Between the lines...

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Key Highlights

I. Supreme Court decides on authority of a person ineligible to be appointed as an arbitrator to nominate an arbitrator

All sections and schedules cited in this case analysis, unless specified otherwise, refer to the sections and schedules of the Arbitration and Conciliation Act, 1996.

In the case of ***Bharat Broadband Network Limited v. United Telecoms Limited*** *(decided on April 16, 2019),* the Supreme Court while upholding its own decision in ***TRF Limited v. Energo Engineering Projects Limited [(2017) 8 SCC 377]*** **("TRF Ltd.")** held that appointment of arbitrator by person ineligible to be appointed as an arbitrator is not valid. This judgement was given retrospective effect and shall be applicable to all arbitrations commencing from October 23, 2015.

Facts

Bharat Broadband Network Limited (**"Appellant"**) had invited bids for a turnkey project and United Telecoms Limited (**"Respondent"**) was a successful bidder. The Appellant issued an Advance Purchase Order on September 30, 2014 which included an arbitration clause. Later, a dispute arose between the parties and the Respondent invoked the arbitration clause on January 3, 2017. According to the arbitration clause, it called upon the Appellant's Chairman and Managing Director (**"MD"**) to appoint an arbitrator. On January 17, 2017, the MD appointed Shri K.H. Khan as the sole arbitrator.

Thereafter, the Supreme Court pronounced its judgement in TRF Ltd. on July 3, 2017, where it held that since a managing director of a company which was one of the parties to the arbitration, was himself ineligible to act as arbitrator, such ineligible person could not appoint an arbitrator, and any such appointment would have to be held to be

null and void. In light of this judgement, the Appellant, despite having appointed the arbitrator itself, on October 7, 2017, made an application before the sole arbitrator to withdraw himself from the proceedings. However, the sole arbitrator rejected such application without giving any reasons.

The Appellants then filed a petition before the Delhi High Court submitting that since the arbitrator had become incapable of acting as such, as per law a substitute arbitrator should be appointed in his place. However, the Delhi High Court too rejected this petition stating that the very person who appointed the arbitrator is estopped from raising a plea that such arbitrator cannot be appointed after participating in the proceedings. The matter was then referred to the Supreme Court.

Issues

The Supreme Court examined the following issues:

1. Whether the Supreme Court judgement in TRF Ltd. can apply retrospectively to the present case?
2. Whether the Appellant, having appointed the arbitrator, can make an application for removal of the arbitrator?
3. Whether the parties have waived their right to not allow an ineligible party to be appointed as an arbitrator by an express agreement?

Relevant provisions

For ease of reference, the sub-sections (4) and (5) of Section 12 have been reproduced below:

"Section 12 - Grounds for challenge.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing."

Arguments

The Appellant argued that since the appointment of Shri Khan is in respect of eligibility to be appointed as an arbitrator, his appointment should be *void ab initio.* Further, the judgment in TRF Ltd. is declaratory of the law and would apply to the facts of this case. Additionally, since there was no express agreement in writing between the parties subsequent to the disputes having arisen between them, the proviso to Section 12(5) would not be applicable.

The Respondent argued that Section 12(4) makes it clear that a party may challenge the appointment of an arbitrator appointed by it only for reasons of which it became aware after the appointment has been made. In the facts of the present case, since Section 12(5) and the Seventh Schedule were in the statute book since October 23, 2015 (as they were introduced by way of Arbitration and Conciliation (Amendment) Act, 2015), the Appellant was fully aware that the appointment of the MD would be null and void. This being so, Section 12(4) acts as a bar to the petition filed by the Appellant. Further, Section 13(2) makes it clear that a party who intends to challenge the appointment of the arbitrator, shall, within 15 days after becoming aware of its disqualification, send a written statement of reasons for the challenge to the arbitrator. This was not done within the time frame stipulated, as a result of which, the petition filed by the Appellant should be dismissed. Also, the proviso to Section 12(5) provides for the words *"express agreement in writing"* which is clearly met in the facts of the present case. This need not be in the form of a formal agreement between the parties, but can be culled out, from the appointment letter issued by Appellant as well as the statement of claim filed by the Respondent before the arbitrator leading, therefore, to a waiver of the applicability of Section 12(5).

