IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 3688 of 2022

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE BIREN VAISHNAV

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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BIOTOR INDUSTRIES LIMITED (IN LIQUIDATION) REPRESENTED BY LIQUIDATOR MR. SANJAY KUMAR AGARWAL

Versus

GUJARAT INDUSTRIAL DEVELOPMENT CORPORATION

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Appearance:

MR.MIHIR THAKORE LEARNED SENIOR ADVOCATE WITH MR.HRIDAY BUCH, MR.AAYUSH AGARWAL and MR.BHASH MANKAD, ADVOCATE (6258) for the Petitioner(s) No. 1

MR.MIHIR JOSHI, LD. SENIOR ADVOCATE with MR RD DAVE(264) for the Respondent(s) No. 1,2

MR RITURAJ M MEENA(3224) for the Respondent(s) No. 3

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CORAM:**HONOURABLE MR. JUSTICE BIREN VAISHNAV**

Date : 13/02/2023

CAV JUDGMENT

1. **RULE** returnable forthwith.

2. The petitioner BIOTOR Industries Limited (in liquidation) ('BIOTOR' for short) has filed this petition challenging the order dated 28.12.2021 passed by the respondent GIDC terminating the license agreement, order dated 31.12.2021 terminating the lease deed and the notice dated 18.01.2022 under Section 5(1) of the Gujarat Public Premises (Eviction of Unauthorized Occupants) Act, 1972. ('GPP Act' for short)

3. Facts in brief indicate as under:

3.1 BIOTOR was previously known as Jayant Oils and Derivatives Limited. It was ordered to be liquidated vide order dated 31.12.2018 by the National Company Law Tribunal. The liquidation process accordingly commenced. The liquidator

on 09.01.2019 made a public announcement accordingly. The erstwhile company had been allotted land being plot nos.02, Vilayat Industrial Estate, Bharuch, admeasuring 11,89,603 square meters. A license agreement was entered into on 20.01.2007 for development of an SEZ / Industrial Park. A lease agreement was entered into between the parties for a period of 99 years on 12.11.2008. By the impugned orders such lease deed is terminated and so is the license agreement and the petitioner has been ordered to evict the land for non-compliance of the conditions of allotment letter resulting in terminating of license agreement and the lease deed.

3.2 It is the case of the petitioner that the respondent - GIDC was aware of the liquidation proceedings inasmuch as, by communication

dated 10.02.2022, the liquidator was informed of the impugned notices. It is also the case of the petitioner that in October 2021, E-mails were exchanged between the respondent no.1-GIDC and the liquidator and therefore, though the GIDC was aware of the appointment of liquidator, the impugned communications were not addressed to the liquidator.

4. Mr.Mihir Thakore learned Senior Advocate with Mr.Hriday Buch, Mr.Aayush Agarwal and Mr.Bhash Mankad learned advocates for the petitioner has made the following submissions:

4.1 That the impugned notice dated 18.01.2022 is issued without following the principles of natural justice. No opportunity of hearing was given to the company which is now represented by its liquidator. He would submit that though

earlier E-mails were addressed to the Liquidator, the impugned notices were sent at the registered address of the company and also issued to the address of the subject property which was an open land having no employee of the company for accepting the notice. No proof of these notices being served was on record and in such circumstances therefore, there was violation of principles of natural justice.

4.2 Relying on the provisions of Section 4(4) of the GPP Act he would submit that the provision mandates for the notice to be served upon any person including an other person in occupation of the leased premises. This provision was not complied with.

4.3 The other challenge to these notices dated 28.12.2021 and 21.12.2021 is on the ground that

such notices were issued in breach of the terms of the lease deed. He would submit that the license agreement was executed on 20.01.2007 whereby certain terms and conditions were imposed with respect to development of the property. He would read clause 6 of the license agreement which provided that the company could seek return of possession only until a lease deed was executed between the parties. Once the lease deed was executed, it superseded the license agreement and therefore, the lease could not be terminated relying on clause 6 of the license agreement. He would submit that the conditions of the license agreement stood extinguished when the lease was executed.

4.4 Mr.Thakore would submit that the lease deed was for a term of 99 years which was executed on 12.11.2008 effective from

09.01.2007. The company had paid an upfront amount of Rs.23,78,12,600/- (Rupees Twenty Three Crores Seventy Eight Lakhs Twelve Thousand Six Hundred) being a premium price in respect of the plot. Further the company was required to pay an annual rent of Rs.1885/- in the month of March each year. It was further provided in the lease deed that the company defaulted for payment of annual rent of two years, the respondent GIDC could seek return of property under the provisions of the GPP Act.

