3

LEGAL WORLD

- SEVERN TRENT WATER PURIFICATION, INC v. CHLORO CONTROLS (INDIA)PVT LTD [SC]
- SHANKAR SUNDARAM v. AMALGAMATIONS LTD & ORS [NCLAT]
- THE NATIONAL SMALL INDUSTRIES CORPORATION LTD V. REKHA SHARMA RESOLUTION PROFESSIONAL [NCLAT]
- MATHOSRI MANIKBAI KOTHARI COLLEGE OF VISUAL ARTS v. THE ASSISTANT PROVIDENT FUND COMMISSIONER [SC]
- DELHI TRANSPORT CORPORATION v. MAHENDER SINGH[DEL]
- SIBY THOMAS v. SOMANY CERAMICS LTD [SC]
- ADITYA KHAITAN v. IL AND FS FINANCIAL SERVICES LTD [SC]
- RAHUL DILIP SHAH v. THE CATALYST TRUSTEESHIP LTD& ORS [DEL]
- INDIAN SUGAR MILLS ASSOCIATION v. COMPETITION COMMISSION OF INDIA & ORS [NCLAT]

Corporate Laws

Landmark Judgement

LMJ 11:11:2023

SEVERN TRENT WATER PURIFICATION, INC v. CHLORO CONTROLS (INDIA)PVT LTD [SC]

Appeal (Civil) No. 1351 & 1353 of 2008

C.K. Thakker & Tarun Chatterjee, JJ. [Decided on 18/02/2008]

Equivalent citations: (2008) 142 Comp Cas 81; (2008) 83 CLA 3;

Companies Act,1956- section 433- winding up of a company- rights of contributory and creditor to wind up a company- Supreme court explains the principle.

Brief facts:

The petitioner Severn Trent filed a winding up petition against Capital Controls India Private Limited (the company). The Company judge admitted the company petition. The Company as well as Chloro Controls (India) Private Limited opposed the admission of the Company Petition. The Company objected to the maintainability of the petition for winding up on several grounds. The learned Company Judge admitted the Company Petition.

On appeal, the Division Bench set aside the order of the Company Judge, holding that Severn Trent is not entitled to file a petition for winding up as a contributory, unless it is registered as a member in the register maintained by the company. It, however, remitted the matter on the question of maintainability in its capacity as a Creditor of the Company to the Company Judge for consideration. The Bench also observed that it would be open to the respondents to oppose the admission of the petition on all grounds, including that of premature advertisement by Severn Trent. Severn Trent being dissatisfied with order in appeal, filed the present SLP.

Decision: Dismissed.

Reason:

We have heard the learned counsel appearing on both the sides at considerable length. We have also given most anxious and thoughtful consideration to the rival submissions. Primarily, three questions arise for our consideration;

1. Whether a winding up petition filed by Severn Trent is maintainable in the capacity as a contributory?

It is abundantly clear that a contributory's right to present a winding up petition must be one either under clause (a) or under clause (b) of sub-section (4) of Section 439. It is nobody's case that clause (a) of Section 439(4) is attracted in the instant case. Hence, Severn Trent can only claim the right to present a winding up petition under clause (b) of sub- section (4) of Section 439 of the Act.

It is clear that the provisions of the Act must be complied with before presenting a winding up petition under Section 439(4)(b) of the Act. If a person intends to present a petition for winding up of a company as a contributory, he/it has to satisfy the Company Court that his/its case is covered by one of the eventualities contemplated by clause (b) of sub-section (4) of Section 439 of the Act.

In the context of Company Law, winding up of a body corporate is not the same thing as or equivalent to death of a member. An individual and a body corporate expressly have been treated separately which is clear from Sections 430, 431 and 432 of the Act. Under the scheme of the Act, every creditor may present a petition for winding up of a company, but every contributory cannot. A contributory to be eligible and qualified to present a winding up petition must be covered by sub-section (4) of Section 439 of the Act and the Legislature, in its wisdom, excluded certain categories of persons from being entitled to present a petition for winding up as contributory. As already held by us earlier, the provision is exhaustive in nature and its sweep cannot be extended by judicial interpretation. Upholding of argument of Severn Trent and conceding the right to present a petition for winding up of a Company though it cannot be said to be a contributory would, in our judgment, result in re-writing of the provision. A Court of law cannot adopt a construction which would result in amendment of a statute. The contention of the learned counsel for Severn Trent, therefore, must be rejected.