Observations of the Supreme Court

The Supreme Court held that, it was clear that the MD could not have acted as an arbitrator himself due to his ineligibility under Schedule 5. Whether such ineligible person could himself appoint another arbitrator was only made clear by Supreme Court's judgment in TRF Ltd. on July 3, 2017 holding that an appointment made by an ineligible person is itself *void ab initio.* Thus, it was only on July 3, 2017, that it became clear beyond doubt that the appointment of Shri Khan would be *void ab initio.* There is no doubt in this case that disputes arose only after the introduction of the new Section 12(5) on October 23, 2015, and Shri Khan was appointed long after on January 17, 2017. The judgment in TRF Ltd. nowhere states that it will apply only prospectively, that is, the appointments that have been made of persons such as Shri Khan would be valid if made before the date of the judgment. Considering that the appointment in the case of TRF Ltd. of a retired Judge of Supreme Court was set aside as being non-est in law, the appointment of Shri Khan in the present case must follow suit.

Deciding on the issue of whether Appellant can make an application for removal of the arbitrator, the Supreme Court held that Section 12(4) has no applicability to an application made to the court under Section 14(2) to determine whether the mandate of an arbitrator has terminated as he has, in law, become unable to perform his functions because he is ineligible to be appointed as such under Section 12(5) of the Act.

Concerning the issue on whether there was a waiver under the proviso to Section 12(5), it was stated that the proviso to Section 12(5) will only apply if subsequent to the disputes having arisen between the parties, the parties waive the applicability of Section 12(5) by an express agreement in writing. The expression *"express agreement in writing"* refers to an agreement made in words as opposed to an agreement which is to be inferred by conduct. The Supreme Court then referred to Section 9 of the Contract Act, 1872 which states: *"In so far as a proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made*

otherwise than in words, the promise is said to be implied". It is thus necessary that there be an "express" agreement in writing. This agreement must be an agreement by which both parties, with full knowledge of the fact that Shri Khan is ineligible to be appointed as an arbitrator, still go ahead and say that they have full faith and confidence in him to continue as such. The facts of the present case disclose no such express agreement. The appointment letter which is relied upon as indicating an express agreement on the facts of the case is dated January 17, 2017 and on this date, the Appellant was certainly not aware that Shri Khan could not be appointed by the MD as the law only became clear after the declaration of the law by the Supreme Court in TRF Ltd. on July 3, 2017. Further, the fact that a statement of claim was filed before the arbitrator, would not mean that there was an express agreement in words which would make it clear that both the parties wish Shri Khan to continue as arbitrator despite being ineligible to act as such.

Decision of the Supreme Court

The Supreme Court overruled the decision of the Delhi High Court and held that (1) the Appellant should be allowed to file an application for terminating the mandate of the arbitrator; (2) TRF Ltd. case can be applied retrospectively; and (3) there was no express agreement between the parties to allow an ineligible party to be appointed as an arbitrator.

VA View

The legitimacy of an arbitral proceeding hinges largely on the independence and impartiality of the appointed arbitrator. Furthering this purpose, amendments were made in October, 2015 by way of Arbitration and Conciliation (Amendment) Act, 2015 which increased the disclosure requirements of the arbitrator and inserted Fifth and Seventh Schedule which provides a guide in determining circumstances for ineligibility of the arbitrator. The TRF Ltd. case in 2017 went further to hold that a person to be appointed as an arbitrator who also has the authority to nominate another arbitrator, on becoming ineligible will lose its authority to appoint an arbitrator as well. The present judgement went even further and held that the ratio of the TRF Ltd. case would apply to all arbitrations which commenced on or after October 23, 2015. Aside from this, the Supreme Court ensured that the sanctity attributed to the appointment of an impartial arbitrator is only waived by an express written agreement where both parties have full knowledge of the legal ineligibility of the arbitrator and not waived offhandedly by interpreting the implicit conduct of the parties. The key takeaway for the parties is to ensure that neutrality of the arbitrator is maintained through and through and take utmost precaution when appointing an ineligible arbitrator by executing a separate written agreement post the dispute.

