VAISH ASSOCIATES ADVOCATES ESTD. 1971

Between the lines...

A BRIEFING ON LEGAL MATTERS OF CURRENT INTEREST

KEY HIGHLIGHTS

* **Supreme Court** allows curative petition against an arbitral award.

* **Delhi High Court:** Shares registered in favor of the pledgee as the 'beneficial owner' does not amount to sale of shares.

* **Supreme Court:** Stamp duty not applicable on every individual increase in the authorised share capital once the cap amount is paid.

* **Supreme Court:** The payment of unearned increase in value payable to the lessor, post a merger or amalgamation of companies upheld.

I. Supreme Court allows curative petition against an arbitral award.

In the matter of ***Delhi Metro Rail Corporation Limited v. Delhi Airport Metro Express Private Limited [Curative Petition (C) Nos. 108-109 of 2022]***, decided on April 10, 2024, the Supreme Court ("**SC**") bench allowed a curative petition filed by Delhi Metro Rail Corporation Limited ("**Petitioner**" / "**DMRC**") and held that the SC previously erred in interfering with the judgment pronounced by the Division Bench of High Court of Delhi ("**Delhi HC**") which had set aside the arbitral award passed against the Petitioner.

Facts

Petitioner is a company wholly-owned by the Government of India and the National Capital Territory of Delhi. Delhi Airport Metro Express Private Limited ("**Respondent**" / "**DAMEPL**") is a special purpose vehicle incorporated by a consortium comprising of Reliance Infrastructure Limited and Construcciones Y Auxiliar de Ferrocarriles SA, Spain. The aforesaid consortium was awarded the contract for the construction, operation and maintenance of the Airport Metro Express Line ("**AMEL**") in the year 2008 ("**2008 Agreement**"). The 2008 Agreement envisaged a public-private partnership for providing metro rail connectivity between New Delhi Railway Station and the Indira Gandhi International Airport and other points within Delhi. Under the 2008 agreement, the Respondent was granted exclusive rights, license and authority to implement the project and concession in respect of AMEL.

However, in April 2012, the Respondent sought a deferment of the concession fee by citing delays in providing access to the stations by the Petitioner. Thereafter, the Respondent expressed its intention to halt operations alleging that the metro line was unsafe to operate and stopped the operations on July 8, 2012. Thereafter, on July 9, 2012, the Respondent issued a notice to the Petitioner containing a "non-exhaustive" list of eight defects which according to it affected the performance of its obligations under the 2008 Agreement and further stated that the aforesaid defects caused "material adverse effect" on the performance of the obligations by it to operate, manage and maintain the project.

Thereafter, on October 8, 2012, the Respondent issued a notice terminating the 2008 Agreement on the ground that the period of 90 days had elapsed since the cure notice in spite of which the defects had not been cured within the cure period. In view of the afore-mentioned, the Petitioner initiated conciliation proceeding as provided in terms of the 2008 Agreement. However, upon failure of the conciliation proceeding, the Petitioner initiated arbitration proceeding on October 23, 2012 as per the 2008 Agreement. Accordingly, in August 2013, the Arbitral Tribunal was constituted. Thereafter, on May 11, 2017, the three-member Arbitral Tribunal passed a unanimous award in favour of the Respondent. In the arbitral award, it was held that the Respondent was entitled to: the termination payment of INR 2782.33 crores plus interest in terms of the 2008 agreement; expenses incurred in operating AMEL from January 7, 2013 to June 30, 2013 and debt service made by the Respondent during this period to the tune of INR 147.52 crores plus interest at 11% per annum from the date of payment of stamp duty; refund of the bank guarantee amounting to INR 62 crores plus interest at 11% per annum which had been encashed and to security deposits with the service providers, amounting to INR 56.8 lakhs plus interest at 11% per annum and that the Petitioner was entitled to INR 46.04 crores as concession fee for the period from February 23, 2012 to January 7, 2013.

The aforesaid arbitral award was challenged by the Petitioner before the Learned Single Judge of the Delhi HC under Section 34 (*Application for setting aside arbitral awards*) of the Arbitration and

Conciliation Act, 1996 ("**Arbitration Act**"). Learned Single Judge of the Delhi HC upheld the arbitral award observing that so long as the award was reasonable and plausible, considering the material before the Tribunal, no interference was warranted, even if an alternate view was possible. It was further held that the Arbitral Tribunal had analyzed the material and evidence in great detail and arrived at a plausible conclusion. Hence, the Learned Single Judge of the Delhi HC dismissed the aforesaid petition.