For the aforesaid reasons, we answer question No.1 in the negative and hold that a winding up petition filed by Severn Trent in the capacity as a contributory is not maintainable.

2. Whether a winding up petition filed by Severn Trent is maintainable in the capacity as a creditor?

In our opinion, however, it cannot be said that the Division Bench was in error in passing the impugned order and remitting the matter to the learned Company Judge to consider the question as to maintainability of company petition filed by Severn Trent as a Creditor of the Company. In this connection, our attention was invited to certain decisions. In our opinion, it would not be appropriate to express any opinion one way or the other since we are of the view that the Division Bench of the High Court was not wrong in allowing Severn Trent to argue that point before the learned Company Judge as that point did not arise before him earlier. We may, however, hasten to add that we may not be understood to have recorded a finding that the petition presented by Severn Trent is maintainable. We clarify that as and

when the matter will be taken up by the learned Company Judge, it will be open to the Company to raise a contention that no such petition as presented is maintainable in the capacity as a Creditor.

3. Whether a winding up petition filed by Severn Trent is liable to be dismissed at the threshold on the ground of premature advertisement by Severn Trent without the order of the Court as required by law?

So far as the third question is concerned, neither the learned Company Judge, nor the Division Bench has decided it. Before the learned Company Judge, no such contention appears to have been advanced by the Company. Before the Division Bench, it was argued that since there was premature advertisement by the Severn Trent without any order from the Company Court, there was 'abuse of process of the Court' by Severn Trent and the petition was liable to be dismissed only on that ground. Before us also, the above contention was reiterated by the learned counsel for the Company and in support thereof, case-law has been cited. The learned counsel for the Severn Trent, however, submitted that the advertisement was qualified, carefully worded and the facts stated therein were accurate. It was essentially a notice to creditors, contributories and other persons intimating about presenting of winding up petition and there was no mala fide intention or oblique motive in issuing the advertisement. We may only state that since the Division Bench of the High Court has remitted the matter to the learned Company Judge and granted liberty to the Company to oppose admission of the Company petition on all available grounds including the ground of 'premature advertisement', we need not express any opinion one way or the other. As observed by the Division Bench of the High Court, at the time the company petition will be taken up by the Company Judge for admission, it will be open to the Company or contesting respondent to oppose the admission on all grounds available.

For the aforesaid reasons, the appeal filed by Severn Trent Water Purification Inc. petitioner of the company petition, deserves to be dismissed and is hereby dismissed.

LW 76:11:2023

SHANKAR SUNDARAM v. AMALGAMATIONS LTD & ORS [NCLAT]

Company Appeal (AT) No. 325/2019 with connected appeals

M. Venugopal & Shreesha Merla. [Decided on 06/10/ 2023]

Companies Act,2013- section 241 and 242- oppression and mismanagement- whether applicant made a case for relief-Held, No.

Brief facts:

Challenge in these Appeals in Company Appeal (AT) No. 325/2019, and in Company Appeal (AT) No. 328/2019 respectively is to the common Impugned Order passed by the National Company Law Tribunal, Chennai Bench, by which common Order, the NCLT has dismissed both the Company Petitions, as devoid of merit.

The core issue involved in these appeals, which had a arduous path of litigation and finally come before the NCLAT is the oppression and suppression of minority shareholders and financial mismanagement of the company. The appellant is a minority shareholder.

Decision: Appeals dismissed.

