Between the lines...

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Key Highlights

I. Supreme Court decides on stage of ineligibility under Section 29A of the Insolvency and Bankruptcy Code while ruling on the resolution plans submitted by ArcelorMittal and Numetal in insolvency process against Essar Steel

The Supreme Court of India in case of ***ArcelorMittal India Private Limited v. Satish Kumar Gupta and Others*** *(decided on October 4, 2018)* interpreted Section 29A of the Insolvency and Bankruptcy Code, 2016 (**"Code"**) to determine the stage of ineligibility of the resolution applicants. The Supreme Court also decided on the power of the resolution professional in relation to resolution plans submitted by the resolution applicants.

Facts

Financial creditors of Essar Steel India Limited (**"ESIL"**) filed an application under Section 7 of the Code for initiation of corporate insolvency resolution process (**"CIRP"**) before the National Company Law Tribunal, Ahmedabad (**"NCLT"**). NCLT admitted the application on August 2, 2017 and an order of moratorium was passed. Resolution Professional (**"RP"**) appointed by the Committee of Creditors (**"CoC"**) of ESIL published a 'request for proposal' for submission of resolution plans by January 29, 2018. On request of the CoC, the NCLT extended the duration of the CIRP by 90 days beyond the initial period of 180 days. Accordingly, date of submission of resolution plan by the resolution applicants was extended to February 12, 2018. In view of the same, ArcelorMittal India Private Limited (**"AMIPL"**) and Numetal Limited (**"Numetal"**) submitted their resolution plans.

Observation of the RP

On March 23, 2018, the RP found both AMIPL and Numetal to be ineligible under Section 29A of the Code and therefore refused to place their resolution plans before CoC. RP rejected the plan submitted by AMIPL on the ground that ArcelorMittal Netherlands BV (**"AMNLBV"**), which was a 'connected person' of AMIPL, was a promoter of Uttam Galva Steels Limited (**"Uttam Galva"**), and the account of Uttam Galva was classified as non-performing asset (**"NPA"**) for more than a year before commencement of the CIRP. Similarly, RP rejected the plan submitted by Numetal on the ground that Aurora Enterprises Limited (**"AEL"**), one of the shareholders of Numetal was held completely by a person, namely, Rewant Ruia, who was deemed to be 'acting in concert' with his father Ravi Ruia. Ravi Ruia was promoter of ESIL, whose account was classified as an NPA for more than a year before commencement of the CIRP. Pursuant to the above, the RP invited for fresh plans, which were submitted by AMIPL, Numetal and one other entity, namely, Vedanta Resources Limited, before April 2, 2018.

Observation of the NCLT

Both, Numetal and AMIPL challenged the decision of the RP before the NCLT. The NCLT upheld the decision of the RP by its order dated April 19, 2018. The NCLT held that the date on which a person stands disqualified would be the date of commencement of the CIRP of the corporate debtor. However, the NCLT provided an opportunity to the resolution applicants to become eligible by payment of overdue amounts in accordance with proviso to Section 29A of the Code. The NCLT remanded matter back to the CoC and the RP on the ground that the RP ought to have produced both the plans before the CoC for their consideration. The NCLT directed that bids of the resolution applicants submitted pursuant to the revised request for proposal, should not be opened pending adjudication.

Observations of the NCLAT

The said order of the NCLT was challenged by both Numetal and AMIPL before the National Company Law Appellate Tribunal (**"NCLAT"**). Before the order of NCLAT, the CoC vide its orders dated May 8, 2018 rejected the plans submitted by both the applicants on the grounds of ineligibility under Section 29A of the Code. The NCLAT vide its order dated September 7, 2018, upheld the findings of the NCLT in part. The NCLAT found that at the time of submission of first resolution plan, AEL was a shareholder of the Numetal. Hence, Numetal was not an eligible person under Section 29A of the Code. However, at the time of submission of the revised plan, AEL was not a shareholder of Numetal and hence, the revised plan of Numetal was required to be considered by the CoC. On the other hand, the NCLAT found AMIPL to be ineligible under Section 29A of the Code in respect of both the plans and gave it an additional opportunity to become eligible by payment of overdue amounts. Aggrieved by the decision of the NCLAT, both Numetal and AMIPL filed appeals before the Supreme Court and the following issues came up for determination:

Issues

Issue 1: Whether the stage of ineligibility of the resolution applicant under Section 29A(c) of the Code attaches at the date of commencement of the CIRP or at the time when the resolution plan is submitted by the resolution applicant?

Issue 2: Whether the resolution applicant can challenge the rejection of the resolution plan by the RP?

