Tata Consultancy Services Limited vs Vishal Ghisulal Jain on 23 November, 2021

Author: D.Y. Chandrachud

Bench: A S Bopanna, Dhananjaya Y Chandrachud

Repor

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No 3045 of 2020

TATA Consultancy Services Limited .... Ap

Versus

Vishal Ghisulal Jain, Resolution Professional,
SK Wheels Private Limited .... Respo

JUDGMENT

Dr Dhananjaya Y Chandrachud, J

1. This appeal arises from a judgment dated 24 June 2020 of the National Company Law Appellate Tribunal1. The NCLAT upheld the interim order dated 18 December 2019 of the National Company Law Tribunal2 which stayed the termination by the appellant of its Facilities Agreement dated 1 December 2016 with SK Wheels Private Limited3.

“NCLAT” “NCLT” or “Adjudicating Authority” “Corporate Debtor” or “Respondent” Factual Background

2. The appellant and the Corporate Debtor entered into a Build Phase Agreement on 24 August 2015 followed by a Facilities Agreement on 1 December 2016. The Facilities Agreement obligated the Corporate Debtor to provide premises with certain specifications and facilities to the appellant for conducting examinations for educational institutions.

3. Clause 11(b) of the Facilities Agreement states that either party is entitled to terminate the agreement immediately by written notice to the other party provided that a material breach committed by the latter is not cured within thirty days of the receipt of the notice. Clause 11(b) reads as follows:

> "11. Termination ....
>
> (b) Termination for Material Breach. Either party may terminate this Agreement immediately by a written notice to the other Party in the event of a material breach which is not cured within thirty days of the receipt of the said notice period."

4. A termination notice was issued by the appellant to the Corporate Debtor on 10 June 2019 which came into effect immediately. The parties have contested the facts leading up to the issuance of the notice.

5. It has been submitted on behalf of the appellant that there were multiple lapses by the Corporate Debtor in fulfilling its contractual obligations, which it failed to remedy satisfactorily. The appellant notified the Corporate Debtor in its email dated 1 August 2018 that it intended to invoke the penalty clause of the Facilities Agreement for the alleged contractual breaches. Another email dated 17 September 2018 was sent to the Corporate Debtor regarding non-compliance with the agreement. Following a site visit, the appellant in its email dated 1 October 2018 directed the Corporate Debtor to take urgent steps to remedy the breaches. On 11 October 2018, the appellant put the Corporate Debtor on notice that it would be constrained to invoke the penalty and termination clauses of the Facilities Agreement for the alleged non-compliance. On 13 October 2018, the appellant addressed an email to the Corporate Debtor highlighting its concerns regarding the insufficiency of housekeeping staff and their malpractices in respect of entering attendance. Eventually on 19 November 2018, the appellant intimated to the Corporate Debtor that it will deploy its housekeeping staff and deduct the costs from the invoice. On 3 February 2019, the appellant wrote an email to the Corporate Debtor raising issues of power supply and shortage of housekeeping staff, among other deficiencies.

6. The Corporate Insolvency Resolution Process4 was initiated against the Corporate Debtor on 29 March 2019. The appellant has alleged that it came to know about the CIRP against the Corporate Debtor when the Electricity Board disconnected the supply of electricity to the Corporate Debtor on 24 April 2019.

7. On 29 May 2019, the Corporate Debtor in its email alleged that the appellant had failed to make the requisite payments and the electricity was disconnected as a result. In its response dated 30 May 2019, the appellant stated that:

> "CIRP"
>
> (i) It came to know that a CIRP was initiated against the Corporate Debtor when the electricity was disconnected;

(ii) There were no amounts due to the Corporate Debtor; and

(iii) It made the payments for periods before March 2019. There was a delay in making payments for March 2019 because the Corporate Debtor requested a change in bank account details. No invoice was raised for April 2019.

8. The appellant claims that the material breaches by the Corporate Debtor have resulted in a liability of Rs. 20,78,500. It did not initiate recovery proceedings on account of the moratorium imposed under Section 14 of the Insolvency and Bankruptcy Code 20165.

