VAISH ASSOCIATES ADVOCATES ESTD. 1971
NEW DELHI | MUMBAI | BENGALURU

June, 2021

Key Highlights

I. Supreme Court: Entries made in balance sheet amount to acknowledgement of debt for the purpose of extending limitation under Section 18 of the Limitation Act, 1963.

II. Calcutta High Court: Award-holder's claim will stand extinguished on approval of award-debtor's resolution plan under Section 31 of the Insolvency and Bankruptcy Code, 2016

III. Delhi High Court: An arbitral award cannot be interfered with on account of disagreement over inference drawn from evidence

IV. Supreme Court: In seeking to construe a clause in contract, there is no scope for adopting either a liberal or a narrow approach

I. Supreme Court: Entries made in balance sheet amount to acknowledgement of debt for the purpose of extending limitation under Section 18 of the Limitation Act, 1963.

The Hon'ble Supreme Court ("**SC**") has in its judgment dated April 15, 2021 ("**Judgement**"), in the matter of ***Asset Reconstruction Company (India) Limited v. Bishal Jaiswal & Another [Civil Appeal No.323/2021],*** held that entries in balance sheets amount to acknowledgement of debt for the purpose of extending limitation under Section 18 of the Limitation Act, 1963 ("**1963 Act**").

Facts

Corporate Power Limited ("**Corporate Debtor**") had set up a thermal power project in Jharkhand in 2009, for which it availed of loan facilities from various lenders, including the State Bank of India ("**SBI**"). The account of the Corporate Debtor was declared as a non-performing asset by SBI on July 31, 2013. On March 27, 2015, SBI issued a loan-recall notice to the Corporate Debtor in its capacity as the lenders' agent. On March 31, 2015, some of the original lenders of the Corporate Debtor, namely, India Infrastructure Finance Company Limited, SBI, State Bank of Hyderabad, State Bank of Bikaner and Jaipur, State Bank of Patiala, and State Bank of Travancore, assigned the debts owed to them by the Corporate Debtor, to the Asset Reconstruction Company (India) Limited ("**Appellant**"). On June 20, 2015, the Appellant issued a notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("**SARFAESI Act**") to the Corporate Debtor. On June 01, 2016, the Appellant took actual physical possession of the project assets of the Corporate Debtor under the SARFAESI Act.

On December 26, 2018, the Appellant filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("**IBC**") before the National Company Law Tribunal, Calcutta ("**NCLT**") for a default amounting to INR 5997,80,02,973/- from the Corporate Debtor. As the relevant form indicating the date of default did not indicate date of default, this was rectified by the Appellant on November 08, 2019, by filing a supplementary affidavit before the NCLT, specifically mentioning the date of default and annexing copies of balance sheets of the Corporate Debtor, which, according to the Appellant, acknowledged periodically the debt that was due. On February 19, 2020, the Section 7 application was admitted by the NCLT. The NCLT observed that the balance sheets of the Corporate Debtor, wherein it acknowledged its liability, were signed before the expiry of three years from the date of default, and entries in such balance sheets being acknowledgements of the debt due for the purposes of Section 18 of the 1963 Act, the Section 7 application is not barred by limitation.

In an appeal filed to the National Company Law Appellate Tribunal ("**NCLAT**"), the Corporate Debtor relied upon a precedent of a full bench judgment of the NCLAT in ***V. Padmakumar v. Stressed Assets Stabilisation Fund [Company Appeal (AT) (Insolvency) No. 57/2020],*** wherein a majority of four members held that entries in balance

sheets would not amount to acknowledgement of debt for the purpose of extending limitation under Section 18 of the 1963 Act. After a preliminary hearing, a three-member bench passed an order on September 25, 2020, doubting the correctness of the majority judgment of V. Padmakumar (supra) and referred the matter to the 'Acting Chairman' of the NCLAT to constitute a bench of coordinate strength to reconsider V. Padmakumar (supra).

A five-member bench of the NCLAT, by the impugned judgment dated December 22, 2020, ("**Impugned Judgment**"), refused to adjudicate the question referred, stating that the reference to the bench was incompetent. The NCLAT, in the Impugned Judgment had, without reconsidering the majority decision in V. Padmakumar (supra), rubber-stamped the same.

Issue

Whether entries made in a balance sheet of the Corporate Debtor amount to an acknowledgement of liability under Section 18 of the 1963 Act.

Arguments

Contentions raised by the Appellant:

The majority judgment of the NCLAT in V. Padmakumar (supra) was *per incuriam* as it had not considered various binding judgments of the SC and that the said judgment was wholly incorrect in rejecting the reference out of hand at a preliminary stage. A number of judgments of the SC were referred in which it had been made clear that by Section 238A of the IBC, Section 18 of the 1963 Act is applicable to a proceeding under Section 7 of the IBC. Catena of judgments of the high courts and of the SC have expressly held that entries made in signed balance sheets of a corporate debtor would amount to acknowledgements of liability and have, therefore, correctly been relied upon by the NCLT on the facts of this case.

It was further argued that the reference made to the five-member bench by the three-member bench was perfectly in order and ought to have been answered on merits. The constitution of the five-member bench which passed the Impugned Judgment was not in order and contrary to the principles of natural justice, since three out of the five members of the bench were members who had assented with the majority opinion in V. Padmakumar (supra), and the dissentient member was not made part of the bench so formed. Further, the fact that a balance sheet has to be filed under compulsion of law does not mean that an acknowledgement of debt has also to be made under compulsion of law.

Contentions raised by the Respondents:

Bishal Jaiswal and another (the "**Respondents**") argued that, by Section 18 of the 1963 Act, entries made in balance sheets do not amount to acknowledgement of debt. Further, the explanation to Section 7, read with the definition of "default" under Section 3(12) of the IBC, would preclude the application of Section 18 of the 1963 Act inasmuch as a default in respect of a financial debt would include a financial debt owed not only to the applicant-financial creditor, but to all other financial creditors of a corporate debtor. Further, reference was made to Insolvency Committee Report which introduced Section 238A of the IBC to gauge the rationale for enacting the said section. The Respondents strongly relied upon the fact that in all matters where recovery proceedings were ongoing before the Debt Recovery Tribunal and/or the appellate authority under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and that, by not applying Section 18 of the 1963 Act to the IBC, recoveries will not be thwarted.