Reason:

In the facts of the instant case, the Appellant is a minority Shareholder and the Company is not in a deadlock situation and having come to such a conclusion we are of the considered view that there is no case made out by the Appellant that there was any Oppression or Mismanagement as defined under Sections 241 and 242 of the Act and no direction can be given compelling the Respondents to purchase the Shares of the Appellant or for any buyout of shares. We are also conscious of the fact that the reliefs sought relates to shares that are subject matter of the Suits filed by the 24th Respondent and the Appellant before the Hon'ble Madras High Court in which the rights of the Parties are yet to be determined. The Appellant has filed C.S. 745/1999 seeking partition of the estate of his grandparents, which is subjudice. Though the powers of this Tribunal under the Sections 241 and 242 of the Act is wide, the over-all objective of these Sections must be kept strictly in view and the marginal note of the said Section of this Act shows that the purpose of the Order of the Court in this Section is to give relief 'in case of Oppression'. Since we do not regard either the remuneration being paid to the Respondents in the Subsidiary Companies, or the allegation of the Appellant that he was not made a Director in the Subsidiary Companies or that the expenses incurred towards the 24th Respondent regarding the 'stay' or 'education', or the investment of Rs. 16 Crores by TAFE in Amco Batteries or the sale of the Properties at Kotturpuram to the second Respondent, to be defined as an act of Oppression, detrimental to the affairs of the Company, the substratum for passing any Order under Sections 241 and 242, is not available. Hence, this Tribunal, in this factual matrix, is of the earnest view that directing for buyout of the shares would not be justified or legally permissible. Only when there is a case of complete deadlock in the Company on account of lack of probity in the management of the Company and there is no scope of efficiently running the Company as a commercial concern, there would arise a case for winding up on just and equitable ground. In the instant case, undisputedly the Respondent Companies, both the Holding and the Subsidiary Companies are not in a position of complete deadlock, but instead are running smoothly and profitably (table @ Para 18 herein). The material on record establishes that the Holding Company is a solvent Company and there is no documentary evidence on record to substantiate the plea of the Appellant that there was any complete lack of confidence against the majority Shareholders. To reiterate, any remuneration which is less than 11% of the net profits or even declaring a low dividend

does not amount to Oppression and mere dissatisfaction on behalf of the Appellant does not justify interference by this Tribunal. There is no functional deadlock leading to a situation where the Members are unable to co-operate in the management of the Company's affairs resulting in a paralysis kind of situation. Therefore, this Tribunal is satisfied that 'the just and equitable proposition' cannot be made applicable in this case, where there is no irretrievable breakdown in trust and confidence, leading to a 'functional deadlock'. In the absence of any contractual right to demand any proportional representation in the Board, an Order in this direction is not justifiable. Moreover, facts arising subsequent to the filing of the Petition cannot be relied upon and the validity of the Petition will be judged on the facts existing at the time of the presentation of the Petition.

This Tribunal is of the considered view that there are no substantial grounds for concluding that there was any 'Oppression or Mismanagement' and therefore, the question of passing any Order directing buyout of shares, bringing to an end any matter complained of, cannot be done in the facts of this case. There is no case made out by the Appellant to exercise any equitable jurisdiction to grant such relief. For all the foregoing reasons, these Appeals are accordingly dismissed.

LW 77:11:2023

THE NATIONAL SMALL INDUSTRIES CORPORATION LTD V. REKHA SHARMA RESOLUTION PROFESSIONAL [NCLAT]

Company Appeal (AT) (Insolvency) No. 841 of 2021

M. Venugopal & Ajai Das Mehrotra. [Decided on 16/10/2023]

Insolvency and Bankruptcy Code,2016- CIRP proceedings – moratorium started- encashment of BG by the secured financial creditor during the moratorium period- whether valid-Held, Yes.

Brief facts:

As per Clause 6 of the Agreement, raw material assistance was provided to the Corporate Debtor by the Appellant subject to furnishing of the Bank Guarantee in form of security. Initially, the raw material financial assistance against Bank Guarantee was sought for Rs.1 Crore which was later increased to Rs. 2.99Crores by executing a supplementary Agreement. In compliance of the two Agreements, 7 Bank Guarantees were submitted to the Appellant.

On an Application by the Operational Creditor M/s. Jasmeet Associates, the Corporate Debtor was admitted in CCIRP and the announcement regarding initiation of CIRP was made in the newspapers on 12.02.2020. The Appellant invoked the Bank Guarantees vide letter dated 14.02.2020.

On an application filed by the Resolution Professional, NCLT quashed the Notices issued by the Appellant regarding invocation of Bank Guarantees. Aggrieved by the said Order of the Adjudicating Authority, the present Appeal has been filed.