4.5 The lease deed also permitted the company to create any charge, mortgage, lien or encumbrance against the subject property. He would rely on the relevant conditions of the lease deed and submit that such conditions would indicate that there was a transfer of interest in favour of the company in the subject property.

Under the provisions of Section 5 of the Transfer of Properties Act, the company had an interest and therefore, it had a right to transfer absolutely such property and there was nothing on record to show that the petitioner had reserved such termination.

4.6 In Mr.Thakore's submission, the action of the respondent is in violation of the provisions of the Insolvency and Bankruptcy Code, 2016 ('IBC' for short). Since the company was ordered to be liquidated, no suit or a legal proceedings could be initiated under a company.

4.7 Further, section 33(5) of the IBC also bars initiation of proceedings against the corporate debtor where, a liquidation order is passed.

4.8 Mr.Thakore would further submit that the

NCLT does not have jurisdiction to adjudicate upon the issues raised in this petition. He would submit that the present dispute falls outside the purview of the IBC and is in the realm of the public law which the NCLT cannot decide. He would submit that the GIDC has proceeded to initiate action under the GPP Act and though the action impugned has an impact on the liquidation proceedings, the same will not fall within the jurisdiction of NCLT. In support of this submission, Mr.Thakore would rely on the following decisions:

(A) ***Embassy Property Development Private Limited v. State of Karnataka and others*** reported in ***(2020) 13 SCC 308***

(B) ***Gujarat Urja Vikas Nigam Limited v. Amit Gupta and Others*** reported in ***(2021) 7***

SCC 209

(C) ***Tata Consultancy Services Limited v. Vishal Ghisulal Jani*** reported in ***(2022) 2 SCC 583***

4.9 Lastly submitting, it was pointed out by Mr.Thakore that the impugned action will cause huge prejudice and loss to the company. The company was admitted into liquidation in 2018 after a long time, the liquidator has successfully secured an order of permitting sale of an asset and the subject property is one of the major assets of the company estimated to derive an amount of approximately Rs.200 crores and if the lease deed is permitted to be terminated, the proceeds from the sale of such assets for repayment of dues to the creditors shall be frustrated.

5. Mr.Mihir Joshi learned Senior Advocate with Mr.R.D.Dave learned advocate for the respondent no.1 has made the following submissions:

5.1 He would submit that the land was allotted to the petitioner vide letter of allotment dated 09.01.2007. The allotment letter is produced along with a synopsis. A license agreement was entered into on 20.01.2007. When the allotment letter and the license agreement are read, what is evident is that the petitioner company was to submit a time bound program / development schedule for utilization of the land within three years from the date of allotment. Adverting to the relevant clauses of the license agreement, he would submit that if the Executive Engineer of GIDC did not approve the plans, the GIDC would have a right to terminate the agreement.

5.2 Relevant clauses of the lease agreement viz. clauses nos.15, 17 and 18 were read to indicate that in the event the company does not pay the rent, the agreement would be terminated in accordance with the provisions of the GPP Act.

5.3 Before the NCLT as a result of the GIDC's delay in lodging the claims before the Liquidator, the GIDC has made an application for a prayer that approval be granted from the NCLT for taking action against the petitioner under the GPP Act. This was done as when a public announcement was made of liquidation, and an E-mail was addressed to the Liquidator, notices and orders impugned were served through E-mail to the company. When the E-auction notice was issued by the Liquidator for sale of this property, the NCLT was moved.

5.4 Mr.Joshi would therefore submit that the allotment letter, the license agreement and the lease deed have to be read as a coterminous contract in continuation and in conjunction. The obligations of the lease agreement and the license agreement run concurrently.

5.5 Mr.Joshi would further submit that it is an admitted position that the petitioner has not carried out any development work over the allotted land. The contention of the petitioner therefore that there is violation of principles of natural justice is misconceived. Non-grant of hearing has not caused any prejudice to the petitioner in view of the admitted position that no development has been put up over the allotted land.

