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Between the lines...

A BRIEFING ON LEGAL MATTERS OF CURRENT INTEREST

KEY HIGHLIGHTS

- **Supreme Court:** Exclusion clauses in insurance contract should be interpreted strictly as they may absolve all the liabilities of the insurer.
- **NCLAT:** Debt arising out of advance payment for supply of goods or services is an operational debt in terms of Section 5(21) of IBC.
- **Telangana High Court:** Civil courts have jurisdiction to determine share title, not NCLT/NCLAT.
- **Bombay High Court:** Mere long-term continuance of employment does not entitle an employee to seek regularization of his services.

I. Supreme Court: Exclusion clauses in insurance contract should be interpreted strictly as they may absolve all the liabilities of the insurer.

In the matter of ***United India Insurance Company Limited v. M/s. Hyundai Engineering and Construction Company Limited and Others [Civil Appeal No. 1496 of 2023]***, decided on May 16, 2024, the Division Bench of the Supreme Court reiterated that the insurer has the burden of proving applicability of exclusionary clauses in insurance contracts and such clauses must be interpreted strictly against the insurer, as they may completely exempt the insurer of its liability.

Facts

The National Highway Authority of India ("**NHAI**") awarded a contract valued at INR 213,58,76,000 for design, construction, and maintenance of a cable-stayed bridge across the river Chambal on NH-76 at Kota, Rajasthan to the joint venture of M/s. Hyundai Engineering and Construction Company Limited and M/s. Gammon India Limited ("**Respondents**"). As per the contract, the construction was to be completed within 40 months. United India Insurance Company Limited ("**Appellant**") issued the Contractor's Insurance Policy covering the interest of NHAI as principal and of the Respondents. Construction for the bridge was commenced in December, 2007. However, during the construction process a part of said bridge collapsed on December 24, 2009, which resulted in the tragic death 48 workers. The Ministry of Road Transport and Highways, Government of India constituted an expert committee to investigate the cause of collapse. After investigation, the final report was submitted wherein the Respondents were found liable for the loss of 48 lives due to defects in construction design. Subsequently, an FIR was lodged against the Respondents under Sections 304 (*Punishment for culpable homicide not amounting to murder*) and 308 (*Attempt to commit culpable homicide*) of the Indian Penal Code.

NHAI informed the Appellant about the said incident on December 29, 2009 and requested the appointment of the surveyor to assess the damages. The surveyor commenced his work on January 6, 2010 and issued a letter seeking additional details and clarifications from the Respondents. In response, the Respondents submitted a claim amounting to INR 151,59,94,542. Surveyor in its report recommended to repudiate the insurance claims as Respondents had violated the conditions of insurance policy and there was a net loss of INR 39,09,92,828. Based on the said reports, Appellant rejected the insurance claim *vide* its letter dated April 24, 2011.

By a letter dated June 17, 2011, the Respondents requested the Appellant to reconsider the repudiation, to which the Appellant agreed to reconsider. The Appellant re-considered the claim, and by a letter dated April 17, 2017 informed the Respondents that the original decision of repudiation is affirmed. After 2 years of repudiation, Respondents on January 24, 2019 filed a consumer complaint bearing no. No. 160 of 2017 before the National Consumer Disputes Redressal Commission ("**NCDRC**") against the Appellant. They alleged deficiencies in services of Appellant and unfair trade practices in rejecting the claim.

NCDRC rejected the preliminary objections of the Appellant and relied upon the reports of independent experts cited by the Respondents. These reports indicated no flaws in design of the project. NHAI allowed the Respondents to continue the said construction. Consequently, NCDRC held that the Appellant is obligated to pay claim of INR 39,09,92,828. Furthermore, an undated addendum to the

judgment unilaterally altered the judgement, increasing the obligation to INR 151,59,94,542 from the previously specified amount.

Aggrieved by the decision of the NCDRC, the Appellant filed an appeal challenging the said decision of the commission.

Issues

1. Whether the Appellant is liable to pay the insurance claim.
2. Whether the defects in design led to the collapse of the bridge.