The Respondents referred the main submission of the Appellant that, INR 12,000 crores would go down the drain if

acknowledgements in balance sheets were not looked at, to contend that, this would be relevant only in recovery proceedings and not in proceedings before the IBC, which are not meant to be recovery proceedings at all.

Further that, no date of default had been mentioned in the original form that was submitted with the application under Section 7 of the IBC, and that this would be a non-curable defect, on account of which the application under Section 7 of the IBC should have been dismissed at the threshold itself.

If a period of three years had elapsed from the date of declaration of the account of a corporate debtor as a non-performing asset, the claim filed by a creditor is a dead claim which cannot be resurrected having recourse to Section 18 of the 1963 Act. Lastly, the balance sheets in the present case did not amount to acknowledgement of liability inasmuch as the auditor's report, which must be read along with the balance sheets, would make it clear that there was no unequivocal acknowledgement of debt, but that caveats had been entered by way of notes in the auditor's report.

Observations of the Supreme Court

The SC in the instant appeal, deemed it important to first advert to the rationale for the enactment of Section 238A (*Limitation*) of the IBC, which was inserted by way of the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018. The SC noted that in the case of ***Jignesh Shah v. Union of India [(2019) 10 SCC 750],*** the SC had referred to the Report of the Insolvency Law Committee of March, 2018, ("**Committee**") which led to the introduction of Section 238A of the IBC and noted that, considering that the 1963 Act applies only to courts, unless made statutorily applicable to tribunals, the Committee was of the view that the 1963 Act should be made to applicable to the IBC as well. The Committee observed that, though the IBC is not a debt recovery law, the trigger being "default in payment of debt" would render the exclusion of the law of limitation "counter-intuitive". Thus, it was made clear that an application to the IBC should not amount to resurrection of time-barred debts which, in any other forum, would have been dismissed on the ground of limitation.

The SC noted that in the case of ***Babulal Vardharji Gurjar v. Veer Gurjar Aluminium Industries Private Limited [(2020) 15 SCC 1]*** **("Babulal")** it was observed that, Section 18 of the 1963 Act would be triggered every time when the principal borrower and/or the corporate guarantor, as the case may be, acknowledge their liability to pay the debt. Such acknowledgement, however, must be before the expiration of the prescribed period of limitation including the fresh period of limitation due to acknowledgement of the debt, from time to time, for institution of the proceedings under Section 7 of the IBC. Further, the acknowledgement must be of a liability in respect of which the financial creditor can initiate action under Section 7 of the IBC.

The SC noted that several judgments including ***Mahabir Cold Storage v. CIT [1991 Supp (1) SCC 402], S. Natarajan v. Sama Dharman [Crl. A. No. 1524 of 2014]*** and ***Bengal Silk Mills Co. v. Ismail Golam Hossain Ariff, [AIR 1962 Cal 115]*** (**"Bengal Silk Mills")** have indicated that an entry made in the books of accounts, including the balance sheet, can amount to an acknowledgement of liability within the meaning of Section 18 of the 1963 Act. It was further noted that if the amount borrowed by the accused is shown in the balance sheet, it may amount to acknowledgement and the creditor might have a fresh period of limitation from the date on which the acknowledgement was made.

The SC observed that the natural inference to be drawn from the balance-sheet is that the closing balance due to the creditor at the end of the previous year will be carried forward as the opening balance due to him at the beginning of the next year. In each balance-sheet, there is thus an admission of a subsisting liability to continue the relation of debtor and creditor and a definite representation of a present intention to keep the liability alive until it is lawfully determined by payment or otherwise. The SC observed that the judgment of Bengal Silk Mills (supra) had held that though the filing of a balance sheet is by compulsion of law, the acknowledgement of a debt is not necessarily so. In fact, it is not uncommon to have an entry in a balance sheet with notes annexed to or forming part of such balance sheet, or in the auditor's report, which must be read along with the balance sheet. The SC

observed that in the judgment of ***Khan Bahadur Shapoor Fredoom Mazda v. Durga Prasad, [(1962) 1 SCR 140]*** it had been clarified that all that was necessary, was that, the acknowledgement establishes a jural relationship of debtor and creditor.

The SC also examined the position under the Companies Act, 2013 ("**Companies Act**") qua any compulsion of law for filing of balance sheets and acknowledgements made. The provisions mentioned below were specifically noted by the SC:

a. Section 2(40) of the Companies Act defines financial statement and Section 129, refers directly to financial statements and the required compliance with the accounting standards mentioned under Section 133 of the Companies Act.

b. Section 92 of the Companies Act, mandates every company to prepare an annual return containing certain particulars as prescribed.

c. Section 128 of the Companies Act, mandates every company to prepare and keep at its registered office, books of accounts and financial statements for every financial year as prescribed.

d. Section 134 of the Companies Act, provides that financial statements are to be approved by the board of directors before they are signed, and the auditor's report, as well as a report by the board of directors, is to be attached to each financial statement.

e. Section 137 of the Companies Act, provides that copies of financial statements are to be filed with the Registrar of Companies.

The SC observed that on a perusal of the aforesaid provisions, there is no doubt that, the filing of a balance sheet in accordance with the provisions of the Companies Act is mandatory, and any transgression of the same is punishable by law. The SC importantly noted that the notes that are annexed to or form part of such financial statements are expressly recognised under Section 134(7) of the Companies Act. Equally, the auditor's report may also enter caveats with regard to acknowledgements made in the books of accounts including the balance sheet. Therefore, the SC observed that, the statement of law contained in Bengal Silk Mills (supra), that there is a compulsion in law to prepare a balance sheet but no compulsion to make any particular admission, is correct in law as it would depend on the facts of each case as to whether an entry made in a balance sheet *qua* any particular creditor is unequivocal or has been entered into with caveats, which then has to be examined on a case by case basis to establish whether an acknowledgement of liability has, in fact, been made, thereby extending limitation under Section 18 of the 1963 Act. The SC observed the precedent cited in Bengal Silk Mills (supra) of, ***Good v. Jane Job, 120 E.R. 810 at 812,*** wherein the court held that, "*The balance-sheet contains admissions of liability; the agent of the company who makes and signs it intends to make those admissions. The admissions do not cease to be acknowledgements of liability merely on the ground that they were made in discharge of a statutory duty*." The SC noted that this judgment of Bengal Silk Mills (supra) has been referred to with approval in various subsequent judgments.

