Lakshmikumaran & Sridharan attorneys

corporate

amicus

An e-newsletter from
Lakshmikumaran & Sridharan, India

August 2022 / Issue–131

Contents

August
2022

Article

Supreme Court clarifies on the assessment of amalgamated entities

By **Raghavan Ramabadran, Krithika Jaganathan and Vishal Sundar M.V.**

The amalgamation of multiple entities into one undertaking is expected to yield business synergies and, at times, identity wars. In *PCIT (Central)* v. *Mahagun Realtors (P) Ltd.* [2022 SCC OnLine SC 407], the Supreme Court elaborated on what seemed to be a settled point of law - would an Income Tax notice issued to a transferor company post its amalgamation be valid? While the popular train of thought deemed the transferor entities as *non est,* having suffered corporate death upon amalgamation, the Supreme Court clarified that an amalgamation would not *per se* invalidate an assessment order issued in the name of the transferor company. In this article, the authors examine the rationale and thrust of the decision.

Facts of the case

Mahagun Realtors Private Limited ('**MRPL**') was the transferor company which amalgamated with Mahagun India Private Limited ('**MIPL**') by virtue of a High Court's order dated 10 September 2007, w.e.f. 1 April 2006 whereby MRPL's liabilities devolved on MIPL. In March 2007, survey proceedings under the Income Tax Act, 1961 ('**Act**') were conducted in respect of MRPL during which discrepancies in its books of account were noticed. In August 2008, search and seizure operations were carried out in the Mahagun group of companies, including at MRPL and MIPL. During those operations, the common directors of MIPL and MRPL had recorded admissions about not reflecting the true income of said entities. In March 2009, the Revenue issued a notice to MRPL to file their Return of Income (ROI) for the AY 2006-2007. On failure by the assessee to file the ROI, the Assessing Officer issued a show cause notice. Later, MIPL filed an ROI describing the assessee as MRPL and furnished the PAN of MRPL. Where Column 27 of the ROI form posed the specific query of '*Business Reorganization: In case of amalgamated company, write the name of amalgamating company'*, the reply given was 'Not Applicable'.

The AO issued an assessment order to MRPL ("**Assessment Order**") which was responded by 'MRPL, represented by MIPL'. MRPL filed an appeal to the Commissioner of Income Tax ('CIT') which was partly allowed. The revenue appealed against this order before the ITAT along with the assessees' cross objections. At this stage, for the first time, the assessees mooted the point that MRPL had been amalgamated with MIPL. The ITAT dismissed the revenue's appeal by allowing the assessees' cross objection on the sole point **that MRPL was not in existence when the assessment order was made, as it had amalgamated with MIPL.** The revenue-appeal before the Delhi High Court was also dismissed by relying upon a judgment of the Supreme Court in *PCIT* v. *Maruti Suzuki India Limited* [2019 SCC Online SC 928].

Findings: Notice issued in name of amalgamated entity not always fatal to proceedings

The principal issue for consideration before the Supreme Court was whether the Assessment Order passed on MRPL (amalgamating

company), which was not in existence on the even date due to its amalgamation with MIPL, is sustainable in law. The Supreme Court held that the corporate death of an entity cannot *per se* invalidate an assessment order issued to the transferor company but will depend upon the terms of the amalgamation and the facts of each case.

The Apex Court considered a plethora of judgments dealing with the impact of amalgamation on the rights and liabilities of the transferor and transferee companies to assimilate the position. In *Saraswati Industrial Syndicate* v. *CIT Haryana, Himachal Pradesh* - (1990) Supp (1) SCR 332, it was held that the transferor entity loses its corporate existence upon amalgamation and ceases to exist. It is significant to note that this decision was delivered before 'amalgamation' was defined under Section 2(1A) of the Act. In *Marshall Sons and Co. (India) Ltd.* v. *ITO* - 1996 Supp (9) SCR 216, it had been held that once the amalgamation becomes effective, the business carried on by the transferor company should be deemed to have been carried on by the transferee company. Basis this understanding, the Supreme Court had held in *CIT* v. *Spice Infotainment ltd* - (2020) 18 SCC 353 that assessment of the transferor (or amalgamated company) was impermissible upon the cessation of the transferor company. The underlying logic was that an assessment framed in the name of a non-existing company is no mere procedural irregularity which can be cured under Section 292B of the Act.

