

IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH – I

IA No. 4460 of 2023

In

CP(IB) No.1807 of 2018

Under Section 60(5) of the Insolvency and Bankruptcy Code,
2016.

Filed by:

Avil Menezes

Resolution Professional of
Topworth Urja and Metals Limited.

...Applicant

Versus

Ministry of Coal

...Respondent No.1

Aarti Mahawar,
Deputy Director, Ministry of Coal

...Respondent No.2

Committee of Creditors,
Topworth Urja & Metals Limited

...Respondent No.3

In the matter of

Bank of Baroda .

...Financial Creditor

Versus

Topworth Urja & Metals Limited

...Corporate Debtor

Order delivered on: 06.02.2024

Coram:

Hon'ble Member (Judicial) : Justice V.G. Bisht (Retd.)

Hon'ble Member (Technical) : Mr. Prabhat Kumar

Appearances:

For the Applicant : Mr. Viraj Parikh, Advocate a/w Mr. Dhruvad
Vaghani, Mr. Gaurav Jain, Advocate.

For the Respondent No.1 and 2 : Mr. M. S. Bhardwaj, Advocate.

ORDER

Per: Prabhat Kumar, Member (Technical)

1. The present Application IA 4460/2023 is filed by the Resolution Professional seeking quashing and setting aside of withdrawal letter dated 05.09.2023 issued by Respondent No.2, Deputy Director, Office of Coal Controller, Ministry of Coal, Government of India.

Submissions Advanced by the Applicant/Resolution Professional and Brief Facts of the case:

1. The Applicant has filed the present Application seeking a direction for quashing of withdrawal of mine opening letter vide letter dated 05.09.2023 issued by Respondent No.2. In order to understand the grievance of the Applicant, it is important to have an overview at brief gist of facts.
2. The Applicant submits that the case at hand involves a series of significant events and legal proceedings surrounding the allocation and subsequent termination of the Coal Mine Development and Production Agreement ("CMDP Agreement") pertaining to the MM-1 Coal Block. The Applicant submits that the inception of this case can be traced back to June 2015 when the Ministry of Coal, Government of India, directed the auction of coal mines, ultimately leading to the allocation of the MM1 Coal Block to the Corporate Debtor in August 2015. This allocation was carried out in accordance with the Coal Mines (Special Provisions) Act, 2015 and its associated rules. The said allocation of the mine was to augment captive coal consumption of the Corporate Debtor's Iron & Steel Production facility situated at Village Heti, Nagpur (Maharashtra).
3. The Applicant submits that the allocation of the MM-1 Coal Block was followed by the execution of a Mining Lease Deed on 09.02.2017, establishing the corporate

debtor's rights and responsibilities in relation to the coal mine. Additionally, an escrow agreement was entered into on 20th March 2017 ("Escrow Agreement"), outlining the financial commitments, including the annual mine closure costs.

4. The Applicant submits that on 17.04.2017, the MM-I Coal Block commenced operations, and the Corporate Debtor initially deposited INR 1,56,00,000/- as mine closure cost for the FY 2017-18. Mine Closure cost is an amount required to be deposited in an Escrow Account in favor of Coal Controller Organization ('CCO'), for which a separate Escrow Agreement was executed on 20.3.2017 by the Corporate Debtor with the CCO. The amount so deposited in terms of such Escrow Account was to be utilized towards the mine closure obligations detailed in the Mining Plan. During Financial year 2018-2019, the Corporate Debtor encountered financial challenges, these adverse circumstances resulted in substantial losses, impeding the Corporate Debtor's capacity to fulfill its annual mine closure cost obligations as per the Escrow Agreement.
5. The Applicant submits on 31st August 2021 the Nominated Authority issued a Show Cause Notice to the corporate debtor for non-compliance with the CMDP Agreement. This notice was based on the Corporate Debtors failure to fulfil the FY 2018-19 mine closure cost obligation, prompting the corporate debtor to cite force majeure due to the COVID-19 pandemic and seek exemption from noncompliance on 06.09.2021.
6. The Applicant submits that on 30th May 2022, the Corporate Debtor provided Performance Bank Guarantees to the Nominated Authority amounting to Rs.33,17,82,000/-, pursuant to discussions and deliberations. The Nominated authority then further demanded the Corporate Debtor to deposit performance bank

guarantee ("PBG") totaling to Rs.41,47,27,500/- on 30th June 2022, which was extended to 12th August 2022.

