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Corporate Laws

Landmark Judgement

LMJ 06:06:2024

M/S SPEEDLINE AGENCIES V. T. STANES & CO.LTD [SC]

Civil Appeal No. 4481of 2010

P. Sathasivam& J.M. Panchal, JJ [Decided on 14/05/2010]

Equivalent citations: 2010 AIR SCW 3880, 2010 (6) SCC 257, (2010) 5 SCALE 670, (2010) 160 Comp Cas 33; (2010) 98 CLA 397

Companies Act,1956- section 391and 394- amalgamation of landlord company- landlord company had eviction order against the tenant- whether post -merger the transferee company could seek eviction of the tenant – Held, Yes.

Brief facts:

Appellant was the tenant of United Coffee Supply Co. Ltd. ["UCSL"]. UCSL changed its name to Stanes Tea and Coffee Ltd ["STCL"]. STCL filed an eviction petition against the appellant on the ground that nit requires the premises for its own use which was allowed by the Rent Controller. Appeal against this order was dismissed and the revision petition filed in the High Court. During the pendency of the revision petition STCL was transferred, by a Scheme of Amalgamation, T. Stanes & Company Ltd. ["TSCL"] and the case title was amended to replace TSCL as respondent in the revision petition. The High court dismissed the petition. Aggrieved by the said order, the appellant has preferred the above appeal before this Court by way of special leave petition.

Appellant contended that the new entity TSCL cannot evict the appellant as the need of TSCL would be different from that of the original landlord STCL. Respondent contended that as per the scheme of amalgamation the transferee company i.e. TSCL had stepped onto the shoes of STCL and has the right to evict the appellant from the premises.

Decision: Appeal dismissed.

Reason:

We have considered all the relevant materials and rival contentions. In normal circumstances, after passing of the decree by the trial Court, the landlord would have obtained possession of the premises, but for the tenant continuing in occupation of the premises only on account of stay order from the appellate court. In such circumstances, the well-known principle that *"an act of the court shall prejudice no man"* shall come into operation. Therefore, the heirs of the landlord will be fully entitled to defend the appeal preferred by the tenant. When a company stands dissolved (with or without winding up) due to amalgamation, its rights under the decree for eviction devolves on the amalgamated company.

In the present case, subsequent event of amalgamation of a company took place during the pendency of the revision in the High Court. Though, subsequent events which have occurred during the pendency of a revision petition in the High Court or the matter was pending before this Court, have been taken into consideration by this Court in some cases, the question as to the difference between the exercise of jurisdiction in appeal and revision was not argued or decided in those cases.

Coming to the expression "for its own use/occupation", it has to be construed widely and given wide and liberal meaning. When a company wants to expand its business and amalgamates with another company, this would also be a case of "for its own use". If a landlord which is a company cannot advance its interest in the business by amalgamating with another company by putting to use its own property, it would be unjust, unfair and unreasonable. Further, the provisions of Rent Control Act should not be so construed as to frustrate and defeat the legislation. If in a case of landlord requiring the premises for its own use, to amalgamate with another company and expands its business, the rent control legislation may clash with the provisions of the Companies Act. The Companies Act and the Rent Control Act have to be harmoniously interpreted and not to be so interpreted as to result in the one Act destroying a right under the other Act.

The landlord's entitlement to evict the tenant had merged with the decree. Further, the amalgamation took place long after the decree for eviction and rights had crystallized under the decree for eviction and merged into it. The assets of the erstwhile company had vested in the amalgamated company. A decree constitutes an asset. The said asset of erstwhile company has devolved on the amalgamated company. The eviction was on the ground of its own requirement of the erstwhile company. The said business will be continued to be carried by the amalgamated company. If the amalgamated company is deprived of the said benefit, it will frustrate the very purpose of amalgamation and defeat the order of amalgamation passed by the High Court exercising jurisdiction under the Companies Act.

The present case being one where the order of eviction is eminently just, fair and equitable as ordered by two authorities and confirmed by the High Court, we do not find any valid ground for interference, on the other hand, we are in agreement with the conclusion arrived at by the authorities as well as the High Court. Taking into consideration the appellant-tenant is continuing in

the premises for more than four decades, we grant time for handing over possession till 31.12.2010 on usual condition of filing an undertaking within a period of four weeks. With the above observation, the appeal fails and the same is dismissed.

LW 39:06:2024

GLOBAL CREDIT CAPITAL LTD. & ANR v. SACH MARKETING PVT. LTD. & ANR [SC]

Civil Appeal No. 1143 of 2022 with Civil Appeal Nos.6991-6994 of 2022

Abhay S. Oka & Pankaj Mithal,JJ. [Decided on 25/04/2024]

Insolvency and Bankruptcy Code,2016- section 7- CIRP initiated by financial creditor- lending by way of security deposits – whether the lender is a financial creditor- Held, Yes.

