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SUPPLEMENT
PROFESSIONAL PROGRAMME

for

December, 2022 Examination

MULTIDISCIPLINARY CASE STUDIES

MODULE 2

PAPER 8

INDEX

Lesson 1

Corporate Laws Including Company Law

17/01/2022	**Devas Multimedia Pvt Ltd (Appellant) vs. Antrix Corporation Ltd (Respondent)**	**Supreme Court of India Civil Appeal No.5766 of 2021 & Civil Appeal No.5906 of 2021**

Brief facts:

Challenging an order of winding up passed by the National Company Law Tribunal under Section 271(c) of the Companies Act, 2013, which was confirmed by the National Company Law Appellate Tribunal on appeals, the company in liquidation, namely, Devas Multimedia Private Limited, through its ex-Director has come up with an appeal in Civil Appeal No.5766 of 2021 and one of the shareholders of the company in liquidation, namely, Devas Employees Mauritius Private Limited (hereinafter referred to as DEMPL) has come up with another appeal in CA No.5906 of 2021.

Decision: Appeals dismissed.

Reason:

Apart from the above main grounds of attack, which we have dealt in extenso, the learned senior counsel for the appellants also made a few supplementary submissions. One of them was that a lis between two private parties cannot become the subject matter of a petition under Section 271(c). But this argument is to be rejected outright, in view of the fact that the claims of Devas and its shareholders are also on the property of the Government of India. The space segment in the satellite proposed to be launched by the Government of India, is the property of the Government of India. In fact, the shareholders have secured two awards against the Republic of India under BIT. Therefore, it is neither a lis between two private parties nor a private lis between a private party and a public authority. It is a case of fraud of a huge magnitude which cannot be brushed under the carpet, as a private lis.

Another contention raised on behalf of the appellants is that the petition under Section 271(c) should have been preceded, at least by a report from the Serious Fraud Investigation Office, which has now gained statutory status under Section 211 of the Companies Act, 2013. But this contention is unacceptable, in view of the fact that under the 2013 Act there are two different routes for winding up of a company on allegations of fraud. One is under Section 271(c) and the other is under the just and equitable clause in Section 271(e), read with Section 224(2) and Section 213(b). What was Section 439(1)(f) read with Section 243 and Section 237(b) of the 1956 Act, have now taken a new avatar under Section 224(2) read with Section 213(b). It is only in the second category of cases that the report of the investigation should precede a petition for winding up.

Yet another contention raised on behalf of the appellants is that the criminal complaint filed for the offences punishable under Section 420 read with Section 120B IPC, has not yet been taken to its logical end. Therefore, it is contended that in case the officials of Antrix and shareholders of Devas are acquitted after trial, the clock cannot be put back, if the company is now wound up. Attractive as it may seem at first blush, this contention cannot hold water, if scrutinised a little deeper. The standard of proof required in a criminal case is different from the standard of proof required in the proceedings before NCLT. The outcome of one need not depend upon the outcome of the other, as the consequences are civil under the Companies Act, 2013 and penal in the criminal proceedings. Moreover, this argument can be reversed like the handle of a dagger. What if the company is allowed to continue to exist and also enforce the arbitration awards for amounts totalling to tens of thousands of crores of Indian Rupees (The ICC award is stated to be for INR 10,000 crores and the 2 BIT awards are stated to be for INR 5,000 crores) and eventually the Criminal Court finds all shareholders guilty of fraud? The answer to this question would be abhorring.

Lastly, it was contended that the actual motive behind Antrix seeking the winding up of Devas, is to deprive Devas, of the benefits of an unanimous award passed by the ICC Arbitral tribunal presided over by a former Chief Justice of India and the two BIT awards and that such attempts on the part of a corporate entity wholly owned by the Government of India would send a wrong message to international investors.

We do not find any merit in the above submission. If as a matter of fact, fraud as projected by Antrix, stands established, the motive behind the victim of fraud, coming up with a petition for winding up, is of no relevance. If the seeds of the commercial relationship between Antrix and Devas were a product of fraud perpetrated by Devas, every part of the plant that grew out of those seeds, such as the Agreement, the disputes, arbitral awards etc., are all infected with the poison of fraud. A product of fraud is in conflict with the public policy of any country including India. The basic notions of morality and justice are always in conflict with fraud and hence the motive behind the action brought by the victim of fraud can never stand as an impediment.

