

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH,
NEW DELHI**

Company Appeal(AT) (Ins) No. 131 of 2021

IN THE MATTER OF:

**RAJASTHAN STATE ROAD DEVELOPMENT & CONSTRUCTION
CORPORATION LTD,**

(Formerly RSBCC Ltd.),

Registered Office: Setu Bhavan,

Opposite Jhalana Doongari,

Jaipur-Agra Bypass, Jaipur-302004 (Rajasthan). ... Appellant

VERSUS

VASUNDHRA GUPTA

(Suspended Director of Aesthetic Stone Arts India Pvt. Ltd.),

R/o: Plot No.9, 22 Godam Circle,

Behind Nehru Sahkar Bhawan,

Jaipur-302001 (Rajasthan), ... Respondent No. 1

M/S AESTHETIC STONE ARTS INDIA PVT. LTD.

(Through Mrs. Anuradha Gupta, IRP),

Address: E-194, Amba Bari,

Jaipur-302039 (Rajasthan). ... Respondent No.2

PUNJAB NATIONAL BANK,

Office Address: Plot No.2,

Nehru Place; Tonk Road,

Jaipur-302015 (Rajasthan), ... Respondent No.3

MR. AMIT KUMAR JAIN,

Address: 65/87, Pratap Nagar,

Sanganer, Tonk Road,

Jaipur-302033 (Rajasthan). ... Respondent No.4

MR. SANWAR MAL TIWARI

(Sole Proprietor of M/s Rajasthan Steel Corporation),

Address: 66, Bhagwan Bahubali Nagar,

Niwaru Road, Jhotwara,

Jaipur-302012 (Rajasthan).

.... Respondent No.5

Present:

For Appellant: Dr. Rajeev Sharma, Advocate

For Respondents: Mr. Jasmeet Singh with Mr. Divjot Singh Bhatia, Mr. Pushpendra Singh Bhadoriya, Mr. Rusheet Salya and Ms. Aastha Chaturvedi, Advocate for Respondent No. 1.

Mr. Ankit Raj and Mr. Piyush Beriwal, Advocates for Respondent No. 3- PNB

JUDGMENT

Jarat Kumar Jain: J.

The Appeal is preferred against the order dated 07.01.2021 passed by the Adjudicating Authority (National Company Law Tribunal, Jaipur Bench) in I.A. No. 167/JPR/2020 and I.A. No. 214/JPR/2020 in CP No. (IB) 131/09/JPR/2019. Whereby Ld. Adjudicating Authority disposed of both the Applications with the direction that the termination of Work Order Nos. 1 and 2 by Rajasthan State Road Development & Construction Corporation Ltd. (the Corporation) are inconsistent with Section 20 of Insolvency and Bankruptcy Code, 2016 (IBC) and are invalid and prohibited under Section 238 of IBC. Moreover, the termination proceeding could not be initiated or continued under bar of moratorium of Section 14 of IBC. Consequently, invocation of performance bank guarantees is untenable.

2(a). Brief facts of this case are that the Work Order No. 1 was awarded to the Aesthetic Stone Arts India Pvt. Ltd. (Corporate Debtor) vide Work Order No.

PD/JP-11/2016-17/31 dated 28.03.2017 by the Corporation (Appellant herein) for construction of building for State of Art Capacity Building and Training Centre and Help Desk Commercial Tax Department, Jaipur for amount of Rs. 2,99,50,904.12 Paisa. The date of commencement of work was 10.04.2017 and the date of completion was 09.07.2018. There were several extensions granted to the Corporate Debtor for completion of work even in the extended period of almost two years the Corporate Debtor was not able to complete the work. Lastly vide letter dated 30.03.2020 since the work was not completed the provisional time further extended and granted upto 30.06.2020 without prejudice to the right of the Corporation to recover the compensation as per the agreement. However, the Corporate Debtor could not complete the work, therefore, vide letter dated 11.06.2020 the work order was terminated as per clauses 59 & 60 of the agreement and bank guarantee was encashed on 26.06.2020. At the time of termination only 76% work was done by the Corporate Debtor. On 28.06.2020 fresh tender in respect of remaining/additional work of Work Order No. 1 was issued. On 02.07.2020 the Work Order in respect of remaining work was given to Amit Kumar Jain (Respondent No. 4 herein).

2(b). The Work Order No. 2 was awarded to the Corporate Debtor vide Work Order No. PD/JP-1/2018 -19/13 dated 13.03.2019 for Rs. 11.12 Lacs with date of commencement as 13.03.2019 and the date of completion as 12.05.2019. Since, the Corporate Debtor was unable to complete the work within stipulated period of time and also even after several extensions, the Corporation

terminated the Work Order No. 2 vide letter No. PD/JPR-IV/2021-21/639 dated 04.08.2020.

