval of the resolution plan, the NCLAT observed that it was clear that resolution plan once approved by the committee of the creditors and thereafter by the adjudicating authority would not only be binding on the Corporate Debtor but would also cover under its ambit, employees, members, creditors, *guarantors* and other stakeholders involved in the resolution plan, including the personal guarantor. Thus, in light of the above, the NCLAT concluded that the effect of the moratorium would also be applicable on the Personal Guarantor, since the resolution plan of the Corporate Debtor was binding on the Personal Guarantor.

Decision

In view of the aforesaid observations, the NCLAT concurred with the decision passed by the NCLT that the moratorium will not only be applicable to the assets of the Corporate Debtor but also to the assets of the Personal Guarantor and dismissed the appeal filed by the Creditor.

VA View

This judgement comes as a disappointment to the creditors as they cannot enforce securities of the personal guarantors, if the corporate debtor is undergoing insolvency and a moratorium has come into force. The legislative intent behind a moratorium under the IBC is to insulate the assets of the corporate debtor till a decision is taken to either adopt a resolution plan or liquidate the Company. However, whether the decision actually goes a long way towards protecting the assets of the corporate debtor is highly doubtful as the nexus between a moratorium on the assets of the corporate debtor and that of the personal guarantor to achieve the purpose of protecting the assets of the corporate debtor has not been adequately justified.

Further, this judgement entirely ignores the previous judgement of the NCLT, Mumbai in the case of ***Schweitzer Systemtek India Private Limited v. Phoenix ARC Private Limited & Others*** *(decided on August 9, 2017),* which explicitly held that a moratorium cannot be placed on the assets of the personal guarantor, without providing any reasoning for the divergence in views. Further, media reports suggest that the panel constituted to review the working of the IBC has proposed that the creditors should be allowed to invoke personal guarantees, usually given by the promoters of the corporate debtor, during the moratorium period. In the light of these developments, this judgement is likely to be re-examined by the Supreme Court in an appeal unless a legislative clarification is issued in this regard.

II. Financial creditor has similar rights against the guarantor and the principal borrower in case of simultaneous insolvency proceedings

The National Company Law Tribunal, New Delhi, Principal Bench (**"NCLT"**) in ***ICICI Bank Limited v. CA Ritu Ratogi*** (*decided on January 23, 2018*), held that a financial creditor can be a part of the corporate insolvency resolution process (**"CIRP"**) and a voting member of the committee of the creditors (**"CoC"**) of the corporate guarantor as well as the principal borrower simultaneously.

Facts:

EduSmart Services Private Limited (**"Corporate Debtor"**) had furnished certain corporate guarantees to ICICI Bank Limited (**"Creditor"**) for loans undertaken by EduComp Solutions Limited (**"Principal Borrower"**). When the

Principal Borrower defaulted, the Creditor invoked corporate guarantee against the Corporate Debtor. Two months after such an invocation, DBS Bank Limited (a financial creditor) filed an application to initiate CIRP against the Corporate Debtor. The application was admitted and the resolution professional (**"RP"**) was appointed.

The Creditor submitted its claims to the RP appointed for the Corporate Debtor, however, it was rejected on the ground that the Creditor was already a part of the duly constituted CoC for the Principal Borrower and therefore the amount recoverable by the Creditor from the Corporate Debtor would be the balance amount after recovery from the Principal Borrower. On that basis, the RP was unable to verify the claim amount and therefore the RP rejected the claim. An application was filed by the Creditor in the NCLT against the decision of the RP which included a prayer to direct the RP to admit the claim of the Creditor, to allow the Creditor to join the CoC as a member and to have a voting share in it. The following issues arose as a result of this application:

Issue: Whether the claims of the Creditor should be admitted by the RP along with conferment of voting rights in proportion to the whole debt?