Issue 3: Whether the NCLAT was right in holding that AMIPL was ineligible to submit the resolution plan and Numetal was eligible to submit the resolution plan in accordance with Section 29A of the Code?

Relevant Provision

Section 29A(c) of the Code as amended by The Insolvency and Bankruptcy Code (Amendment) Act, 2017, which came into force with retrospective effect from November 23, 2017, as applicable in the instant matter provides that, a person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person, has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as NPA in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 and at least a period of one year has lapsed from the date of such classification till the date of commencement of the CIRP of the corporate debtor. However, the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to NPA accounts before submission of the resolution plan.

Arguments

AMIPL argued that plain reading of Section 29A(c) of the Code establishes that the ineligibility in relation to the submission of a resolution plan must consist of the elements set out in Section 30 *(Submission of Resolution Plan)* of the Code. It submitted that responding to preliminary enquiries, that is, an expression of interest, is not the subject matter of a resolution plan, and therefore, the relevant time is the time of submission of a resolution plan. It further argued that the amendment made to Section 29A in June, 2018, expressly stating that the relevant time was the time of submission of a resolution plan, was clarificatory in nature. AMIPL also submitted that since AMNLBV was not a promoter of Uttam Galva at the time of submission of the resolution plan, hence, Section 29A of the Code was not attracted and therefore, the question of paying off the debts of Uttam Galva would not arise.

Numetal argued that as per the unamended Section 29A of the Code, the time at which Section 29A(c) can be said to operate was the date of commencement of the CIRP. Numetal argued that AEL held only 25% interest in Numetal which cannot be considered as exercising 'control' as per the provisions of the Companies Act, 2013. Numetal cannot possibly be described as a joint venture of its shareholders. Further, at the time of submission of revised resolution plan, AEL was not a shareholder of Numetal and hence, it was not hit by Section 29A of the Code.

Observation of the Supreme Court

Issue 1: The Supreme Court observed that the opening words of Section 29A of the Code state that *"a person shall not be eligible to submit a resolution plan…".* Hence, it is clear that the stage of ineligibility attaches when the resolution plan is submitted by a resolution applicant and not when the CIRP is commenced. Further, the expression used in Section 29A(c) is "has", which is *in praesenti* which can also be contrasted by the expression "has been" used

in Sections 29A(d) and 29A(g) of the Code, which refers to an anterior point of time. It was also subsequently clarified by an amendment of 2018.

Issue 2: With respect to challenging the RP's rejection of the plan submitted by concerned resolution applicant, the Supreme Court observed that Section 30(2)(e) of the Code does not empower the RP to "decide" whether the resolution plan does or does not contravene the provisions of law. The said provision shall be read in conjunction with Section 25(2)(i) and second proviso to Section 30(4) of the Code, which would show that the RP is required to examine that the resolution plan submitted by various applicants is complete in all respects, before submitting it to the CoC. The RP is not required to take any decision, but merely to ensure that the resolution plans submitted are complete in all respects before they are placed before the CoC, which may or may not approve it. Even though it is not necessary for the RP to give reasons while submitting a resolution plan to the CoC, it would be in the fitness of things if he appends the due diligence report carried out by him with respect to each of the resolution plans under consideration, and to state briefly as to why it does or does not conform to the law.

Issue 3: The Supreme Court observed that the ineligibility to submit a resolution plan under Section 29A(c) of the Code attaches, if any person, either itself has an account, or is a promoter of, or in the management or control of, a corporate debtor which has an account, which account has been classified as an NPA, for a period of at least one year from the date of such classification till the date of commencement of the CIRP. In other words, for the purpose of application of ineligibility under Section 29A(c) of the Code, any one of the three things, which are disjunctive, needs to be established:

(a) the corporate debtor may be under the management of the person referred to in Section 29A;

(b) the corporate debtor may be a person under the control of such person; or

(c) the corporate debtor may be a person of whom such person is a promoter.

For the purpose of interpretation of Section 29A(c) of the Code, the Supreme Court observed that the expression "management" would refer to *de jure* management of a corporate debtor. The *de jure* management of a corporate debtor would ordinarily vest in a board of directors, and would include, in accord with the definitions of "manager", "managing director" and "officer" of the company, which have meaning as given to them under the Companies Act, 2013. The expression "control" which has meaning given to it in Section 2(27) of the Companies Act, 2013, is defined in two parts: *de jure* control and de facto control. *De jure* control includes the right to appoint the majority of directors of a company. So long as a person or persons acting in concert, directly or indirectly, can positively influence, in any manner, management or policy decisions, they could be said to be"in control". The expression "control", in Section 29A(c) of the Code, denotes only positive control. It means that mere power to block special resolutions of a company cannot amount to "control". The opening lines of Section 29A of the Code are a "see through provision" so that one is able to arrive at persons who are actually in 'control', whether jointly or in concert with other persons. The term "promoter" has meaning given to it in the Companies Act, 2013.