5.6 In support of his submission he would rely

on the decision in case of ***State of Manipur and others v. Y. Token Singh and others*** reported in ***(2007) 5 SCC 65.***

5.7 Mr.Joshi would further submit that all notices and orders have been served to the petitioner at the registered address mentioned in the lease deed as well as the plot in question. This has been in compliance of the provisions of the GPP Act. The provisions of the GPP Act overwrites the provisions of the Transfer of Properties Act. He would rely on a decision in case of ***Cantonment Board v. Church of North India*** reported in ***2012 (12) SCC 573.***

5.8 As per Section 36(4)(a)(iv) of the IBC, he would submit that assets which are owned by a third party and which are in possession of the corporate debtor, as per the contractual

arrangements which do not stipulate transfer of title but only use of the assets are not included in the liquidation estate and shall not be used for recovery in the liquidation. The allotted land therefore, does not form part of the liquidation asset of the petitioner.

5.9 Mr.Joshi would further submit that under Section 60(5) of the IBC, the NCLT shall have jurisdiction to entertain or dispose of any application by or against the corporate debtor. The scope of the Section is the widest and the question whether the subject land falls into the liquidation estate or not is one which can only be gone into by NCLT. It is in this context, that the respondent no.1 has filed Interlocutory Application No.642 of 2022 in Company Petition No.1514/IBC/(MB)2017 before the NCLT. IBC is a complete code and all questions raised in the

present petition can be gone into by the NCLT. He would rely on the decision in case of ***Gujarat Urja*** (supra) and ***Tata Consultancy Services Limited*** (supra).

5.10 Mr.Joshi would further submit that Section 33(5) of IBC stipulates that no suit or a legal proceedings shall be instituted by or against the Corporate Debtor except by the liquidator with prior permission. No such permission has been obtained by the petitioner.

6. Mr.Navin Pahwa learned Senior Advocate with Mr.Ruturaj Meena learned advocate for the respondent no.3-State Bank of India has made the following submissions:

6.1 He would submit that the Bank which is part of the consortium has sanctioned financial

assistance to the company. Such financial assistance was granted against a charge over the assets of the company including a charge over the subject property. In order to create the charge the respondent GIDC had issued a no objection certificate to the bank. He would therefore submit that initiation of the recovery proceedings under the GPP Act without issuing notices to the bank who were having a charge over the subject property is bad.

6.2 Mr.Pahwa would further submit that the lease deed amounts to transfer of title and ownership of the subject property.

6.3 Mr.Pahwa would submit that the interim notice violates the provisions of IBC. As the provisions under Section 33(5) are analogs to the provisions contained in Section 14 of the IBC,

any proceedings during the liquidation which has the effect of causing obstruction in conducting such proceedings is contrary to the decision of the Supreme Court in case of ***Arun Kumar Jagatramka v. Jindal Steel and Power Limited*** reported in ***2021 SCC OnLine SC 220.*** He would also rely on a decision in case of ***Sundresh Bhatt, Liquidator of ABG Shipyard v. Central Board of Indirect Taxes and Customs*** reported in ***2023 (1) SCC 472,*** where the Supreme Court has considered the scheme of the IBC vis-a-vis the Customs Act.

6.4 He relied on the decision of the Supreme Court in the case of ***Rajendra K. Bhutta v. Maharashtra Housing and Area Development Authority and Another*** reported in ***2020 (13) SCC 208***, where the Court has held that it is not open for any authority to take

possession of any asset occupied by the corporate debtor during the moratorium period.

7. Having considered the submissions made by the learned advocates for the respective parties, the issues that deserves consideration are;

(I) Whether the lease agreement has to be read in isolation as canvassed by the learned counsel for the petitioner and whether such termination is in violation of the principles of natural justice?

(II) The other issue that needs consideration is whether the issues raised in this petition can be considered by the NCLT in the application filed by the GIDC with a prayer that no option be undertaken of the property in question and leave be granted of the Tribunal for taking action consequent to the termination of the agreement

dated 20.01.2007.

7.1 What is evident from the facts is that the petitioner was allotted the subject land vide allotment letter dated 09.01.2007. The letter of allotment indicates that the plot was allotted for the purpose of development of a product specific SEZ where the petitioner was an anchor tenant . It was incumbent upon the petitioner to submit a time bound program / development schedule for utilization of the land within three years from the date of allotment. In light of this allotment letter, a license agreement was entered into on 20.01.2007. This license agreement under the relevant clauses also indicated a time bound schedule. The lease deed accordingly was executed on 12.11.2008. It was for a period of 99 years with a relevant date as per the letter of allotment dated 09.01.2007. Clauses 15, 17 and

