

**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION**

Civil Appeal No 2841 of 2020

Neera Saggi

.... Appellant(s)

Versus

Union of India & Ors

....Respondent(s)

WITH

Civil Appeal No 3531 of 2020

Renu Challu

.... Appellant(s)

Versus

Union of India & Ors

....Respondent(s)

ORDER

1 Admit.

2 The two appeals arise from a judgment of the National Company Law Appellate Tribunal¹ dated 4 March 2020 in Company Appeal (AT) Nos 206 of 2019 and 285 of 2019.

3 The National Company Law Tribunal², by its order dated 18 July 2019, allowed an application seeking that the appellants should be impleaded, amongst other persons, in the course of its proceedings relating to IL&FS Limited. The NCLT and

1 “NCLAT”

2 “NCLT”

NCLAT directed that a number of persons be impleaded. Among them were both Executive and non-Executive Directors and the auditors of IL&FS.

- 4 Both the appellants were appointed as Independent Directors of IL&FS Financial Services Limited³. Ms Neera Saggi, the appellant in the first of the two appeals before this Court was appointed as an Independent Director on 18 March 2015. She resigned from the position on 25 July 2016. Ms Renu Challu, the appellant in the companion appeal, was appointed as an Independent Director on 27 September 2017. She resigned on 17 September 2018.
- 5 The NCLT, while dealing with the question as to whether they should be impleaded, observed in paragraph 74 of its order that:

“74. With regard to proposed Respondent No. 336, Neera Saggi, SFIO has stated in its complaint before the Special Court at Mumbai that the independent Directors and CFO of the company are appointed with objective to help the company in improving corporate credibility and governance standard but they ignored all alarming indicators and failed to save the interest of the company and its stakeholders by not raising of these issues in the Board Meetings and remained mute spectator. It is revealed that in connivance with each other, the Independent Directors, Directors, CFO of the IFIN, group CFO abused their positions and used various modus operandi to continue lending from IFIN to group entities, by causing wrongful loss to IFIN & its stakeholders such as investors and creditors whose money it was misusing for fraudulent lending, which ultimately resulted in ultimate loss to the company, and its creditors. Investigation further revealed that the Audit Committee members and the Independent Directors, Director, CFO of the IFIN and group CFO of the IL & FS were aware of the stressed asset portfolio, the modus operandi used for granting loans to group companies of existing defaulting borrowers in order to prevent their being classified as NPA.”

- 6 Having made the above observation, the NCLT, in paragraph 81 of its order, stated that:

3 “IFIN”

“81. It is pertinent to mention that in 2nd SFIO Report, no role of Independent director has been specified. Therefore, their impleadment in the case is not justified, at this stage.”

7 Ultimately, while drawing its final conclusions, the NCLT observed that:

“85. It is also important to point out that in the 2nd SFIO Report, no role of Independent director has been specified. It is observed from the record that even though Mr. Surinder Singh Kohli, Ms.Subhalakshmi Panse were the Independent Directors, they were also the part of Audit Committee of IFIN. We therefore, at this stage allow MA 2071/2019 and direct the petitioner to implead the names of Proposed additional Respondent Nos. 321 to 343 to the Company Petition No.3638/2018”

8 The above extracts would indicate that the NCLT noted that the second SFIO Report did not specify the role of the appellants. However, it observed that though two other Directors (Surinder Singh Kohli and Subhalakshmi Panse) were Independent Directors, they were also part of the Audit Committee of IFIN. On this basis, the NCLT allowed MA 2071 of 2019 and directed the impleadment of the proposed additional respondents, including the two appellants - Ms Neera Saggi and Ms Renu Challu.

9 Appeals were filed before the NCLAT. The NCLAT has, in paragraphs 5 and 6 of its impugned order, observed thus:

“5. In these appeals as similar question of law is involved, they were heard together and disposed of by this common judgment.

6. For the said reasons, we have noticed only the main ground taken and the arguments advanced by learned Senior Counsel in “Deloitte Haskins & Sells LLP v. Union of India - Company Appeal (AT) No.190 of 2019.”

A tabulated chart was set out in the order.

10 From the above extracts, it appears that the NCLAT proceeded to notice the main ground and the arguments which were advanced by counsel appearing on

behalf of Deloitte Haskins & Sells LLP in Company Appeal (AT) No 190 of 2019.

11 The grievance of the appellants is that both before the NCLT and the NCLAT there has been no application of mind to the role of the appellants in regard to their position as Independent Directors.

12 We have heard Mr Shyam Divan and Mr K V Vishwanathan, learned Senior Counsel appearing on behalf of the respective appellants. Apart from stressing on the submission that neither the NCLT nor the NCLAT have adverted to the specific role of the appellants, Mr K V Vishwanathan submitted that notice of the proceedings before the NCLAT was served on Ms Renu Challu on 21 June 2019 shortly before the judgment was delivered on 18 July 2019.

