AJC NEWSLETTER

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Introduction

We here at Agarwal Jetley & Co. (AJC) are happy to bring a new edition of the newsletter. We in this edition cover the various important aspects that are valuable and important legal information. This effort is another step to simplify the understanding for our various readers. We would be happy to hear from you about the 'AJC NEWSLETTER', the hits and misses, inputs and any clarifications that you all require and deem necessary. We thank you in advance and are happy to continue this trend of keeping everyone "Legally Up to Date".

Aspects covered in this issue

In this issue we firstly cover the important notification by the Karnataka Government regarding fixed term employment. Then we look at the new zip that SEBI has tried to add to its International Financial Service Centre by providing stakeholders more opportunities of investment. Finally, we discuss the important aspect of labelling products with their 'Country of Origin' and its effect on e-retailers.

We then look at the judgment of the Supreme Court of India differentiating company cases from inheritance wars. Then our partner, Mr. Neeraj Kumar looks at the aspect of considerations and whether non-payment of the same can lead to cancellation of sale deeds. This Newsletter also covers the aspect of insolvency, where we delve into the possible retrospective position regarding suspension of insolvency proceedings. Neeraj Kumar, our partner also looks into the important Supreme Court order regarding the BSIV issue and sale of vehicles in the lockdown. Finally, our associate Abhishek Naik looks at the important judgment by Bombay High Court regarding construction activities and height requirements near airport areas.

Fixed term employment approved in Karnataka[i]

The Government of Karnataka ("**Government**"), has vide a notification dated June 30, 2020 ("**Notification**") introduced a new category of workmen called "fixed term employment workman". Although the Notification is dated June 30, 2020, it was published by the Government only last week. The notification amends Industrial Employment (Standing Orders) Act, 1946 in terms of its applicability in the state of Karnataka. Prior to the Notification, Schedule I of the Karnataka Industrial Employment (Standing Orders) Rules, 1961 there were six (6) categories of workmen mentioned- permanent, probationer, temporary; badli and casual. Now, a seventh (7^{th}) viz. "fixed term employment workman" has also been added.

According to the Notification a fixed term employment workman is a workman who has been employed on the basis of a written contract of agreement for a fixed period. Hence, all the period relating to his employment will need to be decided in advance. In terms of other relevant provisions and working requirements, all the necessary details viz. hours of work, salary, allowance and other benefit shall not be less than permanent workman and they shall generally be eligible for all statutory benefit available to permanent workman. Further, the Service of a fixed term employment workman shall not be terminated as a punishment unless he has been given a chance to explain the charges alleged against him.

However, in the event of termination of services of a "fixed term employment workman" due to non-renewal of contract of employment or expiry of terms of contract of employment, he shall be entitled to notice or pay in lieu of notice for such termination of service.

Revision of International Financial Services Guidelines[ii]

Introduction

With a view to create viable financial services market centres in the year 2015, the union budget gave an approval for the creation of an International Financial Service Centre ("**IFSC**"). Amongst other aspects, the Securities and Exchange Board of India (International Financial Services Centres) Guidelines, 2015 ("**Guidelines**") set to regulate the securities market in India.

Also, various Indian and Foreign jurisdiction stock exchanges, with the approval of Securities Exchange Board of India (**SEBI**) were allowed to open their subsidiaries and carry out activities of 'stock exchange' in the IFSC. Now, vide a circular dated July 9, 2020 ("**Circular**") issued by SEBI, the existing guideline 4(1) of the Guidelines ("**Operative Guideline**"), i.e. in relation to eligibility and shareholding limit for stock exchanges desirous of operating in IFSC to entail a long list of entities and their shareholding.

Change in composition

Prior to issuing the Circular, as per the Operative Guideline, any recognised stock exchange or clearing corporation of India or foreign jurisdiction could form a subsidiary (to provide services of a clearing corporation). The aforesaid entities were required to hold at least fifty one percent (51%) of the paid up and equity share capital in the clearing corporation.

Now, the as far the Operative Guideline is concerned, the same exists with some slight modifications. Firstly, the remaining share capital (apart from the 51% mentioned above) which prior to the passing of the Circular could only be offered recognised stock exchange or clearing corporation of India or foreign jurisdiction may now also be offered to any other person (whether Indian or of foreign jurisdiction) provided such person shall not at any time, directly or indirectly, either individually or together with persons acting in concert, acquire or hold more than five per cent (5%) of the paid up equity share capital in a recognised stock exchange in IFSC.