18 of the lease deed indicate that in the event of non-payment of rent, action will be taken under the GPP Act. Clause 17 of the lease deed incorporated the terms of the allotment letter. The relevant clause read as under:

> *"17. Lessor's allotment letter*
> *The Lessor had issued in respect of the demised premises an allotment letter No.GIDC/DM/(CG)ANK/ALT/204 dated 09/01/2007 & a corrigendum order No.GIDC/DM/(CG)ANK/ALT/PLT/65 dated 26-4-2007 & corrigendum letter No.GIDC/DM/(CG)ANK/ALT/DHJ/1927 dated 26/3/2008. The terms and conditions of the above mentioned letters will form part of this Lease Deed."*

7.2 What is therefore evident is that the allotment letter, the license agreement and the lease agreement are contracts which have to be read coterminous with each other, in continuation and conjunction. Since the lease agreement is not executed after a certificate of completion of the conditions as stipulated in the

license agreement, the contention of learned Senior Advocate Mr.Thakore that the conditions of the lease deed will supersede the license agreement and once the lease agreement is executed, the license agreement stood extinguished is misconceived.

7.3 Reading of the impugned notice under the provisions of the GPP Act when read in context of the undisputed facts, indicate that as per the terms of the contract, no development has been carried out as stipulated thereunder and therefore, GIDC was right in invoking the condition of the license agreement and the deed of lease. On this count therefore, no fault can be found in the order dated 28.12.2021 passed under the provisions of the GPP Act on termination of the license agreement.

7.4 The contention on behalf of the petitioner that the procedure has been carried out in violation of principles of natural justice is also misconceived merely because the liquidator has addressed an E-mail would not in effect render it necessary for the impugned notices to be served on the liquidator. In accordance with the provisions of Section 4 of the GPP Act, the notices have been served on the company, at its registered office and in accordance with the provisions of Section 4 on the property in question. In view of the admitted position of fact, that no development has been carried out on the plot in question, in light of the decision of the Supreme Court in case of ***Y.Token Singh and Ors.*** (supra) no prejudice is caused to the petitioner.

7.5 The concept of lease, in the perception of

the petitioner, since it being a lease for a period of 99 years would transfer title is misconceived. Section 105 of the Transfer of Properties Act only provides that by virtue of a leasehold agreement, what is transferred in the property is a right to enjoy such property. No title is transferred.

7.6 This brings us to the other submission made by the respective parties on the availability of the violation of the provisions of the IBC Code. The petitioner would rely on the provisions of Section 33(5) of the IBC to submit that when the liquidation order has been passed, no suit or other legal proceedings shall be instituted by or against a corporate debtor. It is the submission of the learned counsel for the petitioner therefore that the notices could not have been issued. The correlated argument that even the invoking of the provisions of the NCLT by the

GIDC by filing an interlocutory application is also misconceived, can be decided simultaneously.

7.7 The decision in the case of ***Embassy Property*** (supra), ***Gujarat Urja*** (supra) and ***Tata Consultancy Services Limited*** (supra) with the relevant paragraphs have been pressed into service by the learned counsel for the petitioner to submit that the jurisdiction of NCLT under Section 60(5)(c) of IBC cannot be invoked in matters where a termination may take place on the grounds unrelated to the insolvency of the corporate debtor. The relevant paragraph pressed into service by the counsel for the petitioner read as under:

> ***(I) Embassy Property Development Private Limited vs. State of Karnataka and Others*** reported in ***(2020) 13 SCC 308***
>
> ***(II) Gujarat Urja Bikas Nigam***

Limited vs. Amit Gupta and Others reported in ***(2021) 7 SCC 209***

(III) Tata Consultancy Services Limited vs. Vishal Ghisulal Jani reported in ***(2022) 2 SCC 583***

7.8 The counsel for the respondent too would rely on the decision in case of ***Gujarat Urja*** (supra) and ***Tata Consultancy Services Limited*** (supra) in support of his submission that the NCLT has rightly been approached. He would rely on paras 21 to 24 and 84 to 91 of ***Gujarat Urja*** (supra) which read as under:

"D Termination of the PPA

21 The appellant issued two notices of default to the Corporate Debtor on 1 May 2019, which were received by the first respondent on 8 May 2019:

21.1 The basis of the First Notice is that under Article 9.2.1(e) of the PPA, the Corporate Debtor undergoing CIRP under the IBC amounts to an event of default'. The appellant called upon the Corporate Debtor to remedy this default within 30 days

from the date of receipt of the said notice, failing which the appellant stated that it shall terminate the PPA by issuing a termination notice; and

21.2 The basis of the Second Notice is that under Article 9.2.1(a) of the PPA, there was a default in the operation and maintenance of the Plant. Once again, the appellant called upon the Corporate Debtor to remedy the O&M default within 90 days from the receipt of the notice, failing which the appellant stated that it shall terminate the PPA by issuing a termination notice.