9. The appellant issued a notice of termination dated 10 June 2019 in terms of Clause 11(b) of the Facilities Agreement. The termination notice stated thus:

"Despite of all our sincere attempts in settling the crucial business issues, we have always received unvaried response from your end and these occurrences of non-observation has now culminated into breach of following terms and conditions of the Agreement.

1. Not maintaining the minimum level of skillset of personal on exam and non-exam days which is non-compliance as per Annexure B, Table C, and also a process violation.

2. Furnishing and Designing guidelines (Annexure B, Table D) not being adhered

a) Furniture broken condition

b) Temperature and ventilation in labs, server room and UPS rooms not being maintained

c) Deploying housing staff "IBC"

d) Cleanliness and up keeping of the center

3. Branding and Navigation not in synchronization with Annexure F of facility agreement In view of all the aforestated events, consider this as a notice of termination as per clause 11 (b) of the Agreement which entitles Tata Consultancy Services Ltd. ("TCS") to terminate the Agreement with immediate effect by issuance of a written notice in the event of a material breach not being cured within 30 days.

Please take notice that the relationship between us as Client/Service Recipient and you as Service Provider/ Vendor/LISP stands terminated with effect from 10th June."

10. On behalf of the Corporate Debtor, it is submitted that certain routine operational requirements were highlighted by the appellant from time to time, which were rectified within a reasonable

duration. The Corporate Debtor has allegedly invested Rs. 8.35 crores to fulfil its contractual obligations. According to the Corporate Debtor, the deficiencies raised by the appellant in its letter dated 11 October 2018 were remedied by the end of October 2018. The Corporate Debtor has further submitted that certain other minor issues were cured by February 2019. The deficiency in relation to the housekeeping staff provided by the Corporate Debtor was allegedly cured when the appellant hired its own staff. The Corporate Debtor has claimed that it complied with the directions of the appellant intimated in its email dated 3 February 2019 in respect of changing faulty batteries and providing cleaning products. The Corporate Debtor has further submitted that while the electricity was disconnected by the Electricity Board in April 2019, it was eventually restored. It is stated that certain meetings were held in April-May 2019 where the Resolution Professional6 informed the "RP" appellant that no prejudice would be caused to it and all the services and facilities will be provided according to the agreement, but the appellant unilaterally terminated the agreement with immediate effect on 10 June 2019. The Corporate Debtor has contested the issuance of the termination notice on the ground that no material breaches have occurred, and, in any event, a thirty days' period is to be given to a party to cure the defects before the agreement can be terminated under Clause 11(b) of the Facilities Agreement.

Proceedings before the NCLT and NCLAT

11. The Corporate Debtor instituted a miscellaneous application7 before the NCLT under Section 60(5)(c) of the IBC for quashing of the termination notice. The NCLT passed an order dated 18 December 2019 granting an ad-interim stay on the termination notice issued by the appellant and directed the appellant to comply with the terms of the Facilities Agreement. The NCLT observed that prima facie it appeared that the contract was terminated without serving the requisite notice of thirty days. The conclusion of the NCLT is extracted below:

> "Further whether the termination is good or bad in law, is a matter of inquiry, which requires examination of the fact and circumstances. In this scenario, we are of the prima facie view that the termination of the contract even without serving a notice to the corporate debtor is not correct.
>
> In view of the same, we hereby stay the termination notice issued by the respondent. Until then the respondent shall adhere to the terms of contract without fail." Miscellaneous Application No 2954 of 2019

12. Aggrieved by the order, the appellant preferred an appeal8 before the NCLAT. The NCLAT by its order dated 24 June 2020 upheld the order of the NCLT observing that it had correctly stayed the operation of the termination notice since the main objective of the IBC is to ensure that the Corporate Debtor remains a going concern. The NCLAT referred to Section 14 to highlight that a moratorium is imposed to ensure the smooth functioning of the Corporate Debtor to safeguard its status as a going concern. Further, it is the responsibility of the RP under Section 25 of the IBC to preserve the Corporate Debtor as a going concern. The relevant portions of the judgment are reproduced below:

> "10...From the order it is seen that the Respondent herein was appointed as Interim Resolution Professional (in short IRP) to carry out the functions as per law. In view of Section 14 once a moratorium was imposed by the Adjudicating Authority Interim Resolution Professional the Interim Resolution Professional will be at the helm of affairs of the company in view of the suspension of the Board of Directors of the 'Corporate Debtor'. As on the date of the imposition of moratorium the business and activities of the 'Corporate Debtor' will have to be carried out for smooth functioning of the company and the company shall remain as a going concern. Apart from that the Resolution Professional shall ensure for smooth running of the company as a going concern and the Resolution Professional shall perform the duties as per Section 25 of the I&B Code. Sub- Section (2)(a) of Section 25, the Resolution Professional take immediate custody and control of all the assets of the Corporate Debtor, including the business records of the Corporate Debtor.

Further sub-section 2 (b) of Section 25 of the I & B Code states that "(b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi- judicial or arbitration proceedings;"

> ... Further, the said provision sets out the duty of Resolution Professional to preserve and protect the assets of the 'Corporate Debtor' and lays down the functions he may Company Appeal (AT) (Insolvency) No. 237 of 2020 perform the same. In view of the duties cast upon the Resolution Professional, the Resolution Professional to keep the Corporate Debtor as a going concern and filed an application being C.A. (M.B.)- 2954 of 2019 before the Adjudicating Authority seeking stay of termination of notice and sought direction to the Appellant to continue the Facilities Agreement dated 01.12.2016.
>
> 11. The Adjudicating Authority after hearing the parties stayed the termination of notice and directed the Appellant herein to adhere to the terms of contract without fail. In view of the law, after initiation of the CIRP the 'Corporate Debtor' shall function and continue its business activities. It is the duty of the Resolution Professional to keep the Corporate Debtor as a going concern. It is the main objective of the Code to keep the Corporate Debtor as a going concern. The Adjudicating Authority rightly stayed the termination of notice and there is no illegality in the Order passed by the Adjudicating Authority dated 18.12.2019." The judgment of the NCLAT has given rise to the present appeal.
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> Submissions of Counsel

13. Ms Fereshte D Sethna, learned counsel appearing on behalf of the appellant, has made the following submissions:

> (i) NCLT has misread the provisions of Section 14 of the IBC which relate to the provision of goods and services to the Corporate Debtor once the moratorium is

imposed. In the present case, the appellant is availing of the services of the Corporate Debtor, to which Section 14 has no application;

(ii) As a result of the impugned order, the Facilities Agreement, which is a determinable contract has become a non-terminable contract, overlooking the mandate of Section 14 of the Specific Relief Act 1963;

(iii) The termination notice was not issued to the Corporate Debtor because it was undergoing CIRP but was on account of the material breaches of the agreement. Multiple opportunities were given to the Corporate Debtor to remedy the breaches before the termination notice was issued;

(iv) The Facilities Agreement is not the sole contract of the Corporate Debtor, termination of which would lead to its corporate death. The Corporate Debtor is in the business of automotive parts, which is evident from the main objects of its Memorandum of Association;

(v) The NCLT under Section 60 (5) (c) of the IBC cannot invoke its residuary powers where there is a patent lack of jurisdiction. IBC does not permit a statutory override of all contracts entered with the Corporate Debtor. A third party has a contractual right of termination;

(vi) The duty of the RP under Section 25 of the IBC is not determinative of the jurisdiction of the NCLT. Such a duty cannot be stretched to convert a determinable commercial contract into a non-terminable contract, forcing a contracting party to pay for deficient services that it is unwilling to avail; and

(vii) In Gujarat Urja Vikas v. Amit Gupta & Ors.9, this Court had injuncted a third party from terminating its contract with the corporate debtor because there were concurrent findings of the NCLT and NCLAT holding that the contract in question was the sole contract of the (2021) 7 SCC 209; “Gujarat Urja” corporate debtor, and the termination of the contract by the third party was merely on the ground of initiation of CIRP without there being any contractual default on part of the corporate debtor.

