S&A Law Offices

INDIAN LEGAL IMPETUS

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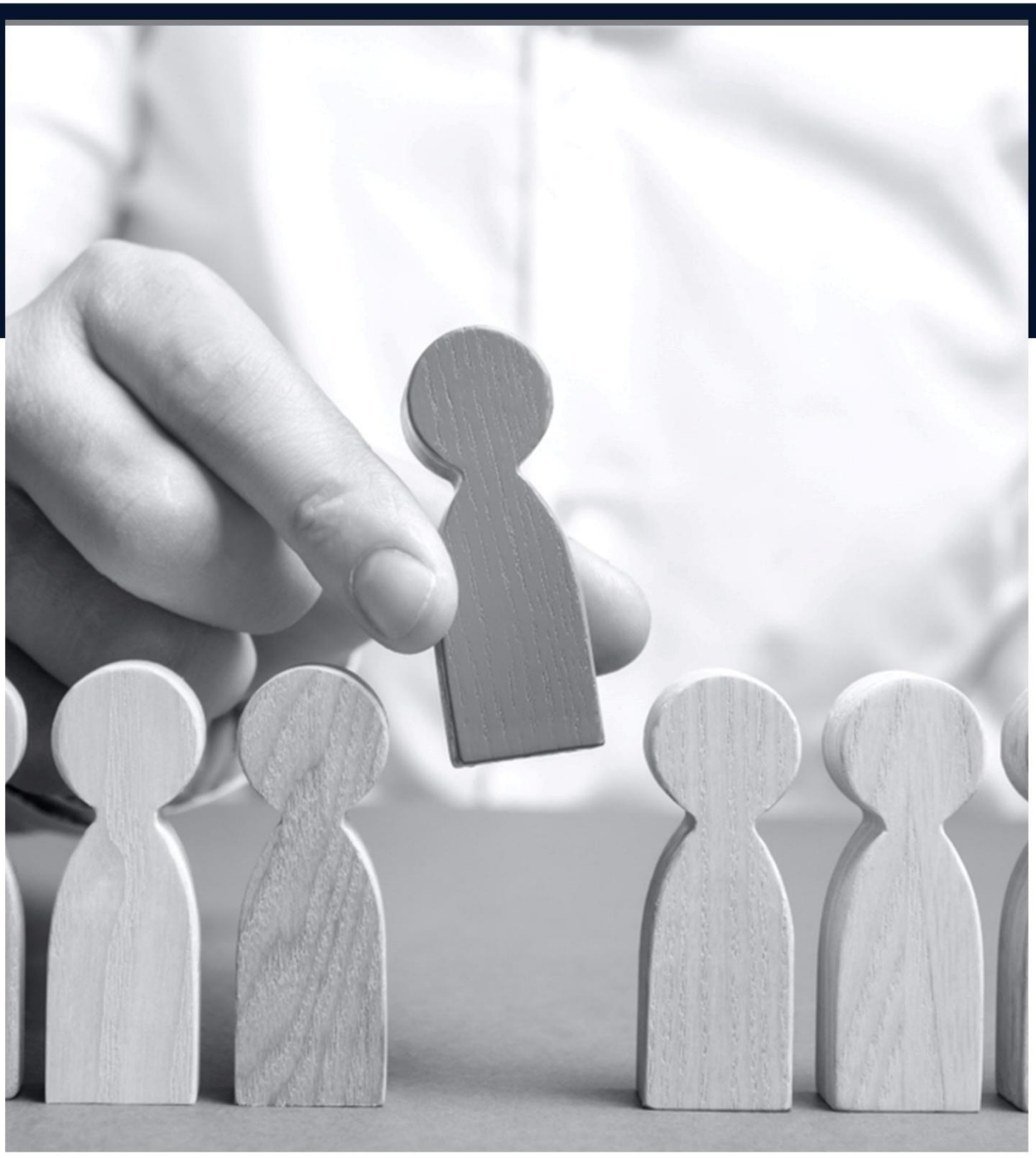

Editorial

S & A Law Offices

Manoj K. Singh

Dear Readers,

Hope you all are in the best of your health and spirits. We are pleased to present the November 2024 Edition of our monthly newsletter "Indian Legal Impetus."

We sincerely hope that this edition will be informative to our readers. We are optimistic that this issue of Indian Legal Impetus will be interesting, enlightening, and engaging for our readers.

Our first article analyses the findings of the Hon'ble Delhi High Court on whether an 'Exclusive jurisdiction' clause can be treated as one which also determines the 'Seat' of arbitration. The article also attempts to address whether the 'Seat' of arbitration will prevail over the generic 'Exclusive jurisdiction' clause if the agreement contains contradictory clauses.

Our second article explores the interpretative challenges surrounding the nature of the proviso to Section 31(4) of the Insolvency and Bankruptcy Code (IBC), which requires prior Competition Commission of India (CCI) approval for resolution plans involving combinations before Committee of Creditors (CoC) approval. The article examines the Court's rulings, advocating for the provision's practical implementation while harmonising the purposes of competition and insolvency laws. The discussion covers the scope the Green Channel route and the Failing Firm Defense as alternatives for expediting approvals. The article underscores the need for a cohesive approach to ensure a streamlined and effective insolvency regime in India.

Our third article elaborates on necessary pre-requisites to ensure that the process of blacklisting the private contractors by the public sector undertakings is not initiated arbitrarily or in violation of the rights of an entity or a person. The article discusses in detail the essentials of a show-cause notice, highlighting that it must not only be valid, fair and reasonable but also be in consonance with commercial wisdom.

Our fourth article throws light on the significance of determining whether time is of the essence of the contract or not. The article discusses whether time can be made essence of the contract by a subsequent notice and what happens when the innocent party decides to take the benefit of such contract after the lapse of the stipulated time period. The article also highlights the consequences under the Indian Contract Act, 8172 when time is of essence of the contract.

Our fifth article analyses the decision of the Hon'ble NCLAT in Anuj Bajpai v. EPFO case in settling the debate regarding the inclusion of EPF contributions to liquidation estate.

We expect that the edition will enable readers to understand and interpret the legal developments. We welcome all kinds of suggestions, opinions, queries, or comments from all our readers. You can also send in your valuable insights and thoughts at newsletter@sandalawoffices.com.

Since the new year is around the corner, we wish that our readers approach the new year with resolve to find the opportunities hidden in each new day. With that in mind, we wish our readers a merry Christmas and very happy new year.

Thank you.

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DOES EXCLUSIVE JURISDICTION CLAUSE AMOUNT TO 'SEAT' OF ARBITRATION?: AN ANALYSIS OF DELHI HIGH COURT JUDGMENT IN 'M/S KINGS CHARIOT VS. MR. TARUN WADHWA'

- *By Sahil Kumar Purvey*

Introduction

The Arbitration and Conciliation Act, 1996 follows the principle of minimum Judicial Interference in the arbitral proceedings. The Indian Courts only has supervisory jurisdiction over the arbitral Proceeding. 'Seat' of arbitration determines which court would have the jurisdiction to supervise the arbitral proceeding and related litigation. Therefore, it is of utmost necessity that there should be a clear provision in the Contract regarding the 'Seat' of arbitration to avoid any unnecessary litigation. Further, Contract between parties usually have 'Exclusive jurisdiction' clause, which is a clause agreed by the parties to confer the territorial jurisdiction upon a specific court, if any dispute arose between parties out of the Contract between the parties. Indian Court has considered 'Exclusive jurisdiction' clause as legally valid[1]. Therefore, the quandary arises that whether an 'Exclusive jurisdiction' clause can be treated as one which also determines the 'Seat' of arbitration. The Hon'ble Delhi High Court in **Kings Chariot v. Tarun Wadhwa**[2] answered the same in negative. Therefore, this article analyzes the findings of the Hon'ble Delhi High Court. Before discussing the Hon'ble Delhi High Court's finding in **Kings Chariot v. Tarun Wadhwa**, it is necessary to understand which clause will prevail in case of conflicting clauses in the Contract.