We do not know if the action of Antrix in seeking the winding up of Devas may send a wrong message, to the community of investors. But allowing Devas and its shareholders to reap the benefits of their fraudulent action, may nevertheless send another wrong message namely that by adopting fraudulent means and by bringing into India an investment in a sum of INR 579 crores, the investors can hope to get tens of thousands of crores of rupees, even after siphoning off INR 488 crores. Conclusion Therefore, in fine, we find all the grounds of attack to the concurrent orders of the NCLT and NCLAT to be unsustainable. Therefore, the appeals are dismissed. However, without any order as to costs.

Lesson 4
Insolvency Law

17/05/2022	**NOIDA (Appellant)** **vs.** **Anand Sonbhadra (Respondent)**	**Supreme Court of India** **Civil Appeal No. 2222, 2367-2369 of 2021**

Facts

The appellant is the lessor described as the Authority under Section 3 of the Uttar Pradesh Industrial Area Development Act, 1976 (hereinafter referred to as the 'UPIAD Act'). NOIDA **("Appellant")** had granted a lease of plot in favour of the Corporate Debtor on 30.07.2010 for a period of 90 years. Thereafter, Corporate Insolvency Resolution Process **("CIR Process")** of the Corporate Debtor was initiated wherein NOIDA initially filed its claim in Form-B as an Operational Creditor **("OC")** and also attended meetings of the Committee of Creditors **("CoC")** as an OC.

Subsequently, NOIDA filed another claim in Form-C claiming to be a Financial Creditor **("FC")** and sought voting share in the CoC on the basis of the Lease Deed entered into between NOIDA and the CD while contending that the same is a Financial Lease. The Hon'ble Adjudicating Authority being the Hon'ble National Company Law Tribunal, New Delhi Bench **("AA")** held that the lease deed in question was not a financial lease according to the Indian Accounting Standards **("IndAS")** and thus, the Appellant cannot be said to be a FC. The said Order of the AA challenged by way of the said Appeal before the NCLAT.

The Hon'ble National Company Law Appellate Tribunal **("NCLAT")** vide its Judgment dated 16.04.2021 rejected the contentions of New Okhla Industrial Development Authority ("NOIDA") claiming to be Financial Creditor **("FC")** basis the lease deed entered into with the Developer Company namely Shubhkamna Buildtech Private Limited **("Corporate Debtor/ CD")**.

NOIDA had filed appeal before Supreme Court against the order of the **"NCLAT".**

Centre of the Controversy

The apex court while delivered its verdict on appeals filed by NOIDA noted that Section 5(8), which is at the centre of the controversy,

Thereafter, Hon'ble Court examined the definitions such as: 'Financial Debt', Financial Creditor, Operational Creditors, Operational Debt, Debt, Claim & Transaction etc.

According to Section "5(8) of IBC, "financial debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes– (a) money borrowed against the payment of interest;
(b) any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent;
(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;
(d) *the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;*
(e) receivables sold or discounted other than any receivables sold on non-recourse basis; (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

[Explanation. -For the purposes of this sub-clause, - (i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and (ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016]

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;
(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;
(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clause (a) to (h) of this clause;"

Section 3(11) defines the word *'debt'*. It reads as: -"debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;"

Section 3(6) defines the word 'claim'. It reads as: - *"claim"* means—
(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;
(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;"

Section 5(21) defines the word *'operational debt'*. It reads as: - "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;"
Section 5(20) defines the word '*operational creditor'*. It reads as: -"operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;"
Section 3(33) defines the word *'transaction'*. It reads as: - "transaction" includes a agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor;"

Analysis

Supreme Court observed that a debt is a liability or an obligation in respect of a right to payment. Irrespective of whether there is adjudication of the breach, if there is a breach of contract, it may give rise to a debt. In the context of section 5(8), disbursement has been understood as money, which has been paid. In the context of the transaction involved in such real estate projects, the homebuyers advance sums to the builder, who would then utilise the amount towards the construction in the real estate project.