At the very outset, in the latest case, the Apex Court found a need to distinguish the above ratio basis the conduct of MRPL and the factual context in which it had been assessed. For starters, the fact of amalgamation was never intimated to the Assessing Officer, either by MRPL or by MIPL at any stage of proceedings. On the other hand, MIPL had continued to transact for and on behalf of MRPL all throughout the proceedings, while such fact of amalgamation was admitted to the department in *Spice Infotainment* (*supra*) and in *Maruti Suzuki* (*supra*). The assessee's conduct was also found to be circumspect as information on the amalgamation had been actively suppressed by MIPL insofar as proceedings were continued in the name of 'MRPL, represented by MIPL', ROI was filed by MRPL even after the amalgamation by withholding the information required in the Column specifically provided for business reorganization [Col. 27(b)], etc.

Then, the Court reasoned how even a straightforward reading of the Act supported the view that the enterprise and the business of the amalgamated company continues post amalgamation and the transferee (MIPL) is deemed to carry on the business of the transferor (MRPL). In such circumstances, the Supreme Court concluded that MRPL's business was continued by MIPL and when the amalgamation was never notified to the tax department, a plea that assessment order had been issued to an amalgamated entity would be unfair and even duplicitous. To bolster this textual understanding, the Supreme Court drew sustenance from *General Radio and Appliances Co. Ltd.* v. *M.A. Khader (dead) by Lrs.*, (1986) 2 SCC 656, where it was observed that while the outer shell of the transferor ceases to exist as such in the case of an amalgamation, its business continues, *albeit* under a new corporate entity (i.e., transferee) quite unlike a winding up which brings the entire business to an end.

The Hon'ble Court also observed that issuance of order by the department in the name of amalgamating entity cannot nullify it as the authority has the option of making a common order in the name of amalgamated entity which may contain different parts relating to the amalgamating entity.

Conclusion

The prevailing principle was that an assessment order issued to an amalgamated entity would be straightaway struck down. The Supreme Court analyzed mergers as dealt with in the Income Tax Act, 1961 to conclude that, the corporate death of an entity on amalgamation *per se* cannot invalidate an assessment order. Whether the assessment notice will survive when issued to an amalgamated entity is subject to the terms of the amalgamation and the facts of each case.

[The authors are Executive Partner, Joint Partner and Associate, respectively, in the Commercial Litigation practice at Lakshmikumaran & Sridharan Attorneys, Chennai]

Notifications and Circulars

ECB limits revised by RBI: The Reserve Bank of India (RBI), *vide* A.P. (DIR Series) Circular No.11 - RBI/2022-23/98, dated 1 August 2022, has increased the limit of External Commercial Borrowing ('**ECB**') *via* the automatic route for eligible ECB borrowers, from USD 750 million or equivalent to USD 1.5 billion or equivalent. Further, the RBI has increased the all-in-cost ceiling for ECBs, by 100 bps. However, the enhanced all-in-cost ceiling is applicable only to eligible borrowers of investment grade rating from Indian Credit Rating Agencies (CRAs). Other eligible borrowers may raise ECB within the existing all-in-cost ceiling. It may be noted that these relaxations would be available for ECBs to be raised till 31 December 2022.

Companies (Accounts) Fourth Amendment Rules, 2022 notified: The Ministry of Corporate Affairs, *vide* Notification G.S.R. 624(E), dated 5 August 2022, has notified the Companies (Accounts) Fourth Amendment Rules, 2022. Amending Rule 3 of the Companies (Accounts) Rules 2014, which deals with the manner of books of accounts to be kept in electronic mode, the MCA has notified the following-

(i) The books of accounts and other relevant books and papers maintained in the electronic mode should remain accessible in India 'at all times'.

(ii) In sub-rule (5), in the proviso, back-up of the books of accounts and other books and papers of the company maintained in electronic mode, including at a place outside India, if any, needs to be kept and maintained in servers physically located in India on 'daily basis'. The earlier requirement was to maintain them in servers in India on a 'periodic basis'.

(iii) In sub-rule (6), which states the information to be provided to the Registrar of Companies (ROC) on an annual basis

at the time of filing of financial statements, a new clause (e) is to be inserted after clause (d). The new clause mandates that when the service provider is located outside India, the name and address of the person in control of the books of account and other books and papers in India, should be provided.

Companies (Incorporation) Third Amendment Rules 2022 notified: The Ministry of Corporate Affairs, *vide* Notification dated 18 August 2022, has amended the Companies (Incorporation) Rules, 2014. The latest amendment rules insert Rule 25B, dealing with the physical verification of the registered office of the company. For the purpose of Section 12(9) of the Companies Act, 2013, the Registrar shall visit the address of the registered office of the company and may cause the physical verification in presence of two independent witnesses of the locality and may also seek the assistance of the local Police for such verification, if required.