Decision: **Allowed.**

Reason:

The Appellant had also brought to the attention of this Tribunal to the Judgement of this Tribunal, wherein it was held that an irrevocable and unconditional `Bank Guarantee' can be invoked even during Moratorium period in view of the amended provisions under Section 14(3)(b) of the IBC, 2016. The relevant portion of the Order of this Tribunal in *IDBI Bank Ltd. Vs. Indian Oil Corporation Ltd., dated 10.01.2023*, is reproduced below for ready reference:

"13. Having regard to the ratio of the Hon'ble Apex Court in the aforenoted Judgments, and keeping in view the provisions of the Code, we are of the considered view that an irrevocable and unconditional Bank Guarantee can be invoked even during moratorium period in view of the amended provision under Section 14 (3) (b) of the Code. We are conscious of the fact that the Bank has not taken any steps with respect to the alleged fraud, if any, between IOCL and the Corporate Debtor. The findings of the Hon'ble Arbitral Tribunal have also attained finality. For all the foregoing reasons, this Appeal is dismissed accordingly. No order as to costs".

In the instant case also the Bank Guarantee is an irrevocable and unconditional one, and the said Judgement squarely applies to the facts of this case on all fours. In conclusion, as per the facts of this case, the Bank Guarantee, provided by the Respondent No. 2/ Bank is held to be covered by the exception provided in provisions of Section 14(3)(b) of IBC, 2016, and the Moratorium prescribed under Section 14(1) of IBC, 2016, shall not apply to its Encashment. In the result, this Tribunal, in the teeth of foregoing qualitative and quantitative discussions mentioned supra, sets aside the Impugned Order.

Industrial & Labour Laws

LW 78:11:2023

MATHOSRI MANIKBAI KOTHARI COLLEGE OF VISUAL ARTS v. THE ASSISTANT PROVIDENT FUND COMMISSIONER [SC]

Civil Appeal No.4188 of 2013

Hima Kohli & Rajesh Bindal, JJ. [Decided on 12/10/2023]

Employees Provident Fund and Miscellaneous Provisions Act,1952- interconnected establishments- merging them for coverage- Supreme Court explains and reiterates the principle.

Brief facts:

The undisputed facts on record are that the Society had initially set up 'Ideal Institute' in the year 1965 and later it set up 'Arts College' in the year 1985-86. Both the Institutes are being managed by the Society. It is also an admitted fact that the Ideal Institute employed 8 persons, whereas the Arts College employed 18 persons. Under the provisions of the EPF Act, if any establishment employs 20 or more persons, the same shall be covered under the provisions of the EPF Act for grant of various benefits thereunder to the employees working there, the EPF Act being a welfare legislation.

The issue which requires consideration in the present appeal is regarding the clubbing of two Institutions being run by the same Society i.e., Ideal Fine Arts Society. In case the two Institutions are interconnected, these can be clubbed for the purpose of coverage under the EPF Act.

Decision: Dismissed.

Reason:

Now coming to the facts of the case in hand, as had already been noticed above, both the Institutes are being run by the same Society. The Ideal Institute was set up in the year 1965, whereas the Arts College (the appellant) was set up in the year 1985-86. If the employees employed in both the institutes are added, the total number of employees would be 26, which will be sufficient for coverage in terms of Section 1(3)(b) of the EPF Act, which stipulates that an institute employing 20 or more persons is liable to be covered under the provisions of the EPF Act. It is also a fact not in dispute that both the institutes are being run in the same campus.

The mere fact that two Institutes, managed and controlled by the same management, offer different courses, or were established at different times is not relevant for their clubbing under the EPF Act. The fact that one of the institutes receives 100% grant-in-aid from the government while the other is receiving to the extent of 70%, is also not relevant. After coverage of the establishments, the benefits, as determined for the purpose of assessing dues under the EPF Act, have already been assessed by the Commissioner.

From a perusal of the material available on record and the settled position of law, it can be safely opined that there is financial integrity between the Society of the appellant as well as the Ideal Institute as substantial funds have been advanced to the Institutes by the Society. Further, both the Institutes are functioning from the same premises. For the reasons mentioned above, the appeal is dismissed. There shall be no order as to costs.

