

Insolvency and Bankruptcy Board of India
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9th March, 2021

Subject: Judgment¹ dated 8th March, 2021 of the Hon'ble Supreme Court of India in the matter of Gujarat Urja Vikas Nigam Limited Vs. Mr. Amit Gupta & Ors. [Civil Appeal No. 9241 of 2019]

While holding that (i) The NCLT/NCLAT can exercise jurisdiction under section 60(5)(c) of the Insolvency and Bankruptcy Code, 2016 (**Code**) to stay termination of contracts solely on account of Corporate Insolvency Resolution Process (**CIRP**) being initiated against the Corporate Debtor (**CD**), and (ii) The NCLT/NCLAT correctly stayed the termination of the Power Purchase Agreement (**PPA**), since allowing it to terminate the same would certainly result in the corporate death of the CD, the Hon'ble Supreme Court in its order dated 8th March, 2021 made some important observations in the context of insolvency proceedings as under:

Sl. No.	Issue / Theme	Observation / Ruling	Para / Page No.
1	Objective of Code	(a) The primary focus of the Code is to ensure the revival and continuation of the CD. The interests of the CD have been bifurcated and separated from the interests of persons in management. The timelines which are prescribed in the Code are intended to ensure the resuscitation of the CD. (b) The enactment of the Code is in significant senses a break from the past. While interpreting the provisions of the Code, care must be taken to ensure that the regime which Parliament found deficient and which was the basic reason for the enactment of the new legislation is not brought in through the backdoor by a process of disingenuous legal interpretation.	56/54 57/54
2	Jurisdiction of NCLT/NCLAT over contractual disputes	(a) NCLT owes its existence to statute. The powers and functions which it exercises are those which are conferred upon it by the Code. (b) The institutional framework under the Code contemplated the establishment of a single forum to deal with matters of insolvency, which were distributed earlier across multiple fora.	44/43 67/60-61

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	<p>(c) Under Section 60(5)(c), NCLT has jurisdiction to adjudicate disputes, which arise solely from or which relate to the insolvency of the CD. However, in doing so, the NCLT and NCLAT must ensure that they do not usurp the legitimate jurisdiction of other courts and tribunals when the dispute is one which does not arise solely from or relate to the insolvency of the CD. The nexus with the insolvency of the CD must exist.</p>	67/61
	<p>(d) The NCLT's jurisdiction shall always be circumscribed by the supervisory role envisaged for it under the Code, which sought to make the process driven by trained resolution professionals.</p>	68/62
	<p>(e) RP can approach the NCLT for adjudication of disputes that are related to the insolvency resolution process. However, for adjudication of disputes that arise <i>dehors</i> the insolvency of the CD, the RP must approach the relevant competent authority. For instance, if the dispute in the present matter related to the non-supply of electricity, the RP would not have been entitled to invoke the jurisdiction of the NCLT under the Code.</p>	72/64
	<p>(f) The residuary jurisdiction of the NCLT under Section 60(5)(c) of the Code 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 the NCLT were to be confined to actions prohibited by Section 14 of the Code, there would have been no requirement for the legislature to enact Section 60(5)(c) of the Code. Section 60(5)(c) would be rendered otiose if Section 14 is held to be the exhaustive of the grounds of judicial intervention contemplated under the Code in matters of preserving the value of the CD and its status as a 'going concern'.</p>	87/76-77
	<p>(g) NCLT cannot derive its powers from the 'spirit' or 'object' of the Code. Section 60(5)(c) of the Code vests the NCLT with wide powers since it can entertain and dispose of any question of fact or law arising out or in relation to the insolvency resolution process. The NCLT's residuary jurisdiction, though wide, is nonetheless defined by the text of the Code. Specifically, the NCLT cannot do what the Code consciously did not provide it the power to do.</p>	163/131

3	Validity/invalidity of <i>ipso facto</i> clauses in contracts	<p>(a) The question of the validity/invalidity of clauses in contracts is one which the court ought not to resolve exhaustively in the present case. Rather, an appeal can be made to the legislature to provide concrete guidance on this issue, since the lack of a legislative voice on the issue will lead to confusion and reduced commercial clarity.</p> <p>(b) The ‘going concern’ status of the CD will be negated by a termination of its sole contract, on the basis of an <i>ipso facto</i> clause.</p> <p>(c) The Code has been in effect from 5 August 2016, and has also been amended multiple times. Hence, if the ‘going concern’ status of CDs was being affected on a regular basis due to <i>ipso facto</i> clauses (which are in vogue even in the present contracts similar to the current PPA), then the legislature may, if it considered necessary, have proceeded to legislate on an explicit position with regard to the operation of <i>ipso facto</i> clauses.</p> <p>(d) The inclusion of the Explanation to Section 14(1) and Section 14(2A) indicates that Parliament has been amending the Code to ensure that the status of a CD as a ‘going concern’ is not hampered on account of varied situations, which may not have been in contemplation at the time of enacting the Code.</p>	<p>143/118</p> <p>155/125</p> <p>155/125</p> <p>161/129</p>
4	Can PPA be terminated in the matter?	<p>(a) But for the subsistence of the PPA, the CD would no longer remain as a ‘going concern’. The continuation of PPA assumes enormous significance for the successful completion of the CIRP. The termination of the PPA will have the consequence of cutting the legs out from under the CIRP.</p> <p>(b) PPA in this case has been terminated solely on the ground of insolvency, which gives the NCLT jurisdiction under Sec.60(5)(c) to adjudicate this matter and invalidate the termination of the PPA as it is the forum vested with the responsibility of ensuring the continuation of insolvency resolution process which requires preservation of the CD as a going concern.</p> <p>(c) In view of the centrality of the PPA to the CIRP in the unique factual matrix of this case, this Court must adopt an interpretation of the NCLT’s residuary jurisdiction which comports with the broader goals of the Code.</p>	<p>152/122</p> <p>164/131</p> <p>164/131</p>

5	Exercise of jurisdiction by NCLT/NCLAT	<p>(a) The jurisdiction of the NCLT under Section 60(5)(c) of the Code cannot be invoked in matters where a termination may take place on grounds unrelated to the insolvency of the CD.</p> <p>(b) It cannot even be invoked in the event of a legitimate termination of a contract based on an <i>ipso facto clause</i>, if such termination will not have the effect of making certain the death of the CD.</p> <p>(c) 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 CD, and not push it to its corporate death by virtue of it being the CD's sole contract (as was the case in this matter's unique factual matrix).</p>	165/132
	Conclusion	<p>(a) The NCLT/NCLAT can exercise jurisdiction under Section 60(6)(c) of the Code to stay termination of PPA only on account of CIRP being initiated against the CD.</p> <p>(b) NCLT/NCLAT correctly stayed the termination of PPA, since allowing it to terminate the PPA would certainly result in the corporate death of the CD due to the PPA being its sole contract; and</p> <p>(c) Broader question of validity / invalidity of <i>ipso facto</i> clauses in contracts was left open for the legislative intervention.</p> <p>The appeal was accordingly dismissed.</p>	173/138