THE LAW DESK

JANUARY 2023
TLD-21

NEWSLETTER

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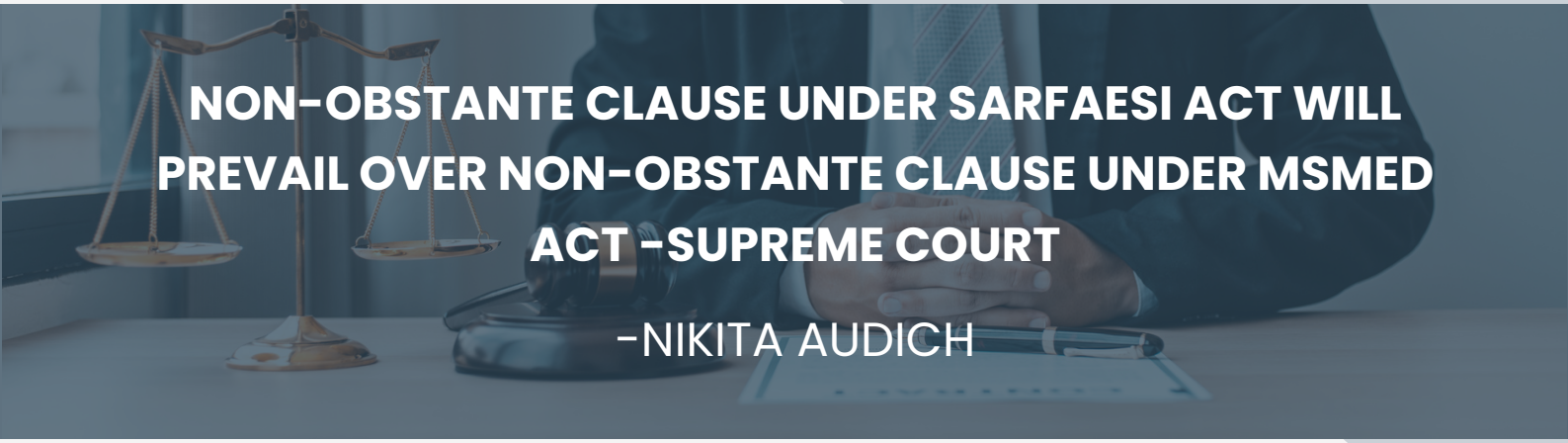

NON-OBSTANTE CLAUSE UNDER SARFAESI ACT WILL PREVAIL OVER NON-OBSTANTE CLAUSE UNDER MSMED ACT -SUPREME COURT

-NIKITA AUDICH

The Hon'ble Supreme Court in 'Kotak Mahindra Bank Limited v. Girnar Corrugators Pvt. Ltd. And Ors'[1] held that dues under MSMED Act will not prevail over the SARFAESI Act.

The Supreme Court stated that in order to recover the sum under the award/decree that has been passed by the Facilitation Council, recoveries under the SARFAESI Act with respect to secured assets would prevail over recoveries under the MSMED Act.

The bench further noted that in MSMED Act, there is no specific express provision giving 'priority' for payments under the Act, over the dues of the secured creditors or over any taxes or cess payable to the central or the state government or the local authority.

FACTUAL MATRIX -

In the case at hand, Kotak Mahindra Bank Ltd. ('Petitioner') challenged the judgment of the Division Bench of Madhya Pradesh High Court by filing the civil appeal.

Succinctly stated facts of the case are that in order to take physical possession of the secured assets, the Appellant Bank a secured creditor of the borrower (M/s. Mission Vivacare), filed an application before the District Magistrate under Section 14 of the SARFAESI Act.

[1] 2023 SCC Online SC 15

The said application was approved with instructions to the Sub-Divisional Magistrate (SDM), District: Dhar to handover the vacant possession of the secured assets to the Appellant Bank.

The Appellant Bank, however, then filed a complaint alleging non-compliance with the afore-mentioned order for taking physical possession as no action was taken. As a result, the SDM then gave the instructions to Naib Tehsildar to obey the District Magistrate's order and acquire physical possession, if necessary, then with the aid of the police.

Thereafter, it was observed that Naib Tehsildar refused to take possession since a recovery certificate had already been issued in favour of another creditor of the borrower under the MSMED Act, and also stated that since the MSMED Act was a special enactment which came into effect after the SARFAESI Act therefore, it would have an overriding effect and hence would prevail over the SARFAESI Act.

The afore-mentioned order of Naib Tehsildar was then challenged in writ before the Single Judge of Madhya Pradesh High Court. The learned Single Judge reversed Naib Tehsildar's decision and held that the SARFAESI Act's provisions would prevail and if the other borrower was aggrieved by the order passed by the District Magistrate, then he may prefer an appeal/application before Debts Recovery Tribunal (DRT) under Section 17 of the SARFAESI Act.