Contradiction between 'Seat' of arbitration and 'Exclusive jurisdiction'

If the contract contains the contradictory adjudication clauses specifying one court as 'Seat' of arbitration and the other Court having 'Exclusive jurisdiction', then quandary arises that which clause will prevail to adjudicate the litigation arising out of the arbitral proceedings. On this issue, High Courts are of the opinion that the Clause determining 'Seat' of arbitration will prevail over the generic 'Exclusive jurisdiction' clause and that court would have jurisdiction to decide any applications arising out of the arbitration agreement[3]. However, if there is a clause which provides 'Exclusive jurisdiction' on a court pertaining to specific arbitration related proceedings like appointment of arbitrator, execution of award etc. then in that case 'Exclusive jurisdiction' clause will prevail over 'Seat' of arbitration[4].

Contradiction between 'Venue' of arbitration and 'Exclusive jurisdiction'

'Seat' of arbitration is different from 'Venue' of arbitration as 'Venue' of arbitration only signifies the physical location where the arbitration proceeding takes place considering the logistical constraints of the parties. However, if 'Seat' of arbitration is not given in the arbitration agreement and only 'Venue' of arbitration is specified then the 'Venue' of arbitration is also considered as 'Seat' of arbitration unless anything contrary given in the Contract[5].

[1] Hakam Singh v. Gammon (India) Ltd., AIR 1971 SC 740
[2] Kings Chariot v. Tarun Wadhwa, ARB.P. 421/2024
[3] Devyani International Ltd. v. Siddhivinayak Builders and Developers, 2017 SCC OnLine Del 11156; NJ Constrution v. Ayursundra Health Care Pvt. Ltd., 2018 SCC OnLine Del 7009; and M.S. Talwar Auto Garages (P) Ltd. v. M.S. VE Commercial Vehicles Ltd., 2023 SCC OnLine Del 4940
[4] CARS24 Services (P) Ltd. v. Cyber Approach Workspace, 2020 SCC OnLine Del 1720; Hunch Circle (P) Ltd. v. Futuretimes Technology India (P) Ltd., (2022) 2 HCC (Del) 6
[5] BGS SGS SOMA JV v. NHPC, (2020) 4 SCC 234

Therefore, if 'Seat' of arbitration is not given and the Contract contains the contradicting provisions specifying one court having 'Exclusive jurisdiction' and the venue of arbitration falls within the jurisdiction of the Court other than having 'Exclusive jurisdiction', then Court faces issue that whether the 'Venue' of arbitration would prevail over the 'Exclusive jurisdiction' clause or not. Courts are of two opinions on the issue. First, the courts have treated the 'Venue' of arbitration as the 'Seat' of arbitration and does not consider the 'Exclusive jurisdiction' clause as contrary indicum. Therefore, 'Venue' of arbitration was given an overriding effect over the 'Exclusive' jurisdiction clause[6]. Second, the courts have treated the 'Exclusive jurisdiction' clause as contrary indicum and given them preference over the 'Venue' of arbitration[7]. The law needs to be settled by the Hon'ble Supreme Court on the issue as the second view could have impacted on the finding of the Hon'ble High Court in the case under analysis in this Article.

If only 'Exclusive jurisdiction' Clause is given

In **Kings Chariot v. Tarun Wadhwa**, the Hon'ble High Court came across the issue that what would be the seat of the arbitration if neither 'Seat' nor 'Venue' of arbitration is given, and the agreement only incorporates the 'Exclusive' Jurisdiction Clause.

Brief Facts: A meeting was held between parties in New Delhi to construct a multi-storied hotel in Guna, Madhya Pradesh and subsequently, a contract was executed in Madhya Pradesh. The petitioner asserted that the respondent manhandled the labour and workforce of the petitioner and threw them out of the site, which caused disputes between the parties.

A Notice invoking Arbitration was sent by the respondent, which was responded by the petitioner, wherein the petitioner asked the Respondent to pay the outstanding amount. However, the respondent neither paid the outstanding amount nor responded to the Petitioner' Reply. Subsequently, the Petitioner filed the Section 11 petition before the Hon'ble Delhi High Court, to seek the appointment of an arbitrator. However, Respondent objected the Jurisdiction of the Hon'ble High Court.

Contention of Parties: Respondent contended that the Hon'ble High Court had no jurisdiction as the cause of action arose entirely in the territorial jurisdiction of Madhya Pradesh High Court. Further, the Contract does not specify venue/seat of the arbitration. Petitioner stated that Annexure 2 of the Contract provided for an exclusive jurisdiction clause which recorded that "all disputes subjected to Delhi jurisdiction only", therefore the Hon'ble High Court has the jurisdiction over the petition filed by the petitioner.

Findings of the Court: The Hon'ble High Court observed that even if no part of the cause of action has arisen in the territorial jurisdiction of a Court, then too the parties with mutual consent can agree on such Court as a 'Seat' of arbitration. However, if the Contract does not incorporate any provision specifying 'Seat' or 'Venue' of the arbitration then 'Seat' of arbitration would be determined in accordance with the provisions given under Section 16 to 20 of the Civil Procedure Code, 1908. Therefore, in the present case as the Contract did not specify any 'Seat' or 'Venue' for arbitration, then the generic 'Exclusive' Jurisdiction Clause cannot determine the 'Seat' of the arbitration. Further, as the Contract was executed in Madhya Pradesh for the construction of hotel in Madhya Pradesh, the cause of action arose in the state of Madhya Pradesh and only the Hon'ble Madhya Pradesh High Court have the jurisdiction to decide the petition.

[6] Raman Deep Singh Taneja v. Crown Realtech Private Limited, 2017 SCC OnLine Del 11966; Global Credit Capital Ltd. v. Krrish Realty Nirman (P) Ltd., 2018 SCC OnLine Del 9178; and Reliance Infrastructure Ltd. v. Madhyanchal Vidyut Vitran Nigam Ltd., 2023 SCC OnLine Del 4894

[7] Isgec Heavy Engineering Ltd. v. Indian Oil Corporation Limited, 2021 SCC OnLine Del 4748; and Cravants Media (P) Ltd. v. Jharkhand State Co. Operative Milk Producers Federation Ltd., 2021 SCC OnLine Del 5350

Analysis and Way forward

The judgment of the Hon'ble Delhi High Court highlights the application of the Doctrine of separability that an arbitration clause incorporated in the Parent contract is to be treated as a separate agreement independent of other terms of the Parent contract. However, at the same time the Hon'ble Delhi High Court missed to discuss that the 'Exclusive' jurisdiction clause could have been seen as an intention of party to designate 'Delhi' as the 'Seat' of arbitration, which would have strengthened the principle of party autonomy.

It is settled law that the Party has the autonomy to agree on the seat/venue of the arbitration[8]. If the party has selected a Court as 'Seat' of the arbitration, then that court would have exclusive jurisdiction over the litigation arising out of arbitral proceedings[9]. Therefore, the reverse should also be considered as correct.

If the agreement contains contradictory clauses, then the 'Seat' of arbitration will prevail over the generic 'Exclusive jurisdiction' clause and that court would have exclusive jurisdiction to decide any litigation arising out of the arbitral proceedings. However, in absence of any clause specifying Seat/Venue of the arbitration, a clause conferring a court with 'Exclusive' jurisdiction, should be considered as the intention of the parties to designate such Court as the 'Seat' of arbitration.