Brief facts:

In Civil Appeal no.1143 of 2022, the issue involved is whether the first respondent is a financial creditor within the meaning of sub-section (7) of Section 5 of the Insolvency and Bankruptcy Code, 2016 (for short, 'the IBC'). The corporate debtor, in this case, is M/s. Mount Shivalik Industries Limited. The impugned judgment respondent was a financial creditor. As far as Civil Appeal nos.6991-6994 of 2022 are concerned, the issue was whether the 1st to 4th respondents therein are financial creditors of the same corporate debtor - M/s. Mount Shivalik Industries Limited. The impugned judgment dated 29th October 2021 follows the impugned judgment in Civil Appeal no.1143 of 2022.

Decision: Dismissed.

Reason:

Now, coming back to the definition of a financial debt under sub-section (8) of Section 5 of the IBC, in the facts of the case, there is no doubt that there is a debt with interest @21% per annum. The provision made for interest payment shows that it represents consideration for the time value of money. Now, we come to clause (f) of sub-section (8) of Section 5 of the IBC. The first condition of applicability of clause (f) is that the amount must be raised under any other transaction. Any other transaction means a transaction which is not covered by clauses (a) to (e). Clause (f) covers all those transactions not covered by any of these sub-clauses of sub-section (8) that satisfy the test in the first part of Section 8. The condition for the applicability of clause (f) is that the transaction must have the commercial effect of borrowing. "Transaction" has been defined in sub-section (33) of Section 3 of the IBC, which includes an agreement or arrangement in writing for the transfer of assets, funds, goods, etc., from or to the corporate debtor. In this case, there is an arrangement in writing for the transfer of funds to the corporate debtor. Therefore, the first condition incorporated in clause (f) is fulfilled.

To decide whether the second condition had been fulfilled, it is necessary to refer to the factual findings recorded in the impugned judgment. The NCLAT has referred to the letter dated 26th October 2017 addressed by the corporate debtor to the first respondent. We have perused a copy of the said letter annexed to the counter. By the said letter, the corporate debtor informed the first respondent that for the year 2016-2017, the corporate debtor had provided the interest amounting to Rs.18,06,000/- in the books of the corporate debtor and that the sum will be credited to the account of the first respondent on the date of payment of TDS. In paragraph 21 of the impugned judgment, it is held that the financial statement of the first respondent for the Financial Year 2017-2018 shows revenue from the interest on the security deposit. It is also held that the amounts were treated as long-term loans and advances in the financial statement of the corporate debtor for the Financial Year 2015- 2016. Moreover, in the financial statement of the corporate debtor for the Financial Year 2016-17, the amounts paid by the first respondent were shown as "other long-term liabilities". Therefore, if the letter mentioned above and the financial statements of the corporate debtor are considered, it is evident that the amount raised under the said two agreements has the commercial effect of borrowing as the corporate debtor treated the said amount as borrowed from the first respondent.

Therefore, we have no hesitation in concurring with the NCLAT's view that the amounts covered by security deposits under the agreements constitute financial debt. As it is a financial debt owed by the first respondent, sub-section (7) of Section 5 of the IBC makes the first respondent a financial creditor. The contracts subject matter of the Civil Appeal Nos. 6991 to 6994 of 2022 are in the form of letters, which provide for similar clauses as in the case of agreements subject matter of Civil Appeal No. 1143 of 2022.

Subject to what is held above, we summarize our legal conclusions:

a. There cannot be a debt within the meaning of sub-section (11) of section 5 of the IB Code unless there is a claim within the meaning of sub-section (6) of section 5 of thereof;

b. The test to determine whether a debt is a financial debt within the meaning of sub-section (8) of section 5 is the existence of a debt along with interest, if any, which is disbursed against the consideration for the time value of money. The cases covered by categories (a) to (i) of sub-section (8) must satisfy the said test laid down by the earlier part of sub-section (8) of section 5;

c. While deciding the issue of whether a debt is a financial debt or an operational debt arising out of a transaction covered by an agreement or arrangement in writing, it is necessary to ascertain what is the real nature of the transaction reflected in the writing; and

d. Where one party owes a debt to another and when the creditor is claiming under a written agreement/

arrangement providing for rendering 'service', the debt is an operational debt only if the claim subject matter of the debt has some connection or co- relation with the 'service' subject matter of the transaction.

For the reasons recorded earlier, we hold that the view taken by the NCLAT under the impugned judgments and orders is correct and will have to be upheld. Therefore, we confirm the impugned judgments and dismiss the appeals with no order as to costs. The Resolution Professional shall continue with the CIRP process in accordance with the impugned judgments.

LW 40:06:2024

SHUBHAM CORPORATION PRIVATE LTD v. KOTOJU VASUDEVA RAO RP OF NAVAYUGA INFOTECH PRIVATE LIMITED & ORS [NCLAT]

Company Appeal (AT) (CH) (Insolvency) No.163 of 2023

Rakesh Kumar Jain & Ajai Das Mehrotra. [Decided on 22/05/2024]

Insolvency and Bankruptcy Code, 2016- CIRP- debt under debenture subscription agreement- whether the debenture holder is a financial creditor-Held, No.