Arguments

Contentions of the Appellant:

The Appellant justified its repudiation by citing the affidavit provided by Mr. S. Anantha Padmanabhan, who was examined as a witness. The said affidavit includes the surveyors report and expert committee report. The Appellant also submitted that there is sufficient evidence to justify repudiation of the claim on the basis of the exclusion clause in the insurance policy.

Contentions of the Respondents:

The Respondents relied on the judgement of the Supreme Court in ***Texco Marketing Private Limited v. TATA AIG General Insurance Company Limited [(2023) 1 SCC 428]*** ("**Texco Case**") to highlight the proof of burden that an exclusionary clauses place on an insurance company.

The Respondents submitted that the findings of the independent experts' report clearly establishes that they are not at fault regarding the design issue. Specifically, they referenced reports made by 1. Mr. Jacques Combault; 2. M/s. SETRA/CETE (French Ministry of Transportation Technical Department); 3. M/s. Halcrow Group Limited and 4. AECOM Asia Company Limited.

Furthermore, the Respondents contended that the reports of the surveyor and expert committee are inconclusive and remain open-ended; failing to hold them accountable for the negligence.

Observations of the Supreme Court

The Supreme Court observed that the Apex Court noted in the Texco Case that burden of proving the applicability of an exclusion clauses rests with the insurer. In ***National Insurance Company Limited v. Ishar Das Madan Lal [2007 (4) SCC 105]*** it was held that evidence must clearly establish that the event sought to be excluded is included in the exclusionary clauses. Further, the Apex Court noted that findings from the expert committee reports which concluded that the said bridge had collapsed due to structural instability, design flaws and poor workmanship.

The Supreme Court also noted that independent experts relied upon by the Respondents were not marked as exhibits. They were not adduced in evidence as none of these experts was examined as a witness. Given these circumstances the Supreme Court concluded that the Appellant has discharged the burden of proof as set out in the Texco Case.

Additionally, the Supreme Court also relied upon ***National Insurance Company Limited v. Hareshwar Enterprises Private Limited [(2021) SCC Online SC 628]*** and ***National Insurance Company Limited***

v. Vedic Resorts and Hotels Private Limited [2023 SCC OnLine SC 648] wherein it was held by this court that surveyor report is credible and reliable evidence. Further, the Supreme Court observed that independent experts report was on a theoretical basis while the surveyor conducted onsite inspections and the expert committee comprised of experts from the field of civil engineering. The Supreme Court observed that NCDRC failed to examine the independent experts and their reports.

Decision of the Supreme Court

In light of the above-mentioned observations, it was held that NCDRC fell in error of law in allowing the said consumer complaint. Therefore, the Supreme Court allowed the appeal and set aside the decision of NCDRC. Further, the Supreme Court held that an insurance is a contract of indemnification, being a contract for a specific purpose which is to cover defined losses and thus, exclusion clause must be construed strictly against the insurer.

VA View: By overturning the decision of NCDRC and referencing its previous judgments in Texco Case, the Supreme Court underscored the need for substantial evidence in such disputes. The Supreme Court's preference for thorough onsite inspections instead of theoretical reports also highlights the importance of robust evidence in such matters.

This judgement has set a precedent for future insurance claims disputes involving such large-scale construction projects by emphasizing the need to strictly comply with the contractual terms and thorough scrutiny of exclusion clauses.

II. NCLAT: Debt arising out of advance payment for supply of goods or services is an operational debt in terms of Section 5(21) of IBC.

The National Company Law Appellate Tribunal, New Delhi ("**NCLAT**"), in its judgement dated May 6, 2024, in the matter of ***Sanam Fashion and Design Exchange Limited v. Ktex Nonwovens Private Limited [Company Appeal (AT) (Ins.) No. 1234 of 2023]***, has held that a debt arising out of an advance paid towards the supply of goods or services would constitute an operational debt in terms of Section 5(21) (*Definition of operational debt*) of the Insolvency and Bankruptcy Code, 2016 ("**IBC**").

Facts

Sanam Fashion and Design Exchange Limited ("**Appellant**") had placed an order for the supply of 10 tons of non-woven fabric by issuing a purchase order dated March 16, 2020 ("**PO**") on Ktex Nonwovens Private Limited ("**Respondent**"). Upon sharing the PO for execution by the Respondent, the Appellant immediately issued a debit advice to its bank in India for crediting an amount of USD 200,000 ("**Advance Payment**") in the Respondent's bank account.