II. Delhi High Court: Provisions of Recovery of Debts and Bankruptcy Act, SARFAESI and IBC do not prevail over provisions of the PMLA

A division bench of the Delhi High Court in case of ***The Deputy Director Directorate of Enforcement Delhi v. Axis Bank & Others*** *(decided on April 2, 2019)* while jointly considering 5 appeals against the order of Appellate Tribunal under the Prevention of Money Laundering Act, 2002 (**"PMLA"**) held that provisions of Recovery of Debts and Bankruptcy

Act, 1993 (**"RDBA"**), the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (**"SARFAESI"**) and the Insolvency and Bankruptcy Code, 2016 (**"IBC"**) do not prevail over provisions of the PMLA and observed that these legislations are to be construed harmoniously, without one being in derogation of the other.

Facts

In five different cases, banks and financial institutions had granted credit facilities against hypothecation/charge over certain assets. In each of these cases, the owner of the assets was charged under certain provisions of the PMLA and orders were passed for attachment of properties charged to banks and financial institutions affecting their vested rights under other statutes such as RDBA, SARFAESI and IBC. The Appellate Tribunal set aside these attachment on various grounds. The orders of the Appellate Tribunal were challenged before the Delhi High Court.

Issues

The issues formed by the Delhi High Court for determination were:

1. Whether the provisions of RDBA, SARFAESI and IBC prevail over PMLA?
2. Whether interest created in a property prior to event of money laundering leading up to the attachment of property takes priority over the attachment?
3. Whether a mere nexus between the attached property where it did not qualify as "proceeds of crime" under the PMLA and the party accused of money laundering was sufficient for the attachment to take place?

Important observations and conclusions of the Delhi High Court

a) It is not only a "tainted property" that is to say a property acquired or obtained, directly or indirectly, from proceeds of criminal activity constituting a scheduled offence which can be attached, but also any other asset or property of equivalent value of the offender of money-laundering which has a link or nexus with the offence (or offender) of money-laundering.

b) If the "tainted property" is not traceable, or cannot be reached, or to the extent found is deficient, any other asset of the person accused or charged under PMLA can be attached provided it is near or equivalent in value, the order of confiscation being restricted to take over by the government of illicit gains of crime.

c) The objective of PMLA being distinct from the purpose of RDBA, SARFAESI and IBC, the latter three legislations do not prevail over the former. The PMLA, by virtue of Section 71, has the overriding effect over other existing laws in the matter of dealing with "money-laundering" and "proceeds of crime" relating thereto. The PMLA, RDBA, SARFAESI and IBC must co-exist, each to be construed and enforced in harmony, without one being in derogation of the other with regard to the assets respecting which there is material available to show the same to have been "derived or obtained" as a result of "criminal activity relating to a scheduled offence" and consequently being "proceeds of crime", within the mischief of PMLA.

d) An order of attachment under PMLA is not illegal only because a secured creditor has a prior secured interest in the property, within the meaning of the expressions used in RDBA and SARFAESI. Similarly, mere issuance of an order of attachment under PMLA does not render illegal a prior charge of a secured creditor, the claim of the latter for release from PMLA attachment being dependent on its bonafides.

e) In case of secured creditor pursuing enforcement of "security interest" in the property sought to be attached under PMLA, such secured creditor having initiated action for enforcement prior to the order of attachment under PMLA, the directions of such attachment under PMLA shall be valid and operative subject to satisfaction of the charge of such third party and restricted to such part of the value of the property as is in excess of the claim of the said third party.

f) If the order confirming the attachment has attained finality, or if the order of confiscation has been passed, or if the trial of a case under Section 4 of the PMLA has commenced, the claim of a party asserting to have acted bonafide or having legitimate interest in the nature mentioned above will be inquired into and adjudicated upon only by the special court.

VA View

Notably, the decision of the Delhi High Court took a harmonious construction of RDBA, SARFAESI, IBC and PMLA and provided clarity that there are in fact no inconsistencies in the provisions of the said legislations given their distinctive objectives. The Delhi High Court emphasized the need for holding to the provisions of the PMLA as providing other statutes with overriding power over its provisions would negate the object of PMLA and defeat the entire purpose of its enactment. A different view could conceivably also provide a means of raising challenges against proceedings under PMLA by offenders who could raise an ostensibly legitimate claim under RDBA, SARFAESI or IBC. Another important principle laid down is that not only can assets out of proceeds of crime be attached but even any asset having a link or nexus with the offence (or offender) of money-laundering could be attached. If the attached asset is not traceable or cannot be reached or is deficient, then any other asset of the person accused of equivalent value can also be attached.