Thereafter, the Petitioner preferred an Appeal under Section 37 (*Appealable orders*) of the Arbitration Act before the Division Bench of Delhi HC. The Division Bench of Delhi HC partly set aside the arbitral award as perverse and patently illegal for the reasons as stated hereinafter. On the aspect of validity of termination, the Division Bench of Delhi HC observed that the Arbitral Tribunal had not correctly interpreted the clause of the 2008 Agreement regarding the duration of cure period. Further, it was observed that the arbitral award was silent and unreasoned on the issue of termination.

Aggrieved by the decision of the Division Bench of Delhi HC, the Respondent preferred a special leave petition under Article 136 (*Special leave to appeal by the Supreme Court*) of the Constitution of India. In light of the afore-mentioned, a two-judge bench of the SC allowed the appeal and restored the arbitral award. Briefly stated, the SC observed that there was no ambiguity in the date of termination and even if a different view from the view taken by the Arbitral Tribunal was possible, construction of the provisions of the 2008 agreement was within the exclusive jurisdiction of the Arbitral Tribunal. A review petition was filed against the aforesaid decision, however, the same was dismissed.

Thereafter, the Petitioner approached the SC in curative petition under Article 142 (*Enforcement of decrees and orders of the Supreme Court and orders as to discovery, etc.*) of the Constitution of India.

Issues

1. Whether the curative petition is maintainable.

2. Whether the SC was justified in restoring the arbitral award which had been set aside by the Division Bench of the Delhi HC on the ground that it suffered from patently illegality.

Arguments

Contentions of the Petitioner:

The Petitioner submitted that the Arbitral Tribunal ignored vital evidence, warranting the interference of Delhi HC under Section 37 of the Arbitration Act. The Petitioner further contended that interference of the Delhi HC with the patent illegality was justified and the SC ought to have refrained from exercising its powers enshrined under Article 136 of the Constitution of India. Further, it was contended that miscarriage of justice as per the decision of the SC in the matter of ***Rupa Hurra v. Ashok Hurra [(2002) 4 SCC 388]*** ("**Rupa Hurra Case**") is linked with patent illegality.

It was contended by the Petitioner that considering the definition of "material adverse effect" under the 2008 Agreement, the defects had no material adverse effect on the Respondent's performance of obligations under the 2008 Agreement, which is apparent from the very fact that the metro line was working.

It was further submitted that in terms of the 2008 Agreement, termination was effective only on January 7, 2013 and on the aforesaid date, none of the defects were pending to be rectified by the Petitioner.

Contentions of the Respondent:

It was submitted by the Respondent that the curative petition is not maintainable as the SC cannot revisit the conclusions arrived at by the Arbitral Tribunal.

It was contended that according to the decision of Rupa Hurra Case, the court is not supposed to sit over a judgment like a court of appeal. Further, the scope of review jurisdiction is narrow in itself and does not warrant rehearing and correction of a judgment. Hence, curative petition proceeding cannot be treated as a second review.

It was further submitted that the Petitioner has taken over the project and has been operating it since July 1, 2012 without having paid to DAMEPL for its operation between January 1, 2013 till June 30, 2013, except for a small fraction of the total awarded amount.

Observations of the SC

The SC analyzed its previous judgment in the Rupa Hurra Case whereby it was examined as to whether any relief is available against a final judgment of the SC after the dismissal of a petition seeking review of the judgment. It was observed that in the Rupa Hurra Case, the SC had laid down an overarching principle that the SC may entertain a curative petition to prevent abuse of process of court and to cure a gross miscarriage of justice.

Thereafter, the SC laid down the scope of its jurisdiction and the competent court which was subordinate to the SC while dealing with cases arising out of an application to set aside an arbitral award under Section 34 of the Arbitration Act. In this regard, the SC examined the provision of Section 34 of the Arbitration Act which provides that a domestic award may be set aside if the SC finds that it is vitiated by apparent "patent illegality". In this regard, the SC referred to the judgment of ***Associate Builders v. Delhi Development Authority [(2015) 3 SCC 49]*** ("**Associate Builders Case**") whereby a two-judge Bench of the SC had held that although the interpretation of contract is exclusively within the domain of the Arbitrator, construction of a contract in a manner that no fair-minded or reasonable person would take, is impermissible. It was further observed that the decision or award should not be perverse or irrational. Further, patent illegality may also arise when the arbitral award is in breach of the provisions of the arbitration statute.

Thereafter, in the judgment of ***Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India [(2019) 15 SCC 131]***, the SC reiterated the ratio laid down in the Associate Builders Case. In view of the aforesaid judgment, the SC observed that the ground of patent illegality is available for setting aside a domestic arbitral award, if the decision of the arbitrator is found to be perverse, or so irrational that no reasonable person would have arrived at it; or construction of the contract is such that no fair and reasonable person would arrive at such interpretation or such interpretation itself is not possible. However, the SC also observed that during the course of adjudicating the merits of a special leave petition and exercising its power under Article 136 of Constitution of India, the SC must exercise such power sparingly and only when circumstances are so exceptional that exercise of such power is justifiable.