The expression "acting jointly" in the opening sentence of Section 29A of the Code cannot be confused with "joint venture agreements". All that is to be seen by the expression "acting jointly"is whether certain persons have got together and are acting "jointly" in the sense of acting together. The Supreme Court observed that doctrine of piercing the corporate veil is applied to group companies so as to look at the economic entity of the group as a whole. The expression "in concert" shall have the same meaning as assigned to it in the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (**"Takeover Regulations"**). While interpreting the expression "in concert", any understanding, even if it is informal, and even if it is to indirectly cooperate to exercise control over a target company, is included. What is of great importance is that whenever persons act jointly or in concert with the "person" who submits a resolution plan, all such persons are covered by Section 29A of the Code.

The Supreme Court observed that *"if it is shown, on facts, that, at a reasonably proximate point of time before the submission of the resolution plan, the affairs of the persons referred to in Section 29A are so arranged, as to avoid paying off the debts of the non-performing asset concerned, such persons must be held to be ineligible to submit a resolution plan, or otherwise both the purpose of the first proviso to sub-section (c) of Section 29A, as well as the larger objective sought to be achieved by the said sub-clause in public interest, will be defeated."*

While examining the eligibility of Numetal under Section 29A(c) of the Code, the Supreme Court observed that transfer of its shareholding by AEL in Numetal to other shareholders does not make Numetal an eligible entity. The Supreme Court has given two reasons for this: (a) the earnest money credited to the account of the corporate debtor, provided to Numetal by AEL as a shareholder of the resolution applicant, continued to remain with the RP showing thereby that Rewant Ruia continued to be present, insofar as Numetal's second resolution plan was concerned;(b) having regard to the reasonably proximate state of affairs before submission of the resolution plan, beginning with Numetal's initial corporate structure, and continuing with the changes made till date, it was evident that, the object of all the transactions that have taken place after Section 29A came into force was undoubtedly to avoid the application of Section 29A(c) of the Code, including its proviso.

With regard to eligibility of AMIPL, the Supreme Court rejected the argument of AMIPL that AMNLBV sold its entire shareholding in Uttam Galva before submission of the resolution plan and therefore AMNLBV was not a promoter of Uttam Galva. Applying the doctrine of piercing the corporate veil, the Supreme Court observed that both AMIPL and AMNLBV are managed and controlled by Shri L. N. Mittal, and were therefore persons deemed to be acting in concert as per the Takeover Regulations. Hence, the Supreme Court concluded that AMNLBV was a promoter of Uttam Galva. After examining the reasonable proximity of the facts, the Supreme Court also observed that it was clear that there was no doubt whatsoever that AMNLBV's shares in Uttam Galva were sold only in order to get out of the ineligibility mentioned in Section 29A(c) of the Code, and consequently the proviso thereto.

Decision of the Supreme Court

The Supreme Court held that the stage of ineligibility attaches when the resolution plan is submitted by the resolution applicant. Further, with respect to RP's rejection of plan, the Supreme Court held that the resolution applicant cannot challenge the rejection of the resolution plan by the RP. However, the Supreme Court also held that the RP does not have the power to reject the resolution plan and directed him to present all the plans before the CoC for their consideration. With regard to eligibility of Numetal and AMIPL, the Supreme Court held that since both the resolution applicants had not paid their respective NPAs prior to submission of their resolution plans, they were hit by Section 29A of the Code and therefore were ineligible to submit their plans. On request of the CoC, the Supreme Court gave one more opportunity to the resolution applicants to re-submit the resolution plans upon payment of their respective NPAs.

VA View

The Supreme Court while interpreting Section 29A of the Code reiterated the well settled principle of law, that is, *"what cannot be done directly, cannot be done indirectly".* Looking at both the literal interpretation as well as the object of the Code, the Supreme Court has clarified that a person cannot be considered as an eligible resolution applicant by using the tactics such as declassification as a promoter without paying off its unpaid NPAs.

This judgment is important and will serve as a good precedent in holding that great care must be taken to ensure that persons who are in charge of the corporate debtor for whom such resolution plan is made, do not come back in some other form to regain control of the company without first paying off their debts.

The Supreme Court also goes lengthily into the discussion of the applicable provisions of the Code in relation to the CIRP and the timeline of 180 + 90 days. While strictly interpreting the provisions of the Code, the Supreme Court also directed the tribunals to conduct the proceedings in timely manner by holding that the time taken by a tribunal should not set at naught the time limits within which the CIRP must take place.