Arguments:

The Creditor asserted that the decision of the RP to reject its claim was arbitrary, lacking application of mind and against the law. It was stated that the Creditor's claim was valid as per the agreement entered into between the Corporate Debtor and the Creditor as well as under the law. The Creditor claimed to have complied with every provision of the Insolvency and Bankruptcy Code, 2016 (**"IBC"**) and that the RP had provisionally admitted the claim but denied voting rights which was absolutely arbitrary and not sustainable under the eyes of law. The Creditor highlighted that the liability of the guarantor is coextensive with that of the principal borrower in the sense that the Creditor could proceed simultaneously. The Creditor cited the observation made by the Supreme Court in ***Industrial Investment Bank Limited v. Bishwanath Jhunjhunwala*** *(decided on August 18, 2009*), and the NCLT in ***Axis Bank Limited v. EduSmart Services Private Limited*** (*decided on October 27, 2017*) to support its contention that the Creditor can be a part of the CoC in the CIRP of the Principal Borrower and the Corporate Debtor for the same amount. The guarantee was invoked against the Corporate Debtor before the commencement of the CIRP against it as per the executed guarantee deed and therefore the Corporate Debtor was bound to pay in terms of the agreement.

The RP pleaded that filing of the claim by the Creditor on the basis of the corporate guarantee was a mala fide attempt to create hurdles in the CIRP. It was emphasized by the RP that the Principal Borrower for whom the Corporate Debtor had furnished corporate guarantee was already undergoing a CIRP and that the Creditor was a financial creditor of the Principal Borrower and a part of its CoC. The raising of claims against the Principal Borrower and the Corporate Debtor (who is a guarantor), both of which are under their respective CIRP would create anomalies. It was also argued that the Creditor cannot act as a 'Financial Creditor' and claim the same amount in two different CIRP with voting rights in two CIRP with respect to the same debt as it would result in unjust enrichment. It was also pointed out

under Section 128 of the Indian Contract Act, 1872 that a claim made by the Creditor would be admissible against the guarantor only if the CIRP of the borrower is over and no claim can be filed simultaneously. If the Creditor is permitted to raise the claim, then the recovery amount may far exceed its total claim which may result in prejudice to others. Further, it was stated that there was no material to access how much amount the Creditor would be able to recover from the Principal Borrower so as to proportionately reduce its claim with respect to the debt of the Corporate Debtor.

Observations of the NCLT:

The NCLT felt it necessary to analyse the status of the Creditor and the nature of the debt owed to it in order to ascertain its rights with respect to CIRP of the Corporate Debtor. The NCLT stated that according to Section 5(8)(i) of the IBC, a 'financial debt' refers to a debt along with interest disbursed against the consideration for the time value of money and includes money borrowed against the payment of interest including the amount of liability in respect of any guarantee or indemnity. Therefore, the nature of debt owed to the Creditor by the Corporate Debtor was a financial debt and consequently the Creditor was a 'Financial Creditor' of the Corporate Debtor. The NCLT held that given the complex situation that had arisen because of simultaneous CIRP of the Principal Borrower and the Corporate Debtor, the ideal situation would have been if one consolidated CIRP has been initiated against the Principal Borrower impleading all the financial creditors and guarantors like the Corporate Debtor as a part respondent. However, the Principal Borrower had invoked Section 10 of the IBC *(Voluntary Insolvency Resolution Process)* creating a paradoxical situation with two resolution professionals and two CoC. The NCLT perused the agreement between the Creditor and the Corporate Debtor which provided that the liability of the guarantor would not be affected and the Creditor is entitled as if guarantor was the Principal Borrower of the lender. Further, it was a well settled principle that right of the parties under Section 128 of the Indian Contract Act, 1872 are subject to the terms of the agreement between the parties and hence the guarantor or the resolution professional are not entitled to raise any objection which goes against the express terms of the duly executed guarantee agreement. Therefore, the contentions of the RP were to be rejected.

Decision

The NCLT ordered the RP to accept the claims of the Creditor, include it in the CoC and be conferred with voting rights as per the proportion of its debt.

VA View

This case is related and an extension to the conclusion drawn by the NCLT in ***Axis Bank Limited v. EduSmart Services Private Limited*** (*decided on October 27, 2017*), as it involved the same parties in their capacities as principal borrower and guarantor. In the previous case, claims made by Axis Bank Limited against EduSmart Services Private Limited as the guarantor were rejected as the guarantee was invoked by Axis Bank Limited after the commencement

of the CIRP. However, the question of unjust enrichment on the part of the creditor in case his claim was accepted, was left unexamined by the NCLT. Therefore, this case ties up the loose ends left unexamined in relation to that issue. The NCLT heavily relied on the wordings of the guarantee deed to discern the rights of the Creditor.