III. Supreme Court holds that courts cannot appoint an arbitrator basis an inadequately stamped agreement containing the arbitration clause

A two judge bench of the Supreme Court, in the case of ***Garware Wall Ropes Limited v. Coastal Marine Constructions and Engineering Limited*** *(decided on April 10, 2019)* held that the arbitration clause contained in an agreement or conveyance is not separable from the said agreement or conveyance and hence, if such agreement or conveyance is insufficiently stamped, the court cannot appoint an arbitrator in the dispute in response to an application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (**"Arbitration Act"**).

Facts

Garware Wall Ropes Limited (**"Appellant"**) entered into an agreement with Coastal Marine Constructions and Engineering Limited (**"Respondent"**) on which adequate stamp duty was not paid by the parties. Annexure to the agreement contained an arbitration clause, which provided for appointment of a sole arbitrator by the Appellant and Respondent jointly, in agreement. A dispute arose and the Appellant terminated the agreement. The Respondent sent a notice nominating a sole arbitrator, which was unacceptable to the Appellant. Hence, the Respondent approached the Bombay High Court, which appointed the same person as sole arbitrator. Aggrieved by the decision of the Bombay High Court, the Appellant approached to the Supreme Court and the following issue came up for determination:

Issue

What is the effect of an arbitration clause contained in an agreement which is insufficiently stamped?

Arguments

The Appellant argued that regardless of Section 11(6A) of the Arbitration Act, which requires courts to only decide on prima-facie existence of an arbitration clause in an agreement, the Supreme Court's decision in ***SMS Tea Estates Private Limited v. Chandmari Tea Company Private Limited [(2011) 14 SCC 66]*** **("SMS Tea Judgement")** would be applicable here. In SMS Tea Judgement, it was held that where there is an arbitration clause in an unstamped agreement, it cannot be acted upon, and the court should impound the documents and proceed with the Section 11 application under the Arbitration Act only after the necessary stamp duty is paid. The Appellant said that the Maharashtra Stamp Act, contained provisions similar to the Indian Stamps Act, 1899 (**"Indian Stamp Act"**) and hence the SMS Tea Judgment shall be applicable in this case as well since Section 11(6A) of the Arbitration Act does not interfere with the Indian Stamp Act.

The Respondent argued that an arbitration clause is independent from the agreement of which it is a part and hence it can be acted upon even if the agreement containing it is unstamped. Further, the Respondent contended that the Indian Stamp Act is a fiscal statute and Section 11(6A) of the Arbitration Act only envisaged courts to rule on the existence or non-existence of an arbitration clause, and not inquire into its substance or validity, leaving those questions to the arbitrator(s), in order to avoid a mini trial. In the present case, it was argued, the insufficiently stamped agreement would only cast a shadow on the validity of the arbitration agreement but its existence is beyond doubt, hence, the Bombay High Court was correct in appointing the sole arbitrator despite the agreement being insufficiently stamped. Further, an application under Section 11 of the Arbitration Act is to be disposed of within 60 days and if the court impounds the documents pending decision of revenue authorities, the 60 days period will lapse.

Observations of the Supreme Court

The Supreme Court analyzed its earlier decision in SMS Tea Judgement, and the introduction of Section 11(6A) of the Arbitration Act, which were the two pillars of basing the current decision. It was observed that under the

Maharashtra Stamp Act, an agreement becomes enforceable in law only when it is duly stamped. It was further observed that an arbitration clause cannot be bifurcated entirely from the agreement it is contained in, as the stamp legislation applies to the entire agreement. Consequently, an arbitration clause would not 'exist' when the underlying agreement is not enforceable under law. Accordingly, the Supreme Court held that under Section 11 of the Arbitration Act, a court can impound an agreement if it is not stamped in accordance with the mandatory provisions of the applicable stamp legislation.

Parallel to these proceedings, a full bench of the Bombay High Court was seized of a matter with a similar question of law. Just a few days before this judgment, the Bombay High Court in the case of ***Gautam Landscapes Private Limited v. Shailesh Shah*** *(decided on April 4, 2019),* held that for appointment of arbitrators under Section 11 of the Arbitration Act, it was not necessary for courts to await the adjudication of stamp duty by stamp authorities in cases where a document was not adequately stamped. The Supreme Court held that this judgment is not good in law, and thereby set it aside.