7. The Applicant submits that amidst these developments, the corporate insolvency process was initiated on 12.08.2022, leading to the appointment of an Interim Resolution Professional (IRP), however the constitution of Committee of Creditors was stayed by CoC on 18th August, 2022 and this stay was vacated finally on 20.12.2022. On January 13, 2023, the Hon'ble Supreme Court of India dismissed an appeal challenging the NCLAT's decision.
8. It is submitted that Respondent No. 1 then initiated the termination process for the CMDP Agreement on 22.08.2022. An appropriation notice was issued, and on 12th September 2022, the CMDP Agreement was terminated. The Applicant submits that, the IRP approached the Hon'ble Delhi High Court through Writ Petition No. 13282 of 2022 ("Writ Petition") against the said termination. The Hon'ble Delhi High Court granted an interim stay on the operation of the termination notice and directed Respondent No. 1 and Respondent No. 2 not to take coercive action against the corporate debtor vide order dated 15th September 2022.
9. The Applicant submits that Respondent No. 2 issued withdrawal of mine opening permission letter on 05.09.2023 due to non-deposit of the mine closure cost and also alleged the sale of coal produced from the mine in the open market during the financial year 2021-22 and 2022-23 in violation of provisions of MMDR Amendment Act 2021. In response to the Withdrawal Letter, the Applicant addressed Respondent No. 2 on September 9, 2023, emphasizing the breach of the moratorium and the sub-judice nature of the matter before the Hon'ble Delhi High Court. The Applicant requested that no coercive action be taken, considering the advanced stage of the CIRP and the pending resolution plans.

10. The Applicant submits that the mining permission withdrawal letter is in complete breach of moratorium under Section 14 of the Code. In furtherance of this submission reliance is placed by the Corporate Debtor on the decision of the Hon'ble Supreme Court in *Gujrat Urja Vikas Nigam limited vs Mr. Amit Gupta & Ors. (2021) 7 SCC 209* and *Tata Consultancy Services Limited vs Vishal Ghisulal Jain, Resolution Professional, SK Wheels Private Limited (2022) 2 SCC 583*.
11. The Applicant submits that the operation of MM-1 Coal Block by the Corporate Debtor is essential for running the Corporate Debtor as a going concern and withdrawal of permission would significantly impact the asset profile of the Corporate Debtor thereby derailing the CIRP process.

Submissions advanced by the Respondents:

12. At the outset the Respondent has taken us through relevant clauses of the CMDPA Agreement Clause 6.1.3 which provides for revision of the Performance Security. Upon revision of the Performance Security, the Successful Bidder shall be under contractual obligation to furnish the revised Performance Security. Further Clause 6.2.1 of the CMDPA provides for Appropriation Events', upon occurrence of an Appropriation Event, the Nominated Authority shall rightfully appropriate the Performance Security, partially or completely, in terms of Clause 6.3.1 of CMDPA.
13. Thereafter, clause 24.3 provides for termination OF CMDPA, as per Clause 24.3.1 (n), breach of any provision of CMDPA may constitute a Termination Event. Upon occurrence of a Termination Event, the Nominated Authority may elect to terminate the CMDPA in terms of Clause 24.3.2. Upon termination of the CMDPA the performance security and all other payments made by the Successful Bidder shall be

forfeited and the Successful Bidder shall not be entitled to any benefits under the CMDPA but would continue to be liable towards any antecedent liability, all obligations accrued before the effective date of the surrender/termination and for the obligations that must be fulfilled after termination