Thereafter, the SC examined the arbitral award on merits and concluded that the award was patently illegal. Further, the SC observed that interpretation of the termination clause of the 2008 Agreement by the Arbitral Tribunal was unreasonable. The SC further observed that the Arbitral Tribunal overlooked vital evidence and matters on the record while passing the arbitral award. The SC arrived at the conclusion that the arbitral award is unreasoned on the above-mentioned aspects.

Decision of the SC

The SC held that the judgment of the two-judge Bench of the SC, which interfered with the judgment of the Division Bench of Delhi HC has caused miscarriage of justice. In fact, Division Bench of Delhi HC had rightly arrived at the conclusion that the arbitral award suffered from perversity and patent illegality. Therefore, while entertaining the special leave petition under Article 136 of the Constitution of India, the two-judge Bench of the SC restored a patently illegal arbitral award. Therefore, in such circumstances, it is necessary to exercise the power under Article 142 of the Constitution of India in the present curative petition in terms of the Rupa Hurra Case.

The SC allowed the curative petition filed by the Petitioner against the arbitral award passed in favour of the Respondent leading to a relief from being liable to pay an amount to the tune of INR 8,000 crores in terms of the arbitral award. Further, the SC held that execution proceedings before the Delhi HC for enforcing the arbitral award must be discontinued and the amounts deposited by the Petitioner must be refunded. Further, in case if any part of the awarded amount has been paid by the Petitioner, the same will be restored in favour of the Petitioner.

Before parting with the judgment, the SC deemed it appropriate to clarify that the exercise of the curative jurisdiction of the SC should not be adopted as a matter of ordinary course.

VA View: This is not merely a landmark judgment from the perspective of deciding the case on factual or legal merits. The relevance of this judgment pronounced by the SC goes beyond merely deciding the dispute *inter-se* between the parties. In the present judgment, the SC has referred and relied upon the ratio and test laid down in its previous landmark judgment in the Rupa Hurra Case and laid down the principle that in case of miscarriage of justice, the SC is empowered to invoke its curative jurisdiction under Article 142 of the Constitution of India, especially when the arbitral award suffers from patent illegality. However, the SC was also conscious and cognizant of the fact that such exercise of curative jurisdiction should not become a matter of practice or ordinary course and therefore before parting with the judgment, the SC has clarified the same to ensure that its exercise of curative jurisdiction under exceptional circumstances in the present case does not open a floodgate of additional layer of litigation in the domain of arbitration proceedings.

This judgment is also critical in the sense that it provides immense clarity which will help in deciding similar cases in future from a precedent perspective on essential questions of law as to the integral aspects of establishing patent illegality of arbitral award and to what extent can a court of law delve into arbitral awards which are based on contractual interpretation.

II. Delhi High Court: Shares registered in favor of the pledgee as the 'beneficial owner' does not amount to sale of shares.

The Delhi High Court ("**Delhi HC**"), in its judgement dated April 2, 2024, in the matter of ***STCI Finance Limited v. Sukhmani Technologies Private Limited [O.M.P. (COMM) 340/2017]***, has held that mere registration of shares in favour of the pledgee as the 'beneficial owner' does not amount to sale of shares, and that the pledgee is not required to account for any sale proceeds until such shares are actually sold to a third party.

Facts

STCI Finance Limited ("**Petitioner**"), a systematically important non-deposit taking non-banking financial company registered with the Reserve Bank of India, upon a request of Sukhmani Technologies Private Limited ("**Respondent**"), agreed to sanction a loan facility of INR 50 crores to the Respondent *vide* a letter of intent dated February 8, 2012 ("**LOI**"), against the pledge of shares of Tulip Telecom Limited ("**Tulip Telecom**"). In terms of the LOI, Cedar Infonet Private Limited ("**Cedar Infonet**") acknowledged to assist the Respondent in raising funds to the tune of INR 50 crores by providing security in the form of pledge of equity shares of Tulip Telecom, owned by it in favour of the Petitioner.