Further share capital requirements with regard to Indian or of foreign jurisdiction - (a) a stock exchanges; (b) a depository; (c) a banking company; (d) an insurance company; (e) a commodity derivatives exchange and public financial institution of Indian jurisdiction, and

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bilateral or multilateral financial institution approved by the Central Government are also given the right to acquire (in any manner) upto fifteen per cent (15%) of the paid up equity share capital of a recognised stock exchange with prior approval of the SEBI.

Conclusion

The aforesaid criteria of acquiring fifteen percent (15%) share capital in the recognised stock exchange is only possible in case the acquirer as described above follows the requirements of the Securities Contracts (Regulation) (Stock Exchanges and Clearing Corporations) Regulations, 2018 which amongst others includes the requirement the eligibility criteria for acquiring holding shares.

Further, greater participation in IFSC and prospect of holding share capital in stock exchange would definitely lure various investors. With diverse portfolios and increased presence, the IFSC in India would look to emulate its other counterparts in Dubai and Shanghai. The vivid relaxations vide the Circular would definitely increase participation.

DPIIT & Consumer Affairs Ministry ask 'Country of Origin' to be mentioned[iii]

Introduction

After the India e-marketing registration entity Government e-Marketplace ("**GeM**") on June 23, 2020 made it mandatory for 'Country of Origin' to be exhibited on products through e-commerce websites, e-retailers and e-marketplace entities ("**Order**") having been facing the heat. Just last week recent e-meeting with several e-commerce companies like Amazon and Flipkart, the Department for Promotion of Industry and Internal Trade (**DPIIT**) discussed the mandate of mentioning the 'Country of Origin' on each product sold through their platforms. In this, state governments have been directed to strictly enforce the provision that requires companies and e-commerce players to display the ''Country of Origin'' on all products. In its recommendations, the DPIIT proposed that ecommerce companies should start doing so for new product listings by August 1 and for existing products by October 1, 2020.

Following suit, the Ministry of Consumer Affairs, Food and Public Distribution ("**Ministry**") has recently also informed all e-retailers that they would be affixing responsibility and strictly following the requirements under the Legal Metrology (Packaged Commodities) Rules, 2011 ("**Rules**") relating to 'Country of Origin'.

Genesis of the issue

Very recently, the Domestic traders' body Confederation of All India Traders (**CAIT**) had also demanded that it be made mandatory for e-commerce companies to mention the ''Country of Origin'' on each product sold on their platforms. Although there hasn't been any clear indication of how the measure will be applied to such ecommerce listings as such. The Rules as well as news show that the matter would involve certain changes related to packaging of the product, which would have been discussed with the Ministry. Hence, the Ministry provided the aforesaid information discussed in our introduction.

Contents of the Order

The Order specifically makes it mandatory for e commerce companies to ensure that all the products listed on their sites contain the mark of origin of the country of where they were made. However, e commerce companies mainly entail sellers who can only reproduce or sell the already manufactured objects that have already been produced. Therefore, this would

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mean that the burden would fall upon either these intermediary websites or the sellers to ensure that all products listed contain the mark of ''Country of Origin''. Since the mark of ''Country of Origin'' depends on a lot of factors such as manufacture details, area of assembly and other details, it would require contact with a lot of manufacturers of these listed products as well. However, these companies essentially cater to lakhs of sellers who sell millions of products. Therefore, it is necessary that this is not applied without any deliberation or full disclosure of relevant legal provisions. Otherwise the burden of correct disclosure would fall on small sellers and MSMEs due to increased pressure to comply.

Existing legal requirements

The Rules which govern the pre-packed commodities, specifically state that pre-packaged commodities must bear certain information on their package. This information entailed both the mention the ''Country of Origin'' and 'manufacture of the packaged item or the country of assembly in case of imported products'. Non compliance of the same are punishable under the Legal Metrology Act, 2009 and can invite a maximum jail term of three (3) years or a fine of Rs 2,000 or both. This placed the burden on the manufacturers, packers and importers to declare details such as the 'Country of Origin' of the product, manufacturing details along with expiry of the products by putting stickers, tags, online printing, etc.

Further, sellers who had already uploaded their products on GeM were reminded regularly to update the 'Country of Origin', with a warning that their products shall be removed from GeM if they fail to do the same.