The judgment of the Single Judge was challenged by an Appeal before the Division Bench of the Madhya Pradesh High Court. The Division Bench allowed the said appeal and set aside the judgment of the Single Judge Bench, by observing that the MSMED Act being the subsequent enactment would prevail over SARFAESI Act hereby, feeling aggrieved and dissatisfied by the afore-mentioned judgment

of the Division Bench (Impugned Judgment dated 11.08.2017) has been challenged by the Appellant Bank by way of the present Appeal before the Supreme Court.

OBSERVATION OF SUPREME COURT

While considering the above provisions and allowing the appeal the Hon'ble court observed that there is no conflict between the Acts. The Supreme Court observed that the provisions of the SARFAESI Act which were subsequently amended in 2016 would prevail over the MSMED Act in the absence of any specific priority and held as follows:

- In the entire MSMED Act, there is no specific provision giving 'priority' forpayments under the MSMED Act over the dues of the secured creditors

- In sharp contrast to this, Section 26E of the SARFAESI Act which has been inserted vide Amendment in 2016, provides that notwithstanding anything inconsistent therewith contained in any other law for the time being in force, after the registration of security interest, the debts due to any secured creditor, shall be paid in 'priority' over all other debts and government revenues.

- As per the settled position of law, if two enactments have competing non - obstante provisions and nothing repugnant, then the non-obstante clause of the subsequent statute would prevail over the earlier enactments.

- Thus, a 'priority' conferred/ provided under Section 26 E of the SARFAESI Act would prevail over the recovery mechanism of the MSMED Act" because SARFAESI Act has been enacted providing a specific mechanism/provision for the financial assets and security interest.

- Hence, the Court proceeded to set aside the Impugned Judgment of the Division Bench, restored the judgment of the Single Judge, and accordingly allowed the present appeal.

ANALYSIS

The ruling of the apex court is fair in holding that the non-obstante clause in MSMED Act because there is no specific 'priority' provision for payments mentioned in the MSMED Act, whereas the SARFAESI Act, which is a special legislation has been enacted to provide the specific mechanism or provisions for the financial assets and creditors. Therefore, if it would have not been considered then in that case, not only the object and purpose of SARFAESI ACT would have been defeated, but also the later enactment by way of insertion of section 26 E would be frustrated and would become nugatory, otiose / redundant.

SUPREME COURT REJECTS GOOGLE'S PLEA FOR STAY AGAINST CCI RULING

-ACHINTYA SINGH

INTRODUCTION

Smart mobile devices need an operating system (OS) to run applications (apps) and programs. Android is one such mobile operating systems which was acquired by google in 2005. The Competition Commission (CCI) in the instant matter has examined various practices of google w.r.t licensing of the android mobile operating system and various proprietary mobile applications of google (e.g. Play store, Google search, Google chrome, Youtube, etc.). CCI has issued demand notices to Google for abusing its dominant position in multiple markets in the Android mobile device ecosystem, apart from issuing a cease-and-desist order. CCI also directed google to modify its conduct within a defined timeline.

FACTS OF THE CASE

In 2019, the CCI investigated following complaints by users of android-based smartphones in the country. Google's Android is an open-source mobile operating system used by original Equipment Manufacturers ("OEMs") in their smartphones. Google operates and manages the Android OS and licenses its other

proprietary applications, which are then used by OEMs.

CCI examined Google's practices related to licensing of the Android OS and proprietary mobile applications, such as the play store, google search, google chrome and Youtube. The investigation revealed that Google's ultimate goal was to increase users on its platform to interact with its revenue-earning services, especially the online search which directly affects the sale of online advertising services. CCI also found that Google's objective in entering into agreements was to protect and strengthen its dominant position in general search services and to increase its revenue from search advertisements.

COMPETITION COMMISSION OF INDIA'S FINDINGS

The investigation revealed that Google's dominance and conduct resulted in entry barriers for other app stores. The CCI imposed a penalty worth 10% of Google's average revenue in India over the past three years, or INR 1,337.76 Cr.

The mandatory pre-installation of the entire Google Mobile suite under the mobile application distribution system with no option to uninstall it was an unfair condition imposed on device manufacturers and was found to be in violation of section 4 of the competition Act,2002.

Google's actions resulted in a perpetually dominant position in the online search market, denying access to competing search apps, in violation of section 4(2)(C) of the Competition Act. Additionally, google leveraged its dominant position in the online search market, android OS, Non-OS specific web browsers through the google chrome App, and online video hosting platform market through Youtube, in violation of section 4(2)(e) of the Competition act.