Pursuant to the LOI, the Petitioner and the Respondent entered into and executed several loan/security documents, all dated February 10, 2012, including a facility agreement ("**Loan Facility Agreement**"), irrevocable power of attorneys, and declarations along with post-dated cheques, to secure the loan being granted to the Respondent. In order to secure the loan facility granted by the Petitioner under the Loan Facility Agreement, Cedar Infonet and the Respondent (being the pledgers) executed a share pledge agreement dated February 10, 2012 ("**Share Pledge Agreement**") with the Petitioner (the pledgee). Under the terms of this Share Pledge Agreement, it was agreed that shares equivalent to 200% of the loan amount would be pledged. Mr. H.S. Bedi, the director of the Respondent, and Mrs. Maninder Singh Bedi ("**Personal Guarantors**") executed a personal deed of guarantee dated February 10, 2012, in favour of the Petitioner, thereby unconditionally guaranteeing to repay any outstanding amount within a period of 3 days of a demand notice being served in writing by the Petitioner. Accordingly, the Personal Guarantors and Cedar Infonet pledged 1,37,13,000 equity shares of Tulip Telecom ("**Pledged Shares**") in favour of the Petitioner to secure the loan amount granted to the Respondent.

On September 2012, due to a steep fall in the share price of the Pledged Shares, the Personal Guarantors offered the Petitioner an additional security by way of mortgage over their immoveable properties as well as a revised payment schedule to regularise the interest payment. However, as a consequence of such steep fall in the share price of the Pledged Shares and a failure on part of the Personal Guarantors to provide the requisite security margin, the Petitioner invoked 1,01,50,000 shares out of the Pledged Shares in terms of the Loan Facility Agreement and the Share Pledge Agreement, and managed to sell only 1,69,099 shares, thereby recovering only a part of the outstanding amount, which was duly credited and reflected in the account statement of the Respondent, maintained by the Petitioner.

Thereafter, the Petitioner agreed to renew the loan facility on two occasions upon the request of the Respondent, however, despite several demands by the Petitioner, the Respondent failed to make payments and regularise its loan account. Consequently, the Petitioner issued a letter dated May 19, 2014 demanding the Respondent to clear its entire dues of approximately INR 52 crores as on April 1, 2014. A loan recall notice dated September 2, 2014 was also served upon the Respondent, to which the

Respondent filed a reply objecting to the credit of the proceeds of sale of the Pledged Shares in its account. Another legal notice dated September 15, 2014 was served upon the Personal Guarantors, demanding them to make the payment of the dues to the Petitioner. In view of the dispute that had arisen, the Petitioner issued a notice dated February 12, 2016 invoking the arbitration clause contained in the Loan Facility Agreement. During the arbitration proceedings, the Petitioner sought the recovery of a sum of approximately INR 70 crores along with interest at the rate of 18% per annum. However, the Respondent contested the claims of the Petitioner.

Pursuant to the above, the sole arbitrator passed a '*Nil Award*' dated August 11, 2017 ("**Impugned Award**"), observing that immediately upon the invocation of the Pledged Shares by the Petitioner, it became the beneficial owner of such Pledged Shares, and would be entitled to the credit of the value of such Pledged Shares. The sole arbitrator further opined that if the invoked portion of the Pledged Shares had promptly been sold by the Petitioner at the time of such invocation, the Petitioner could have recovered its outstanding dues from the Respondent.

Aggrieved by the Impugned Award, the Petitioner and the Respondent filed separate petitions under Section 34 (*Application for setting aside arbitral award*) of the Arbitration and Conciliation Act, 1996, challenging the Impugned Award passed by the sole arbitrator, and urged the Delhi HC to set aside the Impugned Award.

Issue

Whether registration of shares in favour of the pledgee as the 'beneficial owner' amounts to sale of such pledged shares.

Arguments

Contentions of the Petitioner:

The Petitioner submitted that the Impugned Award was perverse, arbitrary, unsustainable and had prejudiced the rights of the Petitioner in claiming the loan amount extended by it to the Respondent. The Petitioner further contended that the Impugned Award was in conflict with the fundamental policy of Indian law and that the sole arbitrator had committed a serious error of law in not appreciating the law in respect of pledges in India.

The Petitioner submitted that the Impugned Award was based on the incorrect premise that the Petitioner would be entitled to the credit of the total value of the shares invoked/transferred, prevalent as on the date of such invocation/transfer. In order to support its arguments, the Petitioner relied on the judgement of the Hon'ble Supreme Court ("**SC**") in the case of ***PTC India Financial Services Limited v. Venkateswarlu Kari and Another [(2022) 9 SCC 704]*** ("**PTC India Case**"), whereunder the SC had held that an exercise of right on the part of a pawnee as the 'beneficial owner' is not 'actual sale'. The pawnor's right to redemption under Section 177 (*Defaulting pawnor's right to redeem*) of the Indian Contract Act, 1872 ("**Contract Act**") continues and can be exercised even after the pawnee has been registered and has acquired the status of 'beneficial owner'. Such right of redemption would cease only on the 'actual sale', that is, when the 'beneficial owner' sells the securities/ pawned goods to a third person. Once the 'actual sale' has been affected by the pawnee, the pawnor forfeits his right under Section 177 of the Contract Act to ask for redemption of the securities/ pawned goods.