International aspects concerning 'Country of Origin'

Rules for ''Country of Origin'' are the criteria needed to determine the national source of a product. International law does not have any specific rules governing the determination of the ''Country of Origin'' of goods in international commerce. Each country is free to determine its own unique origin rules depending on the purpose of the particular regulation. However, the General Agreement on Tariffs and Trade in principle does recognise the *need for minimizing the incidence and complexity of import and export formalities and the interpretative note of the same mentions that '''Country of Origin'''.*

Furthermore, in order to sustain the most-favored-treatment (**MFN**) within the World Trade Organization (**WTO**), rules of origin have been classified into non-preferential rules of origin and preferential rules of origin. Preferential rules of origin are those referential rules or origin are those which apply in reciprocal trade preferences i.e. regional trade agreements or customs unions or in non-reciprocal trade preferences such as preferences in favour of developing countries. However, for non preferential rules of origin, there is not yet a common set of rules of origin for non-preferential purposes within the WTO.

Many countries have the law that requires manufacturers and distributors to make sure that ''Country of Origin'' is always specified, mainly as it helps consumers make an informed choice and helps country administrations to enforce tariff laws and regulations. The U.S. Customs and Border Protection, as per the Code of Federal Regulations (**CFR**), as per the 19 CFR requires virtually that all imported and exported products must have the ''Country of Origin'' mark. However, it should be pointed out that, according to EU customs and taxation union, the ''Country of Origin'' must always be indicated in a specific box of the customs import declaration.

Conclusion

The move concerning the Order, therefore, tries to reinforce the already existing rules that mandate manufacturers, importers and packers to mention origin of country on the products by roping in e-commerce companies that allow sellers to list their products. Since they mainly entail sellers who can only reproduce or sell the already manufactured objects that have already been produced, the burden would fall upon either these intermediary websites or the sellers to ensure that all products listed contain the mark of origin. Although the suggestion itself has been agreed upon, several issues such as that of single product manufactured in more than one country, imported goods and unbranded or unpackaged items pose new questions that are yet to be specified. Most countries around the world also include the rules of origin as they help consumers make an informed choice and it also makes trade more convenient. However, both time restraints and specified rules, the effect of this rule would place the burden of correct disclosure would fall on small sellers and MSMEs that may have enlisted themselves on these companies.

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Dispute of inheritance of shares is a civil dispute and cannot be decided in petition of oppression and mismanagement [iv]

Introduction

The petition of oppression and mismanagement under Sections 241 and 242 of the Companies Act, 2013 ("**Act**") can be maintained by a person who satisfies the requirement of Section 244 of the Act. The person should represent the body of shareholders holding requisite percentage of shares (at present 10%- Section 244 of the Act) in company. Section 241 of the Act deals with an application to the tribunal for relief in cases of oppression, mismanagement etc. Section 242 of the Act deals with powers of tribunal. Section 244 of the Act deals with the members who have right to apply under Section 241 of the Act.

Recently, in the matter of *Aruna Oswal vs Pankaj Oswal and Ors., Civil Appeal No. 9340 of 2019* ("**Case**") before Supreme Court (SC) decided on July 6, 2020, the following issues cropped up - (1) what would be the effect of nomination of shares by the deceased as per the provisions of the Act and (2) whether a legal representative can maintain a petition under Sections 241 and 242 of the Act at the time when the dispute of inheritance of shares is pending before civil court. The judgment in the said Case is delivered by the Division Bench comprising Justice Arun Mishra and Justice S. Abdul Nazeer; the judgment is made reportable.

Brief Facts of the Case

On or about June 18, 2015 Mr. Abhey Kumar Oswal (deceased on March 29, 2016) filed a nomination according to Section 72 of the Act in favour of his wife, Aruna Oswal. Two witnesses duly attested the nomination in the prescribed manner. Section 72 of the Act provides that every holder of securities of a company may nominate any person to whom his securities shall vest in the event of his death. The name of Mrs. Aruna Oswal was registered as a holder on March 16, 2014 as against the shares as held by her deceased husband. Mr. Pankaj Oswal (son of the deceased) filed a suit for partition claiming entitlement to one-fourth of the estate including shares of the deceased. In suit for partition, the court directed the parties to maintain *status quo* concerning shares and other immovable property. Mr. Pankaj Oswal thereafter filed a company petition claiming oppression and mismanagement in the affairs of company and claimed his eligibility to maintain the petition on the ground of being a holder of 0.03% shareholding and claiming entitlement and legitimate expectation to 9.97% shareholding in company by virtue of his being the son of the deceased. The maintainability of the petition was questioned before the National Company Law Tribunal, Chandigarh (**NCLT**) which held it to be maintainable and the same was affirmed by National Company Law Appellate Tribunal (**NCLAT**). The appeal was preferred against the judgment and order of NCLAT before the SC.