22. The first respondent issued his replies to both the notices on 10 May 2019. The replies are summarized below:

22.1 The reply to the First Notice states that the Corporate Debtor's PPA with the appellant is its only PPA, and hence they are heavily dependent on it for reaching a resolution under the IBC. In case the appellant terminates the PPA, prospective resolution applicants (PRAs) who had submitted their expression interest for the Corporate Debtor might not submit a resolution plan, which would eventually lead to liquidation of the Corporate Debtor, defeating the main object of the IBC.

22.2 The reply to the Second Notice states that since the Corporate Debtor is undergoing CIRP under the IBC, the

operations at the Plant were severely affected due to force majeure events in terms of the PPA. Thus, the conditions of the PPA could not be said to have been breached.

23. On 21-05-2019, a meeting was scheduled between the first respondent and the General Manager (IPP) of the appellant. During this meeting, the first respondent emphasized that if the PPA was to be terminated, revival of the Corporate Debtor will be at stake, since prospective resolution applicants may not submit resolution plans or may withdraw the resolution plans, if submitted, citing termination of the PPA. Declining to accede to this position, the appellant made it clear that in accordance with a legal opinion obtained by them, they will be terminating the PPA under Articles 9.2.1(e) and 9.3.1 under the First Notice, since the Corporate Debtor is under CIRP. However, the appellant confirmed that the O&M default stood cured, and hence it would not act upon the Second Notice. It may also be noted at this stage that the appellant has not pressed the issue of the O&M default either before this Court or before the NCLAT/NCLT.

PART E Proceedings before NCLT and NCLAT

24 In May 2019, the first and second respondents filed applications under Section 60(5) of the IBC before the NCLT in regard to the Notices issued by the appellant to the

Corporate Debtor, and sought an injunction restraining the appellant from terminating the PPA. By an interim order dated 31 May 2019, NCLT restrained the appellant from terminating the PPA till the next date of hearing.

...

84. The respondents have relied upon the decision of this Court in Committee of Creditors of Essar Steel India Limited vs Satish Kumar Gupta57, where this Court held that section 60(5)(c) of the IBC —is in the nature of residuary jurisdiction vested in the NCLT so that NCLT may decide all questions of law or fact arising out of or in relation to insolvency or liquidation under the Code.

85. At this stage we may visit some of the precedents emanating from this court where a statutory conferment of residuary powers has been analyzed. A two-judge Bench of this Court discussed the contours of the residuary power in Remdeo Chauhan vs Bani Kant Das59, while interpreting sub-Section (j) of Section 12 of the National Human Rights Commission Act, 1993 which confers (2020) 8 SCC 531; hereinafter referred to as "Satish Kumar Gupta Ibid, para 69 (2010) 14 SCC 209 PART I NHRC with —such other functions as it may consider necessary for the promotion of human rights. While construing the provision, this Court held that:—

45....It is not necessary that each and every case relating to the violation of human rights will fit squarely within the four corners of Section 12 of the 1993 Act for invoking the jurisdiction of the NHRC. One must accept that human rights are not edicts inscribed on a rock. They are made and unmade on the crucible of experience and through reversible process of human struggle for freedom. They admit of a certain degree of fluidity. Categories of human rights, being of infinite variety, are never really closed. That is why the residuary clause in Sub-section (j) has been so widely worded to take care of situations not covered by Sub- sections (a) to (i) of Section 12 of the 1993 Act.