14. It is submitted that in compliance of Clause 6.1.3 of CMDPA, vide letter dated 30.06.2022 annexed and marked as Exhibit-B the corporate debtor was requested to furnish revised Performance Security of Rs. 41,47,27,500/- within 15 days. The corporate debtor, vide its letter dated 09.07.2022 sought an extension of at least 3 weeks for furnishing the revised Performance Security. Acceding to the request of the corporate debtor, the Nominated Authority, vide its letter dated 13.07.2022 granted an extension of 14 business days i.e., till 04.08.2022 to submit the revised Performance Security. However, the corporate debtor still failed to furnish the revised Performance Security and thereby failed to comply with the provision of the CMDPA. The corporate debtor, vide its letter dated 02.08.2022 annexed and marked as Exhibit-E again requested further extension. The Nominated Authority again obliged to the said request by granting a further extension of 7 days vide its letter dated 05.08.2022
15. The Respondent submits that despite multiple extensions, the corporate debtor failed to comply with the provisions of the CMDPA. Therefore, in terms of Clause 24.3.1(n) r/w Clause 24.3.2 the Termination Notice dated 12.09.2022 was issued. The effect of the termination notice is two-fold i.e., (i) immediate appropriation of the 100% bank guarantee and all other payments made by the successful bidder, and (ii) termination of CMDPA and Vesting Order on completion of 15 business days of the date of issuance of notice.

16. Further, the Corporate Debtor assailed the Termination Notice dated 12.09.2022 through WP(C) No. 13282/2022 before High Court of Delhi, the Hon'ble High Court vide its order dated 15.09.2022 has held that:

*“The Court is thus left to consider the validity of the Termination Notice which has come to be issued and in terms of which the agreement titled the Coal Mines Development and Production Agreement [“CMDPA”] is itself sought to be annulled. That action is precipitated by a purported failure on the part of the petitioner, who is the Interim Resolution Professional [“IRP”] of the Corporate Debtor, having failed to revise the amount of the Performance Bank Guarantee [“PBG”] to Rs. 41,47,27,500/-
In the meanwhile and till the next date of listing, the Termination Notice dated 12.09.2022 shall remain stayed. The respondents shall also stand restrained from taking further coercive action against the petitioners pursuant to the said Termination Notice.”*

17. It is submitted that Vide order dated 12.09.2022 passed in WP No. 13282/2022 the Hon'ble High Court of Delhi restrained the respondents from taking coercive action against the Petitioner in pursuance of the Termination Notice. Thus, the Respondents have been restrained from giving effect to the two-fold consequences of the termination notice i.e., (1) immediate appropriation of the 100% bank guarantee and all other payments made by the successful bidder, and (ii) termination of CMDPA and Vesting Order on completion of 15 business days of the date of issuance of notice.

18. It is further submitted that the successful bidder/corporate debtor is under obligation to open an Escrow Account. The escrow account is to be maintained by the successful bidder for compliance with Clause 15 of the CMDPA i.e., for ensuring closure of the mine as per mine closure plan. The Respondent submits that Rule 10A of the Colliery Control Rules, 2004 empowers the Coal Controller to monitor mine closure and

operate the escrow account formed for funding mine closure activity. Further, Coal Controller is empowered to inspect the mine closure activities and for ensuring compliance of conditions of Mine Closure Plan. It is a necessary corollary that enforcement of Escrow Agreement and timely deposit of yearly closure costs by the successful bidder are means to achieve strict compliance of mine closure activities. In furtherance of the aforementioned statutory provision an escrow agreement dated 20.03.2017 was executed.

19. As per the Escrow Agreement, the Successful Bidder is required to deposit the mine closure cost in a yearly manner. Furthermore, as per terms (ii)(h) under the head 'Operation of Escrow Account' states that if the mine owners fail to deposit the annual amount required to be deposited, the Government can withdraw the mining permission. Respondent No. 2 raised the demand for the annual mine closure cost vide its letters dated 29.05.2019, 20.06.2019, 15.03.2021, 06.09.2022, and 27.02.2023. However, the successful bidder/corporate debtor failed to deposit the requisite costs in the escrow account. It may also be submitted that the successful bidder has been a habitual defaulter since FY 2016-17.