This judgement, although welcomed by the financial creditor fraternity as their recourse to the guarantor remains intact despite simultaneous CIRP, has resulted in two ambiguities. Firstly, if the lender has taken a haircut with respect to its debts under the insolvency resolution plan of the principal borrower, can it recover the rest of its debts from the guarantor and second, if the debt of the lender is discharged by the principal borrower, whether the decisions already taken by the CoC of the guarantor with the lender acting as a voting member be rendered void. We will have to await the changes mooted by the IBC review panel constituted by the Government to remove such ambiguities and legal logjams.

III. Requirement of prior notice under Section 34(5) of the Arbitration Act before filing the arbitration petition is not mandatory

The Bombay High Court (**"Court"**) in case of ***Global Aviation Services Private Limited v. Airports Authority of India*** (*decided on February 21, 2018*), held that in an application for setting aside the arbitral award, requirement of prior notice under Section 34(5) of the Arbitration and Conciliation Act, 1996 (**"Arbitration Act"**) is only directory and not mandatory.

Facts:

Pursuant to a dispute between the parties, arbitration agreement was invoked by Global Aviation Services Private Limited (**"Petitioner"**) and arbitral award was passed in favor of Airports Authority of India (**"Respondent"**). Meanwhile, the Arbitration and Conciliation (Amendment) Act, 2015 (**"Amendment Act"**) was passed and Section 34(4) and Section 34(5) were inserted in Section 34 of the Arbitration Act with effect from October 23, 2015.

Being aggrieved by the arbitral award, the Petitioner filed an arbitration petition under Section 34 of the Arbitration Act. The Respondent raised a preliminary issue of maintainability on the ground that no notice under Section 34(5) of the Arbitration Act had been issued. The following issue came up before the Court for determination:

<u>Issue:</u> Whether issuance of prior notice under Section 34(5) of the Arbitration Act by the Petitioner upon the Respondents, before filing the arbitration petition under Section 34(1) of the Arbitration Act is mandatory?

Arguments:

The Petitioner submitted that Section 34(5) of the Arbitration Act cannot be construed as mandatory but directory as no specific right is created in favor of the Respondent even if no prior notice before filing of the arbitration

petition is issued. The Petitioner placed reliance on Section 26 of the Amendment Act which provides that *unless otherwise agreed between the parties,* the Amendment Act shall not apply to the arbitral proceedings commenced before the commencement of the Amendment Act. Since the parties did not agree to be bound by the provisions of Amendment Act, the said provisions are not applicable. The Petitioner submitted that Section 34(5) of the Arbitration Act does not provide for any consequences of non-compliance. The Petitioner argued that the right to challenge an arbitral award is a vested right which vests on the date of commencement of arbitral proceedings. Section 34(5) is procedural in nature. It is an impediment, which affects a vested right and therefore, has to be treated as prospective and cannot be given a retrospective effect. Lastly, the Petitioner submitted that even if a notice under Section34(5) is not issued prior to the date of filing of the arbitration petition, substantive remedy of the aggrieved party cannot be taken away under Section 34(1) of the Arbitration Act.

The Respondent contended that the provisions of Section 34(5) and Section 34(6) of the Arbitration Act cannot be read in isolation but have to be read with Section 34(1) and Section 34(2). The legislative intent would be frustrated if Section 34(5) and 34(6) of the Arbitration Act are construed as directory. Since the arbitral petition is filed after commencement of the Amendment Act, compliance under Section 34(5) is mandatory. With regard to Section 26 of the Amendment Act, the Respondent submitted that it does not save post arbitral proceedings under Section 34 of the Arbitration Act from the application of the Amendment Act and therefore, the mandatory provisions of Section 34(5) will be applicable. Emphasis was supplied on use of the word “shall” in Section 34(5) of the Arbitration Act and therefore, issuance of a notice is a sine qua non before filing of a challenge petition under Section 34(1) of the Arbitration Act.

Observations of the Court:

The Court examined Section 26 of the Amendment Act and observed that *unless otherwise agreed by the parties,* the provisions of Amendment Act shall apply in relation to the arbitral proceedings commenced on or after the date of commencement of the Amendment Act. The Court observed that the term “arbitral proceedings” referred in Section 26 of the Arbitration Act is one which commences upon receipt of notice under Section 21 by the other party and does not refer to two separate arbitral proceedings, that is, one before the arbitral tribunal and another before the Court. Section 21 of the Arbitration Act does not apply to proceedings in the court. The Court further observed that the date of filing of the arbitration petition under Section 34 of the Arbitration Act is not relevant for the purpose of deciding whether the parties will be governed by provisions of the Amendment Act.