Effect of nomination under Section 72 of the Act

The SC in the Case observed that it is quite apparent from a bare reading of the provisions of section 72(1) of the Act, that every holder of securities has a right to nominate any person to whom his securities shall "vest" in the event of his death. In the case of joint holders also, they have a right to nominate any person to whom "all the rights in the securities shall vest" in the event of death of all joint holders. Sub-section (3) of section 72 of the Act contains a non obstante clause in respect of anything contained in any other law for the time being in force or any disposition, whether testamentary or otherwise, where a nomination is validly made in the prescribed manner, it purports to confer on any person "the right to vest" the securities of the company, all the rights in the securities shall vest in the nominee unless a nomination is varied or cancelled in the prescribed manner. It is prima facie apparent that vesting is absolute, and the provisions supersede by virtue of a non obstante clause any other law for the time being in force. Prima facie shares vest in a nominee, and he becomes absolute owner of the securities on the strength of nomination. Rule 19(2) of the Companies (Share Capital and Debentures) Rules, 2014 ("**Rules 2014**") framed under the Act, also indicates to the same effect. Under Rule 19(8) of Rules 2014, a nominee becomes entitled to receive the dividends or interests and other advantages to which he would have been entitled to if he were the registered holder of the securities; and after becoming a registered holder, he can participate in the meetings of the company.

The SC in the Case further observed that admittedly, in a civil suit for partition, Mr. Pankaj Oswal is also claiming a right in the shares held by the deceased to the extent of one-fourth. The question as to his right is required to be adjudicated finally in the civil suit, including what is the effect of nomination in favour of his mother Mrs. Aruna Oswal, whether absolute right, title, and interest vested in the nominee or not, is to be finally determined in the said suit. The decision in a civil suit would be binding between the parties on the question of right, title, or interest. It is the domain of a civil court to determine the right, title, and interest in an estate in a suit for partition.

Thus, the SC though gave its apparent view on the bare reading of relevant provisions in respect of nomination but left open the question to be decided by civil court.

Inheritance of shares is a civil dispute

The SC in the Case followed *Sangramsinh P. Gaekwad and Ors. v. Shantadevi P. Gaekwad (Dead) through LRs. and Ors.,* (2005) 11 SCC 314 ("**Sangramsinh's Case**"*)* and observed lucidly what was held in Sangramsinh's Case that the dispute as to inheritance of shares is eminently a civil dispute and cannot be said to be a dispute as regards oppression and/or mismanagement so as to attract Company Court's, i.e. NCLT jurisdiction under sections 397 and 398 of the Companies Act, 1956 (which is *pari materia* to sections 241 and 242 of the Act). Adjudication of the question of ownership of shares is not contemplated under Section 397 of Companies Act, 1956.

Maintainability of petition under Sections 241 and 242 of the Act by legal representative at the time when the dispute of inheritance of shares is pending before civil court

The SC in the Case observed that in *World Wide Agencies Pvt. Ltd. & Anr. vs Margarat T. Desor & Ors. (1990) 1 SCC 536 ("***World Wide Agencies Case**"), the SC held that a legal representative has a right to maintain an application regarding oppression and mismanagement without being registered as a member against the securities of a company. However, the question of nomination was not involved in the said decision, as such, the SC was not required to decide the question of the effect of nomination whether it vests all the rights in the securities in nominee to the exclusion of legal representatives.

However, in the Case, the nomination had been made, and the nominee is registered as the holder of shares. What is the effect of the same is required to be decided to determine the extent of shareholding of Mr. Pankaj Oswal, concerning which civil suit filed earlier in point of time is pending consideration.

The SC in the Case distinguished the decision in World Wide Agencies Case and held that the basis of the petition is the claim by way of inheritance of 1/4th shareholding so as to constitute 10% of the holding, which right cannot be decided in proceedings under section 241/242 of the Act. Thus, filing of the petition under sections 241 and 242 seeking waiver is a misconceived exercise, firstly, Mr. Pankaj Oswal has to firmly establish his right of inheritance before a civil court to the extent of the shares he is claiming; more so, in view of the nomination made as per the provisions contained in Section 72 of the Act.