The SC further observed that, in ***Shahi Exports Private Limited. v. CMD Buildtech Private Limited [(2013) 202 DLT 735],*** the Delhi High Court held that it is hardly necessary to cite authorities in support of the well-established position that an entry made in the company's balance sheet amounts to an acknowledgement of the debt and has the effect of extending the period of limitation under Section 18 of the 1963 Act.

Decision of the Supreme Court

The SC held that the entries in balance sheets amount to acknowledgement of debt for the purpose of extending limitation under Section 18 of the 1963 Act. Therefore, the SC concluded that the majority decision in V.

Padmakumar (supra) was contrary to a catena of judgments referred and hence set it aside. The SC further observed that, the NCLAT, in the Impugned Judgment had, without reconsidering the majority decision of V. Padmakumar (supra), rubber-stamped the same, therefore, the SC set aside the Impugned Judgment.

The SC allowed the appeal, and the matter was remanded to the NCLAT to be decided in accordance with the law laid down in this Judgment.

VA View:

The SC has importantly noted that, it is an undisputed fact that, a balance sheet is the statement of assets and liabilities of a company, which at the end of a financial year is approved by the 'Board of Directors' and is authenticated in the manner provided by law. The SC also noted the observation made by Justice Krishna Iyer in ***Ambika Prasad Mishra v. State of Uttar Pradesh [(1980) 3 SCC 719],*** that, every new discovery or argumentative novelty cannot undo or compel reconsideration of a binding precedent.

The SC in this Judgement reiterated the well-established position of law that, an entry made in the company's balance sheet amounts to an acknowledgement of the debt and that it has the effect of extending the period of limitation under Section 18 of the 1963 Act. It was rightly observed that, the inclusion of a debt in a balance sheet duly prepared and authenticated by a company would amount to admission of a liability and therefore would satisfy the requirements of law for a valid acknowledgement under Section 18 of the 1963 Act for extension of the limitation period.

II. Calcutta High Court: Award-holder's claim will stand extinguished on approval of award-debtor's resolution plan under Section 31 of the Insolvency and Bankruptcy Code, 2016

The Calcutta High Court ("**CHC**") has in its judgment dated May 7, 2021, in the matter of ***Sirpur Paper Mills Limited v. I.K. Merchants Private Limited (Formerly Known as I.K. Merchants) [A.P. 550 of 2008]*** ("**Judgement**")**,** held that the claim of the arbitral award-holder will be frustrated once the resolution plan of the award-debtor is accepted under Section 31 of the Insolvency and Bankruptcy Code, 2016 ("**IBC**").

Facts

In the instant case, the petitioner is Sirpur Paper Mills Limited ("**Petitioner**") and the respondent is I.K. Merchants Private Limited, formerly known as I.K. Merchants ("**Respondent**"). This is an application for setting aside an award, dated July 7, 2008, passed by a sole arbitrator in arbitration proceedings between the Petitioner and Respondent ("**Award**"), as a result of subsequent developments after the passing of the impugned Award. By a judgment dated January 10, 2020 ("**2020 Order**") on the question whether application by the Petitioner under Section 34 *(Application for setting aside arbitral awards)* of the Arbitration and Conciliation Act, 1996 ("**1996 Act**") should be kept in abeyance following invocation of the provisions of the IBC against the Petitioner, the CHC had held that corporate insolvency resolution proceedings ("**CIRP**") cannot be used to defeat a dispute which existed prior to initiation of the insolvency proceedings. Subsequently, the Petitioner applied to recall the 2020 Order, which was rejected. The present application is the second round in the recourse against the Award where the Petitioner has urged that the application for setting aside of the Award cannot be proceeded with after approval of the resolution plan ("**Resolution Plan**") in relation to the Petitioner.

Issues

Whether the claim of an award-holder can be frustrated on the approval of a resolution plan under Section 31*(Approval of resolution plan)* of the IBC.

Arguments

Contentions raised by the Petitioner:

The Petitioner averred that the proceedings initiated under Section 34 of the 1996 Act, pursuant to the Award were infructuous in nature, and that the Respondent's claim ceased to exist since the control of the Petitioner was vested in a new entity, following the approval of a Resolution Plan of the Petitioner by the National Company Law Tribunal ("**NCLT**") under the IBC. The Petitioner relied on Section 31 of the IBC which provides that an approved resolution plan is binding on the corporate debtor and its employees, members and other stakeholders. Placing reliance on the decision of the Supreme Court ("**SC**") in ***Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta [(2020) 8 SCC 531] ("Essar"),*** Petitioner contended that a successful resolution applicant cannot be faced with undecided claims after the resolution plan has been accepted, and hence as per Essar, in the instant case, the debts of the Petitioner stood extinguished, save to the extent of the debts which were taken over by the resolution applicant under the approved Resolution Plan. Regulation 38 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016 ("**CIRP Regulations**") provides that a resolution plan must mandatorily contain the amount payable under it including the amount payable to the operational and financial creditors. The Petitioner submitted that in the event a creditor fails to submit his claims before the resolution professional, it forfeits its rights to the claim. Relying on ***Board of Control for Cricket in India v. Kochi Cricket Private Limited & Others [(2018) 6 SCC 287]*** **("Kochi Cricket")**, the Petitioner urged that Section 36 *(Enforcement)* of the 1996 Act would apply to pending applications under Section 34 of the 1996 Act on the date of commencement of the Arbitration and Conciliation (Amendment) Act, 2016 ("**2016 Amendment**").