20. The Respondent has relied on Office Memorandum "F. No. 34011/28/2019-CAM", Dated 29th May 2020 (Guidelines for Preparation, Formulation, Submission, Processing, Scrutiny, Approval and Revision of Mining plan for the coal and lignite blocks.) which provides that:

"The money to be provided per hectare of total Project Area for the purpose is to be deposited every year on commencement of any development activity on the land for the mine after opening a Fixed Deposit Escrow Account prior to obtaining mine opening permission from Coal Controller. Mining company/owners including all Public Sector Undertakings shall deposit the yearly amount in a Scheduled Bank. If the Mine owners fail to deposit the required

annual amount in accordance with Para 2.6, 2.7 & 2.8, the Government can withdraw the mining permission"

21. The Respondent submits that the outstanding amount from Corporate Debtor as on the Insolvency Commencement Date, i.e. 12.08.2022 is Rs.14,36,83,050/- plus interest as would have accrued if the amounts were deposited on time as a Fixed Deposits (as per agreement), Annual Mine Closure Cost of Rs.2,75,27,268/- for F.Y. 2023-24 is also due and required to be deposited.
22. The Respondent submits that failure of the successful bidder, despite multiple reminders to deposit the outstanding the amount constrained Respondent No. 2 to withdraw the mine opening permission granted to the successful bidder vide its letter dated 05.09.2023. It is submitted that the letter dated 05.09.2023 for withdrawal of mining permission arises out of breach of Escrow Agreement dated 20.03.2017 and it is not in pursuance of the Termination Notice dated 12.09.2022. The Respondents have in compliance of order dated 15.09.2022 issued by the Hon'ble High Court of Delhi in WP No. 13282/2022 has kept the rights and obligations of both the parties to CMDPA alive and subsisting.

Findings:

23. Heard the Learned Counsel and perused the material available on record.
24. At the outset, it is hereby clarified that the issue for determination before us is (a) whether the withdrawal letter dated 05.09.2023 could have been issued in view of the CIRP commencement on 12.08.2022 and consequential imposition of moratorium in terms of Section 14 of the Code; (b) Whether the Mine closure cost upto the CIRP commencement date are Operational Debt or moneys held in trust.
25. The issue qua termination notice dated 12.09.2022 is already sub-judice before the Hon'ble Delhi High Court wherein the effect of the said termination notice is stayed

vide order dated 15.09.2022. Nonetheless, the termination of the mining lease has still not taken place though the process was initiated on 22.8.2022, which is a date after commencement of CIRP and consequential imposition of moratorium in terms of section 14 of the Code, which, inter-alia, bars the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor. Accordingly, the initiation of termination process is barred by the Code during the CIRP. As regards withdrawal letter, issued on 15.9.2022, the said withdrawal letter has been issued in view of failure of the Corporate Debtor to deposit annual mine closure charges in Escrow Account. At this juncture, we are of considered view that withdrawal letter merely suspends the operation of mining activities and it is not pleaded case that the Corporate Debtor has been operating its manufacturing unit during CIRP which shall be adversely affected on account of withdrawal notice. It is the case of the Applicant that MM-1 Coal Block is integral for the functioning of the Corporate Debtor as a going concern and withdrawal of mine opening permission vide the Withdrawal Letter shall affect the overall asset valuation of the Corporate Debtor and will derail and whole CIRP of the Corporate Debtor pushing the Corporate Debtor towards its death.

26. It is the Respondent's contention that the withdrawal letter was issued dehors the termination notice pursuant to breach of the escrow agreement wherein the Corporate Debtor had agreed to deposit annual mining closure cost, the said agreement stipulated that if the mine owners fail to deposit the cost, the Government can withdraw the mining permission.