Further, Court observed that no consequence of default is provided if the requirements under Section 34(5) and Section 34(6) of the Arbitration Act are not complied with. The requirement of the notice under Section34(5) of the Arbitration Act is procedural in nature and not a substantive provision. The compliance of such procedural provision without providing any consequences incase of defiance thereof thus cannot be construed as mandatory and has to be construed as directory. The discretionary power is given to the courts to look into the facts in each case and decide if the same has to be made mandatory or not.

Decision:

The Court held that, unless otherwise agreed by the parties, if the arbitral notice invoking arbitration agreement under Section 21 of the Arbitration Act is received by other party prior to commencement of the Amendment Act, the provisions of the Amendment Act would not be applicable. Further, irrespective of the date of the notice received by the party invoking arbitration agreement under Section 21, the provisions under Section 34(5) and 34(6) are only directory and not mandatory.

VA View

This judgement is a welcome addition to a long list of judgements where "shall" has been interpreted as "may". It is not merely the use of a particular expression that renders a provision directory or mandatory. The provision has to be interpreted in the light of the settled principles while ensuring that the intent of the law is not frustrated. If an object of the law is defeated by holding the same as directory, it should be construed as mandatory, whereas if by holding it mandatory, serious general inconvenience is created without furthering the object of the law, the same should be construed as directory.

Recognizing the substantive and vested right of the Petitioner to file an arbitration petition for setting aside the arbitral award under Section 34 of the Arbitration Act, the Court held that the mere procedural obligation to give a notice to the other party is directory in nature. The Court has kept the discretionary power with itself to direct the petitioner to issue notice along with papers and proceedings upon the respondent, after the petitioner files the arbitration application under Section 34(1) and before such petition is heard by the Court at the stage of admission. This pronouncement buttresses one of the primary objectives of the Arbitration Act, that is, to expedite the proceedings and provide speedy remedy to disputes.

IV. Fresh proceedings before NCLT under IBC admissible regardless of winding up petitions before Company Court admitted and pending disposal

In case of ***Jotun India Private Limited and Others v. PSL Limited*** (*decided on January 5, 2018*), the Bombay High Court (**"Court"**) while upholding the question relating to supremacy of Insolvency and Bankruptcy Code, 2016 (**"IBC"**) over the Companies Act, 1956 and the Companies Act, 2013 (**"Companies Act"**), held that, the corporate debtor or the creditor can file fresh proceedings under the IBC before National Company Law Tribunal (**"NCLT"**) regardless of winding up petitions before the company court admitted and pending disposal.

Facts:

Jotun India Private Limited (**"Creditor"**) filed a company petition before the Court against PSL Limited (**"Corporate Debtor"**) under Sections 433 and 434 of the Companies Act, 1956, claiming an outstanding sum with interest in respect of unpaid invoices for the goods supplied. The said petition was admitted, however, no official liquidator was appointed. Simultaneously, the Corporate Debtor made a reference to Board of Industrial and Financial Reconstruction (**"BIFR"**) under Sick Industrial Companies (Special Provisions) Act, 1985 (**"SICA"**). Meanwhile the SICA was repealed and the IBC was brought into force. Accordingly, the Corporate Debtor filed an application before the NCLT, Ahmedabad under Section 10 of the IBC for the commencement of the corporate insolvency resolution process. After hearing the parties, the NCLT, Ahmedabad, reserved the matter for orders.

Thereafter, an application was filed in the Court by the Creditor for appointment of a provisional liquidator, wherein the learned judge passed an order restraining the NCLT, Ahmedabad, from continuing with the IBC application. Against the said impugned order, an appeal was filed by the Corporate Debtor in the Court and following issue was framed for determination:

Issue: Whether the company court has jurisdiction to stay the proceedings filed by a corporate debtor before the NCLT notwithstanding a previously instituted company petition by a creditor has been admitted and pending disposal?