Contentions raised by the Respondent:

The Respondent contended that the same arguments were made by the Petitioner on two earlier occasions as well in 2020, which had been decided and that such orders had not been challenged by the Petitioner. Relying on ***Satyadhyan Ghosal vs. Deorajin Debi (Smt) [AIR 1960 SC 941]*** and ***Arjun Singh v. Mohindra Kumar [(1964) 5 SCR 946]***, it was argued that *res judicata* would apply to different stages of the same proceeding. It was further submitted that upon filing of the application under Section 34 of the 1996 Act in October 2008, the Award was automatically stayed, and the Respondent could not approach the NCLT for lodging its claim. Relying on Kochi Cricket and ***Government of India v. Vedanta Limited (Formerly Cairn India Limited)[(2020) 10 SCC 1]***, it was contended that amendments will only have prospective application. It was thus submitted that with the filing of an application under Section 34 of the 1996 Act, the dispute raised, amounted to a pre-existing dispute, taking the Respondent outside the purview of the IBC. The Respondent relying on ***Swiss Ribbons Private Limited v. Union of India [(2019) 4 SCC 17],*** argued that a default would occur only when a debt, arising from a claim, becomes due and payable and is not paid by the debtor. It was submitted that in the instant case, the Respondent being the operational creditor does not have any claim since nothing is due from the Petitioner, in view of the pendency of the application under Section 34 of the 1996 Act.

Observations of the Calcutta High Court:

The CHC observed that in the 2020 Order, it was held that CIRP cannot be used to defeat a dispute which existed prior to initiation of the insolvency proceedings. It was observed that subsequently, on February 3, 2020, the Petitioner's application for recalling of the judgment, was rejected by the CHC as well. The CHC clarified that the reason for revisiting the 2020 Order, was the pronouncement of the law by the SC in Essar and in the recent ***Ghanshyam Mishra and Sons Private Limited v. Edelweiss Asset Reconstruction Company Limited [2021 SCC OnLine SC 313] ("Edelweiss")***, wherein it was held that once a resolution plan is approved, a creditor cannot initiate proceedings for recovery of claims which are not part of the resolution plan.

The CHC observed that a decision-making process must be attuned to a dynamic legal landscape shaped by

legislative intervention and judicial pronouncements. The most predictable aspect of law is its constant evolution. The CHC stated that it would hence be judicial short-sightedness, even stubbornness, to hold on to a view when the law, in the meantime, had transformed into a different avatar.

Addressing the contention of *res judicata* raised by the Respondent, the CHC observed that the principle of *res judicata* was essentially to guard the court from abuse of the process where the same matter in issue, which had been heard and finally decided by a court, is urged again between the same parties. However, it was observed that the question of maintainability of the application under Section 34 of the 1996 Act could be considered at any point of time on the legal aspect and particularly on the pronouncement of a decision relevant to the matter.

Analysing the SC judgements in Essar and Edelweiss, and the IBC, the CHC noted that for a claim to be considered by the resolution professional and later by the committee of creditors ("**CoC**") for approval of the resolution plan, the said claim must feature in the information memorandum prepared by the resolution professional and provided to the resolution applicant which would ultimately take over the business of the corporate debtor. The CHC observed that the IBC contemplates of several stages where an operational creditor is given notice of the commencement of CIRP against a corporate debtor. The IBC also takes into account claims of parties who have not initiated proceedings against the corporate debtor as operational creditors. The CHC deemed the arrangement of the sections to be not only conducive to making all creditors aware of the CIRP but also to invite claims and include them as part of the list of claims which are collated by the resolution professional and approved in the resolution plan by the CoC and finally by the adjudicating authority.

Analysing Regulations 7 *(Claims by operational creditors)* and 12 *(Submission of proof of claims)* of the CIRP Regulations, the CHC opined that from the date of the admission of the application of initiation of CIRP against the petitioner, that is, on September 18, 2017, until approval of the Resolution Plan on May 16, 2018, the Respondent had sufficient opportunity to approach the NCLT for appropriate relief. The Respondent was obligated to take active steps under the IBC instead of waiting for the adjudication of the application under Section 34 of the 1996 Act. Addressing the issue of whether or not the Respondent could have lodged and pursued a claim before the NCLT, when the Award was challenged by the Petitioner in the CHC on October 31, 2008, the CHC noted the stance of the Respondent that in light of Section 34 of the 1996 Act, prior to 2016 Amendment, impugned Award was automatically stayed upon filing of the application under Section 34 of the 1996 Act. The CHC observed that post the 2016 Amendment, Section 36(2) of the 1996 Act requires the court to grant an order of stay of the operation of the award in accordance with Section 36(3) of the 1996 Act, on a separate application for stay taken out by the award-debtor. The CHC noted that the amended Section 36(2) of the 1996 Act marks a significant departure from the erstwhile provision in clarifying that filing of an application for setting aside of an award under Section 34 of the 1996 Act shall not by itself make the award unenforceable unless the award is stayed by an order of court in an application made in the manner provided under Section 36(3) of the 1996 Act.

Placing reliance on Kochi Cricket, the CHC clarified that with regard to Section 34 of the 1996 Act, applications which were pending at the time of the judgment in Kochi Cricket would also be governed by the new Section 36 of the 1996 Act, as amended. Thus, the Petitioner would not have the benefit of the Award being automatically stayed upon filing of the application and the Respondent would be free to enforce the Award against the Petitioner in the absence of an application for stay of the Award under the amended Section 36 of the 1996 Act.

The CHC heavily relied on the view of the SC, as crystallized in Essar and Edelweiss, that pre-existing and undecided claims which have not featured in the collation of claims and the consequent consideration by the resolution professional, shall be treated as extinguished upon approval of the resolution plan under Section 31 of the IBC.

Judgement

The CHC rendered the Award as infructuous. The CHC ruled that the Respondent could have enforced the Award against the Petitioner, in the absence of an application for stay of the Award under the amended Section 36 of the

1996 Act, and that the Award would not automatically stay on filing of the application under Section 34 of the 1996 Act. It was further held that an operational creditor who fails to lodge a claim in the CIRP literally missed boarding the claims-bus for chasing the fruits of an award, even where a challenge to the award is pending in a civil court. Thus, it was held that an award-holder's claim will stand extinguished on approval of the award-debtor's resolution plan under Section 31 of the IBC.

VA View:

The CHC has thus clarified that an award-holder's claim will get frustrated on the approval of the resolution plan of the award debtor. Through this Judgement, the CHC has upheld the intent of the IBC, and has protected the rights of a successful resolution applicant. The Judgement recognized the necessity of featuring all the claims beforehand, in the information memorandum, to be provided to the resolution applicant, as claims which do not form a part of the resolution plan would stand extinguished.