Thus, the SC in the facts and circumstances of the instant case, observed that in order to maintain the proceedings, Mr. Pankaj Oswal should have waited for the decision of the right, title and interest, in the civil suit concerning shares in question. The entitlement of Mr. Pankaj Oswal is under a cloud of pending civil dispute. Thereby, the SC deem it appropriate to direct the dropping of the proceedings filed before the NCLT regarding oppression and mismanagement under sections 241 and 242 of the Act with the liberty to file afresh, on all the questions, in case of necessity, if the suit is decreed in favour of Mr. Pankaj Oswal and shareholding of Mr. Pankaj Oswal increases to the extent of 10% required under section 244 of the Act.

Conclusion

The SC in the Case gave the liberty to the parties to file afresh on all the questions in respect of oppression and mismanagement in case of necessity. At the same time, it holds a precedential value that a legal representative on the basis of legitimate expectation of holding of shares, when the nomination of shares exist under the Act, cannot maintain a petition of oppression and mismanagement unless he represents the body of shareholders holding requisite percentage of shares (at present 10%- Section 244 of the Act) in company. Further, it has been endorsed that inheritance of shares is a civil dispute and right, title or interest in the same is to be decided by civil court and the same cannot be decided in parallel proceeding of petition of oppression and mismanagement; no waiver in meeting the requirement under section 244 of the Act is appropriate that too in view of nomination done as per the Act and entitlement needs to be decided first.

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Non-payment of sale-consideration in entirety is not a ground for cancellation of the sale deed[v]

Introduction

Bread, clothes and home are considered as attributes in human life to live a life with dignity. We have seen in recent past few days exodus of many people from their 'place of work' due to lack of one of the major attribute 'home' with those people during this ongoing pandemic of COVID-19. Though, everyone wants to have his own dream home someday where their place of work is but it also involves many different aspects of law in respect of buying/ selling of land/ flat/ home.

There are different kinds of people who are naïve and shrewd in respect of buying/ selling of land/ flat/ home. There may be one of the case in which seller may allege after the execution of sale deed that he has not received the sale-consideration in entirety as mentioned in sale deed. Here we are going to discuss the effect of the same as per the position of law in India as explained by the Hon'ble Supreme Court ("**SC**") in a recent reported judgment *Dahiben vs Arvindbhai Kalyanji Bhanusali (Gajra) (D) thr LRs and Ors, Civil Appeal No. 9519 of 2019* ("**Dahiben's Case**") decided on July 9, 2020.

Definition of sale

Sale has been defined in Section 54 of the Transfer of Property Act, 1882 ("**Act**"), provides as under:
"*54. 'Sale' defined.—'Sale' is a transfer of ownership in exchange for a price paid or promised or part-paid and part promised.*"
The SC in Dahiben's Case observed:
"15.3 ……The definition of "sale" indicates that there must be a transfer of ownership from one person to another i.e. transfer of all rights and interest in the property, which was possessed by the transferor to the transferee. The transferor cannot retain any part of the interest or right in the property, or else it would not be a sale. The definition further indicates that the transfer of ownership has to be made for a "price paid or promised or part paid and part promised". Price thus constitutes an essential ingredient of the transaction of sale….."

Effect of non-payment of sale-consideration in entirety

The SC in Dahiben's Case followed the judgment of *Vidyadhar* v. *Manikrao & Anr.*, (1999) 3 *SCC 573* ("**Vidyadhar's Case**") in which SC held that the words "price paid or promised or part paid and part promised" in Section 54 of the Act indicates that actual payment of the whole of the price at the time of the execution of the sale deed is not a *sine qua non* for completion of the sale. Even if the whole of the price is not paid, but the document is executed, and thereafter registered, the sale would be complete, and the title would pass on to the transferee under the transaction. The non-payment of a part of the sale price would not affect the validity of the sale. Once the title in the property has already passed, even if the balance sale consideration is not paid, the sale could not be invalidated on this ground. In order to constitute a "sale", the parties must intend to transfer the ownership of the property, on the agreement to pay the price either in *praesenti*, or in future. The intention is to be gathered from the recitals of the sale deed, the conduct of the parties, and the evidence on record.

The SC in Dahiben's Case held that in view of the law laid down by SC in Vidyadhar's Case even if entire sale consideration had not been paid, it could not be a ground for cancellation of the Sale Deed. There may be other remedies in law available to Plaintiff for recovery of the balance consideration, but could not be granted the relief of cancellation of the registered Sale Deed.