The pre-installation of proprietary apps on the condition of signing the Anti-fragmentation Agreement and Android compatibility commitment agreement for all android devices manufactured, distributed, or marketed by device manufacturers, was also found to violate section 4(2)(b)(ii) of Competition Act as it reduced the ability and incentive of device manufacturers to develop and sell devices operating on alternative versions of android.

ANALYSIS

Google filed an appeal with the NCLAT, claiming that it harmed the Android user experience and safety and may increase smartphone pricing, and thus requested an immediate stay of the CCI's order.

On 4th January 2023, the NCLAT upheld the CCIs order and ordered google to deposit 10% of the penalty sum. The NCLAT also postponed the hearing of Google's appeal against the CCI until April 2023. Thus, Google approached the supreme court. The Supreme Court refused to interfere with the order of the National Company Law Appellate Tribunal which upheld the order of the CCI wherein a penalty of Rs 1,338 crore was imposed on Google India for abuse of dominance in relation to android eco-system.

SEBI VIOLATIONS MUST BE GOVERNED BY SEBI REGULATIONS AND NOT BY THE RECTIFICATORY JURISDICTION OF NCLT – SUPREME COURT

-VARNALI PUROHIT

In the instant matter titled as IFB Agro Industries Limited versus SICGIL India Limited and Ors.[2], the Hon'ble Supreme Court adjudicated on the scope and extent of the rectificatory Jurisdiction of the National Company Law Tribunal under section 59 of the Companies Act, 2013.

FACTS

The Appellant in the instant appeal is a listed company engaged in the manufacture and sale of rectified spirit, country liquor, marine products, carbon dioxide gas etc. Respondent No. 1, also, a listed company is engaged in the business of of producing carbon dioxide gas and dry ice. Respondent No. 2 is the managing director of Respondent No. 1, Respondent No. 3-6 are close relatives of Respondent Nos. 2.

Contentions of the Appellant- In August 2003, Respondent No. 2 came up with a proposal for a business tie-up between the Appellant and Respondent No. 1 which the Appellant rejected as a result, the Respondents started acquiring shares of the Appellant from the open market to eliminate competition and strengthen its own dominant position. As of 18.01.2004, the Respondents collectively held just under 5% of the Appellant's total paid-up share capital.

[1] 2023 SCC Online SC 15

On 19.01.2004, Respondent No. 1 acquired 600 equity shares of the Appellant as a result of which the aggregate shareholding of the Respondents crossed 5% of the total paid-up share capital of the Appellant, thereby triggering Regulation 7(1) of the SEBI (Substantial Acquisition of shares and takeovers) (SAST) Regulations.

Regulation 7(1) mandates that when an acquirer, either by himself or with any person acting in concert with the acquirer, acquires 5% or more of the total paid-up share capital of a company, then a disclosure has to be made to the acquiree company and the stock exchange.

It was contended by the Appellant that the disclosure was not made as per the format prescribed under the Regulation 7 (1) of the SEBI (SAST) Regulations. Further on 27.05.2004, Respondent No. 1 acquired additional shares of the Appellant, as a result of which the individual shareholding of the concerned Respondent exceeded 5% of the total paid-up share capital of the Appellant, thereby triggering the SEBI (Prohibition of Insider Trading) (PIT) Regulations, as per which if any person acquires more than 5% shares of a company, then it shall make a disclosure to the acquiree Company. Respondent No. 1 admits to having failed to make this disclosure within the prescribed time and the same was not an intentional mistake.

Company Petition under Section 111A of the Companies Act, 1956

Appellant filed a petition before the Company Law Board (CLB) under Section 111A of the 1956 Act seeking deletion of the name of the Respondents (as owner of shares) from the Company Register.

The Respondents collectively held around 8.22% of the Appellant's paid-up share capital on the date of filing of the Petition.

Further the Respondent contested that it had while acting in accordance with the SEBI(PIT) Regulations sold a few shares of the Appellant and had thereby brought down its individual shareholding to 4.91%, the Appellant contested the said fact by claiming that Respondent No. 1 never reduced its shareholding.

During the pendency of the petition under Section 111A, the 2013 Act came into force, and the matter stood transferred to the Tribunal and the issue for adjudication before the Tribunal was whether the acquisition of shares by the Respondents without complying with the statutory provisions under SEBI Regulations was valid.

The Tribunal held that there has been a violation of the SEBI (SAST) Regulations as the Respondents did not make the disclosure in the proper format. Further, the Tribunal also held that in case of violation of SEBI regulations, Section 111A empowers a company to apply for rectification, further the Tribunal opined that the regulatory jurisdiction of SEBI would not bar the Tribunal from exercising its power under Section 111A of the 1956 Act.

However, the Tribunal held that the powers exercised by the CLB and SEBI fall in different and distinct jurisdictional fields and therefore, the present order will not preclude SEBI from deciding any violation of its regulations.