During the physical verification, the authenticity of documents filed on MCA-21 should be cross verified with the copies of supporting documents kept at such address collected and duly authenticated from the occupant of the property. MCA has also notified a format for a report with various details, including location details and photographs of the registered office taken during verification. In case the company's registered office is found to be not capable of receiving and acknowledging all communications and notices, the registrar will send a notice to the company and all its directors seeking information within a period of 30 days.

SEBI (Listing Obligations and Disclosure Requirements) (Fifth Amendment) Regulations, 2022 notified: The Securities and Exchange Board of India (SEBI), *vide* F. No. SEBI/LAD-NRO/GN/2022/88, dated 25 July 2022, has amended the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015. The SEBI has notified a new Chapter IX-A, which deals with the obligations of social enterprises. Further, consequently, in regulation 2, which states the definitions, the SEBI has amended sub-regulation (1) as follows –

i. In clause (h), defining designated securities, 'Zero Coupon Zero Principal Instruments' shall be inserted after the words and symbol 'mutual funds,'.

ii. After clause (zn), the clause (zo) shall be inserted. The new clause states that the expressions 'For Profit Social Enterprise', 'Not for Profit Organization', 'Social Enterprise', 'Social Stock Exchange', 'draft fundraising document', 'final fundraising document', 'fundraising document', 'Social Auditor' and 'Social Audit Firm' shall have the same meaning as assigned to them in the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018.

It may be noted that according to the new Regulation 91F, a listed 'Not for Profit Organization' shall submit to the Social Stock Exchange(s) the statement in respect of utilisation of the funds raised, on a quarterly basis. The statement will cover category-wise amount of monies raised, category-wise amount of monies utilised, and balance amount remaining unutilised.

Enhanced guidelines for debenture trustees and listed issuer companies on security creation and initial due diligence: The Securities and Exchange Board of India (SEBI), *vide* Circular No. SEBI/HO/DDHS/DDHS_Div1/P/CIR/2022/106, dated 4 August 2022, has issued enhanced guidelines for debenture trustees and listed

issuer companies on security creation and initial due diligence.

A. Manner of change in security/ creation of additional security/ conversion of unsecured to secured in case of already listed non-convertible debt securities:

- Before initiating due diligence, a Debenture Trustee (DT) and the listed entity shall enter into an amended debenture trust agreement to incorporate the obligations with respect to security creation, initial due diligence, and continuous monitoring by respective DTs.
- Pursuant to the initial due diligence, the DT shall issue a no-objection certificate (NOC) to the issuer company for going ahead with the proposed change in the structure/ creation of security. Thereafter, the issuer company shall create the proposed security and the charge in favour of DT.
- Pursuant to the creation and registration of charge, the issuer company and DT shall enter into a supplemental/ amended debenture trust deed.
- The issuer company, pursuant to the execution of supplemental/ amended debenture trust deed, shall submit certain specified documents to the Depositories and Stock Exchanges.
- The Depository will assign a new International Securities Identification Number (ISIN) and share information with respect to the change in ISIN with the stock exchanges.

B. Encumbrance on securities for issuance of listed debt securities:

The creation of encumbrance on the securities for securing the non-convertible debt securities shall be through the depository system only.

C. Due Diligence Certificate in case of Shelf Prospectus/ Memorandum:

If details of the security are not finalized at the time of filing of a draft shelf prospectus/placement memorandum by an issuer company, then the DT will be required to undertake due diligence as follows:

1. The DT may furnish a due diligence certificate confirming that it has carried out due diligence for clauses other than that related to security creation.
2. At the time of the issuance of the tranche memorandum/ prospectus when the issue structure including terms related to security has been determined and finalized, the DT shall issue a due diligence certificate covering all clauses of formats.

D. Empanelment of External Agencies by Debenture Trustee(s):

- The DT shall adopt an empanelment criteria/policy as approved by their board of directors and disclose the same on their website.
- The DT shall also formulate a policy on mitigating conflict of interest and shall disclose the same on their website. The policy should include, *inter alia*, a requirement that the empanelled agency would have no pecuniary relationship with the issuer company three years prior to the issue.

E. Compliance with SEBI Circulars on 'Security & Covenant Monitoring System':

Various stakeholders such as issuer entities, depositories, debenture trustees, and credit rating agencies will be required to ensure that they are compliant with circulars issued by SEBI with respect to the distributed ledger technology system.

Such compliance will ensure efficient recording of details regarding the creation of security and monitoring of covenants via the system hosted by depositories using distributed ledger technology.