46. The jurisdiction of NHRC thus stands enlarged by Section 12(j) of the 1993 Act, to take necessary action for the protection of human rights. Such action would include inquiring into cases where a party has been denied the protection of any law to which he is entitled, whether by a private party, a public institution, the government or even the Courts of law. We are of the opinion that if a person is entitled to benefit under a particular law, and benefits under that law have been denied to him, it will amount to a violation of his human rights. (emphasis supplied)

86 In D.R. Kohli vs Atul Products Ltd.60, a three judge Bench of this Court

differentiated between the power of Central Excise authorities for recovery of monies due to the Government under two provisions, one of them being a residuary provision:

> *14. The next question relates to the appropriate provision of law under which action could have been taken in this case by the Central Excise authorities. This question was not decided by the High Court in view of its finding on the liability of the respondent to pay excise duty on the products manufactured by (1985) 2 SCC 77*
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> *PART I it. Since we have not agreed with the decision of the High Court on this point, it has become necessary for us to decide this question in this appeal. While the Department asserts that it was open to it to proceed under Rule 10-A of the Rules, the respondent contends that even if there was any short levy, the proper Rule applicable to its case was Rule 10 and not Rule 10-*
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> *A. Rule 10 and Rule 10-A of the Rules during the relevant period ran as follows :*
>
> *10. Recovery of duties or charges short-levied, or erroneously refunded: When duties or charges have been short-levied through inadvertence, error, collusion or misconstruction on the part of an officer, or through misstatement as to the quantity, description or value of such goods on the part of the owner, or when*

any such duty or charge, after having been levied/has been owing to any such cause, erroneously refunded, the person chargeable with the duty or charge, so short-levied, or to whom such refund has been erroneously made, shall pay the deficiency or pay the amount paid to him in excess, as the case may be, on written demand by the proper officer being made within three months from the date, on which the duty or charge was paid or adjusted in the owner's account-current, if any, or from the date of making the refund.

10-A. Residuary powers for recovery of sums due to Government:

Where these Rules do not make any specific provision for the collection of any duty, or of any deficiency in duty if the duty has for any reason been short-levied, or of any other sum of any kind payable to the Central Government under the Act or these Rules, such duty, deficiency in duty or sum shall, on a written demand made by the proper officer, be paid to such person and at such time and place, as the proper officer may specify.

15. The points of difference between the above two Rules were that (i) whereas Rule 10 applied to cases of short levy through inadvertence, error, collusion or misconstruction on the part of an officer, or through misstatement as to the

quantity, description or value of the excisable goods-on the part of the owner Rule 10-A which was a residuary clause applied to those cases which were not covered by Rule 10 and that (ii) whereas under Rule 10, the deficit amount could not be collected after the expiry of three months from the date on which the duty or charge was paid or adjusted in the owners account-current or from the date of making the refund, Rule 10- A did not contain any such period of limitation.‖ (emphasis supplied)

87 Hence, the residuary jurisdiction conferred by statute may extend to matters which are not specifically enumerated under a legislation. While a residuary jurisdiction of a court confers it wide powers, its jurisdiction cannot be in contravention of the provisions of the concerned statute. In A. Deivendran vs State of T.N.61, a two judge Bench of this Court, while determining the limitations of the residuary jurisdiction under Section 465 of the Code of Criminal Procedure, 197362, held that a residuary jurisdiction cannot be invoked when there is a patent defect of jurisdiction or an order is passed in contravention of any mandatory provision of the CrPC. Speaking through Justice G.B. Pattanaik, this Court observed that a competent court is vested with the power to exercise residuary jurisdiction under section 465 of the CrPC in the following terms:

15. We may notice also the arguments advanced by Mr Mohan, learned counsel appearing for the State, that the conviction and sentence against the appellants should not be interfered with in view of the provisions of Section 465 of the Code, inasmuch as there has been no failure of justice. We are unable to accept this contention. Section 465 of the Code is the residuary section intended to cure any error, omission or irregularity committed by a Court of competent jurisdiction in course of trial through accident or inadvertence, or even an illegality consisting in the infraction of any provisions of law. The sole object of the Section is to secure justice by preventing the invalidation of a trial already held, on the ground of technical breaches of any provisions in the Code causing no prejudice to the accused. But by no stretch of imagination the aforesaid provisions can be attracted to a situation where a Court having no jurisdiction under the Code does something or passes an order in contravention of the mandatory provisions of the Code. In view of our interpretation already made, that after a criminal proceeding is committed to a Court of Sessions it is only the Court of Sessions which has the jurisdiction to tender pardon to an accused and the Chief Judicial Magistrate does (1997) 11 SCC 720 —CrPC PART I not possess any such jurisdiction, it would be impossible to hold that such tender of pardon by the Chief Judicial Magistrate can be accepted and the evidence of the