Brief facts:

The IRP received a claim from the Appellant herein. The IRP after verifying the same, approved the claim as Financial Debt, included the Appellant in the List of Financial Creditors and reconstituted the CoC including Appellant as Member and filed IA No. 1384/2022 before the Ld. NCLT, Hyderabad to bring on record the updated summary of claims and the reconstituted CoC. The Operational Creditor/Respondent in the said IA filed counter before the Ld. NCLT seeking directions to the IRP to re-examine the claim of the Appellant and consequential reconstitution of CoC.

The Ld. NCLT considered the objections raised by the Operational Creditor that the Appellant herein cannot be included in the list of Financial Creditors. After examining the Debenture Subscription Agreement (hereinafter referred to as 'DSA'), the Ld. NCLT held that the inclusion of the Appellant herein in the list of Financial Creditors is impermissible under law and consequently the prayer to receive the revised list of members of CoC is unacceptable and is liable to be rejected. The said IA was dismissed thereby the Appellant was not accepted as Financial Creditor and the revised CoC was not taken on record.

Decision: Dismissed.

Reason:

It is an admitted fact that the Appellant herein was a debtor of sum of Rs. 110,85,44,776/- and that the Corporate Debtor had offered to issue Compulsory Convertible Debentures (CCD) carrying 0% interest to the Appellant in lieu of the said debt. The said offer was made vide letter dated 03.02.2020 which is available at page 85 of the Appeal Paper Book. The said offer for issuance of Zero Coupon CCDs was accepted by the Appellant vide letter dated 14.02.2020 which is at page 86 of the Appeal Paper Book.

Thereafter, on 02.03.2020, the Corporate Debtor and the Appellant entered into Debenture Subscription Agreement (DSA). The terms and conditions of the CCDs are defined in Annexure A available at page 99 of the Appeal Paper Book, according to which CCDs shall be of face value of Rs. 10/- and shall be freely transferable. The CCDs can be converted into equity shares at any time before the expiry of 10 years from the date of allotment of CCDs and if no such option is exercised, such CCDs will automatically be converted to equity shares as per conversion formula given in clause 2.3 of the Annexure. The equity shares allotted on conversion of the CCDs shall carry the right to receive all dividends and other distributions and shall rank pari passu with the existing equity shares of the Company. On conversion of CCDs into equity shares, the Appellant will be eligible for rights proportional to its shareholding and as mutually agreed with the Company.

The perusal of the relevant clauses of the DSA, Annexure A of the DSA and the Debenture Certificate clearly shows that the only obligation of the Corporate Debtor was to issue shares in exchange of the said debentures. These debentures are not interest bearing and are Zero Coupon CCDs. As per the DSA, the debentures have to be compulsorily converted into shares and do not carry any obligation towards repayment of the original debt. The Appellant, through the DSA dated 02.03.2020 and issue of CCD Certificate dated 31.03.2020, had voluntarily and contractually given up any right whatsoever to receive repayment of principal or interest. It is now entitled only to receive shares at end of tenure, or earlier, if it so opts. The Corporate Debtor was admitted into CIRP on 16.09.2022, much after the extinguishment of right of repayment of the Appellant under DSA dated 02.03.2020 and issue of Debenture Certificate on 31.03.2020.

The issue to be decided in this case, therefore, is whether the Compulsorily Convertible Debentures which do not carry any obligation to repay should be treated as debt or as equity, while admitting the claim under IBC. Similar issue was examined by this Tribunal in the case of *M/s IFCI Limited vs Sutanu Sinha, Company Appeal (AT) (CH) (Ins.) No. 108/2023* vide order dated 05.06.2023. The said judgment has been upheld by the Hon'ble Supreme Court of India in Civil Appeal No. 4929/2023 vide judgment dated 09.11.2023. Since this is the latest judgment under IBC by the Hon'ble Apex Court, we shall be guided by it in our decision. In the said judgment of IFCI cited supra, upheld the decision of NCLT and NCLAT for treatment of CCD as equity.

The salient clauses of the DSA have been reproduced earlier. An examination of the DSA shows that the debentures issued to the Appellant were compulsorily

convertible into equity and the only option to the Appellant was to get it converted to shares even prior to the stipulated period of 10 years, failing which the CCDs were to automatically convert into equity shares at the end of 10 years. There was no liability or obligation to repay the debt.

We have noted the guidance approved by the Hon'ble Supreme Court in stating in para 23 of the IFCI judgment cited supra that it is not advisable for court to supplement or add to commercial contract. The DSA between the Appellant and the Corporate Debtor clearly had no clause regarding repayment and no clause regarding any option other than conversion of the debentures into shares. A convertible debenture can be regarded as "debt" or "equity" based on the test of liability for repayment. If the terms of convertible debentures provide for repayment of borrower's principal amount at any time, it can be treated as a debt instrument but if it does not contemplate repayment of the principal amount at any time, that is, if it compulsorily leads to conversion into equity shares, it is nothing but an equity instrument. Respectfully following the judgment of the Hon'ble Supreme Court in the case of M/s IFCI Limited vs. Sutanu Sinha & Ors., cited supra, we hold that the compulsorily convertible debentures held by the Appellant are equity instrument and accordingly, we do not find any reason or justification to interfere in the impugned order of the Adjudicating Authority. In the result, the Appeal is dismissed. All related IAs pending, if any, are closed. No order as to costs.