The Supreme Court also slammed the autonomous power exercised by the RPs by holding that the RPs do not have power to take any decision in relation to the resolution plan and therefore they cannot reject or approve a plan without presenting the same for consideration before the CoC. The RP can merely ensure that the plans submitted are complete in all respects before they are placed before the CoC. In other words, only a prima facie opinion can be given by the RP to the CoC as to any contravention of the law, including Section 29A of the Code.

II. Supreme Court lays down considerations for fair and reasonable rate of interest in arbitral awards

The Supreme Court in ***Vedanta Limited v. Shenzen Shandong Nuclear Power Construction Company Limited*** *(decided on October 11, 2018)* held that a dual rate of interest on an arbitral award which increased if the payment was not made within 120 days was unfounded. Further, the Supreme Court also stated that depending on the

currency, the rate of interest must also differ and a blanket rate of interest cannot be applied in case of all currencies.

Facts

Vedanta Limited (**"Petitioner"**) and Shenzen Shandong Nuclear Power Construction Company Limited (**"Respondent"**) entered into certain EPC contracts for the construction of a 210MW co-generation power plant. All the EPC contracts contained an arbitration provision with the place of arbitration being Mumbai and with the governing law being Indian law. The EPC contracts included a termination clause, which provided that if the purchaser (Petitioner) suspends the services of the supplier (Respondent) for a period of more than 180 days, the supplier was entitled to terminate the contract and purchaser had to pay to the supplier 105% of the cost incurred by the supplier till the date of termination as compensation after adjusting payments already made till the termination. No consequential damages would be payable by the purchaser to the supplier in the event of such suspension.

Disputes arose between the parties, which resulted in the termination of the EPC contracts by the Respondent. The Respondent called upon the Petitioner to pay the outstanding dues which were disputed by the Petitioner. The disputes emanating out of the EPC contracts were referred to arbitration in terms of the agreement between the parties. The arbitral award was passed predominantly in the favour of the Respondent and arbitral tribunal in the award granted a part of the claim in Indian Rupees, while the other component was awarded in Euro. The arbitral tribunal curiously enough adopted a dual rate of interest in its award. If the amounts awarded were paid within 120 days' from the passing of the award, the awarded sum would carry a 9% rate of interest on both the components of the award, that is, the amounts payable in Indian Rupees and Euro. However, if the awarded amounts were not paid within 120 days, the arbitral tribunal imposed a higher rate of further interest @15% till the date of realization of the amount.

Aggrieved by the award, the Petitioner made applications challenging it before the Delhi High Court Single and Division Bench, both of which were rejected. The Petitioner consequently filed a special leave petition before the Supreme Court.

Issue

Whether the rate of interest awarded by the arbitral tribunal was justified?

Observations of the Supreme Court

Considerations before making an award:

The Supreme Court listed down the host of factors that need to be considered before pronouncing the arbitral award, such as:

(I) the 'loss of use' of the principal sum;

(ii) the types of sums to which the interest must apply;

(iii) the time period over which interest should be awarded;

(iv) the internationally prevailing rates of interest;

(v) whether simple or compound rate of interest is to be applied;

(vi) whether the rate of interest awarded is commercially prudent from an economic standpoint;

(vii) the rates of inflation;

(viii) proportionality of the count awarded as interest to the principal sums awarded.

The Supreme Court stated that the rate of interest must be compensatory as it is a form of reparation granted to the award holder and it must not be punitive, unconscionable or usurious in nature. Courts may also reduce the interest rate awarded by an arbitral tribunal where such interest rate does not reflect the prevailing economic conditions or where it is not found reasonable, or promotes the interests of justice. The Supreme Court also held that the rate of interest awarded must correspond to the currency in which the award is given.

No reasoning for imposing dual rate of interest:

The Supreme Court held that the dual rate of interest awarded was unjustified. The award of a much higher rate of interest after 120 days was arbitrary, since the award debtor is entitled to challenge the award within a maximum period of 120 days as provided by Section 34(3) of the Arbitration and Conciliation Act, 1996 (**"Arbitration Act"**). If the award debtor is made liable to pay a higher rate of Interest after 120 days, it would foreclose or seriously affect his statutory right to challenge the award by filing objections under Section 34 of the Arbitration Act. The imposition of a high rate of interest @15% post 120 days is exorbitant, from an economic standpoint, and has no co-relation with the prevailing contemporary international rates of interest. Furthermore, the arbitral tribunal had not given any reason for imposing a 15% rate of interest post 120 days. The grant of 15% interest was excessive and contrary to the principle of proportionality and reasonableness. Further, the EPC contract also expressly provided that there would be no consequential damages payable by the purchaser to the supplier in the event of termination of the contract, as the supplier would get 105% of the costs incurred. Therefore, the imposition of 15% interest post 120 days would be unjustified.