It is discussed above if Contract agreement missed to incorporate 'Seat' of arbitration, then the 'Venue' of arbitration is considered as 'Seat' of arbitration unless anything contrary given in the agreement as the same indicates the indicates the intention of party[10].

The Hon'ble Delhi High Court in **Isgec Heavy Engineering Ltd. v. Indian Oil Corporation Limited** have treated the 'Exclusive jurisdiction' clause as contrary indicum and given them preference over the 'Venue' of arbitration[11]. Therefore, in absence of any 'Venue' of arbitration clause, the 'Exclusive' Jurisdiction Clause must be considered as the intention of parties to allocate the same as 'Seat' of arbitration.

In **Swastik Gases Private Limited v. Indian Oil Corporation Limited**[12], the arbitration clause did not specify a seat. However, the Contract has 'Exclusive Jurisdiction Clause which states that the "the agreement shall be subject to jurisdiction of the courts at Kolkata". A petition was filed before the Hon'ble Rajasthan High Court for the arbitrator's appointment, which was dismissed by the Hon'ble Rajasthan High Court considering the 'Exclusive' jurisdiction clause. The decision of High court was challenged, and the Hon'ble Supreme Court upheld the view of the Hon'ble Rajasthan High Court stating that the intention of the parties was "clear and unambiguous" that "the courts at Kolkata alone shall have jurisdiction". Therefore, considering this judgment of the Hon'ble Supreme Court, an 'Exclusive' jurisdiction clause should be considered equivalent to the parties' selection of the seat of arbitration.

Further, author is of the opinion that the term "all disputes" includes civil suits as well as litigation arising out of arbitral proceedings. Despite that, the Hon'ble Delhi High Court refused to entertain the petition. Therefore, it is necessary for the party drafting the contract to be specific about whether the 'Exclusive' jurisdiction of the court is only for civil suits or also includes litigation arising out of arbitral proceedings to avoid any unnecessary litigation and subsequent adverse decision.

[8] Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552
[9] BGS SGS SOMA JV v. NHPC, (2020) 4 SCC 234
[10] BGS SGS SOMA JV v. NHPC, (2020) 4 SCC 234
[11] Isgec Heavy Engineering Ltd. v. Indian Oil Corporation Limited, 2021 SCC OnLine Del 4748; and Cravants Media (P) Ltd. v. Jharkhand State Co. Operative Milk Producers Federation Ltd., 2021 SCC OnLine Del 5350
[12] Swastik Gases Private Limited v. Indian Oil Corporation Limited, 2013 (9) SCC 32

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NATURE OF THE OPTIONAL PROVISO TO SECTION 31(4) OF THE IBC

- *By Saksham Chaturvedi & Zeel Gondaliya*

Introduction

Section 31(4) of the Insolvency and Bankruptcy Code 2016 (for brevity "IBC 2016") requires a successful resolution applicant to obtain any necessary approvals required under the law. Such approvals must be obtained within 1 year from the date when the Adjudicating Authority approves the resolution plan. The proviso to Section 31(4) of the IBC 2016 requires a resolution plan involving a combination[1] to be approved by the Competition Commission of India (CCI) prior to its approval by the Committee of creditors ("CoC"). As per Section 5 of the Competition Act, a 'Combination' is any acquisition, merger, or amalgamation of enterprises that exceeds the threshold prescribed under the Act. The purport of the proviso is to proscribe a resolution plan that designs a combination susceptible to having an adverse effect on competition.

Interpreting the proviso to Section 31(4) as directory and not mandatory, company tribunals have diluted the want of a CCI approval before a resolution plan is placed before the CoC. This article purposively examines the position of law and examines the mandatory/directory nature of the optional proviso in light of the sub-judice HNG – AGI Greenpac Corporate Insolvency Resolution Process (CIRP). Additionally, the article explores the scope of opting for a green channel approval route for resolution plans resulting in combinations.

The Creation of a Combination under the Competition Act

Section 6 of the Competition Act prohibits the creation of a combination which is likely to cause an appreciable adverse effect on competition within the relevant market. Any person or enterprise desirous of entering into a combination is required to give the Commission a notice along with details of such agreement/document. The explanation to Section 6(2) of the Competition Act provides that a document is any form of agreement that entails acquisition of control, shares, voting rights or assets. In this regard, a cursory conspectus of the scheme of a document covered under Section 6(2) suggests that a document should be in the nature of a binding document for the CCI to scrutinize. However, the proviso to Section 31(4) of the IBC provides that all resolution plans, which are still prospective in nature, should be approved by the CCI before they are laid out for the CoC's consideration.

Let us briefly consider the chronology and trace the consequences of such a scheme. In a CIRP, multiple resolution applicants submit their resolution plan before the Resolution Professional (RP). The RP then examines each resolution plan to confirm if the plan conforms to requirements under Section 30(2) of the IBC and does not contravene any of the provisions of law. All such plans which pass the muster before the RP are then presented to the CoC for voting after considering the feasibility and viability of the plans. Here, the CoC chooses a plan that brings the maximum value to creditors. At this stage, it is imperative that any resolution plan laid before the CoC has the necessary permission in case of a combination, because if the CoC approves a plan which is later disallowed by the CCI, it would turn an arduous and time-sensitive CIRP process futile and send the CoC back to the drawing board.

[1] Section 5, The Competition Act 2002.

However, such a scheme entails the CCI to check all proposed resolution plans in the eventuality wherein they were to be approved by the RP and then the CoC. In this regard, it would be rather imprudent to require all prospective resolution applicants to obtain the prior approval of the CCI before submitting their resolution plans to the CoC.

Therefore, to observe the compliance of Section 31(4) and make the position such that it is worth the while for both the CCI and the CoC, the company tribunals have interpreted the proviso to be a directory provision. In line with the same spirit, the company tribunals have affirmed CIRPs wherein the CCI approval for a combination was obtained after obtaining the majority vote of the CoC – deeming the proviso to Section 31(4) to have been substantially and purposively complied.

Interplay between Insolvency Law and Competition Law

Initially, the requirement for CCI approval was included in the broadly framed Regulation 37(1) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, which stipulated that the resolution plan should include obtaining necessary approvals from the Central and State Governments and other authorities. The CCI's approval was categorized as one of the statutory approvals required for a resolution plan. Notably, no specific time frame or stage of proceeding was set for securing these approvals.

The exact stage at which regulatory approvals, particularly the approval from the CCI, are required in the insolvency process remained ambiguous until the introduction of Section 31(4) by the IBC (Second Amendment) Act, 2018. The newly inserted provision draws a difference between CCI's approval and other statutory approvals required under other laws.

Apart from CCI's approval, the Resolution Applicant is required to obtain any other necessary approvals under applicable laws within one year from the date the resolution plan is approved by the NCLT, or within such period as specified by the respective law, whichever is later. Therefore, while obtaining other statutory approvals takes place after the NCLT's approval of the resolution plan, CCI's approval must be obtained prior to the CoC approval of the plan.

The rationale behind this distinction is that CCI approval directly impacts the core of the resolution plan. By requiring CCI's approval before the CoC votes on the resolution plan, the CoC is able to review CCI's opinion for all resolution plans under consideration. This allows for any necessary adjustments to be made at this early stage, ensuring that the plans comply with Competition Law before proceeding further in the approval process.

Contradicting Views on CCI Approval: Whether directory or mandatory?

Several judicial decisions have deviated from this mandate, with courts adopting a more liberal interpretation, viewing CCI's approval prior to CoC approval as directory rather than mandatory. The cases dealing with the point of law are briefly discussed below.