LW 41:06:2024

SUPERINTENDENT OF STAMPS & INSPECTOR GENERAL OF REGISTRATION v. AVIL MENEZES RP OF AMW AUTO-COMPONENT LTD[NCLAT]

Comp. App. (AT) (Ins) No. 1591 of 2023 & I.A. No. 5750 of 2023

Rakesh Kumar Jain, Naresh Salecha & Indevar Pandey. [Decided on 20/05/2024

Insolvency & Bankruptcy Code, 2016- corporate debtor was the transferee company in a demerger scheme - stamp duty liability on demerger payable by the corporate debtor - Resolution Plan provided for partial liability only- department filed claim belatedly-whether the claim is admissible- Held,No.

Brief facts:

The Stamp Duty accrued as a result of demerger of Asia Motors Works Ltd. being transferor company and AMW Motors Ltd being the transferee No. 1 company and AMW Autocomponent Ltd. being the transferee No. 2 company. It was the claim of the Appellant that the Appellant had filed the claims of Rs. 15,38,79,179/- being in nature of Stamp Duty and Penalty, however only Rs. 2,65,00,000/- has been provided in the Resolution Plan under the caption "Land Payments and Stamps Duty" and did not consider remaining outstanding amount of stamp duty and fees.

The limited issue to be decided in the present appeal was regarding belated claims of the Appellant which has been filed by the Appellant in form 'F' on 23.03.2023 against the public announcement by the Respondent issued on 03.09.2020.

Decision: Dismissed.

Reason:

We observe that the time is essence for resolution of the Corporate Debtor and if any plan is saddled with huge delays of more than 30 months as in present case, we are afraid that the resolution of the Corporate Debtor will never take off.

We have noted from the pleadings of the Appellant that he was informed for the first time by the Respondent on 17.02.2021 whereas which was much delayed after the public announcement on 03.09.2020. One query was raised by this Appellate Tribunal to the Appellant that even for argument's sake the Appellant came to know only on 17.02.2021 why did the Appellant file the claim only on 23.03.2023 i.e., after more than 2 years and not immediately after 17.02.2021, the Appellant could not response properly on this pointed query. Thus, we note that there was no plausible reason for the Appellant to explain his conduct of filing such belated claims after 30 months of the public notice.

We note that the claim was filed by the Appellant much beyond the date when the Resolution Plan was approved by the CoC. We also note that the Respondent, however disclosure the contingent liability to the perspective Resolution Applicants through financial statement that the Respondent is seeking a waiver of Stamp Duty Payments through the provisions of its Resolution Plan. The Respondent explained that though he sought exemption time the stamp duty however it was not a condition precedent for the implementation of the Resolution Plan and made clear that the denial of waiver by the Adjudicating Authority would only result in that the Stamp Duty Payments to be made by the SRA in accordance to the Resolution Plan.

We also note that in catena of Judgment of Hon'ble Supreme Court of India has held that SRA cannot be burdened with related undisputed claims after the Resolution Plan submitted by him has been approved by the CoC. It is the fact that the Resolution Plan was approved by the CoC much earlier then the claim submitted by the Appellant. The Resolution Plan is stated to have been implemented by the SRA.

We have already noted that as per ratio decided by the Hon'ble Supreme Court of India in the matter of Committee of Creditors of Essar Steel India Limited (Supra) that claims after the Resolution Plan has been approved by the CoC should not be accepted. Similarly, in RPS Infrastructure (Supra) the Hon'ble Supreme Court of India has again held that mere fact that the plan has not been approved by the Adjudicating Authority does not imply that plan can go back and forth thereby

making the CIRP an endless process. In view of above detailed discussions, we find no merit in the appeal. The appeal deserved to be dismissed and stand dismissed. No Costs. Interlocutory Application(s), if any, are Closed.

Tax Laws

LW 42:06:2024

COMMISSIONER OF TRADE AND TAXES v. FEMC PRATIBHA JOINT VENTURE NTs [SC]

Civil Appeal No. 3940 of 2024

P.S. Narasimha & P.B.Varale, JJ. [Decided on 01/05/2024]

Delhi Value Added Tax Act, 2004 - section 38 and 42- refund of tax- adjustment of refund against outstanding tax dues- whether refund of tax is bound by the timelines set in the Act-Held, Yes.

Brief facts:

The issue for consideration before the court was whether the timeline for refund under Section 38(3) of the Delhi Value Added Tax Act, 2004 must be mandatorily followed while recovering dues under the Act by adjusting them against the refund amount.