Conclusion

The SC has laid down the law in Vidyadhar's Case which was followed by SC in Dahiben's Case that non-payment of sale consideration in entirety cannot be a ground for cancellation of the sale deed. Thus, buyer as well as seller needs to be beware and cautious in their approach to protect their respective rights before the sale deed is executed and registered before the concerned sub-registrar office.

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NCLT Chennai - IBC Ordinance, suspending initiation of CIRP retrospective in nature[vi]

Introduction

In an attempt to mitigate the losses that businesses will face due to COVID-19 and subsequent lockdown, certain relaxations in various laws were also provided. One such relaxation is the amendment of the Insolvency & Bankruptcy IBC, 2016 ("**IBC**") through the Insolvency and Bankruptcy (Amendment) Ordinance, 2020 ("**Ordinance**") which has permanently barred the filing of fresh insolvency application against corporate debtor(s) for defaulting in payment/re-payment of debt on or after March 25, 2020. The Ordinance inserts Section 10A to the IBC which provides that no fresh insolvency for initiation of corporate insolvency resolution process ("**CIRP**") can be filed against the corporate debtor under Section 7 and 9 of the IBC for default in re-payment/payment as well as the corporate debtor itself under Section 10 cannot initiate CIRP for its inability to pay debts, on or after March 25, 2020 for a period of six (6) months thereafter, which is extendable upto one (1) year. However, the Ordinance is only applicable to the cases where the date of such default/inability to pay debt was on or after March 25, 2020. As of now, anyone committing default after six (6) months from March, 25, 2020 is not exempted. This Ordinance was in addition to the changes brought to the Section 4 of the IBC by the Ministry of Corporate Affairs which, on March 24, 2020, enhanced the threshold limit of default amount to initiate CIRP from Rs.1 Lakh to Rs. 1 Crore.

Recently, the Hon'ble National Company Law Tribunal, Chennai Bench ("**NCLT**") on July 9, 2020 in the case of *M/s. Siemens Gamesa Renewable Power Ltd. vs. Ramesh Kymal* (IBA/215/2020) ("**Case**") has dealt with a very important questions in respect of retrospective applicability of the Ordinance with regard to admission for default of debt after March 25, 2020 but before the Ordinance was promulgated on June 05, 2020.

Factual background

An application under Section 9 of the IBC ("**Insolvency Application**") was filed by one Mr. Ramesh Kymal ("**Operational Creditor**") against M/s Siemens Gamesa Renewable Power Ltd. ("**Corporate Debtor**") for default in payment of Rs. 104.11Crore of debt. The date of default mentioned in the Insolvency Application filed by the Operational Creditor was April 30, 2020. After the promulgation of the Ordinance on June 05, 2020, an application was filed by the Corporate Debtor before the NCLT contending that after the insertion of Section 10A to the IBC, no insolvency application could be filed for default beyond March 25, 2020 and admittedly, the date of default in present Case was April 30, 2020.Hence, in view of the promulgation of the Ordinance, the application to initiate CIRP against Corporate Debtor was no more maintainable, thus deserved to dismissed. Contradicting it, the Operational Creditor averred that although the date of default was beyond March 25, 2020 but the Ordinance came to be promulgated only on June 05, 2020 and as such, the Ordinance was not applicable to the present Case as the Insolvency Application was already filed and heard for two dates by the NCLT. It was further contented that no fresh application after June 05, 2020 for default on or after March 25, 2020 can be filed and the Ordinance was not applicable to the pending applications. IBCIBC

Judgment

In deciphering the question as to the prospective/retrospective applicability of the Ordinance, the NCLT analysed the statement of objects and reasons of the Ordinance. The NCLT stated that due to Covid-19 pandemic resulting in lockdown across India, businesses, financial market and economy has been severely affected. Thus, in larger public interest and to protect the debtors and to further de-stress them by giving a breathing time to revamp their business and financial situation by restraining the creditors from pushing them to insolvency proceeding which would also be detrimental to the economy of the nation, the Ordinance was promulgated under Article 123 of the Constitution of India. A new section, Section 10A was introduced to the IBC, barring filing of insolvency applications on or after March 25, 2020and for at least six (6) months from date of its applicability. The NCLT after analysis various judgment of the Hon'ble Supreme Court and High Courts, as cited by the parties, concluded that an ordinance is at par with the legislation enacted by the Parliament, as such can have 'retrospective' effect by its act or by express provisions contained therein or by necessary implication or intendment. Thus, the Ordinance barring filing of insolvency applications will retrospectively applicable to all default arising on or after March 25, 2020.