Ratio Decidendi

Insolvency – Earnest Money towards purchase of land is not 'financial debt'

The Principal Bench of National Company Law Appellate Tribunal ('**NCLAT**'), New Delhi has upheld the National Company Law Tribunal ('**NCLT**')'s order wherein it had rejected the claim of the Appellant as a Financial Creditor within the meaning of Section 5(8) of the Insolvency and Bankruptcy Code, 2016 ('**IBC**'). The NCLT had held that the earnest money paid towards purchase of land cannot be treated as 'financial debt' as there was no indication of a contract, whether oral or written, for the purchase of land and that mere mention of the payment as financial liability in the Annual Returns of the Corporate Debtor does not render it a 'financial debt', which understanding was upheld by NCLAT

Brief facts:

The Appellant had sent an offer letter to the Corporate Debtor to purchase a surplus land available at the mills premises of the Corporate Debtor at Jamnagar, Gujarat. Subsequently, the Appellant made a payment of the earnest money of INR 7 crore to the Corporate Debtor. In the meantime, an application for initiating Corporate Insolvency Resolution Process ('**CIRP**') under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("**IBC**") was filed by one M/s. Oman Inc. against the Corporate Debtor and was admitted by the concerned NCLT. The Appellant thereafter filed its claim as a Financial Creditor in response to which the Appellant was informed by the Resolution Professional (RP) that the remitted payments / funds / earnest money to the Corporate Debtor as interest free advance to be adjusted against sale consideration of the land shall not fall under 'financial debt' and hence, admitted the same under the category of 'other creditors' and not a financial creditor. Thereafter, the Resolution Plan was approved, which did not contain any amounts allocated to the Appellant. The Appellant then filed an application praying for quashing of the approved Resolution Plan, and thereby the entire CIRP, which was dismissed by the NCLT. The Appellant accordingly filed an appeal before this Tribunal against the dismissal order passed by the NCLT.

Submission by the Appellant before the NCLAT:

- It was submitted that the payment for the earnest money and the receipt of the same was not disputed by the Corporate Debtor. Further, in the Annual Reports for Financial Year 2018-19 and 2019-20 of the Corporate Debtor, the earnest payment was classified as 'other Financial Liability' and hence the Appellant's claim deserved to be admitted as a 'financial debt'.
- It was submitted that no amount was earmarked to the Appellant for repayment in the Resolution Plan even though the claim of the Appellant, to the tune of INR 7 crore, was admitted as 'other creditors', it being against the provisions of Section 30(2)(e) and Section 30(2)(f) of the IBC and Regulation 38(1-A) of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons), Regulations, 2016, which provides for the adequate balance of the interest of all stakeholders.

Submission by the Respondent before the NCLAT:

- It was submitted that the claim of the Appellant was rightly admitted in the category of 'other creditors' and the Appellant was not a Financial Creditor since there was no contract between the Appellant and Corporate Debtor for sale of any land and without there being any acceptance of the offer letter of the Appellant, the earnest money advanced by the Appellant cannot be treated as 'financial debt'.
- It was submitted that none of the essential conditions for holding a debt within the meaning of Section 5(8) of the IBC were present, and hence the NCLT was correct in not accepting the claim of the Appellant as Financial Creditor.

Decision:

The Tribunal analysed the nature of the transaction in light of the offer letter / proposal sent by Appellant to the Corporate Debtor and observed that there was nothing on record to indicate that the proposal was accepted by the Corporate Debtor or that there was even an existence of an oral contract between the parties for the sale of land.

The NCLAT analysed the meaning of 'financial debt' within Section 5(8) of the IBC and observed that for a debt to be a financial debt, the essential condition to be proved is that the debt is disbursed against the consideration for the time value of money. The Tribunal then reviewed the concept of 'disbursal' and 'time value of money' in Black Law's Dictionary and through judicial precedents in *Pioneer Urban Land and Infrastructure Ltd.* v. *Union of India* [(2019) 8 SCC 416], *Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited* v. *Axis Bank Limited and Ors.* [(2020) 8 SCC 401], and *Sach Marketing Pvt. Ltd*. v. *Resolution Professional of Mount Shivalik Industries Ltd*. [Company Appeal (AT) Ins. No. 180 of 2021] and observed that 'time value of money' means the price received for the length of time for the money for which the money has been disbursed and the 'disbursal' refers to money which has been paid against consideration for 'time value of money'. The Tribunal opined that disbursement made by the Appellant to the Corporate Debtor was only a payment of earnest money which was to be adjusted in sale of the land. The disbursement was not in consideration for the time value of money.

The NCLAT further held that acknowledging the liability of earnest money as a financial liability in the Annual Returns is not akin to admitting a 'financial debt'. A debt of 'other creditors' is also a financial liability. Thus, solely on the strength of annual return of Financial Year 2018-19 and

2019-20, it cannot be held that payment of earnest money by the Appellant was a 'financial debt'.