14. Ms Udhita Singh, the learned counsel appearing on behalf of the RP, has urged that:

(i) NCLT is vested with the jurisdiction under Section 60(5)(c) of the IBC to adjudicate issues relating to fact or law in respect of a company undergoing CIRP;

(ii) The appellant’s argument that the contractual dispute can be decided only through arbitration and the provisions of the Indian Contract Act 1872 and Specific Relief Act 1963 are attracted is incorrect. Section 238 of the IBC has an overriding effect over other laws. This Court in Ashoka Marketing v. PNB10 has held that two

special laws containing non-obstante clauses must be interpreted harmoniously by looking at the purpose of the laws. Further, this Court has observed that a special law enacted at a later date prevails over the earlier special law. Thus, the provisions of the IBC would apply to the present dispute;

(iii) In Gujarat Urja (supra), this Court has held that the residuary jurisdiction of the NCLT under Section 60(5)(c) of the IBC provides it a wide discretion to adjudicate questions of law or fact arising from or in relation to the insolvency resolution proceedings. It was further held that Section 14 of the IBC is not exhaustive of the grounds of judicial (1990) 4 SCC 406 intervention contemplated under the IBC otherwise Section 60(5)(c) would be rendered otiose. One such ground of intervention is when the status of the Corporate Debtor as a going concern is in jeopardy. Thus, the NCLT has the power to exercise its jurisdiction under Section 60(5)(c) of the IBC to ensure that the Corporate Debtor survives as a going concern;

(iv) The Corporate Debtor was not given a thirty days' notice to cure the breach in terms of Clause 11(b) of the Facilities Agreement. The termination notice refers to a notice dated 3 October 2018, which has not been placed on record. While a letter dated 11 October 2018 was received by the Corporate Debtor alleging deficiencies, those were cured by the end of October 2018. This is evinced by the fact that after October 2018, no communication, except those dated 19 November 2018 and 3 February 2019, were received by the Corporate Debtor. The Corporate Debtor had rectified any minor deficiencies that were brought to its notice by the appellant promptly. Thus, the allegation that there were material breaches of the agreement by the Corporate Debtor is incorrect;

(v) The appellant became aware that CIRP has been initiated against the Corporate Debtor and had immediately terminated the agreement thereafter; and

(vi) The Corporate Debtor had two main sources of income – a dealership of Maruti and the agreement with the appellant. The dealership was terminated before the initiation of CIRP, thus the only existing source of income as of the date of initiation of CIRP was the Facilities Agreement, for which the Corporate Debtor has incurred a substantial capital expenditure of Rs. 8.35 crores. The termination of the agreement would adversely affect the Corporate Debtor. In Gujarat Urja (supra), this Court has held that the termination of an agreement which is the main source of revenue generation of the Corporate Debtor is against the objective of the IBC which envisages that the Corporate Debtor should be preserved as a going concern.

Analysis

15. The rival contentions will now be considered.

16. Based on the appeal, two issues have arisen for consideration before this Court:

(i) Whether the NCLT can exercise its residuary jurisdiction under Section 60(5)(c) of the IBC to adjudicate upon the contractual dispute between the parties; and

(ii) Whether in the exercise of such a residuary jurisdiction, it can impose an ad-interim stay on the termination of the Facilities Agreement.

17. Clause 12 (d) of the Facilities Agreement provides that the disputes between the parties shall be a subject matter of arbitration. The clause reads thus:

"12 Miscellaneous ....

d) Governing Law, Dispute Resolution and Jurisdiction:- This Agreement shall be governed and interpreted in accordance with laws of India.

In case of disputes or differences between the Parties hereof, shall be subject matter of arbitration under the Arbitration and Conciliation Act 1996 and any subsequent related amendments there to, unless settled amicably between the Parties hereto, be referred to arbitration and such arbitration shall be conducted in accordance with the rules of arbitration of the Bombay Chamber of Commerce and Industry ("BCCI"), which rules as modified from time to time, are deemed to be incorporated by reference into this clause (the "Arbitration Rules") by an arbitration panel comprised of a sole arbitrator. The arbitration panel as referred to above shall be appointed by the BCCI. The arbitration panel shall deliver the award in the arbitration proceedings within three (3) months from reference of any dispute to arbitration. The venue of arbitration shall be Mumbai, India.