What is relevant is to attract section 5(8), on its plain terms, is disbursement. While, it may be true that the word 'transaction' includes transfer of assets, funds or goods and services from or to the corporate debtor, in the context of the principal provisions of section 5(8) of the Code, to import the definition of 'transaction' in section 2(33), involving the need to expand the word 'disbursement', to include a promise to pay money by a debtor to the creditor, will be uncalled for straining of the provisions.

'Debt' means a liability or obligation, which relates to a claim. The claim or right to payment or remedy for breach of contract occasioning a right to payment must be due from any person.

In the lease in question, there has been no disbursement of any debt (loan) or any sums by the NOIDA to the lessee.

The subject matter of section 5(8)(d) is a lease or a hire-purchase contract. It is not any lease or a hire purchase contract, which would entitle the lessor to be treated as the financial creditor. There must be a lease or hire-purchase contract, which is deemed as a finance or capital lease. The law giver has not left the courts free to place, its interpretation on the words 'finance or capital lease'. The legislature has contemplated the finance or a capital lease, which is deemed as such a lease under the Indian Accounting Standards.

The Appellant is not the financial lessor under section 5(8)(d) of the Code. Needless to say, there is always power to amend the provisions which essentially consist of the Indian Accounting

Standards in the absence of any rules prescribed under section 5(8)(d) of the Code by the Central Government.

Section 5(8)(f) is a residuary and catch all provision. A lease, which is not a finance or a capital lease under section 5(8)(d), may create a financial debt within the meaning of section 5(8)(f), if, on its terms, the Court concludes that it is a transaction, under which, any amount is raised, having the commercial effect of the borrowing.

Finding

The lease in question does not fall within the ambit of section 5(8)(f). This is for the reason that the lessee has not raised any amount from the Appellant under the lease, which is a transaction. The raising of the amount, which, according to the Appellant, constitutes the financial debt, has not taken place in the form of any flow of funds from the Appellant/Lessor, in any manner, to the lessee. The mere permission or facility of moratorium, followed by staggered payment in easy instalments, cannot lead to the conclusion that any amount has been raised, under the lease, from the Appellant, which is the most important consideration.

The appeal failed, Supreme Court held that the Appellant is not a Financial Creditor.

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Lesson 5
Competition Law

19/01/2022	Competition Commission of India v. State of Mizoram & Ors	Supreme Court of India Civil Appeal No. 10820-10822 of 2014

Brief facts:

One of the bidders, who participated in the tender processing conducted by the State of Mizoram, for the appointment of selling agents for State lottery run by the State, made a complaint to the Competition Commission of India (CCI) alleging bid rigging in the tender process. The CCI directed investigation into the matter and the State of Mizoram approached the High Court challenging the jurisdiction of the CCI. High Court allowed the petition and held CCI has no jurisdiction to investigate in the matter. Aggrieved, CCI was before the Supreme Court. The core issue was whether CCI had jurisdiction to investigate the allegation of bid rigging and cartelisation in the tender process conducted by the State of Mizoram.

Decision: Appeal allowed.
Reason:

We are in agreement with the line of arguments that the concern of the CCI was not at all with the carrying out, regulation or prohibition of the lottery business as was governed by the Regulation Act. Rather, the concern was limited to the role assigned to the CCI under the Competition Act, and in the context of the EoI was limited to examining any perceived bid rigging in the tendering process for appointment of selling agents and distributors for the lottery business. There was no conflict in the interplay of the two Acts that even needed reconciliation or prohibition against either one, as the limited scrutiny was to examine the mandate of Section 3(1) read with Section 3(3) of the Competition Act.

Lotteries may be a regulated commodity and may even be res extra commercium. That would not take away the aspect of something which is anti-competition in the context of the business related to lotteries. We must take note of the expansive definition of 'Service' under Section 2(u) of the Competition Act. It means "service of any description", which is to be made available to potential users. The purchaser of a lottery ticket is a potential user, and a service is being made available by the selling agents in the context of the Competition Act. Suffice for us to say the inclusive mentioning does not inhibit the larger expansive definition. The lottery business can continue to be regulated by the Regulation Act.
However, if in the tendering process there is an element of anti-competition which would require investigation by the CCI, that cannot be prevented under the pretext of the lottery business being res extra commercium, more so when the State Government decides to deal in lotteries. We would like to say that the intervention by the High Court was extremely premature. It ought to have waited for the CCI to come to a conclusion but on the other hand what has happened is that the CCI proceedings have been brought to a standstill while the High Court opined on the basis of some