LW 79:11:2023

DELHI TRANSPORT CORPORATION v. MAHENDER SINGH[DEL]

W.P.(C) 17742/2005 & CM APPL. 28229/2017

Chandra Dhari Singh ,J. [Decided on 20/10/ 2023]

Industrial Disputes Act,1947- section 33- employee dismissed for prolonged unauthorised leave- approval for dismissal- tribunal refused to allow the approval of dismissal petition filed by the management- whether correct-Held, No.

Brief facts:

The respondent abstained himself from his without any prior permission or authorization from the petitioner. The authority concerned has treated the absence of the respondent from duty as misconduct under Para 4(1) and 19(e) of the Standing Orders governing the conduct of DTC employees (Standing Orders) and a show cause notice was issued to him as to why disciplinary action should not be initiated against him. After completion of the enquiry, the enquiry officer had held that the respondent is guilty of misconduct and recommended his removal from service. The disciplinary authority on the basis of the enquiry report confirmed his removal from the service of the petitioner.

The petitioner moved an application under Section 33(2) (b) of the Industrial Dispute Act ("I. D. Act") before the Industrial Tribunal for approval of the action of removal from services of the respondent. The Industrial Tribunal rejected the application of the petitioner on the ground that as per the Master Attendance Register (MAR), the absence of employees was subsequently treated as leave without pay. Aggrieved by the order dated 29th January, 2003, the petitioner has preferred the instant writ petition.

Decision: Petition allowed.

Reason:

After perusing the entire documents/records in the instant case, I find that oral enquiry and detailed investigation was held in this case by the enquiry officer and the respondent was given full opportunity of defending himself. It is also found that the enquiry was conducted and concluded strictly in accordance with rules and in no stage any principle was flouted. The Tribunal has refused to grant an approval of the order of removal of the respondent from service under Section 33(2)(b) of the I.D. Act only on the basis of MAR report and ignoring all other material on record. As per the discussions in the forgoing paragraphs, it is settled that the Tribunal shall not refuse the approval under Section 33(2)(b) if the proper opportunity of defence had been given to the workman in the disciplinary proceedings.

The conclusions regarding negligence and lack of interest can be arrived by looking into the period of absence more particularly, when same is unauthorized. Burden is on the employee to prove by placing relevant materials on record, that there was no negligence or lack of interest on his part. Clause (1) of Para 4 of Standing Orders shows that there is requirement of prior permission of leave and an exception is made only in the case of sudden illness of the employee. The non- observance of stipulated conditions renders the absence unauthorized.

The learned Tribunal proceeded in the instant case on the basis of note as "leave without pay" in MAR. Treating as leave without pay is not same as sanctioned or approved leave. It is prima facie evident that the enquiry was conducted in fair and legal manner and the punishment was in accordance with the statutory provisions. Prima facie, it was a case of passing punitive orders. There was not even a hint of unfair

labour practice, or victimization. The Tribunal unnecessarily ignored all the materials that were available before it and only relied upon one document i.e. MAR report.

That being the factual position, the learned Tribunal was not justified in refusing to accord approval to the order of dismissal/removal as passed by the employer. In view of the above facts and discussion, the impugned order cannot be sustained and therefore, the same is set aside. The approval under Section 33(2) (b) of I.D Act is hereby accorded for the dismissal/removal order passed by the petitioner against the respondent.

General Laws

LW 80:11:2023

SIBY THOMAS v. SOMANY CERAMICS LTD [SC]

Criminal Appeal No. of 2023 (@SLP (Crl.) No.12 of 2020)

C.T. Ravikumar & Sanjay Kumar,JJ. [Decided on 10/10/2023]

Negotiable Instruments Act,1881- section 141- cheque bouncing-vicarious liability of director- High court refused to quash the proceedings against a resigned partner- whether correct-Held, No.

Brief facts:

The appellant set up twin grounds to seek quashment of the complaint against him; firstly, that he had resigned from the partnership firm on 28.05.2013 whereas the cheque in question was issued on 21.08.2015 and secondly, that the complaint is devoid of mandatory averments required to be made in terms of sub-Section 1 of Section 141 of the NI Act, as relates him. The High Court found that the contention in regard to the maintainability of the complaint against the appellant, owing to his retirement from the partnership firm prior to the issuance of the cheque in question, is a matter of evidence and ultimately, the appellant would have to lead evidence and prove that fact. Consequently, it was held that the complaint could not be rejected qua the appellant at the initial stage in exercise of the powers under Section 482 Cr.PC.