The Parties agree that the award passed by the arbitration panel shall be final and binding upon the Parties, and that the Parties shall not be entitled to commence or maintain any action in any court of law in respect of any matter in dispute arising from or in relation to the Agreement, except for the enforcement of an arbitral award passed by an arbitration panel pursuant to this clause."

18. Section 238 provides that the IBC overrides other laws, including any instrument having effect by virtue of law. The text of Section 238 stipulates thus:

"Section 238 - Provisions of this Code to override other laws The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."

19. In Indus Biotech (P) Ltd. v. Kotak India Venture (Offshore) Fund, a three judge Bench of this Court, of which one of us was a part (Justice AS Bopanna), held that Section 238 of the IBC overrides all other laws. This Court was considering whether a reference to arbitration made under Section 8 of the Arbitration and Conciliation Act 1996 in terms of the agreement between the parties would affect the jurisdiction of the NCLT to examine an application filed under Section 7 of the IBC. This Court observed thus:

"27. As noted, the issue which is posed for our consideration is arising in a petition filed under Section 7 of IB Code, before it is admitted and therefore not yet an action in rem. In such application, the course to be adopted by the adjudicating authority if

> an application under Section 8 of the 1996 Act is filed seeking reference to arbitration is what requires consideration. The position of law that the IB Code shall override all other laws as provided under Section 238 of the IB Code needs no elaboration. In that view, notwithstanding the fact that the alleged corporate debtor filed an application under Section 8 of the 1996 Act, the independent consideration of the same dehors the application filed under Section 7 of IB Code and materials produced therewith will not arise. The adjudicating authority is duty- bound to advert to the material available before him as made available along with the application under Section 7 of IB Code by the financial creditor to indicate default along with the version of the corporate debtor. This is for the reason that, keeping in perspective the scope of the proceedings under the IB Code and there being a timeline for the consideration to be made by the adjudicating authority, the process cannot be defeated by a corporate debtor by raising moonshine defence only to delay the process. In that view, even if an application under Section 8 of the 1996 Act is filed, the adjudicating authority has a duty to advert to contentions put forth on the application filed under Section 7 of IB Code, examine the material placed before it by the financial creditor and record a satisfaction as to whether there is default or not. While doing so the contention put forth by the corporate debtor shall also be noted to determine as to whether there is substance in the defence and to arrive at the conclusion whether there is default. If the irresistible conclusion by the adjudicating authority is that there is default and the debt is payable, the bogey of arbitration to delay the process would not arise despite the position that the agreement between the parties indisputably contains an arbitration clause." (emphasis added)

20. In Gujarat Urja (supra), a two judge Bench of this Court, of which one of us was a part (Justice DY Chandrachud), held that a power purchase agreement, which is a bilateral commercial contract, is an 'instrument' under Section 238. Notably, the power purchase agreement provided that the disputes between the parties relating to the agreement would be entertained by Gujarat Electricity Regulatory Commission. But since Section 238 provides an overriding effect to the provisions of the IBC over any instrument having effect by law, it was held that the NCLT had jurisdiction over the dispute which arose in the context of insolvency proceedings. The relevant extract of the judgment is set out below:

> "82. It has been urged on behalf of the appellant that Section 238 does not apply to a bilateral commercial contract between a corporate debtor and a third party and only applies to statutory contracts or instruments entered into by operation of law. The basis of this submission is that the word "instrument" should be given a meaning ejusdem generis to the provision "contained in any other law". We do not find force in this argument. Section 238 does not state that the "instrument" must be entered into by operation of law; rather it states that the instrument has effect by virtue of any such law.

In other words, the instrument need not be a creation of a statute; it becomes enforceable by virtue of a law. Therefore, we are inclined to agree with the view taken by NCLT.