The respondent claimed refund of excess tax credit amounting to Rs. 17,10,15,285/- for the 4th quarter of 2015-16 through revised return filed on 31.03.2017 and Rs. 5,44,39,148/- for the 1st quarter of 2017-18 through return filed on 29.03.2019, along with applicable interest under Section 42 of the Act. The appellant did not pay the refund even until 2022, pursuant to which the respondent sent a letter dated 09.11.2022 for the consideration of their refund. The Value Added Tax Officer passed an adjustment order dated 18.11.2022 to adjust the respondent's claims for refund against dues under default notices dated 30.03.2020, 23.03.2021, 30.03.2021, and 26.03.2022. The respondent then filed a writ petition before the Delhi High Court for quashing the adjustment order and the default notices.

By judgment impugned herein, the High Court quashed the adjustment order and directed refund of Rs. 17,10,15,285/- for the 4th quarter of 2015-16 and Rs. 5,44,39,148/- for the 1st quarter of 2017-18, along with interest as per Section 42 till the date of realisation. In respect of the default notices, the High Court gave liberty to the respondent to avail statutory appeal under Section 74 of the Act.

Decision: Dismissed.

Reason:

The learned ASG has submitted that the timelines specified in section 38(3) are only to ensure that interest is paid if the refund is delayed beyond the statutorily prescribed period. However, he has argued, the timeline cannot be used to denude the power to adjust refund amounts against outstanding dues under Section 38(2). The refund can be adjusted as long as outstanding dues exist at the time when the refund is processed, even if it is beyond the stipulated timeline. The learned counsel for the assessee has supported the reasoning of the High Court and has placed reliance on several judgments of the Delhi High Court that affirm this position of law.

We find no reason to interfere with the impugned judgment, which follows the view that has been consistently adopted by the High Court. The finding of the High Court is based on the plain language of Section 38 of the Act. Sub-section (1) provides that any amount of tax, penalty and interest that is in excess of the amount due from a person shall be refunded to him by the Commissioner. Sub-section (2) permits the Commissioner to first apply such excess to recover any other amount that is due under the Act or the Central Sales Tax Act, 1956. Sub-section (3), which is relevant for our purpose, provides the assessee with the option of getting the refund or carrying it forward to the next tax period as a tax credit. In case of refund, Section 38(3)(a) provides the timeline for refund from the date on which the return is furnished or claim for refund is made as: (i) within one month, if the period for refund is one month; (ii) within two months, if the period for refund is a quarter. Sub-section (4) provides that if notice has been issued under Section 58 or additional information has been sought under Section 59, then the amount shall be carried forward to the next tax period as tax credit. Sub-sections (5) and (6) pertain to security. Sub-section (7) provides certain exclusions while calculating the period under sub-section (3). Sub-sections (8)-(10) pertain to refund in cases of sale to registered and unregistered dealers. Lastly, sub-section (11) provides that the refund shall not be allowed to a dealer who has not filed any return that is due under the Act. The language of Section 38(3) is mandatory and the department must adhere to the timeline stipulated therein to fulfil the object of the provision, which is to ensure that refunds are processed and issued in a timely manner.

In the present case, Section 38(3)(a)(ii) is relevant as both the refunds in the present case pertain to quarter tax periods. Therefore, as per Section 38(3)(a)(ii), the refund should have been processed within two months from when the returns were filed (31.03.2017 and 29.03.2019), which comes up to 31.05.2017 and 29.05.2019. The default notices are dated 30.03.2020, 23.03.2021, 30.03.2021, and 26.03.2022. It is therefore evident that the default notices were issued after the period within which the refund should have been processed. Sub-section (2)

only permits adjusting amounts towards recovery that are "due under the Act". By the time when the refund should have been processed as per the provisions of the Act, the dues under the default notices had not crystallised and the respondent was not liable to pay the same at the time. The appellant-department is therefore not justified in retaining the refund amount beyond the stipulated period and then adjusting the refund amount against the amounts due under default notices that were issued subsequent to the refund period.

Further, the learned ASG's contention that the purpose of the timeline provided under sub-section (3) is only for calculation of interest under Section 428 would defeat the object of the provision. Such an interpretation would effectively enable the department to retain refundable amounts for long durations for the purpose of adjusting them on a future date. This would go against the object and purpose of the provision. This contention is hence rejected.

In view of the above, we dismiss the present appeal and affirm the impugned judgment directing the refund of amounts along with interest as provided under Section 42 of the Act.

Competition Laws

LW 43:06:2024

HARMIT AHUJA v. MARUTI SUZUKI INDIA LTD [CCI]

Case No. 43 of 2023

Ravneet Kaur, Anil Agrawal & Sweta Kakkad. [Decided on 06/05/ 2024]

Competition Act, 2002-section 4-abuse of dominance- car dealer- limited edition of car model with freebies and extended period of warranty-denial of refund of excess amount paid by the manufacturer- whether abuse of dominance-Held,No.