In terms of the PO and the invoice raised by the Respondent on the Appellant ("**Invoice**"), the goods were supposed to be delivered to the Appellant on March 19, 2020. However, owing to the outbreak of the Covid-19 pandemic, the export of materials from India was banned. After the lifting of the Covid-19 ban, e-mails were exchanged between the parties in relation to the supply, terms of delivery, refund of the Advance Payment and other related issues. Thereafter, the Appellant issued a demand notice under Section 8 (*Insolvency resolution by operational creditor*) of IBC ("**Demand Notice**"), demanding

the repayment of the Advance Amount from the Respondent. However, the Respondent failed to respond to the Demand Notice.

Consequently, the Appellant filed a petition under Section 9 (*Application for initiation of corporate insolvency resolution process by operational creditor*) of IBC ("**Section 9 Petition**"), before the National Company Law Tribunal, Ahmedabad Bench ("**NCLT**") for initiation of corporate insolvency resolution process ("**CIRP**") against the Respondent.

In its Section 9 Petition, the Appellant iterated that as per the contract, the goods were supposed to be delivered at its office in Hong Kong, however, the Respondent had made available the goods for pick up at its plant situated at Rajkot, India. Hence, the goods never reached the Appellant.

The NCLT, *vide* its order dated August 10, 2023 ("**Impugned Order**"), rejected the Section 9 Petition filed by the Appellant, since in NCLT's view, the Appellant had merely made an Advance Payment to the Respondent, which would not get covered under the definition of an 'operational debt' under Section 5(21) of IBC. Further, the terms of delivery of the goods under the Invoice was 'Ex-Plant Rajkot', however the Appellant had failed to pick up the said goods from the Respondent's Rajkot plant.

Aggrieved by the Impugned Order, the Appellant filed the present appeal before the NCLAT.

Issues

1. Whether the Appellant is an operational creditor under IBC.

2. Whether there existed a breach of terms and conditions of the contract leading to a pre-existing dispute between the Appellant and the Respondent.

Arguments

Contentions of the Appellant:

The Appellant submitted that the finding of NCLT that the Advance Payment was not to be treated as an operational debt under Section 5(21) of IBC was erroneous. To support its submission, the Appellant relied on the judgment of the Hon'ble Supreme Court ("**SC**") in the case of ***Consolidated Construction Consortium Limited v. Hitro Energy Solutions Private Limited [(2022) 7 SCC 164]*** ("**Consolidated Construction Case**") wherein the SC had clarified that the definition of operational debt encompasses an amount paid in advance for the purchase of goods and services.

The Appellant relied on an e-mail dated March 14, 2020, received from the Respondent wherein the Respondent had confirmed the terms of delivery along with other relevant details, and contended that it was not the duty of the Appellant to lift the goods from the Respondent's Rajkot plant.

The Appellant further submitted that a conjoint reading of the said e-mail and the PO made it evident that the Appellant was to receive the goods from the Respondent at Hong Kong, and that the NCLT had wrongly interpreted the words 'Ex-plant Rajkot' as appearing in the Invoice to mean that the goods were to be picked by the Appellant from the Rajkot plant of the Respondent.

The Appellant further submitted that the Respondent did not raise any dispute against the Demand Notice issued by the Appellant, and that the Respondent had sent the e-mail dated April 18, 2023, as an afterthought levelling allegations against the Appellant on its inability to pick up the goods from the Respondent's Rajkot plant. Moreover, the NCLT had overlooked the fact that the goods were not even manufactured by March 19, 2020, which should have been a sufficient ground for the Respondent to refund the Advance Payment to the Appellant.

The Appellant contended that its Section 9 Petition was dismissed by the NCLT on the very first day, without affording it a reasonable opportunity of being heard, and hence, the Impugned Order violated the principles of natural justice.

Contentions of the Respondent:

The Respondent submitted that as per the Invoice, the terms of delivery of the goods was 'Ex-Plant Rajkot', which was *prima facie* evidence that the Respondent was required to prepare and keep the goods ready for collection by the Appellant from the Respondent's Rajkot plant.