Decision: Allowed.

Reason:

In the light of the dictum laid down in Ashok Shewakramani's case (supra), it is evident that a vicarious liability would be attracted only when the ingredients of Section 141(1) of the NI Act, are satisfied. It would also reveal that merely because somebody is managing the affairs of the company, per se, he would not become in charge of the conduct of the business of the company or the person responsible to the company for the conduct of the business of the company. A bare perusal of Section 141(1) of the NI Act would reveal that only that person who, at the time the offence was committed, was in charge of and was responsible to the company for the conduct of the business of the company, as well as the company alone shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished. In such circumstances, paragraph 20 in Ashok Shewa Ramani's case (supra) is also relevant. After referring to the Section 141(1) of NI Act, in paragraph 20 it was further held thus:

"20 On a plain reading, it is apparent that the words "was in charge of" and "was responsible to the company for the conduct of the business of the company" cannot be read disjunctively and the same ought be read conjunctively in view of use of the word "and" in between."

The upshot of the aforesaid discussion is that the averments in the complaint filed by the respondent are not sufficient to satisfy the mandatory requirements under Section 141(1) of the NI Act. Since the averments in the complaint are insufficient to attract the provisions under Section 141(1) of the NI Act, to create vicarious liability upon the appellant, he is entitled to succeed in this appeal. We are satisfied that the appellant has made out a case for quashing the criminal complaint in relation to him, in exercise of the jurisdiction under Section 482 of Cr.PC. In the result the impugned order is set aside and the subject Criminal Complaint stand quashed only in so far as the appellant, who is accused No. 4, is concerned. Appeal stands allowed as above. There will be no order as to costs.

LW 81:11:2023

ADITYA KHAITAN v. IL AND FS FINANCIAL SERVICES LTD [SC]

Civil Appeal Nos. 6411-6418 of 2023 (@ SLP (C) Nos. 4789-4796 of 2021)

J.K. Maheshwari & K.V. Viswanathan,JJ. [Decided on 03/10/2023]

Commercial Courts Act,2016- suit filed during the Covid period- delay in filing written statement- HC refused to condone the delay – how to construe the exemption from limitation order of the SC- whether rejection correct-Held, No.

Brief facts:

The present appeals challenge the judgment of the High Court at Calcutta. By the said judgment, the High Court had dismissed the said applications and consequently denied the applicants/defendants prayer to take on record their written statements. According to the High Court, the applications cannot be allowed as the period of 30 days to file the written statements had expired on 08.03.2020. The High Court has held that the order dated 23.03.2020 passed by this Court in Suo Motu Writ Petition (C) No. 3 of 2020 [In Re: Cognizance for Extension of Limitation],

which is to be effective from 15.03.2020 would not enure to the benefit of the applicants/defendants since the limitation period for filing the written statements had expired on 08.03.2020.

Decision: Allowed.

Reason:

In the above background, the only question that arises for consideration is, was the High Court justified in rejecting the application for extension of time dated 20.01.2021 and in not taking the written statements on record?

As has been set out hereinabove, while summons was served on 07.02.2020, the 30 days period expired on 08.03.2020 and the outer limit of 120 days expired on 06.06.2020. The application for taking on record the written statements and the extension of time was filed on 20.01.2021. Applying the orders of 08.03.2021 and the orders made thereafter and excluding the time stipulated therein, the applications filed by the applicants on 19.01.2021 are well within time. The judgment passed by the High Court, for the reasons set out herein above, needs to be set aside. The principle underlying the orders of this Court dated 08.03.2021, 27.04.2021 and 23.09.2021, in In Re: Cognizance for Extension of Limitation, albeit those orders being passed, subsequent to the impugned order, would enure to the benefit of the applicants-defendants. For the reasons stated above, the Appeals are allowed and the written statements filed on 20.01.2021 are directed to be taken on record.