Section 238 is prefaced by a non obstante clause. NCLT's jurisdiction could be invoked in the present case because the termination of PPA was sought solely on the ground that the corporate debtor had become subject to an insolvency resolution process under IBC." (emphasis added)

21. Section 60(5)(c) grants residuary jurisdiction to the NCLT to adjudicate any question of law or fact, arising out of or in relation to the insolvency resolution of the Corporate Debtor. Section 60(5)(c) provides thus:

> "Section 60 - Adjudicating Authority for corporate persons .....
>
> (5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of— ....
>
> (c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code." Clause 12 (d) of the Facilities Agreement provides that any dispute between the parties relating to the agreement could be the subject matter of arbitration.

However, the Facilities Agreement being an 'instrument' under Section 238 of the IBC can be overridden by the provisions of the IBC. In terms of Section 238 and the law laid down by this Court, the existence of a clause for referring the dispute between parties to arbitration does not oust the jurisdiction of the NCLT to exercise its residuary powers under Section 60(5)(c) to adjudicate disputes relating to the insolvency of the Corporate Debtor.

22. The appellant has contested the reliance of the NCLAT on Section 25 of the IBC to hold that the RP can invoke the jurisdiction of the NCLT to stay the termination of the Facilities Agreement in pursuance of its duty to preserve the Corporate Debtor as a going concern. The learned counsel has submitted that the jurisdiction of the NCLT cannot be determined based on the duties of the RP. Reliance was placed on the judgment of this Court in Embassy Property Developments (Private) Limited v. State of Karnataka11, where this Court held that the duties of the RP are entirely different from the jurisdiction and powers of the NCLT. While the duty of the RP and the jurisdiction of the NCLT cannot be conflated, in Gujarat Urja (supra), this Court has clarified that the RP can approach the NCLT for adjudication of disputes which relate to the insolvency resolution process. But when the dispute arises dehors the insolvency of the Corporate Debtor, the RP must approach the relevant competent authority (para

72). We have discussed whether there is a nexus between the termination notice and the insolvency resolution proceedings in the subsequent paragraphs.

23. It was also urged on behalf of the appellant that the NCLT and NCLAT have re-written the agreement changing its nature from a determinable contract to a non-terminable contract overlooking the mandate of Section 1412 of the Specific Relief Act 1963. It is a settled position of law

that IBC is a complete code and Section 238 overrides all other laws. The NCLT in its residuary jurisdiction is empowered to stay the termination of the agreement if it satisfies the criteria laid down by this Court in Gujarat Urja (supra). In any event, the intervention by the NCLT and NCLAT cannot be characterized as the re-writing of the contract between the parties. The NCLT and NCLAT are vested with the responsibility of (2020) 13 SCC 308 "Section 14 - Contracts not specifically enforceable The following contracts cannot be specifically enforced, namely:--

> (a) where a party to the contract has obtained substituted performance of contract in accordance with the provisions of section 20;
>
> (b) a contract, the performance of which involves the performance of a continuous duty which the court cannot supervise;
>
> (c) a contract which is so dependent on the personal qualifications of the parties that the court cannot enforce specific performance of its material terms; and
>
> (d) a contract which is in its nature determinable." preserving the Corporate Debtor's survival and can intervene if an action by a third party can cut the legs out from under the CIRP.

24. On behalf of the appellant, it has been further submitted that the NCLAT misread Section 14 of the IBC, which has no application to the present case. Section 14 of the IBC provides thus:

> "Section 14 - Moratorium (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:--
>
> (a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
>
> (b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
>
> (c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
>
> (d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

Explanation.--For the purposes of this sub-Section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota,

concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period;

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.