Same rate of interest for different currencies is unwarranted:

The Supreme Court held that the award of interest @9% on the Euro component of the claim was unjustified as interest rates differ depending upon the currency. When the parties do not operate in the same currency, it is necessary to take into account the complications caused by differential interest rates. It was essential for the arbitral tribunal to co-ordinate the choice of currency with the interest rate. Therefore, charging a uniform rate of interest for two different currencies, that are, Indian Rupees and Euro would therefore not be justified.

Decision

The Supreme Court held that:

(i) The interest rate of 15% post 120 days granted on the entire sum awarded would be deleted and a uniform rate of interest @9% will be applicable for the Indian Rupee component in entirety till the date of realization.

(ii) The interest payable on the Euro component of the award would be at the rate as per LIBOR + 3% on the date of award, till the date of realization.

VA View

Section 31(7)(b) of the Arbitration Act empowers the arbitral tribunal to affix a rate of interest to be paid by the award debtor from the date of the pronouncement of the award till the date of the payment. The Supreme Court held that the arbitral tribunal has to be reasonable in determining such rate of interest. Imposing a dual rate of interest which increases in case of delay in payment and not taking into account the component of foreign currency were held to be unreasonable as per the decision of the Supreme Court. The judgement makes a positive ruling on the aspect of considering the prevailing international rates to determine the rate of interest in case of foreign currency and not subjecting it to the interest rates prevailing in India.

On the aspect of dual rate of interest, the Supreme Court has stated that the award debtor cannot be subjected to a penal rate of interest, either during the period when he is entitled to exercise the statutory right to challenge the award, before a court of law (which is 120 days or 3 months as per the Arbitration Act), or later. Therefore, this clearly limits the scope of the arbitral tribunal to impose any penal rate of interest even if the time has elapsed for the award debtor to challenge the arbitral award/application challenging the award is rejected by the court and the award debtor has not made payments.

III. Limitation Act applicable to corporate insolvency resolution process since inception of the Insolvency and Bankruptcy Code

The Supreme Court of India in the matter of ***B.K. Educational Services Private Limited v. Parag Gupta and Associates*** *(decided on October 11, 2018)* held that the Limitation Act, 1963 (**"Limitation Act"**) is applicable to proceedings under Sections 7 and 9 of the Insolvency and Bankruptcy Code, 2016 (**"Code"**) since the inception of the Code that is from December 1, 2016.

Facts

Parag Gupta and Associates (**"Respondent"**) initiated corporate insolvency resolution process (**"CIRP"**) against B.K. Educational Services Private Limited (**"Appellant"**) for payment of certain debts which were held to be time barred under the provisions of the Limitation Act by the National Company Law Tribunal (**"NCLT"**). Meanwhile,

Section 238A was inserted to the Code by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 (**"Amendment Act"**) which provides that the Limitation Act shall apply to the proceedings or appeals before the Adjudicating Authority. The said amendment came into force on June 6, 2018.

The National Company Law Appellate Tribunal (**"NCLAT"**) had held that the Limitation Act is not applicable to the initiation of CIRP under the Code. Further, NCLAT had observed that even if it was held that Article 137 under the Schedule to the Limitation Act was applicable to CIRP, all applications were still within time as they were filed only after the Code came into force that is on December 1, 2016. Article 137 under the Schedule to the Limitation Act provides for limitation period of 3 years from the day when the right to apply accrues for any other application for which no period of limitation is provided elsewhere in the third division of the Schedule which deals with the applications. The NCLAT, however, had observed that belated claims filed beyond three years from the cause of action were not to be entertained unless the delay was explained. This was challenged before the Supreme Court and the following issue came up for determination:

Issue

Whether the Limitation Act will apply to applications that are made under Section 7 and/or Section 9 of the Code on and from its commencement on December 1, 2016 till June 6, 2018.

Arguments

The Appellant submitted that the amendment brought about by the Amendment Act to the Code had retrospective application because:

a. the amendment was clarificatory in nature; and

b. the law on limitation pertained to the realm of procedural law.

The Appellant argued that allowing stale claims to be admitted under the Code would have not been the legislative intent while enacting the Code and therefore the Limitation Act would be applicable. Further, it was contended that proceedings before the NCLT were covered by the Limitation Act by virtue of Section 433 of the Companies Act, 2013 (**"Companies Act"**) which states as under:

"The provisions of the Limitation Act, 1963 (36 of 1963) shall, as far as may be, apply to proceedings or appeals before the Tribunal or the Appellate Tribunal, as the case may be."