LW 82:11:2023

RAHUL DILIP SHAH v. THE CATALYST TRUSTEESHIP LTD& ORS [DEL]

CS (COMM) 108/2022 & I.A. 2620/2022

Rekha Palli,. [Decided on 20/10/2023]

Injunction – plaintiff holding 26% shares in D3- D3 availed loan from D1 and D2- plaintiff pledged his shares as collateral security towards guaranteeing the loan repayment- Da defaulted in repayment-D1&2 invoked the pledged shares-whether invocation valid- Held, Yes.

Brief facts:

The Plaintiff claims to own 32,82,720 equity shares amounting to 26% of the total paid up capital of the defendant no.3. The defendant no.1 and the defendant no.2 are companies and are registered with the Securities Exchange Board of India as a Debenture Trustee and as a Category III Alternative Investment Fund and a Portfolio Manager.

The defendant no.3 entered into a 'Debenture Trust Deed'(hereinafter referred to as the 'DTD') for a loan of Rs. 75,00,00,000/- with the defendant no.1. In order to secure the debt of the defendant no.3 under the DTD, the plaintiff, acting as the promoter and managing director of defendant no. 3, agreed to pledge his 26% shares in the company under an 'Unattested Share Pledge Agreement' (hereinafter 'SPA').

As the defendant no.3 failed to clear its due payments, the defendant no.1 and 2 issued Invocation Notices to the defendant no.3 invoking the pledge created by the plaintiff under the SPA over his shares as also the pledge subsequently created over the shares of Nova. These pledged shares were thereafter transferred to Demat accounts of the defendant no.1.

Aggrieved by the invocation notice the plaintiff filed the present suit. The present application under Section 151 CPC has been filed by the plaintiff seeking ad interim directions permitting the plaintiff to exercise its voting rights in respect of 32,82,720 equity shares claimed to be owned by the plaintiff in the defendant no. 3 company in the proposed meeting of the equity shareholders of the defendant no. 3 scheduled on 27.10.2023.

Decision: Injunction refused.

Reason:

It is evident that the parties had agreed that as long as there was no ''Event of Default'', it was the pledgor, i.e. the plaintiff, who alone was entitled to exercise all voting rights and other consequential rights pertaining to the pledged shares, except the right to sell, transfer, assign or encumber these shares. It was further agreed between the parties that after the occurrence of an ''Event of Default'', the debenture trustee i.e. defendant no.1, would be authorised to exercise voting rights in respect of these pledged shares.

In the present case, it is an admitted case of the parties that after the ''Event of Default'' occurred in February, 2022, the defendant no.1 has, in accordance with clause 2.3.1 of the SPA, been exercising all voting rights in respect of the shares pledged by the plaintiff. The plaintiff's plea that the position has now changed and there is no continuing ''Event of Default'' has already been rejected hereinabove and, therefore, I am unable to appreciate as to how in the light of clause 2.3.1, the plaintiff can be permitted to urge that the defendant no.1 is not entitled to exercise voting rights qua these pledged shares which already stand invoked in February, 2022 itself.

In the light of the aforesaid clauses of the SPA, I have no hesitation in holding that the amendment to the DTD executed on 22.04.2023, would not come in the way of exercise of rights which had already accrued in favour of defendant no. 1 upon the occurrence of ''Event of Default'' in February, 2022. The plaintiff being a pledgor, who is guilty of default as per clauses 16 (j) and (h) of the SPA, cannot be permitted to urge that because his interests are likely to be adversely affected on account of the proposed composite scheme of arrangement, he should be granted the right to vote against this scheme of arrangement in the meeting of equity shareholders scheduled on 27.10.2023.

Before I conclude, I may also deal with the decision in Vistra ITCL (India) Limited (supra) on which heavy reliance was placed by the plaintiff to contend that during the existence of a pledge, the general rights or ownership rights in the property remain with the pledgor. It has therefore been urged that as the pledged shares are yet to

be sold, the pledge continues and therefore, it is the plaintiff only who can exercise the voting rights qua these shares. Having considered the said decision, I find that in the said case, the Court was not dealing with the case like the present one, where the parties had entered into a specific agreement thereby agreeing that the rights which the pledge/ defendant no. 1 had acquired after the occurrence of an 'Event of Default' would not be effected by any subsequent event. The plaintiff having voluntarily agreed that once an 'Event of Default' occurs, it is the defendant no. 1 which will have the voting rights, cannot be now permitted to urge that these rights continue to vest in him. I may also note that as per the terms of the agreement, on account of the plaintiff having been declared a wilful defaulter by the Yes Bank Limited and his no longer being a Director of defendant no. 3, the 'Events of Defaults' in terms of the DTD continue to subsist as on date and therefore, the rights of voting rightfully vest with defendant no.1.