Contentions of the Respondent:

The Respondent submitted that the sole arbitrator had erred in passing the Impugned Award and had failed to determine the value of 1,01,50,000 shares of Tulip Telecom invoked by the Petitioner. Despite the Respondent filing a pledge master report, clearly depicting the invocation of 1,01,50,000 shares of Tulip Telecom by the Petitioner, along with all the data pertaining to the share prices of such shares prevalent on different dates, the sole arbitrator had failed to determine the surplus amount realised by the Petitioner after invoking 1,01,50,000 shares of Tulip Telecom. Hence, the Respondent submitted that the Impugned Award was liable to be set aside.

Observations of the Delhi HC

The Delhi HC relied on the PTC India Case wherein the SC had observed that even upon becoming the 'beneficial owner' of the pledged shares, the pledgee lender continues to be the financial creditor of the corporate debtor. In the PTC India Case, the SC had emphasized on the concept of actual sale for the purpose of Sections 176 (*Pawnee's right where pawnor makes default*) and 177 (*Defaulting pawnor's right to redeem*) of the Contract Act, and held that an actual sale means sale of the invoked shares to the third party. Till the time such actual sale does not take place, the pledger's right of redemption of the shares remains alive.

Decision of the Delhi HC

In furtherance of the position of law propounded by the SC in the PTC India Case, the Delhi HC opined that the Impugned Award was against the fundamental policy of law, and hence, was set aside.

VA View: The Delhi HC has rightly relied on the PTC India Case and confirmed the position that mere registration of shares in favour of a pledgee as the beneficial owner does not automatically amount to the sale of those shares. The right of a pledgee to recover its debt would subsist till the shares are actually transferred or sold to a third party. Further, the pledger's right to redeem the shares expires only after the pledged shares are sold to a third party. The mere conferment of the status of 'beneficial owner' would not preclude the pledgee from bringing any action to recover the entire debt payable to it by the pledgor.

Through this judgement, the Delhi HC has offered much needed insight regarding the legal position pertaining to pledge over shares.

III. Supreme Court: Stamp duty not applicable on every individual increase in the authorised share capital once the cap amount is paid.

The Supreme Court ("**SC**"), *vide* its judgement dated April 5, 2024, in the case of ***State of Maharashtra and Another v. National Organic Chemical Industries Limited [2024 SCC OnLine SC 497]***, has held that stamp duty is not required to be paid on every individual increase in the authorised share capital of the company and the maximum cap as provided under the law is applicable as a one-time measure.

Facts

National Organic Chemical Industries Limited ("**Respondent**") was incorporated with an initial authorised share capital of INR 36 crores. In 1992, it increased its authorised share capital to INR 600 crores and accordingly paid a stamp duty of INR 1,12,80,000 as per *erstwhile* Article 10 (*Articles of Association of a company*) of Schedule-I (*Stamp duty on Instruments*) of the Bombay Stamp Act, 1958 ("**Stamp Act**") which provided for a stamp duty of INR 1,000 for every INR 5,00,000 or part thereof on the Articles of Association ("**AoA**") of a company where the company has no authorised share capital or nominal share capital or increased share capital.

Subsequently in 1994, the State of Maharashtra ("**Appellant**") amended Article 10 of the Stamp Act and introduced a maximum cap of INR 25 lakhs. Thereafter, the Respondent passed a resolution for a further increase in its authorised share capital to INR 1,200 crores and paid INR 25 lakhs as stamp duty when it filed its notice in Form No. 5 (*Notice of consolidation, division, etc. or increase in share capital or increase in number of members*) pursuant to Section 97 (*Notice of increase of share capital or of members*) of the Companies Act, 1956 ("**Companies Act**"). However, according to the Respondent, this was done inadvertently as it was soon realised that stamp duty was not liable to be paid by it since the maximum stamp duty of INR 25 lakhs payable on AoA as per the provisions of the Stamp Act had already been paid by them in 1992. Consequently, the Respondent wrote a letter to Deputy Superintendent of Stamps, Maharashtra ("**DSS**"), seeking a refund of INR 25 lakhs.

DSS rejected the request stating that whenever the authorised share capital of a company is increased, stamp duty is payable on each such occasion at the time of filing Form No. 5 and it is not a one-time measure. Aggrieved, the Respondent filed a writ petition before the Bombay High Court ("**Bombay HC**") challenging the aforesaid order and seeking refund of stamp duty with interest. The Bombay HC concluded that Form No. 5 is not an instrument as defined by Section 2 (*Definitions*) of the Stamp Act and that stamp duty can only be charged on AoA, where the maximum duty, payable as per the amendment, has already been paid by the Respondent. The Bombay HC allowed the writ petition and directed the Appellant to refund stamp duty of INR 25 lakhs along with interest @ 6% per annum.