The case of ***State of Madhya Pradesh and Another v. Bhailal Bhai and Others [(1964) 6 SCR 261]*** was cited before the Supreme Court stating that even if the Limitation Act was not applicable, the doctrine of delays and laches was applicable.

The Respondent submitted that the provisions of the Limitation Act could not be made applicable to the NCLT as it is a tribunal and not a court as held in various cases by the Supreme Court. The Respondent pointed out that the NCLAT served as an appellate tribunal under three laws, that are the Companies Act, the Code and the

Competition Act, 2002 (**"Competition Act"**). The Competition Act prescribed no period of limitation and hence, the NCLAT has to decide the competition case on merits without applying the Limitation Act. On the other hand, the NCLAT is required to apply the provisions of the Limitation Act while deciding a case under the Code. This, according to the Respondent, would lead to an inconsistent practice and would not have been the intention of the legislature. The Respondent countered the arguments of the Appellant with regard to the retrospective application of Section 238A by submitting that applications filed before June 6, 2018 were to be decided without applying the provisions of the Limitation Act and the amendment could not take away such a vested right.

Observations of the Supreme Court

a. Report of the Insolvency Law Committee

The Supreme Court relied on the report of the Insolvency Law Committee (**"CLC"**) dated March 26, 2018 which stated that the intent of the Code could not have been to give a new lease of life to debts which are time-barred. The report also provided that a specific section be inserted in the Code applying the Limitation Act to it. The Supreme Court observed that observations in CLC report were testament that CLC had applied its mind to the catena of cases decided by the adjudicating authorities under the Code on the issue of limitation and other aspects on this issue while opining on the same.

b. Applicability of the Limitation Act- Provisions under the Code and the Companies Act

The Supreme Court referred to its decision in the case of ***Innoventive Industries Limited v. ICICI Bank and Another [(2018) 1 SCC 407]*** and observed that the expression "debt due" in the definition sections of the Code would obviously only refer to debts that are "due and payable" in law, that is, the debts that are not time-barred.

Further, the Supreme Court referred to Section 433 of the Companies Act *(reproduced above)* and noted that expressions *"under this Act"* or *"subject to the provisions of this Act"* were conspicuously missing from the language used in the section, meaning that the section was not restricted to only proceedings or appeals under the Companies Act.

The Supreme Court went on to take note of one another provision under the Companies Act- Section 434(1) which provides for transfer of proceedings before any District Court or High Court to the NCLT. The Supreme Court noted that as the limitation provisions applied to such proceedings before the High Court and District Court, it could not be said that such provisions ceased to apply once the proceedings were transferred and were before the NCLT. It was observed that Section 433 of the Companies Act was applicable to the NCLT while deciding applications under Section 7 *(initiation of corporate insolvency resolution process by financial creditor)* and Section 9 *(application for initiation of corporate insolvency resolution process by operational creditor)* of the Code.

The Supreme Court held that the NCLT was bound to decide the applications under the Code in the same manner as it would decide matters under its jurisdiction under the Companies Act.

c. Amendment- whether retrospective or prospective in operation

The Supreme Court cited several decisions, some of which are covered below, which sum up the Supreme Court's view:

i. ***M.P. Steel Corporation v. CCE [(2015) 7 SCC 58]:*** It was held in this case that the law of limitation, being procedural in nature, applies with retrospective effect except for the provisions providing for a longer period of limitation than what was provided earlier.

The Supreme Court, after referring to these observations, noted that, *"in the present case, these observations are apposite in view of what has been held by the Appellate Tribunal. An application that is filed in 2016 or 2017, after the Code has come into force, cannot suddenly revive a debt which is no longer due as it is time-barred."*

ii. ***Allied Motors (P) Limited v. CIT [(1997) 3 SCC 472]:*** In this case, the Supreme Court had referred to Principles of Statutory Interpretation, 4th Edition (G.P. Singh) in which it is noted that, *"It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended".*

The Supreme Court noted that in the present case too, the amendment would not serve any purpose unless it is construed as being retrospective. Not applying the amendment retrospectively would lead to allowing time-barred and stale claims to be revived.

iii. ***SBI v. V. Ramakrishnan [Civil Appeal Nos. 3595 and 4553 of 2018]:*** In this case, the Supreme Court had held that the amendment which provided that the moratorium under Section 14 of the Code was not to apply to guarantors was clarificatory in nature and hence, retrospective in application.

iv. ***Andhra Pradesh Power Coordination Committee and Others v. Lanco Kondapalli Power Limited and Others [(2016) 3 SCC 468]:*** In this case, the Supreme Court had held that claim coming before the Electricity Commission cannot be entertained or allowed if it is barred by limitation prescribed for an ordinary suit before the civil court.