This Judgement has reiterated the fact that a successful resolution applicant cannot suddenly be faced with undecided claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up, rendering uncertain the running of the business of a corporate debtor by a successful resolution applicant. This Judgement has reaffirmed that a successful resolution applicant who takes over the business of the corporate debtor must receive the opportunity to start running the business of the corporate debtor on a fresh slate.

III. Delhi High Court: An arbitral award cannot be interfered with on account of disagreement over inference drawn from evidence

The Delhi High Court ("**DHC**") has in its judgment dated April 15, 2021, in the matter of ***Megha Enterprises and Others v. M/s Haldiram Snacks Private Limited [O.M.P (COMM) 79/2021],*** held that an arbitral award cannot be interfered with on account of disagreement over inference drawn from evidence.

Facts

Megha Enterprises ("**Petitioner**"), engaged in the trade of crude palm oil (edible grade), entered into two agreements dated February 2, 2013 and February 25, 2013 with M/s Coral Products Private Limited ("**Coral**") for sale and purchase of crude palm oil on a high sea sale basis ("**High Sea Sale Agreements**"). Pursuant thereto, Coral sold 1470 MT and 2500 MT of crude palm oil to the Petitioner at a rate of INR 46,600/- per MT and INR 48,750/- per MT respectively, and issued two separate invoices dated February 2, 2013 (for INR 6,85,02,000/-) and February 25, 2013 (for INR 12,18,75,000/-), to the Petitioner aggregating to INR 19,03,77,000/-.

Thereafter, in terms of a scheme of amalgamation under Section 391-394 of the Companies Act, 1956 ("**Act**"), Coral merged with M/s Haldiram Snacks Private Limited ("**Respondent**"). Under the terms of the said scheme of amalgamation, all the assets of Coral stood vested with the Respondent, which also included the sum of INR 19,03,77,000/- receivable from the Petitioner in respect of the High Sea Sale Agreements. According to the Respondent, the Petitioner took delivery of the crude palm oil at Kakinada, which was the port of delivery, in accordance with the terms and conditions of the documents executed between Coral and the Petitioner. However, the aforesaid amount of INR 19,03,77,000/- remained outstanding as the Petitioner failed to pay the same.

Consequently, by a notice dated May 18, 2016 addressed to the Petitioner, the Respondent invoked the arbitration clauses under the High Sea Sale Agreements, and sought the consent of the Petitioner to appoint a sole arbitrator from amongst a set of three former judges of the DHC. In the said notice, the Respondent sought payment of INR 19,03,77,000/- together with interest at the rate of 18% per annum, which according to the Respondent was in terms of the High Sea Sale Agreements as well as the custom and usage of trade. The Petitioner responded to the said notice under a letter dated June 3, 2016 denying its liability to pay the said amount as claimed by the

Respondent and also declined to give consent for the appointment of an arbitrator. The Petitioner further claimed that the arbitration clause was not binding on any of the parties.

Thereafter, the Respondent filed a petition with the DHC under Section 11(6) of the Arbitration and Conciliation Act, 1996 ("**1996 Act**") seeking appointment of a sole arbitrator to adjudicate the disputes arising out of the High Sea Sale Agreements in question. The said petition was allowed by the DHC and under an order dated April 18, 2017, the DHC then referred the parties to the Delhi International Arbitration Centre ("**DIAC**") with a direction for the DIAC to appoint an arbitrator in accordance with the provisions of the 1996 Act and its rules.

Following this, the Respondent filed its statement of claims before the sole arbitrator on June 5, 2017 claiming (a) INR 19,03,77,000/- as the amount outstanding against the sale of crude palm oil; (b) interest at the rate of 18% per annum from the date the amount became due till the date of filing of the statement of claims, quantified at INR 14,56,38,405/-; (c) pendente lite and future interest at the rate of 18% per annum from the date of filing of the claim till payment of the award; and (d) costs of litigation. In response, the Petitioner filed its statement of defence raising several contentions including the Respondent's claims being barred by limitation as the arbitration clause was invoked on May 18, 2016, which was beyond a period of three years from the date on which the amounts became payable under the High Sea Sale Agreements. The arbitral tribunal, however, rejected the contention that the claims made by the Respondent were barred by limitation and in its award (i) held that a sum of INR 19,03,77,000/- was due and payable by the Petitioner to the Respondent, (ii) interest at the rate of 9% from April 1, 2013, that is, the date of filing the statement of claims till the recovery of the said amount would be payable by the Petitioner to the Respondent, and (iii) awarded costs of INR 5,00,000/- in favour of the Respondent.

Aggrieved by the arbitral award, the Petitioner filed the present petition under Section 34 of the 1996 Act challenging the impugned arbitral award dated October 26, 2020, before the DHC.

Issue

Whether the arbitral award can be interfered upon the ground of disagreement over inference drawn from evidence.

Arguments

<u>Contentions raised by the Petitioner</u>:

The Petitioner, *inter alia*, contended that the Respondent's claim was barred by limitation and the arbitral tribunal's conclusion to the contrary, was patently illegal. It was submitted that the High Sea Sale Agreements in question were entered into on February 2, 2013 and February 25, 2013 and invoices (of INR 6,85,02,000/- and INR 12,18,75,000/-) were also issued on the aforesaid dates. In terms of clause 11 of the High Sea Sale Agreements, which were identically worded, the payment for the same was required to be made on expiry of ten days from the date of the High Sea Sale Agreements. Accordingly, the payment of INR 6,85,02,000/- against the invoice dated February 2, 2013 was to be made by February 12, 2013 and the payment of INR 12,18,75,000/- against the invoice dated February 25, 2013 was required to be made by March 7, 2013. Since the notice invoking arbitration was issued on May 18, 2016, it was contended by the Petitioner that the said notice was beyond the period of three years from the agreed dates of payment and hence the Respondent's claim was barred by limitation. It was also contended that the arbitral tribunal had erred in accepting the Respondent's contention that one Mr. Avneesh Agarwal of Coral had received a letter dated May 31, 2013 ("**Balance Confirmation Letter**") acknowledging the liability of the Petitioner under the invoices. The Petitioner contended that the said letter was not signed and therefore, could not have been considered as an acknowledgement under Section 18 of the Limitation Act, 1963 ("**Limitation Act**"). It was further contended that an e-mail dated June 4, 2013 forwarding the Balance Confirmation Letter which was purportedly forwarded by one Mr. Mohan Maganti of M/s KGF Cottons Private Limited to the said Mr. Avneesh Agarwal could not be construed to extend the period of limitation as it had not

been sent by any of the constituent partners of the Petitioner. Further, there was no evidence that Mr. Mohan Maganti was an employee of the Petitioner. Additionally, the e-mail itself indicated that it was sent on behalf of M/s KGF Cottons Private Limited, and a communication by a third party (in this case, an incorporated company) could not be considered as an acknowledgement by the Petitioner or on its behalf.