27. The relevant clauses of the escrow account agreement are as follows:

“3). The money to be deposited year-wise by the said Mining Company in the Escrow A/c to be opened by the Coal Mine owners with any Scheduled Bank and the President

of India acting through Coal Controller's Organization as exclusive beneficiary, is the annual Mine closure cost as approved by the Ministry of Coal and which is to be verified by the Coal Controller's Organization as per the guidelines of the Ministry of Coal, Govt, of India, if mining activity starts after the approval of Mine Closure Plan, then project proponent will be required to recalculate the closure cost based on WPI which will be effective from the financial year of starting of the project.

4) Up to 80% of the total deposited amount including interest accrued in the Escrow Account may be released after every 5 years in the line with the periodic examination of the closure plan as per clause 3.1 of the annexure of the guidelines. The amount released should be equal to the expenditure incurred in the Progressive Mine Closure in the past 5 years or 80% whichever is less. The balance amount at the end of the Final Mine Closure shall be released to the Mine Owners/Leaseholder on compliance of all provisions of closure plan duly signed by the Lessee to the effect that said closure of mine complied all statutory rules, regulations, orders made by the Central or State Government, statutory organizations, court etc. and duly certified by the Coal Controller.

5) If the Coal Controller has reasonable grounds for believing that the protective, reclamation and rehabilitation measures as envisaged in the approved mine closure plan in respect of which financial assurance was given has not been or will not be carried out in accordance with mine closure plan, either fully or partially, the Coal controller shall give the mine owner a written notice of his intention to issue the orders for forfeiting the sum assured at least thirty days prior to the date of the order to be issued after giving an opportunity to be heard.

Operation of Escrow Account

Deposit

....ii) *The M/S. Topworth Urja & Metals Ltd. shall cause deposit in such “Escrow Account” in the following manner on yearly basis as would be communicated by the Coal Controller from time to time to it:*

a) The payment shall be made by RTGS/NEFT/DEMAND DRAFT/PAY ORDER

b) Around Six lakhs per hectare of the total project area in case of OC mines at current price level (August, 2009) subject to modification based on the wholesale price Index (WPI) as notified by the Government of India from time to time.

c) One lakh per hectare for UG project area, at current price level of (August, 2009) subject to modification based on the wholesale price index as notified by the Government of India from time to time.

d) Annual Closure Cost is to be computed on the total Project Area over and above the aforesaid rate per hectare and dividing the same by the entire life of the mine in years for new projects and balance life of mine in years for operating /existing mines is to be deposited each year by the said company (M/s. Topworth Urja & Metals Ltd., the mining company) throughout the life of the mine compounded at the rate of 5% annually.

e) An amount equal to the annual cost is to be deposited each year throughout the life of the mine compounded at the rate of 5% annually.

f) Mine closure plan which have already been approved earlier on the basis of lease hold area, the project proponents are required to recalculate the closure cost on the basis of total project area and submit a certificate stating that amount in Escrow Account would be deposited as per re-calculated amount.

g) The Closure Cost may change subject to Government of India's Notification from time to time.

h) If the Mine owners fail to deposit the annual amount required to be deposited, the Government can withdraw the mining permission.

i) It is to be clearly understood that the fund so generated are towards the security to cover the cost of closure in case the mine owner fails to complete the relevant closure activities. The prime responsibility of mine closure shall always lie with the mine owner, and in case the funds so generated are found to be insufficient to cover the cost of final mine closure, the mine owner shall undertake to provide the additional fund equivalent to the gap in funding before five years of Mine Closure failing which it may be recovered by such other methods as the competent authority may deem fit in this regard.”

28. The prayer sought by the Applicant herein is to quash and set aside the Withdrawal Letter dated 05.09.2023 issued by Respondent No.2. At this juncture it is essential to refer to the judgement of the Hon’ble Supreme Court in matter of ***M/s Embassy Property Developments Pvt. Ltd. vs State of Karnataka & Ors. Civil Appeal No. 9170 of 2019*** while deciding the issue arising out of a similar subject relating to mining lease it has been held as follows:

“45. Therefore, in fine, our answer to the first question would be that NCLT did not have jurisdiction to entertain an application against the Government of Karnataka for a direction to execute Supplemental Lease Deeds for the extension of the mining lease. Since NCLT chose to exercise a jurisdiction not vested in it in law, the High Court of Karnataka was justified in entertaining the writ petition, on the basis that NCLT was coram non judice.