The Supreme Court, after referring to this case, observed that, *"The Code cannot be triggered in the year 2017 for a debt which was time-barred, say, in 1990, as that would lead to the absurd and extreme consequence of the Code being triggered by a stale or dead claim, leading to the drastic consequence of instant removal of the present Board of Directors of the corporate debtor permanently, and which may ultimately lead to liquidation and, therefore, corporate death."*

d. Inconsistent practice, NCLAT being appellate tribunal under competition law which does not provide for limitation

On this contention of the Respondent, the Supreme Court observed that the appeals under three different statutes including under the competition law, go to the NCLT merely for convenience purposes. This cannot result

in any inconsistent practice as each appeal has to be decided as per the specific statute under consideration in that appeal.

e. Miscellaneous observations

The Supreme Court took note of Section 60(6) of the Code (reproduced below) and observed that if the Limitation Act was not applicable to proceedings under the Code, such a provision would not have been a part of the Code. Section 60(6) of the Code states as under:

"(6) Notwithstanding anything contained in the Limitation Act, 1963 (36 of 1963) or in any other law for the time being in force, in computing the period of limitation specified for any suit or application by or against a corporate debtor for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded."

The Supreme Court finally held that in light of the above observations, Article 137 of the Limitation Act is applicable to applications filed under Sections 7 and 9 of the Code. The applications will be time barred under Section 137 if the default has occurred over 3 years prior to the date of filing the application. However, this would not be the case if Section 5 of the Limitation Act is applicable to the case. Section 5 of the Limitation Act provides for condonation of delay and prescribes that certain applications may be admitted after the prescribed period, if the applicant satisfies the court that he had sufficient cause for not making the application within the prescribed period of limitation.

Decision of the Supreme Court

The Supreme Court held that the Limitation Act was applicable to the proceedings under the Code since the inception of the Code. Appeals were remanded to the NCLAT for consideration afresh.

VA View

This judgment by the country's apex court finally puts to rest the controversy surrounding this issue. Belated claims by the financial and operational creditors stand barred which will lead to positive results, as on one hand, the already burdened adjudicating authorities will have some relief as the stale claims are not allowed, and on the other hand, this will ensure that the provisions of the Code are not misused to invoke old claims.

However, it is to be noted that the limitation provisions will not be applicable to application of the corporate debtor under Section 10 of the Code as it initiates CIRP against itself as a defaulter having no claims against others.

IV. Supreme Court holds that litigant can take different stands at different times but cannot take contrary stands in the same case

The Supreme Court in case of ***Suzuki Parasrampuria Suitings Private Limited v. The Official Liquidator of***

Mahendra Petrochemicals Limited (in Liquidation) and Others (*decided on October 8, 2018*) held that a litigant can take different stands at different times but cannot take contrary stands in the same case.

Facts

Industrial Finance Corporation of India Limited (**"IFCI"**) provided financial facilities to M/s. Mahendra Petrochemicals Limited (**"MPL"**), a company in liquidation, which were secured by MPL against all of its movable and immovable assets. MPL defaulted in making the payment of the dues and as a result, IFCI initiated the proceedings against MPL before the Company Court. MPL was also referred for rehabilitation to the Board for Industrial and Financial Reconstruction (**"BIFR"**). A company petition was filed for winding up and an order was passed on April 19, 2010 for winding up of MPL. During the pendency of these matters and without the knowledge and permission of BIFR, MPL entered into an unregistered Memorandum of Understanding (**"MoU"**) with the sister concern of Suzuki Parasrampuria Suitings Private Limited (**"Appellant"**), for leasing out its properties to the Appellant for 20 years for repayment of its debt. The MoU was not brought to the attention of the Company Court till the winding-up order was passed against MPL on April 19, 2010.

Subsequently on July 28, 2010, IFCI assigned debts due of MPL by a registered deed of assignment in favour of the Appellant for a sum of INR 85 lakhs. Accordingly, an application for substitution of secured creditor was preferred by the Appellant before the official liquidator of MPL. In the meanwhile, on November 21, 2011, IFCI, Bank of Baroda and Punjab National Bank initiated another proceedings against MPL, as secured creditors, for recovery of their debts before the Debt Recovery Tribunal (**"DRT"**), Ahmedabad under the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (**"SARFAESI Act"**). IFCI held first charge over the assets of MPL for an outstanding sum of INR 160 Crores and the Bank of Baroda held second charge with an outstanding sum of approximately INR 4.68 Crores.