Aggrieved by the order of the Bombay HC, the Appellant filed an appeal in the SC.

Issues

1. Whether the notice sent to the Registrar of Companies ("**RoC**") in Form No. 5 is an "instrument" as defined under Section 2(l) of the Stamp Act.

2. Whether the maximum cap on stamp duty is applicable every time there is an increase in the authorised share capital or it is a one-time measure.

Arguments

Contentions of the Appellant:

The Appellant contended that Form No. 5 records or purports to record the right or extension of the right of a company to increase its authorised share capital as recorded in its AoA and thus would be considered as an 'instrument' under the Stamp Act.

The Appellant submitted that every time a company increases its authorised share capital, it is a separate taxing event and stamp duty is liable to be paid irrespective of whether the maximum amount payable

under the Stamp Act has previously been paid. The Appellant stated that increase in the authorised share capital of the Respondent, from INR 600 crores to INR 1,200 crores, materially altered the character of the AoA. It also relied on Section 14A (*Alterations in instruments how to be charged*) of the Stamp Act to contend that any material or substantial alteration in the character of an instrument requires a fresh stamp duty according to its altered character.

The Appellant also contended that the maximum cap or upper ceiling of INR 25 lakhs was introduced after the payment of stamp duty of INR 1,12,80,000/-. Therefore, the stamp duty paid earlier cannot be taken into consideration in any case.

Contentions of the Respondent:

The Respondent submitted that it was only the AoA of a company which is chargeable to stamp duty under Article 10 of the Stamp Act. Form No. 5, which is being contended by the Appellants to be a separate instrument, is completely alien to the Stamp Act as it serves a very limited purpose of giving notice to the RoC that a company has increased its authorised share capital beyond its current authorised share capital. It was also argued that increase in the authorised share capital of a company does not materially or substantially alter the character of the AoA so as to fall within the ambit of Section 14A of the Stamp Act. The Respondent referred to Section 31 (*Alteration of articles by special resolution*) of the Companies Act to submit that any alterations made to the AoA are valid and are to be taken as if originally contained therein.

The Respondent, through a catena of judgements, also submitted that fiscal statutes have to be construed strictly and in case of any ambiguity in the charging provision, the same has to be resolved against the department.

Observations of the SC

The SC observed that any increase in the authorised share capital by a company is neither required to be confirmed by the court, as per Section 94(2) (*Power of limited company to alter its share capital*) of the Companies Act, nor does the RoC exercise any discretion, provided that Form No. 5 is duly filed. The SC stated that filing of Form No. 5 is only a method prescribed, whereby "notice" of increase in authorised share capital of a company has to be sent to the RoC, and the RoC has to record such increase in authorised share capital and carry out the necessary alterations in the AoA.

With respect to the first issue, the SC noted that the stamp duty is affixed on Form No. 5 as a matter of practical convenience because a company itself cannot carry out the alterations and record the increase in authorised share capital in its AoA. It is only the AoA which is an instrument within the meaning of Section 2(l) of the Stamp Act and accordingly has been mentioned in Article 10 of Schedule-I of the Stamp Act.

The SC observed that the Companies Act provides for the origin, purpose and scope of articles. In this regard, the Companies Act is the special law and the Stamp Act is the general law, and in case of conflict between two laws, the general law must give way to the special law.

The SC referred to the case of ***M. Swaminathan v. Chairman and Managing Director [1987 SCC OnLine Mad 438]***, where the Madras High Court had held that Section 31(2) of the Companies Act was introduced with the intention to confer validity on any alterations to the AoA as if they were

originally contained therein. Therefore, any increase in the authorised share capital of the company also shall be valid as if it were originally there when the AoA were first stamped. The SC also noted that there is no concept of a company having new AoA and thus, Section 14A of the Stamp Act would not be of any help to the Appellant.

In respect of the second issue, the SC added that Article 10 of Schedule-I of the Stamp Act provides that stamp duty is to be charged on AoA, *inter alia*, on increase in the authorised share capital of a company. Thus, in spite of Section 31(2) of the Companies Act, stamp duty will be payable on increased authorised share capital. If there is no specific provision for charging the increase, then no stamp duty is payable for any increase in the authorised share capital of a company. The SC referred to the case of ***S.E. Investments Limited v. Union of India [2011 SCC OnLine Del 1867]***, wherein the Delhi High Court held that "*in the absence of a specific provision that permits the levy of stamp duty on the increase in authorized share capital, it would not be open to the respondents to insist upon the petitioner having to pay stamp duty for the increased authorized share capital.*". The SC noted that the Stamp Act is in the nature of a fiscal statute which has to be interpreted strictly. The SC observed that the ceiling of INR 25 lakhs in Article 10 of Schedule-I of the Stamp Act is applicable on AoA and the increased authorised share capital therein, and not on every increase individually. In case stamp duty equivalent to or more than the cap has already been paid, no further stamp duty can be levied.