52. The upshot of the above discussion is that though NCLT and NCLAT would have jurisdiction to enquire into questions of fraud, they would not have jurisdiction to adjudicate upon disputes such as those arising under MMDR Act, 1957 and the rules issued thereunder, especially when the disputes revolve around decisions of statutory or quasi-judicial authorities, which can be corrected only by way of judicial review of administrative action. Hence, the High Court was justified in entertaining the writ petition and we see no reason to

interfere with the decision of the High Court. Therefore, the appeals are dismissed. There will be no order as to costs.”

29. The Hon'ble Supreme Court in the Embassy (supra) has clarified that NCLT would not have jurisdiction to entertain disputes arising out of Mines and Minerals Development Regulation Act, 1957. The Applicant in support of his contention has placed reliance on the decision of the Hon'ble Supreme Court in matter of ***Gujrat Urja Vikas Nigam Limited vs Mr. Amit Gupta & Ors. (2021) 7 SCC 209***. The relevant paragraphs are as follow:

“166. 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 the 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 the CIRP, making the corporate death of the Corporate Debtor a foregone conclusion.

173. (ii) The NCLT/NCLAT correctly stayed the termination of the PPA by the appellant, since allowing it to terminate the PPA would certainly result in the corporate death of the Corporate Debtor due to the PPA being its sole contract; and”

The following paragraphs are also relevant for consideration of the issue before us.

“69. In the present case, the PPA was terminated solely on the ground of insolvency, since the event of default contemplated under Article 9.2.1(e) was the commencement of insolvency proceedings against the Corporate Debtor. In the absence of the insolvency of the Corporate Debtor, there would be no ground to terminate the PPA. The termination is not on a ground independent of the insolvency. The present dispute solely arises out of and relates to the insolvency of the Corporate Debtor.

72 *Therefore, we hold that the RP can approach the NCLT for adjudication of disputes that are related to the insolvency resolution process. However, for adjudication of disputes that arise dehors the insolvency of the Corporate Debtor, 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 IBC. However, since the dispute in the present case has arisen solely on the ground of the insolvency of the Corporate Debtor, NCLT is empowered to adjudicate this dispute under Section 60(5)(c) of the IBC.”*

75. *Reliance has also been placed on the judgement of this Court in Embassy Property (supra), where this Court held that the NCLT and NCLAT did not have jurisdiction over a dispute arising under the Mines and Minerals (Development and Regulation) Act, 1957, in relation to the refusal of the State of Karnataka to extend a mining lease. The primary consideration which weighed with this Court while coming to its decision was that NCLT cannot have jurisdiction on matters of public law....*

In the present case the decision to terminate the PPA has not been taken by any governmental or statutory authority acting within the domain of its public law functions. The decision has been simply taken by a contracting party solely on account of the initiation of insolvency proceedings against the Corporate Debtor in terms of an agreement between the parties.”

165. *Given that the terms used in Section 60(5)(c) are of wide import, as recognized in a consistent line of authority, we hold that the NCLT was empowered to restrain the appellant from terminating the PPA. However, our decision is premised upon a recognition of the centrality of the PPA in the present case to the success of the 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 the NCLT would have been empowered to set aside the termination of the PPA in this case because the termination took place solely on*

the ground of insolvency. The jurisdiction of the NCLT under Section 60(5)(c) of the 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).

166 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 the 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 the CIRP, making the corporate death of the Corporate Debtor a foregone conclusion.”