In one of the earliest cases, the New Delhi Bench of the National Company Law Appellate Tribunal (NCLAT) in Arcelormittal India Pvt. Ltd. v. Abhijit Guhathakurta[2] rejected a challenge to the resolution plan on the ground of non-compliance of Section 31(4) of the IBC. The NCLAT deemed that the proviso is directory and not mandatory and it is open for the CoC to look into the into viability, feasibility and commercial aspect of a 'Resolution Plan' to approve the 'Resolution Plan' subject to such approval by Commission.

[2] 2019 SCC OnLine NCLAT 920.

Following stead from Arcelormittal, in Makalu Trading Ltd. v. Rajiv Chakraborty[3] the Hon'ble Tribunal deemed the proviso as a directory requirement and chose not to interfere with the insolvency resolution process – observing that the requirement was substantially complied with since the resolution plan was subsequently approved by the CCI.

However, the failure to obtain the prior approval of the CCI was viewed sternly by the Hon'ble Principal Bench of the NCLAT in Bank of Maharashtra v. Videocon Industries Ltd. and Ors.[4] In this case, the NCLAT ruled that the approval from CCI falls outside the commercial wisdom of the CoC which is to be employed when the CoC examines a resolution plan. Unfortunately, the Principal Bench's ruling, despite being comprehensive, is copiously silent on the earlier decisions of the NCLAT on the nature of the proviso. Additionally, the ruling in Videocon Industries was handed out by a 2-member bench whereas Arcelormittal was delivered by a bench comprising 3 members. Distinguishing the judgment of Videocon Industries on numerical inferiority, the Kolkata Bench of the NCLT in DBS Bank Limited v. Hindusthan National Glass & Industries Limited[5] chose not to follow the Videocon Industries.

Similarly, in Vishal Vijay Kalantri v. Shailen Shah[6] the New Delhi Bench of NCLAT followed Arcelormittal while dismissing challenges to the resolution plan instituted on the ground of failure to obtain the CCI's permission before submission of the plan to the CoC. Notably, the decision in Vishal Kalantri was carried up to the Hon'ble Supreme Court (SC) wherein the Hon'ble SC affirmed the ruling delivered by the NCLAT.[7]

In Soneko Marketing (P) Ltd. v. Girish Sriram Juneja[8], soundly interpreting the position of the proviso, the NCLAT held that the proviso to Section 31(4) should be seen in 2 parts.

The NCLAT reasoned that the part of the provision requiring the approval by the CCI is a compulsory requirement. However, the latter part of the proviso which posits that such approval should flow before the plan is placed for the CoC's consideration is a directory one. The tribunal ruled that the timelines prescribed under the IBC are sensitive and would be disturbed if resolution plans have to await the approval of the CCI. Accordingly, the tribunal affirmed the ruling in Arcelormittal and read down the ruling in Videocon Industries.

Green Channel Approval and Failing Firm Defense

The Green Channel Route is an expedited approval mechanism designed for certain merger transactions or combination filings that pose no risk to competition. This automated system allows parties that meet specific criteria to benefit from quicker approval, bypassing the usual 30-day waiting period. It offers an efficient alternative to the standard legal process, facilitating faster resolutions and more immediate administrative decisions.

The Green Channel Route serves three main objectives: (a) to provide a swift and reliable review of combination cases, (b) to balance cooperation and enforcement functions, and (c) to foster a business-friendly and healthy economic environment. The rationale for implementing the Green Channel Route is that, in certain instances, entities may exceed threshold limits, but the proposed transaction may not pose significant competition risks due to the lack of overlap in their activities.

When it comes to obtaining approval under Section 31(4) of the IBC, 2016, the responsibility to seek clearance from the CCI lies with the resolution applicant. These applicants may also opt for the "Green Channel approval" from the CCI, which offers a quicker and more efficient process for transactions that pose no risk to competition.

[3] 2020 SCC OnLine NCLAT 643.
[4] 2022 SCC OnLine NCLAT 6.
[5] 2023 SCC OnLine NCLT 4299.
[6] 2020 SCC OnLine NCLAT 1013.
[7] Vishal Vijay Kalantri v. Shailen Shah, (2022) 10 SCC 510.
[8] (2024) 245 Comp Cas 587.

This provides a valuable alternative to the regular approval process, enabling faster resolutions and more immediate administrative decisions.

The viability of the Green Channel Route for combinations arising in CIRPs is often justified by the principle of the "Failing Firm Defense" (FFD).[9] Under the FFD, a firm that has consistently incurred losses and is rapidly losing market share to the point of likely exiting the market is considered. In such cases, the acquiring firm argues that the acquisition does not substantially lessen competition, as the firm in question is likely to exit the market on its own. In fact, without the merger, the failure of the firm could result in the acquiring firm strengthening its dominant position in the market.

The Competition Act outlines that the "possibility of a failing business" must be considered when assessing whether a combination is likely to have an appreciable adverse effect on competition in the relevant market. There are **three key tests** for evaluating the failing firm defense: **first**, whether the firm's failure is imminent without the merger; **second**, whether there is an alternative entity that could merge with or acquire the failing firm, resulting in a less anti-competitive transaction; and **third**, whether the firm's assets would exit the market if the merger does not take place.

So far, such consideration of Failing Firm Defense in context of Competition Law has been made only once by the CCI. In the case of the acquisition of Asian Colour Coated Ispat Limited (ACCIL) by JSW Coated Steel Products, it was noted that the liquidation of ACCIL "would lead to a reduction in capacity utilization and production in the market, ultimately affecting end-consumers."

[9] Merger control for IRPs: Do acquisitions of distressed firms warrant competition scrutiny?, M. P. Ram Mohan & Vishakha Raj, IBBI RESEARCH INITIATIVE, May, 2020.

In this instance, the CCI applied one of the three tests of the failing firm defense.[10]

As highlighted in the previous sections, one of the primary reasons for a liberal interpretation of the proviso to Section 31(4) is the stringent timelines outlined under the IBC 2016. However, with the introduction of the Green Channel Approval route, a well-established system has been implemented that allows the Resolution Applicant to quickly obtain approval from the CCI while still complying with the timelines mandated under IBC 2016.

Concluding Remarks

The lucid ruling in Soneko Marketing has been challenged and presently lies in appeal before the Hon'ble SC in the AGI Greenpac acquisition case.[11] As of the writing of this article, the Hon'ble SC has reserved its judgment in the appeal to Soneko. It is hoped that the Hon'ble SC decides against a mandatory interpretation of the proviso. The yardstick previously employed by Courts in deciding between a mandatory/directory provision[12] suggests that the SC would deem the proviso to Section 31(4) as directory. This is because non-compliance of the chronology in obtaining the CCI's approval under the proviso does not attract any consequences under the IBC. While the proviso is unambiguous in its literal interpretation, its practical application would lead to an incongruous position wherein the CCI will have to check every prospective resolution plan, and the CoC would have to sit in anticipation of the CCI's approval.

[10] Combination No. C-2019/03/650, Proposal for acquisition of Asian Colour Coated Ispat Limited by JSW Steel Coated Products Limited, CCI.
[11] Independent Sugar Corporation Limited v. Girish Sriram Juneja & Anr., Civil Appeal No(s). 6071/2023.
[12] See Vidarbha Industries Power Ltd. v. Axis Bank Ltd., (2022) 8 SCC 352; Torrent Investments Pvt. Ltd. v. Y. Nageswara Rao, NCLT Mumbai.

Therefore, it would temporally prudent to have the CCI's permission after the plan is approved by the CoC.