The SC also made a reference to the Maharashtra Stamp (Amendment) Act, 2015 which amended Article 10 of Schedule-I of the Stamp Act and added the words "increased share capital" which meant that the cap will now be applicable on each individual increase. The SC observed that the amendment made in 1994 does not have a retrospective effect, however since the instrument 'AoA' remains the same, and the increase was initiated by the Respondent after the cap was introduced, the duty already paid on the AoA will be considered. It is not a fresh instrument which has been brought to be stamped, but only the increase in authorised share capital in the original document, which has been specifically made chargeable by the legislation.

Decision of the SC

The SC dismissed the appeal and upheld the order of the Bombay HC and directed the Appellant to refund INR 25 lakhs paid by the Respondent along with interest @ 6% per annum.

VA View: Through this notable judgement, the SC has provided clarity regarding the payment of stamp duty on increases in authorised share capital. The SC has provided consistency in the calculation of stamp duty by carefully examining established legal principles and statutory provisions, and correctly ruled that the stamp duty is not required to be paid on every individual increase in the authorised share capital of the company and is subject to the maximum cap as provided under the law.

The SC further noted that the amendment made in 1994 does not have a retrospective effect, however since the instrument 'AoA' remains the same, and the increase in authorised share capital in this case was initiated after the cap was introduced, the duty already paid on the increased authorised share capital in the AoA will be considered.

While penning down the judgment, SC also reinforced the established legal principle that a special act prevails over a general act. The SC held that the Companies Act is the special law and the Stamp Act is the general law concerning the AoA.

IV. Supreme Court: The payment of unearned increase in value payable to the lessor post a merger or amalgamation of companies upheld.

The Supreme Court ("**SC**"), *vide* its judgement dated April 5, 2024, in the case of ***M/s. Jaiprakash Industries Limited (Presently known as Jaiprakash Associates Limited) v. Delhi Development Authority [Civil Appeal No. 8336 of 2009]***, upheld the payment of unearned increase in the value to the lessor post a merger or amalgamation of companies.

Facts

Four separate perpetual lease deeds were executed by the Hon'ble President of India on August 12, 1983, in favour of M/s. Jaiprakash Associates Private Limited in respect of several plots. A joint application was made by M/s. Jaiprakash Associates Private Limited and M/s. Jaypee Rewa Cement Limited in July 1986, before the Allahabad High Court, wherein both the parties prayed for amalgamation. Resultantly, the Allahabad High Court, *vide* its order dated July 30, 1986, sanctioned the scheme of amalgamation and directed that some of the properties mentioned in the first, second and third parts of Schedule II of the order shall stand vested in the transferee company, that is, M/s. Jaypee Rewa Cement Limited.

In September 1986, after the amalgamation, the name of M/s. Jaypee Rewa Cement Limited was changed to M/s. Jaiprakash Industries Limited which was subsequently changed to M/s. Jaiprakash Associates Limited ("**Appellant**"). Hence, the Appellant is a transferee company created as a result of the amalgamation of the *erstwhile* M/s. Jaiprakash Associates Private Limited and M/s. Jaypee Rewa Cement Limited.

The Appellant made an application to the Delhi Development Authority ("**Respondent**") for a grant of permission to mortgage the said plots in favour of the Industrial Finance Corporation of India. However, *vide* a letter dated March 14, 1991, the Respondent demanded an unearned increase value of INR 2,13,59,511.20. The Appellant, being aggrieved by the said demand of the Respondent, made representations, which were not favourably considered by the Respondent. Therefore, the Appellant filed a writ petition before a single judge of the Delhi High Court ("**Delhi HC**"). The Delhi HC, *vide* its order dated January 30, 2003, dismissed the said petition filed by the Appellant. Being aggrieved by this decision of the Delhi HC, an appeal was preferred by the Appellant before the division bench of the Delhi HC which was also dismissed ("**Impugned Judgment**").

Hence, being aggrieved by the Impugned Judgment, the Appellant filed an appeal before the SC. Prior to proceeding further, the SC, *vide* an order dated January, 3, 2008 ("**Interim Order**"), granted an interim stay to the Impugned Judgment, subject to a condition that the Appellant deposits a sum of INR 2,13,59,511.20 with the SC. The said amount as well as the interest accrued thereon was separately invested.