Applying the doctrine of harmonious construction, the Supreme Court interpreted the scope and application of section 11(13) of the Arbitration Act read with Sections 33 and 34 of the Indian Stamp Act, and laid down a procedure to be followed by courts and stamp authorities when the agreement in question is unstamped. It was held that the Bombay High Court must impound the agreement which does not bear the requisite stamp duty. Thereafter, the unstamped or insufficiently stamped agreement should be handed over to the relevant authority under the relevant stamp legislation, which will decide the issues relating to stamp duty and penalty as expeditiously as possible, and preferably within a period of 45 days from the date on which the authority receives the agreement. Once the requisite stamp duty and penalty is paid by the parties, the parties can bring the instrument to the notice of the High Court. The High Court will then proceed to expeditiously hear and dispose of the Section 11 application under the Arbitration Act.

Decision of the Supreme Court

The Supreme Court allowed the appeal and held that a court cannot appoint an arbitrator when the contract containing arbitration clause is insufficiently stamped. In light of the same, the matter was remitted to the Bombay High Court for adjudication.

VA View

The Supreme Court has settled the position on a long-drawn issue of law, which was creating confusion due to contrary positions in different High Courts. The Supreme Court has balanced the fiscal interests of the country, while at the same time ensuring that the efficacy of alternate dispute resolution is not disrupted in the process. However, the primary concern here is the efficacy of the procedure prescribed for impounding the instrument and appointment of arbitrator(s) thereafter. The revenue authorities may not be able to adhere to the 45 days timeline, which may ultimately lead to a major delay in the arbitration proceedings.

IV. NCLAT holds that shareholders can file application to approve settlement with creditors even after appointment of official liquidator

In a recent judgement in the case of ***Rasiklal S. Mardiya v. Amar Dye Chem Limited*** *(decided on April 8, 2019),* the National Company Law Appellate Tribunal (**"NCLAT"**) has stated that shareholders can file application to approve settlement with creditors even after appointment of official liquidator.

Facts

The case arises from a winding up petition filed before the Bombay High Court in 1998, upon the recommendation of the Board for Industrial and Financial Reconstruction (**"BIFR"**). In 2008, Rasiklal S. Mardiya, the promoter of Amar Dye Chem Limited (**"Appellant"**), attempted to resolve differences with the creditors. The Bombay High Court granted him liberty to do so. He subsequently filed application for convening the meeting of shareholders and creditors which was allowed by the Bombay High Court in 2010. The official liquidator did not object to these proceedings. During the pendency of the same, the Ministry of Corporate Affairs on December 7, 2016, issued the Companies (Transfer of Pending Proceedings) Rules, 2016 (**"Transfer Rules"**) transferring pending proceedings to the respective National Company Law Tribunals (**"NCLT"**). Consequently, the petition was transferred to the NCLT, Mumbai in 2017.

The matter was continued in NCLT, Mumbai which held that under Section 391(1) of the Companies Act, 1956 (**"Old Act"**), of which the corresponding provision in the Companies Act, 2013 (**"New Act"**) is Section 230(1), once a company is in liquidation, only the liquidator was authorized to file a petition for compromise or arrangement. Aggrieved by the NCLT Mumbai's judgement, the Appellant approached the NCLAT.

Issues

The following issues were examined by the NCLAT:

1. Whether the NCLT, Mumbai was correct in holding that the liquidator alone can file for compromise or settlement?

2. Whether the transfer of proceedings from the Bombay High Court to NCLT, Mumbai was good in law?

Arguments

Relying on the observations of the Bombay High Court, the Appellant claimed that he had locus to submit the scheme which was permitted by the Bombay High Court and his locus was wrongly held against him by the NCLT, Mumbai. Reference was made to the Order of the Bombay High Court dated July 21, 2011, whereby extension of time was granted for convening meetings of the shareholders and creditors. It was argued that official liquidator of the Amar Dye Chem Limited (**"Respondent"**), had never objected to the right of Appellant to file such scheme of compromise/ arrangement under Section 391–394 of the Old Act and therefore the NCLT, Mumbai could not have

reopened the issue whether or not the Appellant was competent to file the scheme when the company was already in liquidation.