The NCLAT, on the issue that all stakeholders have not been catered to in the Resolution Plan, opined that such a question cannot be raised since Appellant was not able to prove violation of any provision of the IBC and therefore the Resolution Plan does not require any interference.

[*S. Chandriah* v. *Sunil Kumar Agarwal & Ors.* – Judgment dated 22 July 2022 in Company Appeal (AT) Insolvency No. 22 of 2022, National Company Law Appellate Tribunal, Principal Bench, New Delhi]

Arbitration – Depriving right to counter-claim or set-off may lead to parallel proceedings before various fora and offend the very purpose of Section 23

A Division Bench of the Supreme Court has held that when there is a provision for filing the counter-claim/ seeking set-off, which is expressly inserted in Section 23 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"), there is no reason for curtailing the right of the appellant for making the counter-claim or seeking set-off. According to the Court, if the counter-claim made by the Respondent is not allowed in the proceedings arising out of the claims made by the Appellants, it may lead to parallel proceedings before various fora, which offends the very purpose of Section 23 of said Act.

Brief facts:

The Appellant and the Respondent-contractor had entered into an EPC (Engineering Procurement and Construction) Agreement in respect of the improvement of a national highway under National Highways Development Project (NHDP) ("**Agreement**"). On account of various breaches of the Agreement, a notice of intention to terminate the same was issued by the Appellant. Aggrieved by the untimely termination, the Respondent had invoked the arbitration clause contained in the Agreement. Two days after the initiation of the arbitration proceedings before the constituted arbitral tribunal, at the time of filing the Statement of Defence, the Apepllant had sent a letter to the Arbitral Tribunal seeking extension of time for filing the counter-claim which was rejected by the Tribunal, on the ground that the procedure as provided by Clause 26 of the Agreement had not been followed by the Appellant for the counter-claim, being that the counter-claim was a dispute which needed to be first amicably settled by way of conciliation as mandated by the Agreement and only then, it could be taken to arbitration. The Appellant thereafter filed a petition for setting aside of said order under Section 34 of the Arbitration Act, 1996 before the Delhi High Court. The High Court dismissed the petition confirming the order passed by the Arbitral Tribunal. Subsequently, the Appellant filed the present appeal before the Supreme Court.

Submissions by the Appellant:

- It was submitted that both in the termination notice as well as in the Statement of Defence, it had reserved its right to claim damages and that such a set-off of INR 1.23 crore was claimed as it also specifically mentioned that it reserved its right to file the counter-claim in such communications/ pleadings Hence, it could not be said that the counter-claim was raised by surprise or by way of counterblast.
- It was submitted that, further, the counter-claim was not a separate 'dispute' but rather a 'claim' and Clause 26 of the Agreement does not contemplate repeated invocation of the same procedure when there is an overlapping cause of action. The Appellant further pleaded that the Tribunal alongside the High Court have collectively failed to realise that the term

dispute is used in instances of conflicts from both the sides, however the term claim is used in representation of only one side.

Submissions by the Respondent:

- It was submitted that mere reservation of rights would not entitle either party to bypass the contractually agreed mechanism under Clause 26 of the Agreement.
- It was further submitted that Section 23(2A) of the Arbitration Act refers to claims within the scope of arbitration. However, considering the fact that the Appellant failed to follow the procedure of the Agreement, the current claim in question fails to fall under the purview of Section 23 of the Arbitration Act. According to them, neither the Tribunal nor the High Court made any error in their decisions.

Decision:

On the basis of the decisions announced by the Tribunal as well as the High Court, the two clear issues before the Apex Court were with relation to the classification of counter-claim as a separate dispute, in the interpretation of the word 'dispute' itself with respect to counter claims as well as in reference to the general procedure that was to be followed as per Clause 26 of the Agreement. With respect to the issue of separate disputes, the Court observed that the main dispute was the termination of the contract by the Appellant and hence, was to be approached for resolution amicably as requested under the Clause 26 (2) of the Agreement. However, the same could not be stated in the light of the counter-claim. The Court was of the opinion that the Appellant's request to file counter-claim was a 'claim' and not a 'dispute', as the Court on the similar lines as the contention raised by the Appellate held that both the Arbitral Tribunal as well as the High Court had failed to appreciate the difference between the expressions 'claim', which may be made by one side, and 'Dispute', which by its definition has two sides. Following the establishment of the same, the Court additionally ruled that once it was established that the counter-claim was a 'claim' and not a 'dispute' there was no requirement to follow the procedure mentioned under Clause 26 of the Agreement, much less a question to bypass the procedure.