Issue

Whether the amalgamation of the companies and the resulting transfer of leasehold rights amount to a transfer under the lease deed, requiring payment of unearned increase value to the Respondent.

Arguments

Contentions of the Appellant:

It was contended by the Appellant that clause II(4)(a) of the lease deed puts an embargo on the lessee not to sell, transfer, assign or otherwise part with the possession of the whole or any part of the said plots, except with the previous written consent of the lessor. Additionally, the proviso to the said clause of the lease deed entitled the lessor to impose a condition of, while granting consent, payment of a portion of the unearned increase in the value, that is, the difference between the premium paid and the market value.

The Appellant submitted that the amalgamation of the lessee with another company under the orders of the Company Court would not amount to the sale, transfer or assignment of the said plots.

It was also contended by the Appellant that the amalgamation of the two companies does not involve any transfer within the meaning of the Transfer of Property Act, 1882 ("**TPA**") and the assets and liabilities of the lessee had merged and devolved on the Appellant as per the operation of Section 394 (*Provisions for facilitating reconstruction and amalgamation of companies*) of the Companies Act, 1956 ("**Companies Act**"). Additionally, the Allahabad High Court's order sanctioning the scheme of amalgamation is an order *in rem*, which binds everyone.

It was further submitted by the Appellant that no sale consideration or consideration for transfer was present in the scheme of amalgamation and by virtue of the scheme of amalgamation, the transferor personality ceased to exist and merged with the transferee.

Contentions of the Respondent:

The Respondent, while relying upon the order of the Allahabad High Court wherein the said amalgamation was sanctioned, contended that clause (1) of the order provides that the transferor company's properties, rights and powers in respect of the property described in the first, second and third parts of schedule II shall be transferred without any further act or deed to the transferee company. Therefore, the Respondent submitted that the demand for unearned increase was lawful.

Observations of the SC

The SC took into consideration clause (II)(4)(a) incorporated in all four perpetual leases and observed that the second proviso to the clause clarifies that the Respondent, which has stepped into the shoes of the lessor, would be entitled to recover a portion of the unearned increase in the value. It was noted by the SC that all the categories of transfers are covered within the ambit of clause II(4)(a), including the involuntary transfers. However, the SC observed that the present case is not one of an involuntary transfer, as the transfer was made based on a petition filed by the lessee and the transferee seeking amalgamation.

It was also noted by the SC that clause (II)(4)(a) covers transfers as well as parting with possession, so the transfer contemplated by the said clause is much wider than what is defined under Section 5 (*"Transfer of property" defined*) of TPA. Further, Section 5 of the TPA clarifies that nothing contained therein shall affect any law for the time being in force in relation to the transfer of property to or by companies. Thus, the SC stated that Section 5 of the TPA would not be of any assistance to the Appellant.

The SC also emphasised on clause (1) of the Allahabad High Court's order sanctioning the scheme of amalgamation which states that the said plots stand transferred from the original permanent lessee to the Appellant.

Decision of the SC

The SC found nothing illegal about the Impugned Judgment and accordingly dismissed the appeal filed by the Appellant. Further, the SC allowed the Respondent to withdraw the principal amount along with the interest which was deposited by the Appellant pursuant to the Interim Order.

VA View: The present judgment of the SC is a significant judicial pronouncement as the SC has rightly held that any merger or amalgamation of two companies resulting in transfer of a property may lead to payment to the lessor of an unearned increase in the value of the assets being leased, subject to the contractual arrangement between the lessor and lessee. The SC has also examined the scope of Section 5 of the TPA *vis-à-vis* the terms of the perpetual lease deeds in the present case which provided for the recovery of a portion of the unearned increase in the value of the assets at the time of sale, transfer, assignment, or parting with the possession.

Additionally, SC by the virtue of this judgement provided clarity which could be used as a precedent in respect to similarly placed lease or arrangements which is commercial in nature and where an entity enters into such commercial arrangement with a government entity, being the lessor.

Contributors:

Navya Shukla, Prerna Mayea, Pritika Shetty, Rishabh Chandra, and Saksham Kumar

Corporate, Tax and Business Advisory Law Firm

DELHI

1st, 9th, 11th Floor,
Mohan Dev Building, 13, Tolstoy Marg,
New Delhi, 110001 (India)
+91-11-42492525
delhi@vaishlaw.com

MUMBAI

106, Peninsula Centre,
Dr. S.S. Rao Road, Parel,
Mumbai, 400012 (India)
+91 22 42134101
mumbai@vaishlaw.com

BENGALURU

105 -106, Raheja Chambers,
#12, Museum Road,
Bengaluru, 560001 (India)
+91 80 40903588/89
bangalore@vaishlaw.com