Brief facts:

The basic grievance of the Informant is the alleged introduction of limited edition 'Thunder' Model of Maruti Jimny by the OP in India in June 2023, costing ₹10.74 lacs, laced with several freebie accessories and extended warranty free of cost, which not only led to the initial customers of Jimny, who had bought the car from the OP at higher prices, feeling cheated, but also led to a downfall in the resale prices of the cars purchased by them as this new model was available at a discount of around ₹2.30 lacs. Further, the Informant was aggrieved by the fact that when he asked the OP for a refund of the excess amount paid by him for purchasing the Jimny cars, the OP refused to provide him such refund. Therefore, the Informant had filed the present Information alleging contravention of the provisions of Section 4 of the Act.

Decision: Dismissed.

Reason:

The Commission has perused the Information filed by the Informant and the documents annexed therewith.

As the allegations made in the present Information pertain to the car 'Jimny', an SUV, it is noted from the information available in the public domain and evidently, in 2022 and 2023, the SUV sales made by the OP were 2,49,100 and 2,06,200 respectively, while the sales made by Mahindra & Mahindra were 2,39,800 and 2,04,500, respectively. Assuming that the above-stated data comprises the entire SUV segment of the passenger cars market in India, the market share of the OP in the same in 2022 and 2023 comes to approx. 22% and 21.5% respectively.

In light of the data extracted above, in the opinion of the Commission, the OP does not hold a market share large enough to enable it to operate independently of competitive forces prevailing in the market or to affect its competitors or consumers or the market in its favour, especially in the SUV segment of passenger vehicles. As such, the OP does not appear to be a dominant player in the market. Therefore, in the opinion of the Commission, a case of violation of the provisions of Section 4 of the Act cannot be made out against the OP.

Further, the Commission also notes that the grievance raised by the Informant is an inter-se dispute between the Informant and the OP regarding price of the product sold by the OP to the Informant. In the opinion of the Commission, on the basis of the grievances alleged by the Informant, no competition issue or concern seems to arise from the facts and allegations stated by the Informant. Once a buyer purchases a product from a seller at a given price, it cannot insist to avail benefit of any future discount which may be offered on such product by the seller. The discounted price alleged also does not seem to be predatory in nature.

In view of the above, the Commission is of the considered opinion that no prima facie case of contravention of the provisions of Section 4 of the Act is made out against the OP in the present matter. Hence, the matter is directed to be closed in terms of the provisions contained in Section 26(2) of the Act.

LW 44:06:2024

RAVI SHANKAR TIWARI v. AUTOMATTIC INC.[CCI]

Case No. 01 of 2023

Ravneet Kaur, Anil Agrawal, Sweta Kakkad& Deepak Auurag. [Decided on 29/04/ 2024]

Competition Act, 2002 -section 4- abuse of dominance- delisting of complainant's plugins from the plugin's directory maintained by WordPress-whether abuse of dominance-Held,No.

Brief facts:

The Informant is a software developer from Kolkata. It has been submitted that the Opposite Party is involved in the development of open-source software, applications, blogging websites, plugins, etc. The Informant has further averred that the Opposite Party is the parent company of Wordpress.org [a content management system (CMS)], wherein the user can create a simple blog as well as a fully operational website and mobile applications.

The Informant was primarily aggrieved by delisting of its plugins from the plugin's directory maintained by WordPress and the same is alleged to be an abuse of its dominant position in the relevant market by WordPress in violation of provisions of Section 4 of the Act.

Decision: Dismissed.

Reason:

At the outset, it is noted that the alleged conduct of the OP or wordpress.org does not appear to be an abuse of dominant position, if any, for reasons elaborated in this order. However, for completeness, the Commission has delineated the applicable relevant market and assessed dominance of the OP or wordpress.org in the same.

In relation to dominance in this market, it is noted that in addition to wordpress.org, there are multiple players in this market like Wix, Squarespace, Shopify, Joomla, and Drupal which offer similar website building and management services. Based on the available data, it is noted that wordpress.org has the largest market share i.e., 62.5% in the relevant market and thus, can be inferred to be dominant on that basis.

Now, coming to the examination of alleged conduct of WordPress, it is noted that the primary grievance of the Informant is delisting of its plugins by WordPress. The OP has submitted that all plugin developers are subject to a set of guidelines i.e., 'Detailed Plugin Guidelines', 'Forum Guidelines' and the 'Community Code of Conduct', in order to ensure a simple and transparent process for developers to submit their plugins to the Plugin Directory. The Detailed Plugin Guidelines contain a list of do's and don'ts applicable to developers who submit plugins for being listed in the Plugin Directory. Some of the acts prohibited under the Guidelines include spamming of public facing pages of WordPress.org and engaging in dishonest, immoral, or illegal activities. Violation of Detailed Plugin Guidelines may result in all the developers' plugins being removed from the Plugin Directory and the developer being banned from hosting any plugins on WordPress.org.