The Respondent further submitted that it had duly manufactured the goods, prepared the consignment, and informed the Appellant about the same. This established the Respondent's willingness to fulfil its obligations under the PO.

The Respondent contended that while the Appellant had successfully collected the goods of the second consignment after the Covid-19 ban was lifted, it had intentionally failed to pick the first lot which reflected the Appellant's wilful failure in fulfilling its contractual obligations. The Respondent further submitted that it was under the belief that the Appellant would collect the goods from the Rajkot plant, and hence continued to store the goods for a period of 3 years as evidenced in the e-mails exchanged between the parties from March, 2020 onwards.

The Respondent submitted that the NCLT had passed the Impugned Order in its favour after duly considering the material on record, since the Appellant had failed to bring forth any evidence to prove that the parties had in fact agreed to deliver the goods in Hong Kong.

The Respondent contended that the Appellant was conveniently trying to shift its burden onto the Respondent, as a means to escape its liability and was misusing the provisions of IBC as a recovery mechanism to extract undue and unjust amounts from the Respondent, despite the lack of compliance on their part.

Observations of the NCLAT

With respect to the issue on whether the Appellant was to be considered as an operational creditor under IBC, the NCLAT observed that in the Consolidated Construction Case relied upon by the Appellant, the SC had opined that when the appellant encashed a cheque for advance payment for the supply of light fittings despite the contract being subsequently terminated, such encashment gave rise to an operational debt in favour of the appellant, and the appellant was considered to be an operational creditor under IBC.

In NCLAT's view, the Consolidated Construction Case squarely applied to the facts of the present case as there was a clear nexus between the Advance Payment made by the Appellant and the supply of goods and services.

While deliberating on the issue on whether there existed a breach of the terms and conditions of the contract leading to a pre-existing dispute, the NCLAT observed that from the documents submitted on record, it was clear that the delivery was to be made at the Respondent's Rajkot plant, and not at Hong Kong as claimed by the Appellant. The NCLAT observed that the Respondent on the other hand had informed the Appellant of the readiness of the goods and had requested the Appellant to pick up the goods from Respondent's Rajkot plant after the lifting of the Covid-19 ban. These events reflected a pre-existing contractual dispute between the parties, which the Appellant was trying to settle through the IBC mechanism.

The NCLAT relied on the judgement of the SC in the case of ***Mobilox Innovations Private Limited v. Kirusa Software Private Limited [(2018) 1 SCC 353]*** ("**Mobilox Innovations Case**"), wherein the SC had held that once a notice is received by a corporate debtor under Section 8(2) of IBC, it is enough to prove that a dispute is pending and it is not necessary that a suit/arbitration should also be pending. The SC while pronouncing its judgment in the Mobilox Innovations Case, relied on another judgement of the SC in the case of ***Kay Bouvet Engineering Limited v. Overseas Infrastructure Alliance (India) Private Limited [(2021) 10 SCC 483]*** wherein it was held that one of the objects of IBC qua operational debts (which debts are usually smaller than financial debts) is to ensure that the amount of such operational debts do not enable the operational creditors to put the corporate debtor into CIRP prematurely or initiate the process for extraneous considerations.

Decision of the NCLAT

In view of the above, the NCLAT held that the Appellant would be considered as an operational creditor under IBC, since an 'operational debt' would include a debt arising from a contract in relation to the supply of goods or services from the Respondent.

Further, since a pre-existing dispute already existed between the Appellant and the Respondent, the Section 9 Petition filed by the Appellant could not be admitted, and accordingly, the NCLAT dismissed the petition filed by the Appellant.

VA View: The NCLAT has rightly relied on the Consolidated Construction Case and provided much needed clarity on the scope of 'operational debt', by including a debt which arises out of an advance payment made to a corporate debtor for the supply of goods or services within the ambit of 'operational debt' under the framework of IBC.

The definition of 'operational debt' contained in IBC means a claim in respect of the provision of goods or services. Hence, the operative requirement is that the claim must bear some nexus with the provision of goods or services. In the instant case, since there was a clear nexus between the Advance Payment made by the Appellant and the supply of goods and services, the NCLAT has rightly categorized the Appellant as an operational creditor of the Respondent.