(3) The provisions of sub-section (1) shall not apply to--

(a) such transactions, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;

(b) a surety in a contract of guarantee to a corporate debtor. (4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

> Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be." (emphasis added) Admittedly, the appellant is neither supplying any goods or services to the Corporate Debtor in terms of Section 14 (2) nor is it recovering any property that is in possession or occupation of the Corporate Debtor as the owner or lessor of such property as envisioned under Section 14 (1) (d). It is availing of the services of the Corporate Debtor and is using the property that has been leased to it by the Corporate Debtor. Thus, Section 14 is indeed not applicable to the present case. However, in Gujarat Urja (supra) it was held that the NCLT's jurisdiction is not limited by Section 14 in terms of the grounds of judicial intervention envisaged under the IBC. It can exercise its residuary jurisdiction under Section 60(5)(c) to adjudicate on questions of law and fact that relate to or arise during an insolvency resolution process. This Court observed:
>
> "91. The residuary jurisdiction of NCLT under Section 60(5)(c) of IBC provides it a wide discretion to adjudicate questions of law or fact arising from or in relation to the insolvency resolution proceedings. If the jurisdiction of NCLT were to be confined to

> actions prohibited by Section 14 of IBC, there would have been no requirement for the legislature to enact Section 60(5)(c) of IBC. Section 60(5)(c) would be rendered otiose if Section 14 is held to be exhaustive of the grounds of judicial intervention contemplated under IBC in matters of preserving the value of the corporate debtor and its status as a "going concern". We hasten to add that our finding on the validity of the exercise of residuary power by NCLT is premised on the facts of this case. We are not laying down a general principle on the contours of the exercise of residuary power by NCLT. However, it is pertinent to mention that NCLT cannot exercise its jurisdiction over matters dehors the insolvency proceedings since such matters would fall outside the realm of IBC. Any other interpretation of Section 60(5)(c) would be in contradiction of the holding of this Court in Satish Kumar Gupta [Essar Steel (India) Ltd. (CoC) v. Satish Kumar Gupta, (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443]."

25. Before the initiation of the CIRP, the appellant had on multiple instances communicated to the Corporate Debtor that there were deficiencies in its services. The Corporate Debtor was put on notice that the penalty and termination clauses of the Facilities Agreement may be invoked. This is evident from the appellant's communications dated 1 August 2018, 17 September 2018, 1 October 2018 and 11 October 2018. In its email dated 13 October 2018 the appellant specifically noted that the housekeeping staff being provided by the Corporate Debtor was inadequate. The appellant was apparently constrained to deploy its own staff for housekeeping, evinced from its email dated 19 November 2018. The Corporate Debtor has admitted that the appellant was using its own housekeeping staff and deducting the costs from the invoice. The appellant again intimated the Corporate Debtor to change faulty batteries of the UPS and provide cleaning products in its email dated 3 February 2019. The termination notice dated 10 June 2019 also clearly lays down the deficiencies in the services of the Corporate Debtor. The termination notice enumerated the following deficiencies:

> "1. Not maintaining the minimum level of skillset of personal on exam and non-exam days which is non-compliance as per Annexure B, Table C, and also a process violation.

2. Furnishing and Designing guidelines (Annexure B, Table D) not being adhered

a) Furniture broken condition

b) Temperature and ventilation in labs, server room and UPS rooms not being maintained

c) Deploying housing staff

d) Cleanliness and up keeping of the center

3. Branding and Navigation not in synchronization with Annexure F of facility agreement."

26. In Gujarat Urja (supra), the contract in question was terminated by a third party based on an ipso facto clause, i.e., the fact of insolvency itself constituted an event of default. It was in that context, this Court held that the contractual dispute between the parties arose in relation to the insolvency of the corporate debtor and it was amenable to the jurisdiction of the NCLT under Section 60(5)(c). This Court observed that "....NCLT has jurisdiction to adjudicate disputes, which arise solely from or which relate to the insolvency of the corporate debtor... The nexus with the insolvency of the corporate debtor must exist" (para 69). Thus, the residuary jurisdiction of the NCLT cannot be invoked if the termination of a contract is based on grounds unrelated to the insolvency of the Corporate Debtor.