In relation to the Informant's allegations, the OP has submitted detailed chronology of events leading to banning of Plugins of the Informant. Based on the information provided by the OP, which has not been contested by the Informant, it is noted that the Informant has repeatedly violated multiple guidelines of the wordpress.org despite being warned multiple times. Thus, the plugins of the Informant seems to be banned from the WordPress Plugin Directory due to his persistent misconduct contrary to the guidelines. These guidelines also do not appear to be unfair or unreasonable and are meant for maintaining quality of service and protecting interest of both developers and users. Accordingly, the Commission is of the view that WordPress.org is justified in taking appropriate action against any developer found non-compliant with the prescribed standards and regulations. It is also noted that guidelines have not been applied in a discriminatory manner and around 35 developers including the Informant have been permanently banned from WordPress.org for repeated violation of the Guidelines. Therefore, the conduct of the Opposite Party does not appear to be either unfair or discriminatory.

The Informant has also alleged that Jetpack (the plugin of the OP) could be the reason for deleting 5-star reviews of the Informant to bring the overall rating down. The OP has denied that Informant's Way2enjoy Image Optimizer Plugin was banned to support its own Jetpack Plugin. It is stated that OP's Jetpack plugin offers a wide range of features, whereas the Informant's Way2enjoy Image Optimizer Plugin is a one-point solution that has a sole function i.e., image optimization. Therefore, there is substantial distinction in the scope and depth of features of the two plugins and no legitimate basis is established to perceive the Informants plugin to be in direct competition with Jetpack. Thus, the allegations of self-preferencing are also unfounded.

Given the facts and circumstances of the present case, the Commission finds that no prima facie case of contravention of the provisions of Section 4 of the Act is made out against the Opposite Party in the instant matter. Accordingly, the Information is ordered to be closed forthwith in terms of the provisions contained in Section 26(2) of the Act. Consequently, no case for grant for relief(s) as sought under Section 33 of the Act arises and the said request is also rejected.

General Law

LW 45:06:2024

GEO MILLER AND CO PVT LTD v. UP JAL NIGAM & ORS [ALL]

Civil Misc. Arbitration Application No.4 of 2024 with Civil Misc. Arbitration Application No.5 of 2024

Shekhar B. Saraf, J. [Decided on 17/05/2024]

Arbitration and Conciliation Act,1996- section 29A- extension of time to make award- conflicting judgements of coordinate benches- reference to larger bench- decision pending- in interregnum which one of the conflicting judgement to be followed- Held, the earlier judgement should be followed.

Brief facts:

These applications have been filed under Section 29(A)(4) and Section 29(A)(5) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the 'Act') praying for extension of the mandate of the arbitral tribunal.

There were conflicting judgements of coordinate benches and the issue of which bench's judgement would prevail was referred to a larger bench. Till the decision of the larger bench on the issue, which coordinate bench's judgement would rule the field is the question involved in this case.

Decision: Allowed.

Reason:

Hence, for the better adjudication of the matter, I have divided the instant judgment into two issues:

Issue No. 1: When there are conflicting judgments of different benches of coequal strength of a court on a similar question of law, which one assumes the status of binding precedent when the said question of law has been referred to a larger bench for adjudication ?

What emerges from the wisdom of the Hon'ble Supreme Court is that the doctrine of precedent, is not without its nuances and complexities. As elucidated by the Hon'ble Supreme Court, an earlier decision, even if considered incorrect by a later Bench, retains its binding effect on subsequent Benches of coordinate jurisdiction. The principle which emerges is that the earlier decision must be followed until the decision of the larger bench is returned. This principle is rooted in tradition, certainty, and the integrity of precedent itself. As articulated by the Apex Court, the law would be bereft of utility if thrown into a state of uncertainty by conflicting decisions. Throughout history, the stability and continuity of law have been upheld through adherence to established precedent. By following the earlier decision, even in the face of conflicting precedents, courts preserve the integrity of the legal system and uphold the principle of stare decisis - the notion that like cases should be decided like. From a practical standpoint, following the earlier decision until the decision of the larger bench is returned serves to promote certainty and predictability in the administration of justice. When conflicting precedents arise, uncertainty abounds, and litigants may be left in a state of limbo, unsure of their rights and obligations under the law. By adhering to the earlier decision, courts provide a measure of stability and clarity, allowing parties to proceed with confidence while awaiting resolution from the larger bench.

In light of the aforesaid, Issue No. 1 is answered as follows:

"When a bench of coequal strength is faced with conflicting judgments of other coequal benches, the judgment delivered earlier will continue to govern the field of law, till such time, the same is overturned or in case the question(s) of law, if referred to the larger bench is answered. This will also hold true when a lower court is faced with conflicting judgments of a higher court, or a coordinate bench is faced with conflicting judgments of a division bench."

Issue No. 2: Which judgment will govern the field of law on Section 29A of the Act as far as this Court is concerned ?

In my view, the judgment of this Court in Indian Farmers Fertilizers (supra) ought to have been followed in A'Xykno Capital Services (supra). The doctrine of per incuriam is based on the latin phrase meaning "thorough lack of care". It allows the courts to depart from established precedent when a previous decision was made without proper consideration of relevant statutes, regulations, or binding authorities. However, the doctrine of per incuriam must be exercised with caution to ensure that it is not used as a pretext for disregarding inconvenient precedent. The principle should only be invoked in exceptional cases where the error is clear and unequivocal, and where adherence to the precedent would result in a grave injustice. Per incuriam should be used sparingly and only in exceptional cases.