However, even this situation begs for a question: What would happen if the CCI disproves a plan that has been approved by the CoC? In such a case, the CoC would naturally have to consider other viable resolution plans. However, it is difficult to surmise the composition of an alternate resolution plan which would pass the muster of CCI's approval if one of the resolution plans resulting in a combination has been disallowed by the CCI. This is because any other resolution plan cannot conjecture a starkly different outcome for the corporate debtor such that it would pass the CCI's scrutiny. In such situations, the corporate debtor risks going under liquidation or attract the penalty of gun-jumping.

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ISSUANCE OF SHOW CAUSE NOTICE: TIPPING THE BALANCE IN BLACKLISTING OF CONTRACTORS BY PUBLIC ENTITIES

- *By Stuti Singh*

Introduction

In today's day and age public private partnership is the reality of infrastructure developments. The Central Government of India, many State Governments, and their agencies, corporations, and instrumentalities (public authorities) are permitted to engage into agreements with private parties under Article 298 of the Constitution of India, in order to conduct business by floating tenders and awarding contracts to private companies on agreed terms. However, the right to enter into any contract also includes the parallel right to not enter into a contract. Thus, the act of blacklisting is a deterrent measure exercised by the Government or public sector undertakings in India to not enter into a contractual relationship with contractors due to certain reasons, some of them being a lapse in fulfilling contractual conditions, negligence, willful abandonment or frauds including misrepresentations, falsification of records and other breaches of the regulations under which such contracts were allotted.[1]

What does the Term Blacklisting Entail

Blacklisting or debarment has been defined as "a list of persons or firms against whom its compiler would warn the public, or some section of the public; *a list of persons unworthy of credit, or with whom it is not advisable to make contracts*."[2]

A company who is blacklisted is deprived of the opportunity to establish a contractual relationship with the government, and to benefit from it.[3] Blacklisting is a deterring action which is pressed usually in cases of non-compliance to the bid notice, not meeting the eligibility criteria against full disclosure, submitting fraudulent documents, or against any other such reasons as stated in the bid notice, or in the contract. With blacklisting, many civil consequences follow. **It is tantamount to "civil death" of the person, who is foisted with the order of blacklisting**.[4] The stigmatizing nature of such an order prevents the individual from taking part in any other government tenders, thereby preventing him from being awarded government contracts.

The present article restricts its scope to the issue of elaborating on necessary pre-requisites to ensure that the process of blacklisting is not initiated arbitrarily, and in violation of the rights of a judicial entity or a person. However, it is pertinent to note that 'termination' of a contract and blacklisting are mutually exclusive consequences for a lapse of any manner done by the bidder once it is awarded a contract. In **Ace Integrated Solutions Ltd. v. Food Corpn. of India**,[5] Hon'ble Delhi High Court had held that debarment/blacklisting and termination cannot be merged together, and debarment cannot be an automatic consequence or a necessary sequitur to the termination of contract, whatever be the reason for termination.

[1] Bhumika Indulika, 'Judicial Review vis-à-vis Public tender process and Award of Government Contracts', SCC Times (Dec 03, 2022) at https://www.scconline.com/blog/post/2022/12/03/judicial-review-vis-vis-public-tender-process-and-award-of-government-contracts/

[2] P. Ramanatha Aiyar, 'The Law Lexicon: The Encyclopaedic Law Dictionary', (1997 Edn.).

[3] SBI v. Rajesh Agarwal, (2023) 6 SCC 1.

[4] Gorkha Security Services v. Govt. of NCT of Delhi, CA No. 7167-7168 of 2014 at Para 17.

[5] Ace Integrated Solutions Ltd. v. Food Corpn. of India, 2019 SCC OnLine Del 8422 at Para 16.

It was specifically stated that "*while termination is a mode of ending an existing contractual relationship; debarment or blacklisting is a mode of preemptively disqualifying a party from future contractual relationships.*"[6]

It becomes pivotal in cases of blacklisting in public contracts that equality of opportunity is applied. Since blacklists are essentially "instruments of coercion"[7] and involve adverse civil consequences, it casts a slur and creates a barrier between the person blacklisted and the Government in the matter of commercial transactions. Even though no person has a fundamental right to insist that the Government must enter into a contract with him. But on the other hand, it is imperative on the Government to not exclude anyone, and exhibit discrimination or bias against his right to equal treatment under Art. 14 and right to trade under Art. 19[8] of the Constitution of India.

A Show Cause Notice and its Essentials

One of the first precedents which established the pre- requisites to be followed in orders of blacklisting was the landmark judgement of **Erusian Equipment & Chemicals Ltd. v. State of W.B.**[9] wherein the Hon'ble Supreme Court stated that "fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist." The legal position in this regard has since been settled through a series of judgements namely, Southern Painters v. Fertilizers & Chemicals Travancore Ltd.[10], B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd.[11], Patel Engg. Ltd. v. Union of India[12] and very elaborately in Kulja Industries Ltd. v. Western Telecom Project BSNL[13] (among many others), that blacklisting has the consequence of restricting someone from establishing a legitimate relationship with the government in order to profit from it, and thus the authority who undertakes such action has to offer a fair hearing before execution of the blacklisting order, otherwise such action is deemed to be bad in law and must be quashed. Thus, a show cause notice is meant to give this reasonable opportunity to the person proceeded against, so that he can state his objection against the proposed charges indicated in such notice. Accordingly, the following essentials must constitute a part of a valid Show Cause Notice issued in cases of blacklisting-

i. **Adherence to the principles of Natural justice-** Following the principles of Natural Justice forms the basis of a valid Show Cause Notice issued by any public authority. In a catena of judgements including **Indian Oil Corporation Ltd. v. SPS Engineering Ltd.**,[14] the order of blacklisting was held bad in law for the reason of having been made without complying with the principles of Natural Justice. As stated in **Canara Bank v. Debasis Das**[15]-

> *"The adherence to principles of natural justice as recognized by all civilized States is of supreme importance when a quasi-judicial body embarks on determining disputes between the parties, or any administrative action involving civil consequences is in issue. These principles are well settled. The first and foremost principle is what is commonly known as audi alteram partem rule. It says that no one should be condemned unheard. Notice is the first limb of this principle."*

[6] M/s Oasis Projects Ltd. v. National Highway and Infrastructure Development Corporation Ltd., Arb. A. (Comm.) 39/2023 at Para 36.
[7] Erusian Equipment & Chemicals Ltd. v. State of W.B., (1975) 1 SCC 70.
[8] Art. 19(1)(g) of the Constitution of India.
[9] Supra at 7.
[10] Southern Painters v. Fertilizers & Chemicals Travancore Ltd., AIR 1994 SC 1277.
[11] B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd., (2006) 11 SCC 548.
[12] Patel Engg. Ltd. v. Union of India, (2012) 11 SCC 257.
[13] Kulja Industries Ltd. v. Western Telecom Project BSNL, (2014) 14 SCC 731.
[14] Indian Oil Corporation Ltd. v. SPS Engineering Ltd., 2006 SCC OnLine Del 265.
[15] Canara Bank v. Debasis Das, (2003) 4 SCC 557.