Contentions raised by the Respondent:

The Respondent, on the other hand, contended that the arbitral tribunal had carefully examined the evidence on record and concluded that the Petitioner had acknowledged the debt owed against the two invoices in question. It was submitted that the arbitral tribunal had seen and appreciated the e-mail dated June 4, 2013 as well as the Balance Confirmation Letter. It was contended that the arbitral tribunal had also examined the question whether the Balance Confirmation Letter was required to be signed and had in this regard followed the decision of the Karnataka High Court in ***Sudarshan Cargo Private Limited v. Techvac Engineering Private Limited [2014 Company Cases 71]***, where it was held that e-mails can be construed and read as due acknowledgment of debt and the same would meet the parameters as laid down under Section 18 of the Limitation Act.

Observations of the Delhi High Court:

The DHC observed that basis the arbitral tribunal's findings it was clear that it had examined the question of limitation in detail. It had, first of all accepted, on evaluation of evidence led before it that the e-mail dated June 4, 2013 had been sent by one Mr. Mohan Maganti from the e-mail address, mohan@goodhealth.com, to Mr. Avneesh Agarwal, representative of the Respondent. The contents of the said e-mail clearly indicated that the Balance Confirmation Letter issued by M/s KGF Cottons Private Limited and the Petitioner, as on March 31, 2013, were forwarded pursuant to the request made by one, Mr. Mohit Dua. The Balance Confirmation Letter which was attached along with the said e-mail, clearly confirmed that a sum of INR 19,03,77,000/- was outstanding in the ledger accounts of the Petitioner as on March 31, 2013. The arbitral tribunal also concluded that M/s. Good Health Agro Private Limited was a part of the same group company as the Petitioner. This had been conceded by the witness examined by the Petitioner during the proceedings before the arbitral tribunal. Basis this, the arbitral tribunal concluded that it was sent on behalf of one of the employees of the group company and thus, obviously on behalf of the Petitioner. The DHC observed that the Petitioner did not produce its books of accounts or its ledger to otherwise contest the contents of the said e-mail. Thus, no evidence was produced by the Petitioner to establish that the assertion made in the Balance Confirmation Letter that its ledger accounts reflected a sum of INR 19,03,77,000/- as outstanding towards Coral/Respondent was incorrect. The DHC also noted that the affidavit filed by the witness on behalf of the Respondent affirmed that the written acknowledgement dated May 31, 2013 in the form of the Balance Confirmation Letter was sent through an e-mail dated June 4, 2013 and it had confirmed that the credit balance of INR 19,03,77,000/- was standing in the books of accounts of the Petitioner as on March 31, 2013 and that the arbitral tribunal had accepted the same.

It was further observed that the scope of examination of an arbitral award under Section 34 of the 1996 Act was extremely limited. It is trite law that the DHC would not undertake the exercise of re-appreciation of evidence on the ground of patent illegality. In the present case, no case had been made out by the Petitioner that the arbitral award was contrary to the fundamental policy of India as it could not by any stretch be considered to be opposed to justice or morality. The DHC noted that the dispute in the present case related to a simple transaction of sale and purchase of goods and that all that the arbitral tribunal had done after having found that the Petitioner had not paid for the goods purchased by them, was to award that the said consideration be paid with interest. The DHC observed that it was trite that a delay in filing a claim only bars the remedy but does not extinguish any debt. Viewed with this perspective, the arbitral tribunal had after evaluating the material on record, rejected the Petitioner's contention that the Respondent be denied its remedy to seek what it claimed to be legitimately due to it. Therefore, there was no question of such an approach offending any sense of morality as was embodied in the expression "public policy" as used in Section 34(2)(6) of the 1996 Act.

It was also observed that while the evaluation of evidence by the arbitral tribunal may have been erroneous and perhaps the DHC may have taken a different view but that was not the scope of examination under Section 34 of the 1996 Act and the DHC could not interfere with the arbitral award merely on the ground that it did not concur with the inference drawn by the arbitral tribunal from the evidence led by the parties.

Decision of the Delhi High Court

In dismissing the petition, the DHC refused to interfere with the arbitral award on the ground that the arbitral tribunal had arrived at an erroneous conclusion on the evidence led by the parties. Accordingly, the present petition was disposed of.

VA View:

In passing the above order, the DHC has reiterated the set principle that the scope of examination of an arbitral award under Section 34 of the 1996 Act is limited and does not warrant interference or re-examination of the evidence on record on the ground of patent illegality, unless there has been some gross injustice or violation of public policy.

The view taken by the DHC in arriving at its order is well reasoned, as any such re-examination of evidence that has already been dealt with by an arbitral tribunal would not only defeat the intent of Section 34 of the 1996 Act but also negate the objective of speedy and time bound resolution of disputes by arbitration.

IV. Supreme Court: In seeking to construe a clause in contract, there is no scope for adopting either a liberal or a narrow approach

The Supreme Court of India ("**Supreme Court**") in the case of ***Bangalore Electricity Supply Company Limited v. E.S Solar Power Private Limited and Others [C.A. 9273 of 2019]*** by judgement dated May 03, 2021, upheld the decision of the Appellate Tribunal for Electricity ("**APTEL**"). The APTEL had passed an order reversing the findings of the Karnataka Electricity Regulatory Commission ("**KERC**"). KERC, more specifically, had imposed tariff reduction for solar power projects based out of Bagepalli and Bidar, Karnataka.