The Respondent filed reply and opposed the appeal trying to justify the view taken by NCLT, Mumbai stating that when the company is in liquidation, only the official liquidator could apply for scheme of arrangement/ compromise. The Respondent, cited the judgement of the Jharkhand High Court in the case of ***Rajiv Sachdeva v. Rajhans Steel Limited (In Liquidation)*** *(decided on August 12, 2010)* (**"Rajiv Sachdeva Judgement"**) to support the NCLT, Mumbai's conclusion on who can file for settlement, where it was stated that when the proceedings had been initiated initially before BIFR, it becomes matter of record that rehabilitation was not possible and consequently, the company was required to be wound up. The Respondent drew the NCLAT's attention to the Delhi High Court judgement in case of ***Sunil Gandhi and Others v. A.N. Buildwell Private Limited and Others*** *(decided on March 15, 2017)* (**"Sunil Gandhi Judgement"**). The NCLT, Mumbai had only relied on the Sunil Gandhi Judgement to ascertain the issue regarding filing of application by official liquidator for compromise or settlement. The Respondent's contention was that Sunil Gandhi Judgement also comprehensively covers the second question insofar as it holds that NCLT should not exercise jurisdiction when winding up proceedings is in advanced stage in the High Court. It was also averred that transferring the proceedings was not envisaged in the Transfer Rules and should be avoided as it only leads to protracted litigation.

Observations of the NCLAT

The NCLAT took note that the NCLT, Mumbai had not addressed the first question on merits at all. Rather, it had only read Section 391(1) of the Old Act/ Section 230(1) of the New Act restrictively to hold that the liquidator "alone" could file for settlement. The NCLAT has noted that the NCLT, Mumbai had read the word "alone" into the provision which did not appear to be the legislature's intention.

The NCLAT went on to analyse the judgement of the Division Bench of Delhi High Court in ***National Steel & General Mills v. Official Liquidator*** *(decided on March 9, 1989)* (**"National Steel Judgement"**) wherein it was held that liquidator is not the exclusive person who can move an application under Section 391 of the Old Act but is only an additional person. Categorizing the liquidator's power as a general power, the Delhi High Court had underlined that it does not take away the special power of the member, creditor and the company to file a petition for settlement, after the commencement of liquidation proceedings. The NCLAT also found resonance of this opinion in the Supreme Court's judgement in ***Meghal Homes (P) Limited v. Shree Niwas Girni K.K. Samiti*** *(decided on August 24, 2007)* (**"Meghal Homes Judgement"**).

The National Steel Judgement and the Meghal Homes Judgement were weighed against the Jharkhand High Court's observations in the Rajiv Sachdeva Judgement. The NCLAT distinguished the Rajiv Sachdeva Judgement insofar as the observations therein could aid in deciding the merits of the instant matter, but it does not express judicial opinion on Section 391 of the Old Act, per se. Hence, on the first issue, the NCLAT stated that the Appellant could have filed a petition for settlement with creditors before NCLT/Company Court under Section 391 of the Old Act.

The NCLAT answered the second issue, which was the issue of which of the two fora is appropriate for filing of a settlement application in the instant matter. It relied on the extensive observation made by the Delhi High Court in Sunil Gandhi Judgement. Finding itself in agreement with the Delhi High Court, the NCLAT stayed the NCLT, Mumbai proceedings and allowed the Appellant to move to the Bombay High Court. This was done as the NCLAT found the transfer to be bad in law as the Transfer Rules explicitly stated that all cases where winding up was ongoing following BIFR recommendation were to stay with the respective High Courts.

Decision of the NCLAT

The NCLAT reversed the NCLT, Mumbai's stance and stated that the Appellant could have filed a petition for settlement with creditors before NCLT/Company Court under Section 391 of the Old Act. On the second issue, the NCLAT stated that the transfer of proceedings to the NCLT, Mumbai was bad in law.

VA View

The legislature has been resolute in its intention to keep promoters out of the corporate insolvency resolution process. Section 29A was inserted into the Insolvency and Bankruptcy Code, 2016 vide the Insolvency and Bankruptcy Code (Amendment) Act, 2018 to prohibit promoters from bidding for their companies during the corporate insolvency resolution process as well as in case of liquidation as a going concern. This was done to take care of the moral hazard that is apparent in allowing promoters who were primarily responsible for the company's mismanagement and loss of value to buy it back later at a discount. This judgement's practical application may strike a dent into the legislature's intention. It may create a backdoor entry for promoters to cling on to their companies. Hence, in all the fresh liquidation proceedings before the NCLTs, it may have to entertain the application of the promoters for settlement/compromise.

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