approver thereafter can be considered by attracting the provisions of Section 465 of the Code. The aforesaid provision cannot be applied to a patent defect of jurisdiction. Then again it is not a case of reversing the sentence or order passed by a Court of competent jurisdiction but is a case where only a particular item of evidence has been taken out of consideration as that evidence of the so-called approver has been held by us to be not a legal evidence since pardon had been tendered by a Court of incompetent jurisdiction. In our opinion, to such a situation the provisions of Section 465 cannot be attracted at all. It is true, that procedures are intended to subserve the ends of justice and undue emphasis on mere technicalities which are not vital or important may frustrate the ends of justice. The Courts, therefore, are required to consider the gravity of irregularity and whether the same has caused a failure of justice. To tender pardon by a Chief Judicial Magistrate cannot be held to be a mere case of irregularity nor can it be said that there has been no failure of justice. It is a case of total lack of jurisdiction, and consequently the follow up action on account of such an order of a Magistrate without jurisdiction cannot be taken into consideration at all. In this view of the matter the contention of Mr Mohan, learned Counsel appearing for the State in this regard has to be rejected.

(emphasis supplied)

88 In Johri Lal Soni vs Bhanwari Bai63 (—Johri Lal Soni), a two judge Bench of this Court had to determine whether an insolvency court can scrutinize the validity of a transfer made seven years before the transferor was adjudged as insolvent, when Section 53 of the PIA classified only those transfers as voidable against the receiver, where the transferor was adjudged insolvent on a petition presented within two years after the date of transfer. This Court, in view of the wide discretion granted in terms of Section 4, held that the insolvency court will have the jurisdiction to determine the validity of void transfers undertaken at any point of time. While Section 53 was applicable only to voidable transactions, this Court was of the view that Section 4 provides a discretion to an insolvency court to decide all questions which arise in a case of insolvency and an interpretation which allowed the court to examine void transfers undertaken at any point of time would be in consonance with the object of the provision. The Court held:

> *"4. We now proceed to interpret the provisions of s.4 itself, the relevant part of which may be extracted thus:*
>
> > *"4. Power of Court to decide all questions arising in insolvency. - (1) Subject to the provisions of this Act, the Court shall have full power to decide all questions whether of title or priority, or of any nature whatsoever and whether involving*

> *matters of law or of fact, which may arise in any case of insolvency coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case."*

It would be seen that the section has been couched in the widest possible terms and confers complete and full powers on the Insolvency Court to decide all questions of title or priority, or of any nature whatsoever, which may arise in any case of insolvency. The only restriction which is contained in Section 4 is that these powers are subject to the other provisions of the Act. In other words, the position is that where any other section of the Act contains a provision which either runs counter to Section 4 or expressly excludes the application of Section 4, to that extent Section 4 would become inapplicable. Counsel for the respondent strongly relied on the provisions of Section 53 which runs thus:

> *53. Avoidance of voluntary transfer.- Any transfer of property not being a transfer made before and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration shall, if the transferor is adjudged insolvent on a petition presented within two years after the date of the transfer, be voidable as against the receiver and may be annulled by the Court. (emphasis supplied)*

It is relevant to note that unlike Section 4 of the PIA, Section 60(5)(c) of the IBC is not subject to other provisions of the statute. Hence, Section 60(5)(c) of the IBC has been worded more expansively than Section 4 of the PIA.

89 In respect of the interplay between Sections 53 and 4 of the PIA, in Johri Lal Soni (supra), this Court further held:

> *4. It was submitted that the effect of Section 53 of the Act clearly is that it bars the jurisdiction of the Insolvency Court to determine the validity of any transfer made beyond two years of the transferor being adjudged insolvent. It is no doubt true that the words "within two years after the date of the transfer" being voidable as against the receiver does fix a time-limit within which the transfer could be annulled by the Court. But a plain construction of Section 53 would manifestly/indicate that the words "within two years after the date, be voidable as against the receiver and shall be annulled by the Court" clearly connote that only those transfers are excepted from the jurisdiction of the Court which are voidable. The section has, therefore, made a clear distinction between void and voidable transfers-a distinction which is well-known to law. A void transfer is no transfer at all and is completely destitute of any legal effect: it is a nullity and does not pass any title at all. For instance, where a transfer is*

nominal, sham or fictitious, the title remains with the transferor and so does the possession and nothing passes to the transferee. It is manifest, therefore, that such a transfer is no transfer in the eye of the law. Such transfers, therefore, clearly fall beyond the purview of Section 53 of the Act which refers only to transfers which are voidable. It is well settled that a voidable transfer is otherwise a valid transaction and continues to be good until it is avoided by the party aggrieved. For instance, transfers executed by the transferor to delay or defraud his creditors may be avoided under Section 53 of the Transfer of Property Act. Similarly transfers made under coercion, fraud or undue influence may be avoided by the party defrauded. It is only such transfers which, if they take place beyond two years of the date of transfer, cannot be enquired into by the Court by virtue of Section 53 of the Act. This appears to us to be the plain and simple interpretation of the combined reading of Sections 4 and 53 of the Act. Indeed, if a different interpretation is given, it will render the entire object of the section [4] nugatory, because the Court would be powerless to set at naught transfers which are patently void, merely because they had been made at a particular point of time.
(emphasis supplied)