Thus, the purpose of show cause notice is to provide the person being prosecuted with a fair chance and reasonable opportunity to object to the charges that are suggested in the notice. In the case of **Khem Chand v. Union of India**[16] it was held that 'reasonable opportunity' includes within its ambit, an opportunity to deny one's guilt and establish innocence. In issuance of a show cause notice, the language used to frame and communicate charges to the person being prosecuted clearly demonstrates its fairness. A quasi-judicial authority must act in the most equitable manner possible to instill confidence in the minds of those under its jurisdiction in pursuance of the principles of natural justice.[17]

ii. A show cause notice must specify imputations and its consequences:

In order to ensure that the noticee has a sufficient, meaningful, and informed opportunity to refute the allegations and provide justification against the proposed blacklisting, a show cause notice must clearly outline the imputations describing the alleged breaches and defaults that indicate the notice issuer's intent to blacklist the notice. A recent judgement by Hon'ble High Court at Allahabad[18] states-

"A show cause notice, particularly in a case where it proposes to impose an order of blacklisting, is required to adhere to the principles of natural justice and for the said reason is to fulfill the twin requirements of stating in unambiguous terms the grounds which according to the department necessitates an action, and also the penalty which is proposed to be taken in case the noticee is unable to furnish an adequate response to the grounds stated in the notice."

One essential component of any administrative adjudicatory procedure is the right to be informed of the charges and to effectively address them. A party should be given advance notice of the case against him and a chance to appropriately respond to it, as this is a fundamental principle of fairness. To ensure that the party who may be impacted is not caught off guard and has a fair chance to present its defense, the charges must be disclosed precisely and with particularity, along with the consequences in specific terms, including the term of the impending blacklisting if the awardee/noticee is found liable of the charges levied against the party in the Show cause notice. In **Nsoft (India) Services (P) Ltd. v. Purvanchal Vidhyut Vitaran Nigam Ltd.**[19], these valid particulars were observed under paragraph 31 in the following terms-

".....in order for a show cause notice to constitute a valid basis for passing of an order of blacklisting, the notice must spell out the imputations specifying the alleged breaches and defaults indicating the intent of the issuer of the notice to blacklist the notice so as to ensure that the noticee has an adequate informed and meaningful opportunity to rebut the allegations and to show cause against the proposed blacklisting."

iii. Show cause notice must not be issued with prejudiced mindset:

Authorities must be careful to maintain an open mind when issuing a show-cause notice and must act fairly in determining whether the person being prosecuted is guilty or not. The issuance of show cause notice must not be considered an empty ceremony to ultimately hold the noticee guilty. While it is essential that a show-cause notice must include reason for its issuance to the notice, so that he can effectively respond, it might often be misinterpreted by the recipient as an authority decision, rather than conceiving it as reasons to allow for an adequate response.[20]

16 Khem Chand v. Union of India, AIR 1958 SC 300.
17 Oryx Fisheries (P) Ltd. v. Union of India, (2010) 13 SCC 427.
18 Nsoft (India) Services (P) Ltd. v. Purvanchal Vidhyut Vitaran Nigam Ltd., 2022 SCC OnLine All 596.
19 Ibid.
20 TRF Ltd. v. CCE, (2013) 22 GSTR 566.

Thus, the onus to prove that any show cause notice is issued with a predetermined mindset lies on the noticee. In the case of **Oryx Fisheries (P) Ltd. v. Union of India**[21] it has been observed by the Hon'ble Supreme Court that-

"While reading a show-cause notice the person who is subject to it must get an impression that he will get an effective opportunity to rebut the allegations contained in the show-cause notice and prove his innocence. If on a reasonable reading of a show-cause notice a person of ordinary prudence gets the feeling that his reply to the show-cause notice will be an empty ceremony and he will merely knock his head against the impenetrable wall of prejudged opinion, such a show-cause notice does not commence a fair procedure especially when it is issued in a quasi-judicial proceeding under a statutory regulation which promises to give the person proceeded against a reasonable opportunity of defence."

Conclusion

Every administrative action fall within the purview of judicial review on grounds of illegality, procedural irregularity and irrationality. In the case of private parties, the freedom to enter into a contract or not is unqualified. However, the State or any of its agencies are always subject to judicial scrutiny for following the tenets of proportionality and natural justice in exercise of its power to blacklist certain persons. The order being reasonable, fair and proportionate to the gravity of the offence is examinable by a writ court.[22]

Thus, when a show cause notice does not follow the principles of natural justice, and other standard pre-requisites as noted above, any action in furtherance, or absence of the same can be rightfully challenged and overturned in the Court of law.

Where there is arbitrariness in the State action of entering or not entering into contracts, (or any action pursuant thereto) Article 14 springs up and judicial review strikes such an action down.[23]

It is succinctly thus stated in conclusion that the goal of organizing a public auction or soliciting public bids for public works projects is to uphold transparency and provide government works in a transparent manner. This not only directly affects the public coffers, but also aims to increase competition in order to get the best prices for public works from qualified and aggressive bidders. And while deviants of serious nature must be checked from benefitting from public contracts, it must ultimately be considered that, '*the purpose (of a tender) is not to pick holes and find fault with bidders, so as to trip them along way, and oust them from the race*'.[24] Thus, a show cause notice must not only be valid, fair and reasonable but in the humble opinion of the author, it must also be in consonance with commercial wisdom, to imply that the consequence of 'blacklisting' must be a rarity and not general course of action even in case of minor defaults. Debarring someone, even for a set period of years, is equivalent to civil death because it causes them to be commercially shunned, which has detrimental effects on both them and their employees.[25] Therefore, Blacklisting or debarment as a deterrent should not be used in cases involving ordinary breach of contract where the explanation provided by the party in question raises a legitimate dispute.[26]

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[21] Oryx Fisheries (P) Ltd. v. Union of India, (2010) 13 SCC 427 at para 31.
[22] Supra at 13.
[23] Mahabir Auto Stores and Ors. v. Indian Oil Corporation Ltd., (1990) 3 SCC 752.
[24] Dinesh Chandra Patni vs. State of Uttarakhand and Ors., 2024 SCC OnLine Utt 2445.
[25] Raj Corporation Ltd. v. National Highway Authority of India, 2021 SCC OnLine Del 4857.
[26] The Blue Dreamz Advertising Pvt. Ltd. and Ors. vs. Kolkata Municipal Corporation and Ors., SLP (Civil) No. 11682/2018

TIME IS OF THE ESSENCE, BUT IS IT?

- *By Surabhi Rana*

In any contract, where a party who has promised to do a certain thing at a specified time, fails to do it at or before that time, the contract becomes voidable at the option of the promisee, but only if the intention of the parties was to make time essence of the contract. However, if the intention of the parties was never to make time of essence, then the innocent party cannot avoid the contract but becomes entitled to claim damages for losses caused to such a party. This principle is enunciated in Section 55 of the Indian Contract Act, 1872.[1]

However, the mere existence of a clause making time of the essence, does not necessarily make time the essence of the contract.

The Hon'ble Supreme Court in Welspun Specialty Solutions Limited v. ONGC[2], while hearing a petition under Section 34, reiterated the principles required to consider time of essence. The Hon'ble Supreme Court held that the Arbitral Tribunal's reliance on contractual conditions and conduct of parties to conclude that existence of extension of time clause dilutes time being the essence of the contract was in accordance with the contractual interpretation and was not liable to be interfered with. The Hon'ble Supreme Court further held that, merely having an explicit clause is not sufficient to make time the essence of the contract. The Hon'ble Court upheld the Arbitral Tribunal's interpretation that contractual clauses having extension procedure and imposition of liquidated damages were good indicators of the fact that time was not the essence.

Recently, relying on the above precedent, the Hon'ble High Court of Delhi in **Union of India v. Parishudh Machines Pvt. Ltd.**[3], while discussing the principles of Section 55 of the Indian Contract Act in the facts of the case, opined that the party suffering delay had the option of cancelling the contract on more than one occasion, however, they chose to extend the time period for delivery from time to time. The party also chose not to impose damages or make any claims. The Hon'ble Court held that examining the totality of all circumstances and facts, it cannot be said that time was of the essence of the contract. Further, the Hon'ble High Court of Delhi in **Sudha Dewan v. JMD Buildcon**[4] also held that apart from a holistic reading of the contract in question and surrounding circumstances, the conduct of the parties was also to be seen while determining whether time is of the essence.