III. Telangana High Court: Civil courts have jurisdiction to determine share title, not NCLT/NCLAT.

The Telangana High Court ("**Telangana HC**"), *vide* its judgment dated April 24, 2024, in the case of ***Cherukuri Ramakrishna v. Sandhya Hotels Private Limited and Others [C.C.C.A. No. 57 of 2023]***, upheld the jurisdiction of civil courts in matters pertaining to determination of title of shares under the Companies Act, 2013 ("**Companies Act**").

Facts

Cherukuri Ramakrishna ("**Appellant**") was a shareholder in M/s. Sunbeam Hospitality Private Limited ("**SHPL**"). The Appellant, along with other shareholders of SHPL, entered into a memorandum of understanding, Share Purchase Agreement ("**SPA**") and a takeover agreement with Sandhya Hotels Private Limited and two others (collectively referred to as "**Respondents**") for transfer of their shares in favour of the Respondents. The parties agreed that the Respondents would pay INR 20,04,50,700 to the Appellant. Admittedly, the Respondents paid only a part of this amount and the balance remained outstanding.

Resultantly, the Appellant filed a plaint in the City Civil Court at Hyderabad for mandatory injunction and for re-transfer of 10,197 shares. The Respondents thereafter filed an application for rejection of the plaint. The City Civil Court observed that Clause 8 of the SPA provided for arbitration as a dispute resolution mechanism and thus operates as a bar on the court from entertaining the suit and stated that the parties must be relegated to arbitration. Thus, the City Civil Court allowed the application of the Respondents and directed for return of the plaint for filing before a proper forum ("**Impugned Order**").

The present appeal was filed by the Appellant challenging the said Impugned Order.

Issue

Whether the National Company Law Tribunal ("**NCLT**") or the City Civil Court had jurisdiction over the dispute regarding the transfer and title of shares.

Arguments

Contentions of the Appellant:

The Appellant argued that Section 430 (*Civil court not to have jurisdiction*) of Companies Act read along with Sections 58 (*Refusal of registration and appeal against refusal*) and 59 (*Rectification of register of members*) of Companies Act, would have no application to the facts of the instant case, contrary to what was held by the City Civil Court. The prayer for re-transfer of the shares from the Respondents to the Appellant is a matter which is entirely within the domain of a civil court.

The Appellant had also proposed to file an appropriate application for appointment of arbitrator under Section 11 (*Appointment of Arbitrators*) of the Arbitration and Conciliation Act, 1996.

Contentions of the Respondent:

The Respondent submitted that the dispute could not be referred to arbitration in terms of Clause 8 of the SPA executed between the parties since the Appellant was only one of the several 'transferors' in the SPA.

The Respondent mentioned that Section 58 of Companies Act deals with refusal of registration by private and public companies to register the transfer of securities and provides for appeal by a transferee to NCLT against such refusal by a private and a public company. Further, Section 59 of Companies Act

provides for rectification of the register of members of a company where the name of a person has been entered without sufficient cause or where rectification is required for omissions or delay. Therefore, there is a complete bar in the Companies Act against civil courts from entertaining any suit which is within the domain of the NCLT/National Company Law Appellate Tribunal ("**NCLAT**").

Observations of the Telangana HC

The Telangana HC noted that Clause 8 of the SPA indicated that the parties agreed to refer any dispute arising from the SPA with regard to transfer of shares from the Appellant to the Respondents to arbitration. It was hence open to the City Civil Court to take the point of arbitrability of the dispute and pass necessary orders consequent to such finding. The Telangana HC did not go into the merits of the arbitration application and observed that the appropriate court would decide the fate of such application.

The Telangana HC noted that Section 430 of Companies Act constitutes a bar on a civil court from entertaining any suit, the subject matter of which is within the determination of NCLT/NCLAT. The object of Section 430 of Companies Act was to demarcate the zones of adjudication of NCLTs/NCLATs. The Telangana HC observed that Section 430 of Companies Act was enacted to discourage courts from passing injunctions or interfering with actions/orders taken or passed by the NCLT/NCLAT.