LW 83:11:2023

INDIAN SUGAR MILLS ASSOCIATION v. COMPETITION COMMISSION OF INDIA & ORS [NCLAT]

Competition Appeal (AT) No. 86 of 2018 with connected appeals

Rakesh Kumar & Alok Srivastava.[Decided on 10/10/2023]

Competition Act,2002- cartelisation in sugar industry- CCI holding the appellants liable and passed order against them imposing penalty- while passing the order prescribed rules/procedure were not followed- whether order deserves quashment- Held, Yes.

Brief facts:

The batch of appeals which are captioned above are being considered and disposed of by this common judgment. These appeals have been filed by the Appellants assailing the judgment of the Competition Commission of India (in short "CCI") being aggrieved by the Order dated Impugned Order passed by the CCI in case nos. 21, 29, 36, 47, 48 and 49 of 2013. It was submitted before the Bench regarding a basic shortcoming in the impugned order, which weas whether the CCI followed the principle of natural justice as required under sub-section (1) of section 36 of the Competition Act, 2002 during hearings in the matter. This plea was supported by the learned counsels for certain other appellants. In the light of these submissions, and in the interest of fairness and justice, this bench felt it necessary to consider this question first before continuing to hear the appeals on merits, if found necessary at that stage.

In brief, the case leading up to these appeals was an order dated 18.9.2018 was passed by the CCI imposing penalties on some ethanol producers after finding them guilty of allegations of bid-rigging and cartelization, which was done without defining the 'relevant market' and on the basis of sketchy evidence. As a result, the appellants filed appeals under section 53(B) of the competition Act challenging the common order dated 18.9.2018, whereby they have been found guilty in indulging in rigging and cartelization and imposed penalties on the Appellants individually. The appellants aggrieved by the Impugned Order filed appeals which are now under consideration of this bench.

Decision: Appeals allowed.

Reason:

We are of the view that if the contention of the Appellants regarding non-adherence to the principle of natural justice in the hearings and passing of the Impugned Order is held to be correct, it would render the Impugned Order infirm, and therefore null and void, and it may not then be necessary to hear the case on merits.

We note that in the present case the non-compliance to the principle of natural justice is not due to some legal, compelling reason or public interest, but solely due to a faulty, and irrational procedure followed by the Competition Commission which has certainly meant prejudice to the appellants as they were imposed penalty on the basis of such a procedure being followed by CCI.

We are, therefore, of the view that the delay of about 13 months in the pronouncement of the Impugned Order so that only three members could sign and authenticate it instead of five members who heard the case on all the dates leads to two infirmities in the Impugned Order. The first infirmity that the same "coram" of members, who heard the matter, did not sign the order was a major infirmity. It was compounded by the fact that there was inordinate delay in the pronouncement of the final order. In such a situation, we are inclined to hold the opinion that the Impugned Order was not pronounced by following the spirit of the principle of natural justice as was required by section 36 of the Competition Act, 2002.

We are, therefore, of the clear view that the Impugned Order does not comply with the requirement of adherence to the principle of natural justice for the reason that the "coram" of CCI that heard the final arguments did not pass the necessary orders within reasonable period of time, and by the time, the orders were pronounced in the case, one member was not present in at least four later hearings and two members had demitted office and therefore they did not participate in the decision making nor sign and authenticate the final order. Thus the delay in pronouncing the impugned order also resulted in serious infirmity in that 'one who hears must decide' was not followed in letter and spirit. Further, we are also of the opinion that CCI should have afforded an opportunity of oral hearing to the opposite parties after the "Supplementary Investigation Report" was received from the DG, and before pronouncing the final Impugned Order on 18.9.2018. We thus find that the Impugned Order does not satisfy the basic tenet of adherence to the principle of natural justice which was ingrained in section 36 of the Competition Act. On these grounds, we set aside the Impugned Order.