Further, to the question whether Section 10A will have retrospective applicability, the NCLT held the *proviso* to the provision specifically provides that *"no application shall ever be filed"* and as such makes abundantly clear that no application can ever be filed against the corporate debtor(s) for the default occurred on or after March 25, 2020 for period of six (6) months or one (1) year as the case may be. Further, the NCLT held that intention behind enactment of Section 10A was to specifically exclude the 'lockdown' period which came to be enforced from March 25, 2020 and use of words *"shall ever be filed"* clarifies that intention.

While dealing with the questions, the NCLT deemed it proper to considered the date of March 25, 2020 as 'Laxman Rekha', and held the Section 10A will be applicable retrospectively. As a consequence, the Insolvency Application filed by the

Operational Creditor against the Corporate Debtor was held to be not maintainable by virtue of applicability of Ordinance, although it was promulgated on June 05, 2020, and thus dismissed the Insolvency Application as the date of default in the present Case was beyond March 25, 2020 *i.e.* April 30, 2020.

Conclusion

The NCLT upheld the legislative intent behind the promulgation of the Ordinance which was to protect the debtors being adversely affected due to lockdown imposed by the Central Govt. result of pandemic Covid-19. Also, the NCLT clarified the legal position as to permanent bar in initiating CIRP against corporate debtor(s) who defaulted in payment/re-payment on or after March 25, 2020 for a minimum period of six (6) months, as of now, which is extendable upto one (1) year, irrespective of an insolvency application being filed between March 25, 2020 and June 05, 2020. In simple terms, any default committed by debtor after March 25, 2020 till six (5) months, or one (1) year, if extended, is exempted from the purview of the IBC.

SC recalls its order with respect to sale of vehicles after lockdown periods[vii]

Background

The Ministry of Civil Aviation (Height Restrictions for Safeguarding of Aircraft Operations) Rules, 2015 ("**2015 Rules**") were notified on September 30, 2015 which laid down the parameters for carrying our construction and development activities within the vicinity of airports throughout India. The 2015 Rules concerned with permissible height based on distance of the plots under development from Airport Surveillance Radar ("**ASR**") that services an airport. Further, to amend the 2015 Rules amongst others rules, the Ministry of Civil Aviation ("**MCA**") published the draft rules 2018 ("**2018 Draft Rules**") on March 12, 2018 and invited objects and suggestions in respect of the height for development of a plot in the vicinity of an airport which is to be determined. Significantly, one of the proposed amendments was to make the maximum permissible height available to a plot under development only if it is at a distance of more than two (2) kilometres from all the ASR's that services an airport, where there are more than one ASR's.

The Appellate Committee, Airport Authority of India ("**Appellate Committee**") appointed to consider objections and suggestions, in its meeting dated MARCH 23, 2019, considered various appeals filed by different parties, and took a decision to adopt the parameters contained in the 2018 Draft Rules as the criterion for clearing projects for maximum permissible which stated that only plot beyond more than two kilometres away from all the ASR's will be entitled to the benefit of the maximum permissible height. This decision was challenged before the Hon'ble Bombay High Court ("**High Court**") and the High Court decided the matter on July 3, 2020 stating that the Airport Authority of India's Appellate Committee decision to set maximum permissible height based on draft rules was beyond its jurisdiction.

Issue in question

The question before the High Court was that whether the decision of Appellate Committee to implement and adopt the 2018 Draft Rules in relation to determining the permissible height or top elevation was illegal and without jurisdiction?

Decision

Answering affirmatively, the High Court held that the said decision of the Appellate Committee was entirely without authority of law and in excess of the jurisdiction and power as such by taking such decision the Appellate Committee did not act as an appellate forum or authority exercising any quasi-judicial functions the very purpose for which it was constituted under the 2015 Rules. The Appellate Committee did not have any rule making or general administrative powers either under the 2015 Rules or the Aircraft Act, 1934 ("**Aircraft Act**") to make such decision. The power to make rules as well as the power to issue directions to regulate and prohibit the height of buildings within a defined radius of the aerodrome lies with the Central Government. The other general power to issue directions consistent with the Aircraft Act and rules made lies with the Director General Civil Aviation.