Facts

Karnataka Renewable Energy Development Limited ("**KREDL**") had issued a request for proposal in 2015 to invite bids for development of 'Solar PV ground mount power plants' in Karnataka, pursuant to the government's decision of development of 1200 MWA of solar power through private sector participation. Emmvee Photovoltaic Power Private Limited, respondent no. 2 herein**, ("EPL"**) incorporated two special purpose vehicles as per the terms of the request for proposal and submitted the bid for acceptance of Bangalore Electricity Supply Company Limited, the appellant herein ("**BESCL**"). Respondent no. 1 in Civil Appeal 9273 of 2019 (filed by BESCL before KERC) is a special purpose vehicle constituted by EPL for setting up a Solar PV ground mount project with a capacity of 10 MWA (AC) in Bidar. Respondent no. 1 in Civil Appeal 9274 of 2019 (filed by BESCL before KERC) is a special purpose vehicle for setting up a 20 MWA (AC) capacity Solar PV ground mount Project in Bagepalli. The projects were awarded on March 31, 2016. Thereafter, power purchase agreements ("**PPA**") were entered between the parties on May 23, 2016. PPA was approved by KERC on October 17, 2016. Supplementary PPAs were also entered into between the parties on December 17, 2016 incorporating further modifications suggested by KERC. In respect of the Bidar project and Bagepalli project, a commissioning certificate was issued on October 25, 2017 and November 23, 2017 respectively.

Proceedings before KERC

Original petition no. 18 of 2018 was filed in Civil Appeal 9274 of 2019, contesting the reduction of tariff payable by

BESCL from INR 6.10/kWh to INR 4.36/kWh and imposition of damages of INR 20,00,000/- for delay in commissioning the plant. It was contended that the Bagepalli project commenced within 12 months from the approval of the PPA. Therefore, imposition of damages and reduction of tariff payable by BESCL was contrary to provisions of PPA. Original petition no. 19 of 2018 was also filed in Civil Appeal 9723 of 2019 in respect of the Bidar project for reliefs similar to those claimed in original petition no. 18 of 2018. KERC by an order dated October 23, 2018, dismissed the aforementioned original petitions.

KERC had originally framed four issues for consideration:

(i) Whether the scheduled commissioning date of the power projects would fall on October 16, 2017 or October 17, 2017.

(ii) The date on which the solar power projects in the abovementioned original petitions have started injection of power into the state grid.

(iii) Whether injection of power into the state grid was essential to declare that project is commissioned.

(iv) Whether commissioning of the project/commercial operation of the project is the same or are different concepts.

Observations of KERC

In respect of issue (i), the scheduled date of commissioning was October 16, 2017 and not October 17, 2017. As far as issues (ii), (iii) and (iv) were concerned, injection of power into the state grid was a *sine qua non* for declaring that the project was commissioned. However, this had in fact occurred on October 17, 2017. In view of the above, KERC dismissed the above-mentioned original petitions.

Proceedings before APTEL

Thereafter, appeal nos. 332 and 333 of 2018 were filed against the order of KERC before APTEL. The tribunal considered: Whether the project was delayed by one day in terms of PPA and if KERC was justified in imposing liquidated damages for such delay in commissioning.

Observations of APTEL

The commissioning date of both the Bidar and Baghepalli plants was October 16, 2017. The scheduled date of commissioning was done within the time limit prescribed under the agreements even if the commencement was in fact taken to be on October 17, 2017. Allowing the appeals, APTEL set aside the orders passed by KERC. Thereafter, BESCL has challenged the orders passed by APTEL before the Supreme Court.

Contentions of BESCL before the Supreme Court

APTEL's conclusion regarding the scheduled date of commissioning was contrary to the terms of the PPA. Clauses of the PPA justified the decision taken in respect of reductions of tariff and imposition of liquidated damages. Injection of power into the state grid was a prerequisite to determine the date of commissioning. KERC had in fact correctly interpreted the PPA to include the first date and the last date, that is, the date on which PPA was approved by the KERC for determining the scheduled commissioning date. As per records, there was minimum generation of power on October 16, 2017, which did not satisfy the condition of injection power into the state grid. Therefore, the entities were not entitled to the tariff at the rate of 6.10/kWh. APETL had also committed an error by relying on the judgements relating to General Clauses Act, 1897 when the PPA excluded applicability of the same.

Contentions of Respondent Nos. 1 and 2 (E. S. Solar Private Limited and EPL) ("Respondents") before the Supreme Court

The 12-month period for deciding the scheduled commissioning date started from October 17, 2016 which was also date of approval of PPA. As per the covenants of the PPA, the date of approval of PPA had to be excluded for computing 12-month period for deciding the scheduled date of commissioning. As such there is no dispute regarding injection of power into the grid on October 17, 2017. Therefore, there is no default as far as the entities were concerned. Alternatively, even if October 17, 2016 is not excluded, the 12-month period ends on October 16, 2017 on which the plants were commissioned. Further, commissioning date of the plant was different from commercial operation date. Moreover, the PPA were entered into on the basis of the offer to pay tariff at Rs. 6.10/kwh. Reduction of tariff would also be detrimental in respect of the plants.

Observations of the Supreme Court

The dispute in these appeals is whether the projects were not commissioned before the expiry of 12 months from October 17, 2016, which is the date of approval of PPA by KERC. The conflicting views herein relate to computation of 12 months for the purpose of determining whether the scheduled date of commissioning is October 16, 2017 or October 17, 2017. Thereafter, the second aspect being whether injection of power was a pre-requisite for deciding the date of commissioning and whether the commercial operation date and commissioning date were the same. The court noted that its duty was not to delve deep into the intricacies of human mind to explore the undisclosed intention, but only to take the meaning of words used, that is, to say expressed intentions. In seeking to construe a clause in a contract, there is no scope for adopting either a liberal or a narrow approach, whatever that may mean. The exercise or process to be undertaken is to determine what the words mean. It may happen, at times that the conclusion is ambiguous. In such cases, court has to prefer one above the other in accordance with the settled principles. If one meaning is more in accord with what the court considers to the underlined purpose and intent of the contract, or part of it, than the other, then the court will choose the former. The intention of the parties must be understood from the language they have used, considered in the light of the surrounding circumstances and object of the contract. In light of article 5.8.1 of the PPA, liquidated damages could be imposed on the developer if he was unable to commence supply of power by the scheduled commissioning date. Article 12 of the PPA, which deals with applicable tariff, is reproduced herein:

"12.1. The Developer shall be entitled to receive the Tariff of INR6.10 / kWh of energy supplied by it to BESCOM in accordance with the terms of this Agreement during the period between COD and the Expiry Date.