Arguments:

The Corporate Debtor argued that Section 238 of the IBC contains an overriding provision. There being no similar provision in the Companies Act, the provisions of the IBC must prevail. Further, Section 64(2) of the IBC is an express bar against any court granting any injunction in respect of proceedings before the NCLT. The Corporate Debtor relied on the judgment of ***Ashok Commercial Enterprises v. Parekh Aluminex Limited*** (*decided on April 11, 2017*), wherein it was held that the intention of the legislature is clear from the transfer notification dated December 7, 2016 that both proceedings, that is, the winding up proceedings and the NCLT proceedings can continue simultaneously. The Corporate Debtor argued that Section 63 of the IBC bars the jurisdiction of civil courts to entertain proceedings on the issue over which the NCLT has jurisdiction. Further, Section 231 of the IBC specifically curtails the power of civil courts or any other authority to restrain any action taken or to be taken before the NCLT. Lastly, the Corporate Debtor submitted that a statutory bar against the Corporate Debtor from filing an application under Section 10 of the IBC operates, if and only if, an order of liquidation against the Corporate Debtor has been passed.

Opposing the IBC application, Creditor relied on Rule 5 of the Companies (Transfer of Pending Proceedings) Rules, 2016,which provided that all petitions filed under Section 433(e) of the Companies Act, 1956 in the High Court *which had not been served upon respondent* shall be transferred to the NCLT and therefore, the petition being

served upon the Corporate Debtor, would continue under the jurisdiction of the Court. The Creditor further argued that in so far as the petition which has been served upon the Corporate Debtor are concerned, the provisions of the Companies Act are not inconsistent with the provisions of the IBC and therefore, the provisions of the IBC do not override the provisions of Companies Act under Section 238 of the IBC. Section 14 of the IBC and the saving provisions of the Companies Act, 2013 lead to an interpretation that the inconsistent provisions of the IBC, including the moratorium will not apply to the petitions served upon the Corporate Debtor. The Creditor submitted that Companies (Removal of Difficulties) Fourth Order, 2016 amended Section 434 of the Companies Act, 2013, which provided that proceedings relating to winding up of companies which have not been transferred from the High Courts shall be dealt with in accordance with provisions of the Companies Act, 1956, therefore, the provisions of the IBC will not apply and the Company Court has jurisdiction to stay the proceedings filed by a Corporate Debtor before the NCLT.

Observations of the Court:

Relying on the judgment of the Supreme Court in the case of ***Madura Coats Limited v. Modi Rubber Limited*** (*decided on June 6, 2016*), the Court observed that even during the regime of SICA, SICA was held to have primacy over the provisions of the Companies Act. Since IBC replaced SICA, therefore, the IBC will have primacy over the Companies Act.

The Court observed that admission of the winding up petition by the jurisdictional High Court would not mean that the NCLT either loses jurisdiction or cannot exercise jurisdiction in case of a petition which is filed by another creditor. The Court relied on the judgment of the Supreme Court in Bank of ***New York Mellon v. Zenith Infotech*** (*decided on February 21, 2017*) which held that *"by virtue of Section 252 of IBC, even in the case of a company where a winding up order has been passed, it is open to such a company, whose reference was deemed to be pending with BIFR, to seek remedies under IBC before NCLT."*

The jurisdiction of the Court in relation to proceedings under the IBC is expressly barred by virtue of Section 63 of the IBC. Further, by virtue of Section 64(2) of the IBC, the Court is prohibited from injuncting the NCLT from exercising its jurisdiction under the IBC. Section 238 of the IBC overrides the provisions of the Companies Act. The Court observed that the NCLT is not subordinate to the High Court and hence, as prohibited by the provisions of Section 41(b) of the Specific Relief Act, 1963, no injunction can be granted by the High Court against a corporate debtor from institution of proceedings in the NCLT.

Decision

The company courts do not have the jurisdiction to restrain the NCLT from proceeding with the IBC application. Further, there is no bar on the NCLT from proceeding with the IBC application in cases where the winding up petition before company court has been admitted and pending disposal.

VA View

The Court in this case has ruled that once the application under the IBC is admitted by the NCLT, the moratorium will result in the stay of proceedings in the Company Court. This will lead to avoidance of simultaneous and possibly conflicting judgements in relation to the liquidation of the Corporate Debtor in the Company Court and the NCLT. This judgment is a positive step to negate the problems under the old regime regarding winding-up and insolvency in which proceedings were not time-bound. The creditors of the corporate debtor can now, with ease, proceed to the NCLT even if winding up petitions have been admitted by the company courts and pending disposal.

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