In light of the above, the Issue No. 2 is answered as follows:

"The judgments in Lucknow Agencies (supra) and Indian Farmers Fertilizers (supra) having been delivered under different factual scenarios will continue to govern the field of law as far as Section 29A of the Act is concerned before this Court. All applications filed under Section 29A of the Act till such time as the Larger Bench, reference to which was made vide this Court's order dated February 26, 2024, returns its decision on the questions of law,

will have to be decided in accordance with the law laid down in Lucknow Agencies (supra) and Indian Farmers Fertilizers (supra). The judgment in A'Xykno Capital Services (supra) having been delivered after the aforesaid judgments, will not hold any precedential value. Needless to say, this position will be subject to the decision of the Larger Bench."

In light of the aforesaid, since the appointment of the arbitrator in ARBT NOS. 4 and 5 of 2024 was made by this Court in exercise of its powers under Section 11 of the Act, the instant applications filed under Section 29A(4) and Section 29(A(5) of the Act are maintainable before this Court.

LW 46:06:2024

RASHMI GOYAL v. M/S MAHALAXMI FABRICS[DEL]

CRL.M.C. No(s) 2126-2132 of 2023.

Manoj Kumar Ohri, J. [Decided on 30/04/2024]

Section 141 of the NI Act read with Section 482 of the CrPC- Company secretary arrayed as director and made vicariously liable- whether tenable- Held,No.

Brief facts:

As per the material placed on record, the petitioner was sought to be made vicariously liable for the offence under Section 138 NI Act, by describing her as a Director of the accused company and that it was upon her assurance that the goods were provided. Further, she had also assured that the subject cheques would be duly encashed. Thus, upon their dishonour, the petitioner becomes vicariously liable in terms of Section 141 NI Act.

Decision: Allowed.

Reason:

The petitioner has contended that she was a Company Secretary in the accused company, it is also essential to deal with the position of Company Secretary in a company. Section 2(24) of the Companies Act, 2013 provides that 'Company Secretary' means any individuals defined as such in Section 2(1)(c) of the Companies Secretaries Act, 1980, which itself defined him/her as "a person who is a member of the Institute". While no specific definition of Company Secretary has been provided, however Section 2(51) of the Companies Act, which deals with 'Key Managerial Personnel' mentions company secretary as one such personnel. Section 204 of the Companies Act provides for the functions of 'Company Secretary'.

From the discussion above, it can be culled out that the Company Secretary is a 'key managerial personnel' who performs secretarial functions on behalf of the Company to ensure that the secretarial compliances are made by the Company. The statutory role that a Company Secretary performs does not include "conducting the business of the Company" of the kind envisaged in Section 141, for such an individual to be made vicariously liable.

Thus, indisputably, it can be observed that the petitioner was employed in the company as a Company Secretary. Once the same is established, the question that arises for consideration is whether the petitioner can be made vicariously liable in terms of Section 141 NI Act. A perusal of the subject complaints would show that nowhere in the said complaints has the respondent averred that the petitioner was in-charge of, and responsible for the conduct of the business of the company. The word 'in-charge of a business' has been interpreted to mean a person having overall control of the day-to-day business of the company. In the ordinary course of business, it cannot be said that the petitioner, who was acting as a Company Secretary, would be in-charge of the day-to-day affairs of the company, as required in terms of Section 141(1). Thus, the petitioner cannot be vicariously liable in terms of Section 141(1).

Insofar as Section 141(2) is concerned, for the petitioner to be made liable in terms of the said provision, it needs to be shown that there was consent, connivance or neglect on her part, in the issuance as well as the dishonour of the subject cheques. A reading of the above-mentioned extract would show that the petitioner (arrayed as accused No.6 in the subject complaints) has been impleaded based upon sweeping allegations and bald averments, stating therein that based upon the assurances provided by the accused persons, respondent supplied the goods as well as accepted the subject cheques in discharge of the liability. Even if the said averments are taken at their face value, they do not appear to be adequate inasmuch as these averments do not particularly address/show the Girdhari Lal Gupta v. B.H. Mehta, (1971) 3 SCC 189 consent/connivance/ neglect on the part of the petitioner in issuance or dishonour of the cheque.

In view of the facts of the present case including the fact that the petitioner was employed as a Company Secretary in the accused company as well as the position of law w.r.t Section 141 NI Act and the application of the same to the subject complaints as extracted above, it can be observed that the subject complaints are bereft of the adequate averments against the petitioner alleging the Petitioner's involvement in the conduct of the business of the Company beyond her statutory role as a Company Secretary, more particularly, in relation to the transaction pursuant to which cheque in question was issued. Neither is there any averment that the offence has been committed with the consent or connivance of is attributable to any neglect on the part of the Petitioner, so as to potentially make her liable under Sub- section (2) of Section 141.

Consequently, the present petitions are allowed and the criminal complaints filed under Section 138 read with Section 141 NI Act are quashed qua the petitioner.