[1] **55.Effect of failure to perform at fixed time, in contract in which time is essential**.—When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.
Effect of such failure when time is not essential.—If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.
Effect of acceptance of performance at time other than that agreed upon.—If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so.

[2] 2021 SCC OnLine SC 1053
[3] 2024 SCC Online Del 5536
[4] 2024 SCC Online Del 3415

It is clear from the above that having a stipulated clause in the contract will not make time of essence but rather the intention of both parties will define the same. The said intention can be ascertained either from express terms or implied terms. For instance, circumstances of the contract and nature of the subject matter of the contract play a huge role in determining whether time is of essence or not. Time in contracts for sale of immovable property might not be of essence but in a few situations, the nature of property, type of transaction and surrounding circumstances may make time of the essence.[5] The Hon'ble Supreme Court has held that the proposition that time in a transaction related to immovable property is normally not of essence, is not an absolute rule but has several exceptions, one of them being where the contract is related to a commercial enterprise, wherein the contract is for purchase of land or for such purposes or more directly for the prosecution of trade.[6] The onus to plead and to prove that time is of the essence of the contract is on the person alleging it. Whereas, normally in construction contracts, there is a stipulated clause making time essence of the contract, however, existence of any clause providing for extension of time or damages, dilutes the time is of essence clause.

Making time essence of the contract

In situations where time is not of essence, it can be made so by a subsequent notice given by the party not in default. The contract cannot be terminated or cancelled without giving notice to the other party to complete the contract.

In **Hind Construction Contractors v. State of Maharashtra**[7], a 3-judge bench of the Hon'ble Supreme Court, while dealing with a building and engineering contract, held that where time is not of the essence, it can be made so by subsequent notice to fix a reasonable time for completion. This is also in consonance with Section 46 of the Indian Contract Act, 1872.

Section 46 states that, where, by the contract, a promisor is to perform his promise without application by the promisee and no time for performance is specified, the obligation must be performed within a reasonable time and as per the explanation of the said section, what is a reasonable time in each case is a question of fact. In **Claude- Lila Parulekar v. Sakal Papers Pvt Ltd**.[8], the Hon'ble Supreme Court held that it is necessary that the said notice must expressly or by necessary implication say that time is being made of essence.

Acceptance of performance after the specified time and waiver

However, time might not remain the essence of the contract in certain situations. After the time fixed under the contract has lapsed, and the innocent party decides to take the benefit of such contract after the lapse of the stipulated time period, such party waives its right and further cannot insist on time being of the essence of the contract, in order to avoid the contract.[9] The Hon'ble Delhi High Court in **Union of India v. Satish Builders**[10] upheld the Arbitral Tribunal's grant of loss of profits due to prolongation of the contract period. The Ld. **Tribunal** had observed that there were certain essential conditions for claiming loss of profits i.e. (a) proof of definite breach of contract; (b) actual loss suffered with evidence; (c) institution of claim at appropriate time ;(d) proof of efforts to avoid such losses and (e) notice under Section 55 of the Indian Contract act, 1872. The Ld. **Tribunal** further concluded, that, in the facts of the case, time did not remain an essence of the agreement on account of unilateral extension granted by the party (Petitioner) without levy of compensation. The Claimant (Respondent) was held entitled to loss of profits on account of prolongation of contract period.

[5] Chand Rani v. Kamal Rani (1993) 1 SCC 519
[6] Citadel Fine Pharmaceuticals v. Ramaniyam Real Estates Pvt. Ltd AIR 2011 SC 3351
[7] AIR 1979 SC 720
[8] (2005) 11 SC 73
[9] Phamindra Kishore Pal v. State of Tripura, 2017 SCC Online Tri 190
[10] 2024 SCC Online Del 6865

Consequences when Time is of essence of the contract

In terms of Section 55 of the Indian Contract Act 1872, when a party fails to perform its promise/obligation under the contract within the stipulated time period and time is of the essence of the contract, the contract becomes voidable at the option of the innocent party. Once the innocent party exercises the option of avoiding the contract, it can seek return of the advantage which the other party has received. In case of failure to perform the contract within the stipulated time period, the innocent party becomes entitled to claim (a) termination of the contract and (b) damages from breaching party for fundamental breach of the contract. In a situation where the parties did not intend to make time of the essence of the contract, the contract is not voidable, but the innocent party is entitled to compensation for loss occasioned without the requirement of service of any notice upon the breaching party. In addition, as discussed above, if the innocent party accepts late performance of a voidable contract where time is of essence, without notifying the other party of their intention to seek compensation, the innocent party forfeits the right to claim such compensation.[11]

Conclusion

Existence of a '*time is of the essence*' clause, just on the face of the contract, is not enough to make time of essence of that contract. A variety of factors and circumstances surrounding the intention of parties are to be taken into consideration while determining whether time is of the essence of the contract or not. It becomes important to convey the true intention of both parties in the terms of the contract. Any clause for liquidated damages or extension of time along with '*time is of the essence*' clause dilutes the effect of time being of essence and this needs to be kept in mind while drafting of such contracts.

Additionally, acceptance of delayed performance will render the 'time is of the essence' clause inapplicable and if any claim needs to be made, the same should be reserved at the time of grant of such extension or acceptance of such delayed performance. In this scenario, either party must take a clear stand that any extension granted or accepted is without prejudice to the claim of actual damages or liquidated damages, as the case may be.

Hence, adjudication upon whether time is of the essence of the contract or not becomes important in determining whether the innocent party is entitled to avoid the contract or seek compensation for non-performance from the defaulting party.

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[11] Supra endnote (iii)

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WORKMEN DUES UNDER INSOLVENCY & BANKRUPTCY CODE: CASE STUDY OF ANUJ BAJPAI VS. EPFO

- *By Swastik Shukla*

The Insolvency and Bankruptcy Code, 2016 is a landmark legislation in India's commercial regulation jurisprudence. The law attempts to provide comprehensive regulation of asset reconstruction process in India and provides for a convenient exit for financially struggling businesses and their investors. As one of the most significant developments in Indian jurisprudence, this Code not only provides a comprehensive procedure for resolving failing businesses and helping creditors recover their dues, but it also creates a framework whereby said resolution can take place without interference from litigation claims arising out of different statutes.

Background of the Case

The Corporate Debtor (**CD**) in the present case was a shirt-manufacturing company, that underwent liquidation wherein the liquidator, Mr. Anuj Bajpai took over the company's assets[1]. The Employee Provident Fund Authority (**EPF Authority**), established under the Employee Provident Fund Act, 1952 (**EPF Act**), demanded that CD needs to make payments to the EPF and pay damages under Section 14B of EPF Act[2] and interests under Section 7Q of the EPF Act[3], beside paying the dues that it (the CD) owes to the workmen/employees.

The Liquidator contested this claim of the EPF Authority, stating that while dues payable to workmen are indeed exempted from the liquidation estate of the CD (in accordance with Section 36(4)(iii) of the Insolvency and Bankruptcy Code[4] (**IBC**), the damages and interests payable under EPF Act are paid to EPF Authority (i.e., the Respondents in the present case) and not to the employees. Thus, the Liquidator contested that the said damages and interests should not be exempted from the liquidation estate. Instead, the Liquidator/Appellant argued that only an amount of 34.5 lakhs which was payable to the EPF Authority (and subsequently was to be distributed to the employees) should be exempted from the liquidation estate under Section 36(4) of the IBC and not the damages and interests (which are also paid to the EPF Authority by the employer, but which are not distributed to the workmen).