In the light of the above, the Court held that by such a narrow interpretation, the Arbitral Tribunal had taken away the valuable right of the Appellantto submit counter-claim, thereby negating the statutory and contractual rights of the Appellant and paving way for a piecemeal and inchoate adjudication. Similarly, the High Court had seriously erred by making a narrow interpretation of Clause 26 of the Agreement while confirming the order passed by the Arbitral Tribunal. Consequently, the Arbitral Tribunal order and the impugned judgment of the High Court were quashed and set aside. The Appellant's application to file the counter-claim was allowed.

[*National Highway Authority of India* v. *Transstroy (India) Limited* – Judgemnt dated 11 July 2022 – 2022 SCC OnLine SC 832, Supreme Court of India]

Insolvency – Section 7(5)(b) of IBC, which requires the Adjudicating Authority to notify Financial Creditor before rejection of a claim, can be extended to appeals as well

Observing that the appeal is the continuation of original proceedings, the Supreme Court has held that Section 7(5)(b) of the Insolvency and Bankruptcy Code, 2016 ("**IBC**"), which requires the Adjudicating Authority to notify the Financial Creditor before rejection of a claim, can be applied to appeals before the NCLAT as well.

Brief facts:

The Corporate Debtor-Respondent No. 1, for expansion of his business, took a loan from the Appellant-Financial Creditor, which was labelled as a non-performing asset (NPA). Subsequently, the Appellant issued a statutory notice under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("**SARFAESI Act**"), against the Corporate Debtor. The Corporate Debtor, thereafter, recognised its liability to the Appellant and offered a one-time settlement (OTS) proposal, which was defaulted upon once again. As a consequence, the Appellant filed a petition under Section 7 of the IBC, which was admitted and Corporate Insolvency Resolution Process (CIRP) was initiated. Aggrieved by the same, the suspended Directors of the Corporate Debtor filed the appeal before NCLAT contending that the petition filed by the Appellant was patently barred by limitation. Holding the petition to be time barred, NCLAT allowed the appeal. This present appeal has been filed against such dismissal.

Submissions:

- It was submitted by the Appellant that the Corporate Debtor had acknowledged the debt and agreed into a settlement agreement subsequent to the declaration as an NPA. Accordingly, in light of Section 7 or 9 of the IBC, the period of limitation to file the petition was extended from such date of the OTS proposal and agreement.
- It was submitted by the Appellant that, additionally, given that the settlement offer was accepted and signed, the agreement resulting out of the same was to be supported by Section 25 of the Indian Contract Act, 1872. Basis the same, it is clear that any agreement to pay a time barred debt, would be enforceable in law, within three years from the due date of payment, in terms of such agreement. *Decision:*

Decision:

The Supreme Court observed that the NCLAT found that there was acknowledgment within the period of limitation that being 3 years, leading said Appellate Tribunal to allow the appeal and close the CIRP proceedings in the NCLT. However, said Appellate Tribunal did not consider Section 25(3) of the Contract Act. It was observed that if the NCLAT had established the involvement of Section 25 of the Contract Act, the Tribunal would further be able to consider the question of applicability of Section 5 of the Limitation Act for condonation of delay, to proceedings under Section 7 of the IBC. Particularly discussing Section 7(5)(b) of the IBC, the Apex Court held that an appeal being the continuation of original proceedings, the provision of Section 7(5)(b) of the IBC of notifying the Financial Creditor before rejection of a claim would be attracted. If notified of the proposal to close the proceedings on account of being barred by limitation, the Appellant might have got the opportunity to rectify the defects in its application under Section 7 by filing additional pleadings and/or documents. Hence, in the light of the same, the instant appeal before the Supreme Court was allowed. The NCLAT was directed to consider the application for CIRP afresh, in accordance with law, after giving the Appellant and the Respondent opportunity to file additional affidavits disclosing documents/additional affidavit in response.