The High Court further held that the Appellate Committee cannot give effect or implement the 2018 Draft Rules as it was still in force till date, and statutory process as per the Aircraft Act had to be followed for making 2018 Draft Rules as final and binding by prior publishing the rules, unless Central Government has dispensed with in writing, and then placing the rules before the each houses of Parliament for approval. Thus, the decision of Appellate Committee to adopt standard maximum height clearance as per 2018 Draft rules which provides for highest permissible height for objects beyond two

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kilometres from any one of the ASR's, was inconsistent to 2015 Rules, which was still in force, and also beyond the power provided under the Act or 2015 Rules. Consequently, the decision of Appellate Committee was set aside by the High Court. However, the High Court further stated that MCA, taking into all aspects of safety into account, was at liberty to frame any rules and issue appropriate directions for regulating the activities within the vicinity of any airport but the same should be within the statutory framework and manner prescribed in the Act.

Airport Authority of India's Appellate Committee decision to set maximum permissible height based on draft rules was beyond jurisdiction - Bombay High Court [viii]

Background

The Ministry of Civil Aviation (Height Restrictions for Safeguarding of Aircraft Operations) Rules, 2015 ("**2015 Rules**") were notified on September 30, 2015 which laid down the parameters for carrying our construction and development activities within the vicinity of airports throughout India. The 2015 Rules concerned with permissible height based on distance of the plots under development from Airport Surveillance Radar ("**ASR**") that services an airport. Further, to amend the 2015 Rules amongst others rules, the Ministry of Civil Aviation ("**MCA**") published the draft rules 2018 ("**2018 Draft Rules**") on March 12, 2018 and invited objects and suggestions in respect of the height for development of a plot in the vicinity of an airport which is to be determined. Significantly, one of the proposed amendments was to make the maximum permissible height available to a plot under development only if it is at a distance of more than two (2) kilometres from all the ASR's that services an airport, where there are more than one ASR's.

The Appellate Committee, Airport Authority of India ("**Appellate Committee**") appointed to consider objections and suggestions, in its meeting dated MARCH 23, 2019, considered various appeals filed by different parties, and took a decision to adopt the parameters contained in the 2018 Draft Rules as the criterion for clearing projects for maximum permissible which stated that only plot beyond more than two kilometres away from all the ASR's will be entitled to the benefit of the maximum permissible height. This decision was challenged before the Hon'ble Bombay High Court ("**High Court**") and the High Court decided the matter on July 3, 2020 stating that the Airport Authority of India's Appellate Committee decision to set maximum permissible height based on draft rules was beyond its jurisdiction.

Issue in question

The question before the High Court was that *whether the decision of Appellate Committee to implement and adopt the 2018 Draft Rules in relation to determining the permissible height or top elevation was illegal and without jurisdiction?*

Decision

Answering affirmatively, the High Court held that the said decision of the Appellate Committee was entirely without authority of law and in excess of the jurisdiction and power as such by taking such decision the Appellate Committee did not act as an appellate forum or authority exercising any quasi-judicial functions the very purpose for which it was constituted under the 2015 Rules. The Appellate Committee did not have any rule making or general administrative powers either under the 2015 Rules or the Aircraft Act, 1934 ("**Aircraft Act**") to make such decision. The power to make rules as well as the power to issue directions to regulate and prohibit the height of buildings within a defined radius of the aerodrome lies with the Central Government. The other general power to issue directions consistent with the Aircraft Act and rules made lies with the Director General Civil Aviation.

The High Court further held that the Appellate Committee cannot give effect or implement the 2018 Draft Rules as it was still in force till date, and statutory process as per the Aircraft Act had to be followed for making 2018 Draft Rules as final and binding by prior publishing the rules, unless Central Government has dispensed with in writing, and then placing the rules before the each houses of Parliament for approval. Thus, the decision of Appellate Committee to adopt standard maximum height clearance as per 2018 Draft rules which provides for highest permissible height for objects beyond two kilometres from any one of the ASR's, was inconsistent to 2015 Rules, which was still in force, and also beyond the power provided under the Act or 2015 Rules. Consequently, the decision of Appellate Committee was set aside by the High Court. However, the High Court further stated that MCA, taking into all aspects of safety into account, was at liberty to frame any rules and issue appropriate directions for regulating the activities within the vicinity of any airport but the same should be within the statutory framework and manner prescribed in the Act.

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