JUDGMENT OF THE APPELLATE TRIBUNAL

The Appellate Tribunal allowed the appeal and set aside the order of the Tribunal, however there was neither an analysis nor any reasoning in the order of the Appellate Tribunal. Hence an appeal was made to the Apex Court.

RULING OF THE APEX COURT -

The Hon'ble Court held that the rectificatory Jurisdiction under Section 59 of the 2013 Act is summary in nature and must not be exercised where there are contested facts and disputed questions. Further, the Hon'ble Apex Court also held that the transactions falling within the jurisdiction of Regulatory bodies created under a statute must necessarily be subjected to their proper scrutiny, enquiry and adjudication and therefore the National Company Law Tribunal under Section 59 cannot exercise a parallel jurisdiction with Securities and Exchange Board of India for addressing violations of the Regulations framed under the latter

ANALYSIS

The Apex Court while stating the afore mentioned emphasized that the rectification under section 59 of the Companies Act, 2013 is intended to correct an error as a result of which the name is either omitted or wrongly recorded in the Register of the company.

Further, the Apex Court observed that any claim which is founded on/based upon the disputed civil rights or title, denial of any transaction et al falls outside the purview of rectification and must not be adjudicated upon under section 59 of the Companies Act, 2013.

In the instant case, claims of the Appellant arising out of the breach

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and Take Over Regulation fall within the exclusive domain of SEBI and not within the Jurisdiction of this court.

Further the Hon'ble Court also cited the case of Zandu Pharmaceutical Works Ltd. v. Devkumarvaidya & Ors.,[3] wherein in was clearly laid down that in a case of violation of the SEBI Regulations, the Company Law Board cannot exercise reificatory jurisdiction unless and until the SEBI, in the very first instance, decides if there has been a violation or not. The ruling of the Apex Court would deter those seeking adjudication of contentious issues / rights under the garb of rectification.

LEGAL NEWS AND UPDATES

1. The Hon'ble Apex Court on 30.01.2023 held that it would be folly to treat every breach of promise to marry as a false promise and prosecute for the offence of Rape. The Court observed that one cannot deny a possibility that the accused would have given a promise in all seriousness to marry, but might have encountered circumstances that were beyond his control, which prevented him from fulfilling his promise.

2. The Hon'ble Apex Court on 30.01.2023 upheld the decision of NCLAT in the matter of directing the successful bidder to clear the Provident Funds and Gratuity Dues of the Employees. Senior Advocate Saurabh Kirpal while representing the Jalan-Fritsch Consortium, which emerged as the successful bidder, pressed on the fact that an additional burden of Rs. 200 crores would be created, which would render the whole resolution plan would fail and the company would not be revived.

3. The Hon'ble Madras High Court on 30.01.2023 quashed a Khula certificate issued by the Shariat Council and held that Shariat Council and various other similar bodies are private in nature and do not function in the capacity of either Courts or Arbitrators. The Court further observed that Muslim women have an inalienable right to KHULA as recognized by Muslim Personal Law (Shariat) Application Act, 1937 and this right may be exercised by approaching a Family Court.

4. A court in Gandhinagar, Gujarat on 30-01.-2023 convicted Asumal Sirumalani Harpalani (also known as Asaram Bapu) in the 2013 Rape Case. The court simultaneously acquitted his wife, son and daughter. The convict is presently serving a life sentence in Central Jail, Jodhpur in connection with a separate rape case.

5. The Hon'ble Gujarat High Court on 29.01.2023 while quashing a State Information Commission's Order held that the post of a Judge of a High Court is a Constitutional Post and the information about their salary and allowances do not fall under the ambit of Section 4(1)(b)(x) of the Right to Information Act, 2005

6. The Hon'ble Karnataka High Court on 12.01.2023 while setting aside the order passed by the Family Court held that a marriage between a minor girl would not be void u/s 11 of the Hindu Marriage Act. The court further held that section 11 of the Act defines void marriages and it does not include in its ambit the legal age as a pre-condition and has been omitted from its purview.

7. A constitutional bench of the Hon'ble Apex Court on 03.01.2023 held that additional restrictions not found in Article 19(2) cannot be imposed on the Right to Free Speech guaranteed under Article 19(1)(a). This means that the grounds mentioned in Article 19(2) are exhaustive in nature. The bench unprecedentedly held that fundamental rights under Articles 19 & 21 can be enforced against individuals and it is the duty of the state to affirmatively protect the rights of a person whenever there is a threat to personal liberty even by non-state actors.

8. The 50th Chief Justice of India, Justice D.Y. Chandrachud on 02.01.2023 launched the Electronic Supreme Court Reports (e-SCR). This service will contain all the reportable judgments of the Supreme Court of India from its inception in the year 1950. He said that this service will be available for free to lawyers across the nation. He further introduced neutral citations, which the Delhi and Kerala High Court already have.

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