[*Kotak Mahindra Bank Limited* v. *Kew Precision Parts Private Limited and Ors.* – Judgment date on 5 August 2022 in Civil Appeal No. 2176 of 2020, Supreme Court of India]

News Nuggets

Insolvency – Entries in books of account of a company can be treated as acknowledgement of liability in respect of debt payable to a financial creditor

Holding that entries in books of accounts and/or balance sheets of a corporate debtor would amount to an acknowledgment under Section 18 of the Limitation Act, 1963, the Supreme Court has held that an application under Section 7 of the Insolvency and Bankruptcy Code, 2016, would not be barred by limitation, on the ground that it had been filed beyond a period of three years from the date of declaration of the loan account of the Corporate Debtor as a Non-Performing Asset (NPA). The Court in *Asset Reconstruction Company (India) Limited* v. *Tulip Star Hotels Limited* [Judgment dated 1 August 2022] observed that if there is an acknowledgment of the debt by the corporate debtor before the expiry of the period of limitation of three years, the period of limitation would get extended by a further period of three years. The Apex Court noted that the debt of the corporate debtor was declared as an NPA on 1 December 2008 and that the corporate debtor had acknowledged its liabilities in its financial statements from 2008-09 till 2016-17. The Supreme Court allowed the appeal against the decision of NCLAT, observing that the application under Section 7(2) of the IBC was filed on 3 April 2018, well within the extended period of limitation.

Industrial Disputes Act, 1947 – Jurisdiction of civil court when is not ousted

In a case involving correction of the date of birth, the Supreme Court has held that jurisdiction of the civil court is not ousted, as this is not a case relating to enforcement of a right or an obligation under the Industrial Disputes Act, 1947. The Apex Court in *Tulshi Choudhary* v. *Steel Authority of India Limited* [Order dated 3 August 2022] relied upon an earlier decision of the Court in *Premier Automobiles Ltd*. v. *Kamelekar Shantaram Wadke of Bombay & Ors.* [(1976) 1 SCC 496], where the principles applicable to the jurisdiction of the civil court in relation to an industrial dispute were examined, to adjudicate on the matter.

Insolvency – Interest when can be included in calculation of threshold of INR 1 Crore for initiating CIRP process

The NCLAT, Principal Bench, has held that the total amount for maintainability of claim (for filing CIRP application) will include both principal debt amount as well as interest on delayed payment when it is clearly stipulated in the invoice itself. The Appellate Tribunal in *Prashat Agarwal* v. *Vikash Parasrampuria* [Judgment dated 15 July 2022] was of the view that since interest on delayed payment was clearly stipulated in the concerned invoice itself, this will entitle for 'right to payment' (under definition of 'claim' in Section 3(6) of the Insolvency and Bankruptcy Code, 2016) and therefore, will form part of 'debt' (under Section 3(11) of the IBC). The NCLT in this regard observed that all the invoices of the operational creditor clearly stipulated provision of interest on delayed payment and that hence, the outstanding amount was more than the threshold required under Section 4 of the IBC read with notification No. S.O 1205 (E) dated 24 March 2020.

Insolvency – One-time Settlement proposal is acknowledgment of debt

The NCLAT, Principal Bench, has held that One-time Settlement (OTS) proposal filed within three years of date of default falls within the ambit of 'acknowledgement of debt' as defined under Section 18 of the Limitation Act, 1963. Further, noting that another OTS proposal was submitted again within three years of the previous proposal where the 'debt' was acknowledged to be 'due and payable', the NCLAT in *Tejas Khandhar* v. *Bank of Baroda* [Judgment dated 12 July 2022] held that there was a jural relationship between the 'Corporate Debtor' and the Respondent Bank. Supreme Court's decision in the case of *Dena Bank (now Bank of Baroda)* v. *C. Shivkumar Reddy and Anr.* [(2021) 10 SCC 330], was relied upon to adjudicate upon the matter.

Arbitration – Mere use of word 'arbitration' will not make an arbitration agreement

The Supreme Court has reiterated that mere use of the word 'arbitration' or 'arbitrator' in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. Extracting certain part of the contract, the Court in *Mahanadi Coalfields Ltd*. v. *IVRCL AMR Joint Venture* [Judgment dated 25 July 2022] observed that the particular clause was a dispute resolution mechanism at the company level, rather than an arbitration agreement. It noted that the specified clause did not comport with the essential attributes of an arbitration agreement in terms of Section 7 of the 1996 Act as well as the principles laid down in case of *Jagdish Chander* v. *Ramesh Chander* [(2007) 5 SCC 719], as per which the clause/ agreement must provide a procedure for appointment of an arbitrator and for reference of disputes to such arbitrator.

Arbitration – Courts when can under Section 11 adjudicate on arbitrability of disputes

The Supreme Court has held that, under Section 11 of the Arbitration and Conciliation Act 1996, a Court can adjudicate the issue of jurisdiction and arbitrability in cases where the arbitration agreement excludes certain disputes from the purview of the arbitration clause. Accordingly, Apex Court in *Indian Oil Corporation Limited* v. *NCC Limited* [Decision dated 20 July 2022] opined that that though the Arbitral Tribunal has the jurisdiction and authority to decide the disputes including the question of jurisdiction and non-arbitrability in terms of the Act, the same can also be considered by the Court at the stage of deciding Section 11 application only if the facts are very clear and glaring as to whether the dispute is non-arbitrable and/or it falls within the exception clause.