12.2. Provided further that as a consequence of delay in Commissioning of the Project beyond the Scheduled Commissioning Date, subject to Article 4, if there is change in KERC applicable tariff, the changed applicable Tariff for the Project shall be the lower of the following: I. Tariff at in Clause 12.1 above II. KERC applicable Tariff as on the Commercial Operation Date."

The issue here is whether the scheduled commissioning date is October 16, 2017 or October 17, 2017. KERC approved the PPAs on October 17, 2016. Whereas the scheduled commissioning date should be, as per the agreement, 12 months from October 17, 2016. There is no dispute as such that 12 months equals to be 365 days. As per BESCL, if October 17, 2016 is included in the computation, the scheduled commissioning date would be October 16, 2017. Whereas if it is excluded in the calculation, October 17, 2017 would be the scheduled commissioning date. KERC relied on clause 1.2.1 (m) of the PPA to conclude that October 17, 2016 has to be included for interpreting the period of 365 days. Whereas, APTEL held that article 1.2.1 (k) of the PPA would be the relevant interpretation clause. Both of these clauses from the PPA are reproduced hereunder:

"Article 1.2 (k): any reference to month shall mean a reference to a calendar month as per the Gregorian calendar;

Article 1.2 (l) and (m): any reference to any period commencing "from" a specified day or date and "till" or "until" a

specified day or date shall include both such days or dates; provided that if the last day of any period computed under this Agreement is not a business day, then ·the period shall run until the end of the next business day”

Reduction of tariff is permissible under the PPA only if there is a delay in commissioning of the project beyond scheduled commissioning date. The parties agree that the effective date is undoubtedly October 17, 2016. The court looked at the definition of the expression ‘month’ as provided under article 21.1 of the PPA. Month had been defined to mean a period of 30 days and excluding (the date of the event) where applicable, else a calendar month. If the date of the event, that is, October 17, 2016 is excluded, the scheduled commissioning date would be October 17, 2017. Article 21 of the PPA is reproduced herein:

"COD" or "Commercial Operation Date" shall mean the actual commissioning date of respective units of the Power Project where upon the Developer starts injecting power from the Power Project to the Delivery Point.

"Effective Date" shall mean date of Approval of PPA by KERC;

“Month" shall mean a period of thirty, (30) days from (and excluding) the date of the event, where applicable, else a calendar month.

“Scheduled Commissioning Date" shall mean 12 (twelve) months from the Effective Date

Decision of the Supreme Court

KERC was incorrect in its interpretation regarding definition of month. It had applied article 1.2.1 (m) of the PPA which refers to a period commencing from a specified date to a specified day for the purpose of including the date of the event. The correct provision applicable was article 1.2.1 (k) of the PPA read with the definition of month in article 21.1 of the PPA. There is a specific mention of twelve months in the scheduled commissioning date and article 1.2.1 (k) of the PPA provides that any reference to a month shall mean a calendar month. This interpretation therefore in clear terms, excludes the applicability of article 1.2.1 (m) of the PPA. The court noted the second issue raised by BESCL, that the injection of power into the state grid being on October 17, 2017 and the scheduled date being October 16, 2017, the reduction of tariff was justified. Whereas, the Respondents contended that even if scheduled date was October 16, 2017, plants had been commissioned on October 16, 2017 itself. They were objecting to the premise adopted by BESCL that the actual injection of power was required to show that solar plants were commissioned. The court noted that APTEL had reversed KERC’s findings by relying on the commissioning certificate which is to the effect that the plants were commissioned on October 16, 2017 itself. The court held that that there was no dispute that the power was injected into the state grid on October 17, 2017. However, in view of the observations of the court that the scheduled date was October 17, 2017, it was not necessary to look into the point in respect of actual injection of power into the grid *vis-à-vis* date of commissioning.

VA View:

The SC in this instance reiterated that there was no scope for adopting either a liberal or a narrow approach, whatever that may mean. The exercise or process taken by the courts would be to determine what the words actually mean. Even if in terms of determining the contract, there are two different meanings, the court would opt one over the other, if it is in synchronization with the intent and underlying purpose of the contract.

The background of the contract can also be taken into consideration to construe the intent of the contract. It would provide an insight into the understanding between the parties to an agreement. This would be helpful in adopting one interpretation over the other, in the face of two conflicting interpretations.

Contributors:
Netra Nair, Oorja Chari, Shonali Shendge, Simran Gupta and Simrann Venkkatesan.

Disclaimer:

While every care has been taken in the preparation of this Between the Lines to ensure its accuracy at the time of publication, Vaish Associates, Advocates assumes no responsibility for any errors which despite all precautions, may be found therein. Neither this bulletin nor the information contained herein constitutes a contract or will form the basis of a contract. The material contained in this document does not constitute/substitute professional advice that may be required before acting on any matter. All logos and trademarks appearing in the newsletter are property of their respective owners.

2021, Vaish Associates Advocates
All rights reserved.

Contact Details :

www.vaishlaw.com

NEW DELHI	MUMBAI	BENGALURU
1ST, 9TH 11TH Floor,	106, Peninsula Centre,	105-106, Raheja Chambers,
Mohan Dev Bldg, 13 Tolstoy Marg,	Dr. S.S. Rao Road, Parel,	#12, Museum Road,
New Delhi-110001, India	Mumbai – 400012, India	Bengaluru-560001, India
Phone : +91-11-4249 2525	Phone : +91-22-4213 4101	Phone : +91-80-40903588/89
Fax : +91-11-23320484	Fax : +91-22-4213 4102	Fax : +91-80-40903584
delhi@vaishlaw.com	mumbai@vaishlaw.com	bangalore@vaishlaw.com