Denying the Respondents' argument, the Telangana HC noted that the sections relied upon by the Respondents are not applicable to the facts of the present case. The Telangana HC observed that Sections 58 and 59 of Companies Act deals with refusal of registration of the transfer or transmission of shares/securities and appeal against refusal and rectification of register of companies pursuant to certain defaults. It is evident that these provisions would only become relevant once the title to the shares/securities has been decided.

The Telangana HC observed that the decision-making with regard to the title of shares is within the domain of the civil court and not the NCLT/NCLAT. This would also be clear from the proviso to Section 58(2) of Companies Act, which reads that any contract or arrangement between two or more persons in respect of transfer of securities shall be enforceable as a contract. Moreover, Section 58(5) (a) and (b) defines the powers of the NCLT by delineating the orders which may be passed by the NCLT in respect of directing registration of transfer/transmission by the company or rectification of the register or even directing the company to pay damages to the aggrieved party.

The Telangana HC also took note of the wrongful and illegal acts of the Respondents in terms of failing to pay the total consideration for the transfer of shares and unjustly enriching themselves in the process which were described by the Appellant in its plaint.

Decision of the Telangana HC

The Telangana HC, while setting aside the Impugned Order and allowing the instant appeal, held that Sections 430, 58 and 59 of Companies Act have no application to the statements in the plaint and the relief sought for therein and will not operate as a bar to the suit filed by the Appellant in any manner.

VA View: In this judgment, the Telangana HC has rightly upheld the jurisdiction of civil courts to determine the matters pertaining to transfer and title of shares under the Companies Act. The Telangana HC observed that NCLT/NCLAT is not the forum to decide on the acts of omission or commission on the part of the Respondents and more importantly on the issue of re-transfer of the shares in favour of the Appellant or even the title of the shares pending or on completion of the transfer.

The Telangana HC also correctly noted that the facts of the present case were concerned with individual rights of the Appellant and the Respondents. The Telangana HC held that only a civil court is empowered to decide disputes of this nature.

IV. Bombay High Court: Mere long-term continuance of employment does not entitle an employee to seek regularization of his services.

The Bombay High Court ("**Bombay HC**"), *vide* its judgement dated May 6, 2024, in the case of ***The Chief Officer, Pen Municipal Council and Another v. Shekhar B. Abhang and Another [Writ Petition No. 4129 of 2009]***, held that long-term continuance of employment does not constitute as a ground to seek regularization of services.

Facts

Pen Municipal Council ("**Petitioner**") is established under the provisions of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 and Shekhar B. Abhang ("**Respondent No. 1**") was engaged as a clerk to meet exigencies of service in accordance with the resolution adopted by the Municipal Council on December 4, 1997.

Respondent No. 1 had filed a complaint in the Industrial Court, Thane ("**Industrial Court**") accompanied by 3 other clerks apprehending the termination of their services. The said complaint was partly allowed by the Industrial Court by its order dated September 6, 2001, directing the Petitioner not to terminate the services of the complainants. Accordingly, the services of Respondent No. 1 were continued on the post of clerk. Further, Respondent No. 1 was appointed as the tax inspector with effect from August 1, 2003 for 6 months on temporary basis.

However, the services of Respondent No. 1 were terminated after 6 months by the Petitioner on January 31, 2004 by an order dated January 23, 2004. Consequently, Respondent No. 1 filed a complaint before the Industrial Court alleging unfair labour practices under the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 and sought direction for continuation of his service.

The Industrial Court, *vide* its judgement dated March 7, 2009 ("**Impugned Judgement**"), partly allowed the complaint filed by Respondent No. 1 and directed the Petitioner to regularize Respondent No. 1 on the post of tax inspector from the date of its order with further direction to pay consequential and monetary benefits arising out of such regularization. Being aggrieved by the Impugned Judgment, the Petitioner filed a petition before the Bombay HC.

Issue

Whether Respondent No. 1 is entitled to regularization of his services.

Arguments

Contentions of the Petitioner:

It was contended by the Petitioner that the Industrial Court had erred in directing regularization of services of Respondent No. 1 to the post of a tax inspector and the said appointment of Respondent No. 1 was invalid as he was not qualified to be appointed on regular post of tax inspector and he was also not selected as a result of regular selection process, but his appointment was merely temporary subject to the approval of the Regional Director of Municipal Council Administration.