30. In the aforesaid decision, the Hon'ble Supreme Court upheld the decision of the Adjudicating Authority on the ground that the termination of PPA was solely basis the insolvency of the Corporate Debtor therein and it was sole contract of the Corporate Debtor failing which the CIRP would be rendered defunct. The Hon'ble Supreme Court has exercised abundant caution while upholding the decision of NCLT, and clarified that the jurisdiction of the NCLT under Section 60(5)(c) of the IBC cannot be invoked in matters where a termination may take place on grounds dehors the insolvency of the corporate debtor. The decision of Hon'ble Supreme Court in Embassy Property (supra) is distinguishable as in that the direction was for

execution of supplemental lease deed, whereas in the present case, the mining agreement was subsisting as on date of commencement of CIRP; the said mine was awarded for captive consumption of coal of the manufacturing facility of the Corporate Debtor; and the withdrawal of opening of mine permission took place on account of failure of Corporate Debtor to deposit Annual Mine Closure charges. In the present case, the Respondents have withdrawn the mine opening permission on ground of failure of the Corporate Debtor to deposit annual mine closure costs and the said failure has arisen from the insolvency of the Corporate Debtor.

31. As regards allegation of sale of coal in open market, the nominated authority has itself kept its rights reserved for appropriate action in this relation and this factor does not appear to be a primary reason for withdrawal as can be made out from the letter dated 5.9.2022. Needless to say, the withdrawal of permission to open mine for operations shall lead to the Corporate Debtor's death, considering that mine is an integral part of the manufacturing facilities of the Corporate Debtor Hence, this Tribunal is of considered view that it has jurisdiction to direct the nominated authority to withdraw the withdrawal letter in terms of Gujrat Urja (supra).

32. During, the course of hearing held on 11.01.2024, the learned counsel for the Applicant submitted that the annual cost accrued during the CIRP period can be treated as CIRP Costs and be paid in priority. However, per contra, the learned counsel for the Respondents submits that the entire closure costs have to be paid failing which the permission has to be withdrawn. We find that the annual mine closure cost is in nature of funds created under the Mine Plan to ensure that the mining closure activities are completed by the lessee in accordance with the agreed timelines and guidelines laid down in this relation. The said obligation is in nature of guarantee towards fulfilment of social obligations arising out of mining of natural resources. The

terms of maintenance of escrow account clearly provides for release of part money at interval of 5 years subject to the fulfilment of obligation towards closure of mined out land/back filling, and finally upon complete mine closure. The Escrow account clearly stipulates refund of the balance amount to the lessee. It follows therefrom that the annual mine closure costs are in nature of annual deposits which are to be applied towards the statutory obligation of closure of mined out land. Since, these are obligations of the lessee of the mine, even if there is shortfall in contribution of such charges, the lessee does not get discharged from its obligation of final closure. In other words, in case the costs of mine closure is treated as Pre-CIRP costs and is subjected to hair-cut, the short fall equivalent to hair cut shall become obligation of the Successful Resolution Applicant, as Government can not be asked to fund such hair cut under any circumstances. The Code contemplates waivers of fiscal liabilities which has arisen in present, whereas the mine closure obligation is a future obligation, because the failure in fulfilment of progressive fulfilment of obligation can not discharge the lessee from the final obligation of closing the mined land in accordance with the guidelines and statutory mandate. Accordingly, we are of considered view that annual mine closure charges are in nature of moneys held in trust in an Escrow Account to ensure fulfilment of obligation towards the Public at large for complete closure of mine and development of mined area, and such money can not be part of Liquidation estate.

33. Accordingly, we direct the Applicant to consider the Annual Mine closure costs as money not belonging to the Corporate Debtor and keep the same aside. Our observation in this Order shall not prejudice the rights of the Respondent to take appropriate action, except termination of the Coal mine agreement on that ground, in relation to allegation of sale of coal in open market in violation of MMDR

Amendment Act, 2021. In view of these directions, the Respondent No. 2 is directed to withdraw the letter dated 5.9.2022 with immediate effect. However, it is clarified that the Applicant shall dispose of the mined Coal only in accordance with the terms of Mine Agreement and he shall be personally responsible for any deviation in relation to such disposal.

34. With the aforesaid directions, the IA 4460/2023 is partly allowed.

Sd/-

PRABHAT KUMAR

Member (Technical)

06.02.2024

Priyal

Sd/-

JUSTICE V.G. BISHT

Member (Judicial)