27. It is evident that the appellant had time and again informed the Corporate Debtor that its services were deficient, and it was falling foul of its contractual obligations. There is nothing to indicate that the termination of the Facilities Agreement was motivated by the insolvency of the Corporate Debtor. The trajectory of events makes it clear that the alleged breaches noted in the termination notice dated 10 June 2019 were not a smokescreen to terminate the agreement because of the insolvency of the Corporate Debtor. Thus, we are of the view that the NCLT does not have any residuary jurisdiction to entertain the present contractual dispute which has arisen dehors the insolvency of the Corporate Debtor. In the absence of jurisdiction over the dispute, the NCLT could not have imposed an ad-interim stay on the termination notice. The NCLAT has incorrectly upheld the interim order of the NCLT.

28. While in the present case, the second issue formulated by this Court has no bearing, we would like to issue a note of caution to the NCLT and NCLAT regarding interference with a party's contractual right to terminate a contract. Even if the contractual dispute arises in relation to the insolvency, a party can be restrained from terminating the contract only if it is central to the success of the CIRP. Crucially, the termination of the contract should result in the corporate death of the Corporate Debtor. In Gujarat Urja (supra), this Court held thus:

> "176. Given that the terms used in Section 60(5)(c) are of wide import, as recognised in a consistent line of authority, we hold that NCLT was empowered to restrain the appellant from terminating PPA. However, our decision is premised upon a recognition of the centrality of PPA in the present case to the success of CIRP, in the factual matrix of this case, since it is the sole contract for the sale of electricity which was entered into by the corporate debtor. In doing so, we reiterate that NCLT would have been empowered to set aside the termination of PPA in this case because the termination took place solely on the ground of insolvency. The jurisdiction of NCLT under Section 60(5)(c) of IBC cannot be invoked in matters where a termination may take place on grounds unrelated to the insolvency of the corporate debtor. Even more crucially, it cannot even be invoked in the event of a legitimate termination of a contract based on an ipso facto clause like Article 9.2.1(e) herein, if such termination will not have the effect of making certain the death of the corporate debtor. As such, in all future cases, NCLT would have to be wary of setting aside valid contractual terminations which would merely dilute the value of the corporate debtor, and not push it to its corporate death by virtue of it being the corporate debtor's sole contract

(as was the case in this matter's unique factual matrix).

> 177. The terms of our intervention in the present case are limited. Judicial intervention should not create a fertile ground for the revival of the regime under Section 22 of SICA which provided for suspension of wide-ranging contracts. Section 22 of the SICA cannot be brought in through the back door. The basis of our intervention in this case arises from the fact that if we allow the termination of PPA which is the sole contract of the corporate debtor, governing the supply of electricity which it generates, it will pull the rug out from under CIRP, making the corporate death of the corporate debtor a foregone conclusion." (emphasis supplied)

29. The narrow exception crafted by this Court in Gujarat Urja (supra) must be borne in mind by the NCLT and NCLAT even while examining prayers for interim relief. The order of the NCLT dated 18 December 2019 does not indicate that the NCLT has applied its mind to the centrality of the Facilities Agreement to the success of the CIRP and Corporate Debtor's survival as a going concern. The NCLT has merely relied upon the procedural infirmity on part of the appellant in the issuance of the termination notice, i.e., it did not give thirty days' notice period to the Corporate Debtor to cure the deficiency in service. The NCLAT, in its impugned judgment, has averred that the decision of the NCLT preserves the 'going concern' status of the Corporate Debtor but there is no factual analysis on how the termination of the Facilities Agreement would put the survival of the Corporate Debtor in jeopardy.

30. Admittedly, this Court has clarified the law on the present subject matter in Gujarat Urja (supra) after the pronouncements of the NCLT and NCLAT. Going forward, the exercise of the NCLT's residuary powers should be governed by the above decision.

31. We accordingly set aside the judgment of the NCLAT dated 24 June 2020. The proceedings initiated against the appellant shall stand dismissed for absence of jurisdiction. The appeal is disposed of in the above terms with no order as to costs.

32. Pending applications, if any, are disposed of.

.....J. [Dr Dhananjaya Y Chandrachud]
.....J. [A S Bopanna] New Delhi;

November 23, 2021.