It observed that even at the stage of deciding Section 11 application, the Court may *prima facie* consider the aspect of 'accord and satisfaction' of the claims. According to the Court, the limited jurisdiction under Section 11 does not denude the Court of its judicial function to conduct a *prima facie* review, and to look beyond the bare existence of the arbitration clause.

Arbitration order can be set aside in case of improper interpretation of certain clauses of agreement

The Delhi High Court has held that order of arbitral tribunal can be set aside when there is improper interpretation of certain clauses of the arbitration agreement. The High Court in *Union of India* v. *Jindal Rail Infrastructure Ltd.*

[Decision dated 23 May 2022] though noted that the interpretation of a contract falls within the jurisdiction of an arbitral tribunal and anarbitral award based on a plausible interpretation of a contract cannot be interfered with under the provisions of Section 34 of the Arbitration and Conciliation Act, 1995, it observed that the Arbitral Tribunal's interpretation of certain clause, in the present case, was not a plausible one. Terming the award as being in conflict with the fundamental policy of Indian law, the Court held that it is not open to re-work a bargain that was struck between the parties on the ground that it is commercially difficult for one party to perform the same.

NEW DELHI
5 Link Road, Jangpura Extension,
Opp. Jangpura Metro Station,
New Delhi 110014
Phone : +91-11-4129 9811

B-6/10, Safdarjung Enclave
New Delhi -110 029
Phone : +91-11-4129 9900
E-mail : lsdel@lakshmisri.com

MUMBAI
2nd floor, B&C Wing,
Cnergy IT Park, Appa Saheb Marathe Marg,
(Near Century Bazar)Prabhadevi,
Mumbai - 400025
Phone : +91-22-24392500
E-mail : lsbom@lakshmisri.com

CHENNAI
2, Wallace Garden, 2nd Street
Chennai - 600 006
Phone : +91-44-2833 4700
E-mail : lsmds@lakshmisri.com

BENGALURU
4th floor, World Trade Center
Brigade Gateway Campus
26/1, Dr. Rajkumar Road,
Malleswaram West, Bangalore-560 055.
Phone : +91-80-49331800
Fax:+91-80-49331899
E-mail : lsblr@lakshmisri.com

HYDERABAD
'Hastigiri', 5-9-163, Chapel Road
Opp. Methodist Church,
Nampally
Hyderabad - 500 001
Phone : +91-40-2323 4924
E-mail : lshyd@lakshmisri.com

AHMEDABAD
B-334, SAKAR-VII,
Nehru Bridge Corner, Ashram Road,
Ahmedabad - 380 009
Phone : +91-79-4001 4500
E-mail : lsahd@lakshmisri.com

PUNE
607-609, Nucleus, 1 Church Road,
Camp, Pune-411 001.
Phone : +91-20-6680 1900
E-mail : lspune@lakshmisri.com

KOLKATA
2nd Floor, Kanak Building
41, Chowringhee Road,
Kolkatta-700071
Phone : +91-33-4005 5570
E-mail : lskolkata@lakshmisri.com

CHANDIGARH
1st Floor, SCO No. 59,
Sector 26,
Chandigarh -160026
Phone : +91-172-4921700
E-mail :lschd@lakshmisri.com

GURUGRAM
OS2 & OS3, 5th floor,
Corporate Office Tower,
Ambience Island,
Sector 25-A,
Gurgaon-122001
Phone : +91-124-477 1300
E-mail : lsgurgaon@lakshmisri.com

PRAYAGRAJ (ALLAHABAD)
3/1A/3, (opposite Auto Sales),
Colvin Road, (Lohia Marg),
Allahabad -211001 (U.P.)
Phone : +91-532-2421037, 2420359
E-mail : lsallahabad@lakshmisri.com

KOCHI
First floor, PDR Bhavan,
Palliyil Lane, Foreshore Road,
Ernakulam Kochi-682016
Phone : +91-484 4869018; 4867852
E-mail : lskochi@laskhmisri.com

JAIPUR
2nd Floor (Front side),
Unique Destination, Tonk Road,
Near Laxmi Mandir Cinema Crossing,
Jaipur - 302 015
Phone : +91-141-456 1200
E-mail : lsjaipur@lakshmisri.com

NAGPUR
First Floor, HRM Design Space,
90-A, Next to Ram Mandir, Ramnagar,
Nagpur - 440033
Phone: +91-712-2959038/2959048
E-mail : lsnagpur@lakshmisri.com