The Appellant filed a company application with the Company Judge with a prayer for substituting itself in place of IFCI as a secured creditor of MPL. The Company Judge rejected the application on July 31, 2015 holding that the Appellant was neither a bank, a banking company, a financial institution, a securitisation company nor a reconstruction company and therefore could not be substituted in place of IFCI as a secured creditor for the purpose of the SARFAESI Act. Consequently, the Company Judge held that the Appellant could not be substituted under Section 130 of the Transfer of Property Act, 1882 (**"TP Act"**) which provides for substitution of actionable claims.

Thereafter, the Appellant filed Company Appeal before the Company Court under Rule 9 of the Companies (Court) Rules, 1959 for recall/review of the order passed by the Company Judge on the ground that the Appellant never sought substitution as a secured creditor and simply desired substitution as a transferee of an actionable claim under Section 130 of the TP Act. The recall/ review application was rejected by the Company Court holding that an entirely new case was sought to be made out in the application. The appeal against the same was also rejected by the Gujarat High Court by the impugned order dated September 2, 2016. An appeal was filed against the said impugned order by the Appellant before the Supreme Court and the following issue came up for determination:

Issue

Whether a litigant can be permitted to make a *volte face* after the rejection of its only claim and take shifting stands at different times according to its convenience in the same proceedings?

Arguments

The Appellant contended that it had never sought the status of a secured creditor in lieu of IFCI. The Appellant had simply desired to be adjudged a transferee from IFCI of an actionable claim under Section 130 of the TP Act. The rights and claims of the Appellant under the latter were the only issue, which had not been considered at all. The deed of assignment for assignment of debt by IFCI to Appellant dated July 28, 2010 was subsisting and was not challenged. The Appellant further argued that the lack of any status of the Appellant under SARFAESI Act was a wholly irrelevant consideration to reject its action for transfer of an actionable claim under Section 130 of the TP Act. The exercise of the inherent power of the Company Court under Rule 9 of the Companies (Court) Rules, 1959 was wrongly declined by the Company Court.

The Official Liquidator of MPL opposed the application and submitted that the Appellant cannot be permitted to make a *volte face* after rejection of its only claim by the Company Judge and take shifting stands at different times according to its convenience in the same proceedings.

Observations of the Supreme Court

The Supreme Court observed that the unregistered MoU was not only without permission of the BIFR but also not disclosed to the Company Court till the winding-up order was passed on April 19, 2010. However, the assignment of debt of Rs. 160 Crores by IFCI for Rs. 85 Lakhs was admitted. The order dated July 31, 2015 passed by the Company Judge makes it very explicit that the Appellant in Company Application of 2014 had specifically sought substitution in place of IFCI as a secured creditor holding first charge by virtue of having the deed of assignment in its favour dated July 28, 2010 with IFCI. In fact, the submissions before the Company Judge left no doubts that as an assignee of debts from IFCI, the Appellant essentially sought substitution as a secured creditor under the SARFAESI Act through Section 130 of the TP Act. Therefore, the Company Judge opined that Section 130 of the TP Act was not applicable in the facts of the case.

The Supreme Court further observed that the Appellant had initially taken a conscious and considered stand before the Company Judge, staking a claim for being substituted as a secured creditor under the SARFAESI Act consequent to the assignment of debt to it by IFCI. It was evident from the pleadings of the Appellant that the claim was not simply with regard to assignment of actionable claim under Section 130 of TP Act. After the claim of the Appellant was rejected by the Company Judge, the Appellant realised the unsustainability of its claim in law and made a complete *volte face* from its earlier stand and surprisingly, contrary to its own pleadings, contended before the Supreme Court that it had never sought the status of a secured creditor under the SARFAESI Act.

The contention of the Appellant that it had never sought substitution as a secured creditor under the SARFAESI Act is additionally contradicted from the recitals contained in the order dated September 7, 2015 which has been time and again held to be sacrosanct.

Decision of the Supreme Court

The Supreme Court held that a litigant can take different stands at different times but cannot take contradictory stands in the same case. Resultantly, the appeal was dismissed.

VA View

The Supreme Court in the present judgment held that a party cannot be permitted to approbate and reprobate on the same facts and take inconsistent shifting stands. The Supreme Court reiterates its earlier stand that the doctrine of election is based on the rule of estoppel which is species of equitable estoppel. In other words, if the party takes one stand at one time, then it cannot take another stand at another time in the same proceedings. Further, a litigant cannot blow hot and cold by taking inconsistent stands and prolong the proceedings unnecessarily.

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