It was submitted by the Petitioner that Respondent No. 1 is not entitled to be appointed on the post of tax inspector as he was merely the junior most clerk who could not have been directly appointed as tax inspector by ignoring the claims of 14 other senior clerks working in the establishment of the Petitioner.

The Petitioner further argued that the temporary appointment of Respondent No. 1 did not confer any right to seek regularization. Furthermore, the post of tax inspector had been vacant and lapsed until revived by the Directorate of Municipal Administration, with a directive to follow due selection procedures. Therefore, the Petitioner argued that the Impugned Judgment should be set aside.

Contentions of Respondent No. 1:

Respondent No. 1, by relying upon the letter of District Employment and Self-Employment Guidance Center, Alibag, dated July 14, 2003, contended that his name was sponsored by the employment exchange and thus he was not a backdoor entrant. He was appointed after following due process of selection.

Respondent No. 1 also contended that his appointment was backed by resolution adopted by general body of the Petitioner and placed reliance on resolution of the general body dated May 24, 2003.

Respondent No. 1 contended that the post of tax inspector clearly exists in the establishment of the Petitioner and therefore the Industrial Court has not committed any error in directing regularization of his services.

It was also submitted by Respondent No. 1 that it would be too late to disturb his appointment by the virtue of interfering with the Impugned Judgment as Respondent No. 1 has been working as a tax inspector for a considerable period of time.

Observations of the Bombay HC

The Bombay HC took into consideration the case of ***Secretary, State of Karnataka and Others v. Umadevi and Others [2006 (4) SCC 1]***, wherein the Supreme Court ("**SC**") had held that mere continuance of an employee for a long period does not create any right of regularization in the service. The SC has however carved out an exception in respect of only those employees whose appointments were made in an irregular manner against duly sanctioned vacant posts and where the employees have continued to work for 10 years or more, but without the intervention of orders of the courts or of tribunals, the Union of India, the State Governments and their instrumentalities were directed to take steps to regularize their services as a one-time measure.

The Bombay HC also took into consideration the case of ***Hari Nandan Prasad and Another v. Employer I/R to Management of Food Corporation of India and Another [(2014) 7 SCC 190]***, wherein the SC ruled that if posts are not available, issuance of directions for regularization would be impermissible and that such directions cannot be issued only on the basis of number of years put in by a daily wager. However, the SC carved out certain exceptions to this general principle.

The Bombay HC after relying upon the material placed on record by Respondent No. 1 observed that the initial appointment of Respondent No. 1 was a regular appointment and not a backdoor entry who was virtually appointed on regular basis and his tenure was restricted to merely 6 months, possibly on account of apprehension that the post would lapse if not filled in within 6 months. It was also observed

by the Bombay HC that appointment of Respondent No. 1 is made against the sanctioned vacant post and he was eligible to be appointed on the post as he underwent the selection process after his name was sponsored by the employment exchange.

The Bombay HC observed that Respondent No. 1 has been working on the post of tax inspector at least since the year 2012 and has put more than 10 years of service which is in addition to initial 6 months of service. Hence, Respondent No. 1 has clearly made out a case for regularization of his services.

Further, the Bombay HC also observed that the Petitioner has raised fallacious defence before the Industrial Court with respect to Respondent No. 1 not being qualified to be appointed as tax inspector and that only senior clerks were eligible to be promoted to the said post. The defences raised by Petitioner were clearly false and the material information was suppressed by them from the Industrial Court.

Therefore, it was held by the Bombay HC that denying the relief of regularization to Respondent No. 1 would be against the principles of equity and fairness.

Decision of the Bombay HC

The Bombay HC dismissed the writ petition filed by the Petitioner, thereby upholding the Impugned Judgment.

VA View: The Bombay HC has, in an appropriate manner, dealt with the issues pertaining to the regularization of services of employee who have been employed for a considerably long period of time. The Bombay HC has taken into consideration various rules established under various judicial pronouncements governing the regularization of workers and the general exceptions as well as the reasoning put forth by the judiciary while dealing with the regularization of workers.

Thus, in the present case, the Bombay HC while upholding the appointment of Respondent No. 1's observed that mere continuance of an employee for a long period does not inherently grant the right to regularization to an employee.

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