aspects which may or may not arise. The complaint having been made by respondent No.4 under Section 19 of the Competition Act, which provides that the Commission "may" inquire into certain agreements and dominant position of enterprise as envisaged under sub-section (1) of Section 3 and sub- section (1) of Section 4 of the Competition Act. The CCI found out a prima facie case for investigation by the DG under Section 3(1) of the Competition Act, the DG opined adversely, and the CCI issued notice giving an opportunity to the affected parties to place their stand before it. This process ought to have been permitted to conclude with the right available to the affected parties to avail of the appellate remedy under Section 53B of the Competition Act.

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Lesson 7

Interpretation of Law

12/01/2022	**The Authority for Clarification and Advance Ruling & Anr. (Petitioners) v. M/S. Aakavi Spinning Mills (P) Ltd. (Respondents)**	**Special Leave to Appeal (C) No. 306/2022 Supreme Court of India**

No external aid for interpretation can be employed when the exemption Entry being clear and unambiguous

Facts

The petitioners seek special leave to appeal against the judgment and order dated 05.02.2020, as passed by a Division Bench of the High Court of Judicature at Madras in Writ Appeal No. 947 of 2018 whereby, the Division Bench has reversed the common order dated 13.12.2017 as passed by the learned Single Judge in a batch of petitions led by Writ Petition No. 17722 of 2017; and has disapproved the impugned clarification orders dated 14.02.2013 and 29.06.2017.

By the said clarification orders, the petitioner No. 1, the Authority for Clarification and Advance Ruling, had held that the commodity "Hank Yarn", as stipulated in Entry 44 of Part B of the Fourth Schedule to the Tamil Nadu Value Added Tax Act, 2006 ('the Act'), meant only "Cotton Hank Yarn" and not "Viscose Staple Fiber ('VSF') Hank Yarn".

The learned Single Judge agreed with the interpretation put by the petitioner No. 1, essentially looking at the purpose for which the Entry in question was inserted into the Fourth Schedule to the Act, with reference to the Budget speech delivered by the Hon'ble Minister of Finance, Government of Tamil Nadu. The learned Single Judge also referred to the reasons assigned by the petitioner No. 1 based on the contents of a Notification dated 17.04.2003 issued by the Ministry of Textiles, Government of India in exercise of powers conferred under the Textiles (Development and Regulations) Order, 2001 and Section 3 of the Essential Commodities Act, 1955.

Per contra, the Division Bench was of the view that no external aid for interpretation was called for when the language of the Entry in question was clear in itself.

Decision

When the Entry in question specifically provides for exemption to the goods described as "Hank Yarn" without any ambiguity or qualification, its import cannot be restricted by describing it as being available only for the hank form of one raw material like cotton nor could it be restricted with reference to its user industry. That being the position, reference to the decision in *K.P. Varghese (supra)* remains entirely inapposite to the facts of the present case. Therein, this Court was dealing with the interpretation of the language of sub-section (2) of Section 52 of the Income Tax Act, 1961 and it was found that a literal interpretation might not cover several eventualities concerning the value of consideration declared by the assessee in respect of the transfer of a capital

asset vis-a-vis its fair market value as on the date of its transfer. Thus, the Supreme Court found, with reference to the intent and purpose, that the said provision could only be invoked when the consideration for transfer had not been correctly declared by the assessee, with burden of proving such understatement or concealment being on the Revenue. The observations in the said decision, based on the rules of interpretation to cull out meaning of a sentence, do not apply to the question at hand because the Entry in question is clear, direct and unambiguous; and simply reads: "Hank Yarn".

Thus, the view as taken by the High Court commends to us and we find no question of law worth consideration so as to entertain this petition. Therefore, the special leave petition stands dismissed.

For details:
https://main.sci.gov.in/supremecourt/2021/23618/23618_2021_44_1_32516_Order_12-Jan-2022.pdf

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Note: Students appearing in December, 2022 Examination should also update themselves on all the relevant Notifications, Circulars, Clarifications, Orders etc. issued by MCA, SEBI, RBI & Central Government upto 31st May, 2022.