13 Mr N Venkataraman, learned Additional Solicitor General appearing on behalf of the respondents, has relied upon the provisions of sub-sections (8) and (12) of Section 149 of the Companies Act 2013 and of Schedule IV which specifies the Code for Independent Directors. Section 149(12) provides as follows:

“(12) Notwithstanding anything contained in this Act,—
(i) an independent director; &

(ii) a non-executive director not being promoter or key managerial personnel, shall be held liable, only in respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently.”

14 Hence, it has been urged that an Independent Director can be held liable in respect of such acts of omission or commission by a company which had occurred with their knowledge attributable through Board processes and with his consent or connivance or where he had not acted diligently. It was urged that in the present case, the issue as to whether the Independent Directors had acted

with due diligence is a matter which would require to be considered.

- 15 We may also notice at this stage that a circular has been issued by the Ministry of Corporate Affairs of the Government of India on 2 March 2020, in regard to the circumstances in which Independent Directors could be construed to be officers in default within the meaning of Section 2(60).
- 16 Having considered the rival submissions, we are of the view that neither before the NCLT nor before the NCLAT has there been an appropriate and due application of mind to the facts pertaining to the appellants before an order impleading them was passed. Insofar as the NCLT is concerned, as we have seen, there is an observation to the effect that the second SFIO report does not implicate the role of the Independent Directors. In the concluding paragraph of the decision, the NCLT noted the position relating to two other Independent Directors, who were stated to be members of the Audit Committee of IFIN. On that basis, an order of impleading the appellants was passed together with the proposed respondents. The NCLAT, on the other hand, has stated that it was primarily considering the facts of the auditors - Deloitte Haskins & Sells LLP, treating that the appeal raised the same questions of law.
- 17 On the basis of the record, we are of the view that the ends of justice would be met if an order of remand is passed requiring the NCLT to apply its mind to the issue as to whether the appellants should be impleaded. Undoubtedly, Independent Directors have a vital role, as is indicated by the provisions of the Companies Act 2013. While Independent Directors are intended to be independent, they cannot remain indifferent to the position of the company. Since, however, the NCLT and NCLAT have not devoted due consideration to the role, position and allegations against the appellants, we have decided to remand the proceedings only in relation to them. This will not affect the impleading of

others. We clarify that we have not expressed any opinion on the merits of the rival submissions which have been urged in regard to the necessity and propriety of the appellants being impleaded as parties to the proceedings before the NCLT. We accordingly allow the appeals and set aside the impugned judgment and order of the NCLAT dated 4 March 2020 in relation to the appeals filed by the two appellants alone, being Company Appeal (AT) Nos 206 of 2019 and 285 of 2019. The proceedings shall, in consequence, stand remitted back to the NCLT, in relation to the two appellants in the present case, for a fresh decision on the issue of their being impleaded. We request the NCLT to pass fresh orders within a period of one month from the date of receipt of a certified copy of this order.

18 Pending application, if any, stands disposed of.

.....J.
[Dr Dhananjaya Y Chandrachud]

.....J.
[M R Shah]

New Delhi;
February 15, 2021
-S-

ITEM NO.5+32 Court 6 (Video Conferencing) SECTION XVII

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Civil Appeal No(s).2841/2020

NEERA SAGGI

Appellant(s)

VERSUS

UNION OF INDIA & ORS.

Respondent(s)

(WITH IA No.71138/2020-EXEMPTION FROM FILING C/C OF THE IMPUGNED JUDGMENT and IA No.71136/2020-EX-PARTE STAY and IA No.90363/2020-PERMISSION TO FILE ADDITIONAL DOCUMENTS/FACTS/ANNEXURES)

Civil Appeal No. 3531 of 2020 (Section XVII)

(WITH APPLN.(S) FOR EXEMPTION FROM FILING C/C OF THE IMPUGNED JUDGMENT AND EX-PARTE STAY)

Date : 15-02-2021 These appeals were called on for hearing today.

CORAM :

HON'BLE DR. JUSTICE D.Y. CHANDRACHUD
HON'BLE MR. JUSTICE M.R. SHAH

For Appellant(s) Mr. Shyam Divan, Senior Advocate
 Mr. Ashish Prasad, Adv.
 Mr. Mahfooz A. Nazki, Adv.
 Mr. Rohit Sharma, Adv.
 Mr. Arpan Behl, Adv.
 Mr. Avinash Tripathi, AOR

Mr. K.V. Vishwanathan, Sr. Adv.
Mr. Karun Mehta, AOR

For Respondent(s) Mr. N. Venkataraman, ASG
 Mr. Kanu Agrawal, Adv.
 Ms. Sansriti Pathak, Adv.
 Ms. Swarupama Chaturvedi, Adv.
 Mr. Arvind Kumar Sharma, AOR

UPON hearing the counsel the Court made the following
O R D E R

1 Admit.

- 2 The appeals are allowed in terms of the signed order.
- 3 Pending application, if any, stands disposed of.

(SANJAY KUMAR-I)
AR-CUM-PS

(SAROJ KUMARI GAUR)
COURT MASTER

(Signed order is placed on the file)