While the first application was filed before the Ld. National Company Law Tribunal, Mumbai (**NCLT, Mumbai**), the Appellant preferred the present appeal before the Hon'ble National Company Law Appellate Tribunal, Delhi (**NCLAT**) which also ruled in favour of the Respondent (EPF Authority) and against the Appellant.

Issues Identified

1. Whether the damages and interests payable will be considered as dues owed to workmen/employees and will be exempted from liquidation estate?

2. Whether the damages and interests payable to EPF Authority will be exempted from liquidation estate?

[1] 2024 SCC OnLine NCLAT 886.
[2] The Employees Provident Fund and Miscellaneous Provisions Act, 1952, Section 14B.
[3] The Employees Provident Fund and Miscellaneous Provisions Act, 1952, Section 7Q.
[4] Insolvency & Bankruptcy Code, 2016, Section 36(4).

Findings of the Hon'ble NCLAT

The Hon'ble NCLAT in this case was posed with a question which has been brought up in the past before other benches of the Ld. National Company Law Tribunal. Firstly, the Bench discussed all the submissions/arguments put forth by both the parties. The issue-wise rulings given by the Hon'ble Bench are provided below-

1. Section 7Q of the EPF Act provides for payment of interest by employers in case there is a default on their part in paying contributions to the Employee Provident Fund. Section 14B on the other hand provides for the damages which employers need to pay to the EPF Authorities in case of default. The Hon'ble NCLAT in this context relied upon the decision of Hon'ble Supreme Court in the case of *Maharashtra State Cooperative Bank vs Assistant Provident Fund Manager*[5]. In the said judgment, the Hon'ble Apex court ruled that damages and interest payable by the employer cannot be considered as distinct from "due payable to workmen/employees", as allowing so would result in employers avoiding payment of such damages and interests by considering a part of the estate which will be used to pay back the employer's creditors. In order to prevent the Employer from evading liability under Section 7Q or 14B, the Hon'ble Apex court, and now the Hon'ble NCLAT as well, have clarified that damages and interests payable by the employers are to be considered as dues payable to workmen/employee and will be exempted from the employer's liquidation estate.

2. Given the above line of reasoning, the Hon'ble NCLAT concluded that damages and interests payable by employer are also exempted from liquidation estate. In other words, all the dues payable by employer under Sections 7A, 7Q and 14B of the EPF Act are to be paid before any other dues are paid back by the employer undergoing liquidation or any other such insolvency resolution process. The same is substantiated by Section 11 of the EPF Act[6], which states that any dues payable by employers to the EPF Authority will take precedence over any other debts owed by the employer.

3. Section 36 of the Insolvency and Bankruptcy Code 2016 provides the liquidation estate. In terms of the same provision, the liquidation estate consists of assets (tangible or intangible) owned by the CD. However, sub-section 4(a) of Section 36 provides for those assets which are exempted from the said liquidation estate. This is because although these assets are in possession of the CD, they are owned by third-party (in this case, dues owed to workmen/employees are essentially assets owned by such workmen/employees). As such, dues owed by employer to workmen/employees are exempted from the Liquidation Estate under Section 36(4) of the IBC.

Considering the overwhelmingly overriding nature of the IBC and the literal wording of Section 36(4)(a)(iii) of the said statute, there are certain identifiable issues with the ruling of the Hon'ble NCLAT in the present case. The same is discussed in the next section.

Analysis

The decision of the Hon'ble NCLAT in the present case appears to have put a full stop on a longstanding debate regarding the inclusion of EPF contributions to liquidation estate.

[5] (2009) 10 SCC 123.

[6] The Employees Provident Fund and Miscellaneous Provisions Act, 1952, Section 11.

However, the finality of this ruling on this legal question remains shaky. It remains to be seen if the Hon'ble Supreme Court gives a different line of reasoning to arrive at a different conclusion. It has to be noted that an appeal has been field against the decision of the Hon'ble NCLAT before the Hon'ble Supreme Court by Anuj Bajpai in September, although the matter remains to be listed.

Regardless, the legal question in the present case is essentially a tussle between the prevailing nature of IBC vs EPF Act. Previously, in the case of *EPFO v. Enviro Bulk Handling Systems (P) Ltd.*[7], Ld. NCLT Mumbai ruled that while it might be true that the damages collected by EPF Authorities under Section 14B is being used to compensate the employees who have suffered due to the delay in payment by employers, such damages, or the interest levied under Section 7Q as well, cannot be termed as dues owed to workmen/employees, and thus, cannot be exempted from liquidation estate under Section 36(4) of the IBC.

Considering that the Hon'ble NCLAT is directly superior to Ld. NCLT in the judicial hierarchy, the current standing on this issue is clear. The EPF Act does takes precedence over the IBC and in accordance with Section 11 of the EPF Act, any dues owed to EPF Authorities under the provisions of EPF Act. In this scenario, this provision comes directly in conflict with Section 238 of the IBC[8], which states that the provision of IBC prevails over other statutes. The question of which non-obstante clause would prevail in such scenario has always been a difficult one for Indian judicial authorities.

Considering these ambiguities in Indian jurisprudence, the two-fold issue with the present ruling of the Hon'ble NCLAT becomes clear as following-

1. Firstly, there is the issue of literal interpretation. Section 36(4)(a) clearly uses the phrase "any amount due to any workman or employee…", which clearly shows that the amount payable to workmen is to be excluded from liquidation estate defined under the same section. If the phrase clearly talks about dues only to workmen, and does not mention EPF Authority anywhere, there is no reason to interpret it as anything different. Unless and until it is clarified with substantial evidence, that the EPF Authority use the damages and interests levied under Section 14B and 7Q, respectively, to pay for the losses incurred by employees, said damages and interests should not be excluded from the liquidation estate going by literal interpretation of the provisions of IBC.

2. The clash between non-obstante clauses of Section 11 of the EPF Act and Section 238 of IBC need to be harmoniously interpreted in favour of IBC. The reason is straightforward. The IBC was introduced later in time, and even Section 11 of the EPF Act specifically mentions that it overrides the older Insolvency laws, which IBC has come to replace. It can be strongly argued that the legislators intended for the EPF Act to replace the older Insolvency laws, only for the new IBC to turn the tables.

Conclusion

The non obstante clause under Section 238 of the IBC has, in the past, overpowered the provisions of other statutes, both general and special[9]. In the present case, the dues owed by employers under the purview of IBC still became subject to the provisions of the EPF Act. In essence, the primary argument would be to harmoniously interpret the non-obstante clause under Section 238 of the IBC in favour of insolvent employer,

[7] IA 2428/2021 in CP (IB)/1319(MB)/C-III/2017.
[8] Insolvency & Bankruptcy Code, 2016, Section 238.
[9] Non-Obstante Provisions in Statutes by Ashwini Panwar and Nipun Dwivedi at https://articles.manupatra.com/article-details/Non-Obstante-Provisions-in-Statutes

and not exempt any other amount except what is due directly to workmen under Section 36(4)(a)(iii) of the IBC from the Liquidation Estate.

Historically as well, the Hon'ble Supreme Court has consistently held that if the literal meaning of a provision is clear enough, there is no need to interpret it any differently. This is beside the fact that the non-obstante clause under Section 238 of IBC ought to prevail over Section 11 of the EPF Act, keeping in line with the earlier judgments of the Indian judicial forums as far as the prevalent nature of IBC is concerned.

Regardless, what this article helps us conclude is that the tussle between liquidation estate as defined under IBC and the dues owed by employers under the EPF Act is far from over. The perspective of the Hon'ble Supreme Court on this issue is curiously awaited.

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