90 The decision in Johri Lal Soni (supra) gave an expansive interpretation to the powers of an insolvency court under Section

4 of the PIA, which is similar to Section 60(5)(c) of the IBC. This Court held that an insolvency court was empowered to consider the validity of void transfers under Section 4 of the PIA, which did not explicitly fall under Section 53 of the PIA. However, this Court's decision was premised on the finding that Section 53 of the PIA only dealt with voidable transfers. This Court noted that the jurisdiction of an insolvency court will be restricted in matters where a voidable transfer has taken place beyond the time-limit stipulated under Section 53 within which the transfer could be annulled by the court. Hence, in the name of exercising a residuary jurisdiction, a court cannot cloak itself with jurisdiction which is contrary to the provisions of a statute. However, at the same time, as held by this Court in Johri Lal Soni (supra), an interpretation which renders the objective of a residuary jurisdiction nugatory cannot be upheld by this Court. A fine line has to be drawn between ensuring that a residuary jurisdiction is not rendered otiose due to an excessively restrictive interpretation, as well as, guarding against usurpation of power by a court or a tribunal not vested in it.

91 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. If the jurisdiction of the NCLT were to be confined to actions prohibited by Section 14 of the

IBC, there would have been no requirement for the legislature to enact Section 60(5)(c) of the IBC. 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 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 the 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 the NCLT. However, it is pertinent to mention that the 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 (supra)."

7.9 Paras 22, 24 and 26 of ***Tata Consultancy Services Limited*** (supra) read as under:

"22. 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.

...

24. 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 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.

...

26. 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 20 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].”

7.10 It is in this context that what is evident is that it is the case of the petitioner that the property in question is under the protective umbrella of ***Tata Consultancy Services Limited*** (supra). Alternatively, when it comes to contesting the jurisdiction invoked by the GIDC it is their case that the NCLT will have no jurisdiction as the contract and the termination thereof is not a ground related to insolvency and therefore NCLT cannot be approached under Section 60(5)(c) of the IBC.

7.11 In this context, Section 36(4)(a)(iv) indicates that contractual arrangement which do not stipulate transfer of title are not included in the liquidation estate assets and shall not be used to recovery in the liquidation.

7.12 Section 60(5)(c) of the IBC reads as under:

> *"60(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."*

7.13 The reading of the provision indicates that the National Company Law Tribunal shall have a jurisdiction to entertain or dispose of any

question arising out of or in relation to insolvency resolution.

7.14 While in the case of ***Gujarat Urja*** (supra) and ***Tata Consultancy Services Limited*** (supra) the contract was central to the success of CIRP. Reading paras 84 to 91 of the judgment in ***Gujarat Urja*** (supra), what is evident is that the residuary jurisdiction of NCLT under Section 60(5)(c) of the IBC provides a wide discretion to adjudicate questions of law or fact arising from or in relation to the insolvency resolution proceedings. Reading the relevant paragraphs in ***Tata Consultancy Services Limited*** (supra) as cited by the respondent, the NCLT can intervene when, it is even the case of the petitioner that there is an embargo under the IBC. In the application filed by the respondent which is pending before the NCLT, it is open for the

petitioner to take all the contentions raised in this petition. The residuary jurisdiction of the Tribunal therefore to decide this issue had already been invoked by the respondent and the petition therefore, at the hands of the petitioner company which seeks the protective umbrella under the IBC itself can oppose the prayers made in that application.

8. For all the aforesaid reasons therefore, the petition is dismissed. Rule is discharged.

(BIREN VAISHNAV, J)

FURTHER ORDER

After the pronouncement of the judgement, learned counsel for the petitioner requested that the interim relief may be extended for a period of four weeks. The parties to the petition i.e. the petitioner as well as the respondent to maintain status quo till 03.03.2023.

(BIREN VAISHNAV, J)

ANKIT SHAH