2(c). One Mr. Sanwarmal Tiwari (Respondent No. 5 herein) filed an Application under Section 9 of IBC against the Corporate Debtor. The Ld. Adjudicating Authority vide order dated 04.03.2020 admitted the Application and initiated CIRP and declared moratorium and appointed Mrs. Anuradha Gupta as Interim Resolution Professional (IRP).

3. On 10.07.2020 Ms. Vasundhra Gupta, Suspended Director of the Corporate Debtor (Respondent No. 1 herein) filed I.A. No. 167/JPR/2020 under Section 60(5) of IBC before the Adjudicating Authority for stay on the operation of the termination order dated 11.06.2020 and stay on fresh work order dated 02.07.2020 and to maintain status quo as on 21.03.2020. On 17.08.2020 the IRP Mrs. Anuradha Gupta filed I.A. No. 214/JPR/2020 under Section 60(5) of IBC before the Adjudicating Authority and prayed the same relief which is prayed in the aforesaid I.A. No. 167/JPR/2020.

4. The Corporation filed reply and resisted the Applications on various grounds including that the Applications are not maintainable as per the provisions of IBC.

5. Ld. Adjudicating Authority vide impugned order disposed of both the Applications with the following directions.:

“Para 29. In view of entirety of the foregoing, we hold and order as follows:-

a. Provisions for termination included in or connected with instruments of Work Order No. 1 and 2, are inconsistent inter-alia with Section 20 of IBC, 2016 and are invalid and prohibited under Section 238 of the Code. Moreover, termination proceedings could not be initiated or continued by Respondent No. 1 under bar of moratorium of Section 14 of the Code.

b. Termination of Work Orders 1 and 2 all communication, including notices, in this regard is /are held to be inoperative and null.

c. Consequent invocation of bank guarantees by Respondent No. 1, in the factual situation is untenable. Respondent No. 3 is hereby directed to place a lien on one or more bank account(s) of Respondent No. 1, at any of the branches of Respondent No. 3, for a cumulative sum equivalent to the total amount of bank guarantees invoked by Respondent No. 1. This sum shall be blocked and held as *custodia legis*, by Respondent No. 3 under escrow till any further directions of the Adjudicating Authority. In the event of any shortfall in the sum placed under lien, Respondent No. 1 shall open a fixed deposit with Respondent No. 3 for the amount of shortfall, which amount shall also be held as *custodia legis*, as above.

d. Respondent No. 1 and 3 are directed not to take any prejudicial action or steps against the Corporate Debtor during the CIRP period without prior approval of the Adjudicating Authority.

e. Any fresh tender awarded in this regard, sequencing from root illegal action(s) to detriment of the Corporate Debtor, by Respondent No. 1 is liable to be set aside and is hereby held as invalid and void.

f. The Corporate Debtor is at liberty to raise claim(s) for its dues in accordance with law as may be advised.”

6. Being aggrieved with the impugned order, the Corporation has filed the present Appeal.

7. Ld. Counsel for the Appellant submitted that in this matter two issues are involved one termination of work orders and second encashment of bank guarantees. The final notice was given on 09.12.2019 (Pg. 18 of the Rejoinder) and when the Corporate Debtor failed to act in accordance with final notice, the Appellant (Corporation) rightly in view of clauses 59 & 60 of the agreement

terminated the Work Order No. 1. Since the final notice was given prior to the commencement of CIRP (04.03.2020). Therefore bar of moratorium under Section 14 of IBC is not applicable. This Appellate Tribunal in the case of Monnet Ispat& Energy Ltd. (Resolution Professional) Vs. Government of India, Ministry of Coal in CA (AT) (Ins) No. 26 of 2018 decided on 30.11.2018 has held that if final notice given prior to commencement of CIRP and the CD fails to act in accordance with that notice, the order of cancellation/termination of work order cannot be held in violation of Section 14 of IBC. It is submitted that Ld. Adjudicating Authority has failed to consider the explanation inserted to Section 14 w.e.f. 28.12.2019 which provides that the termination cannot take place but subject to condition that there is no default by the Corporate Debtor during the moratorium period. Under Section 14 termination on the ground of Insolvency is not permissible but in the present matter the termination is not on the ground of Insolvency but due to repeated default committed by the Corporate Debtor and as such in the present matter the termination is not barred by Section 14 of IBC. Since, Section 14 is not intended to dispense with the obligation to comply with the non-pecuniary requirements during the moratorium period.

8. It is also submitted that the Rajasthan Government Order dated 08.06.2020 clearly states that the extension shall be applicable for those awardees who are not in default for their obligations prior to 19.02.2020. Ld. Adjudicating Authority has wrongly placed reliance on this Government Order.

9. Ld. Counsel for the Appellant submitted that the performance bank guarantee does not fall within the definition of Security Interest under sub-Section (31) of Section 3 of IBC and as such the provisions of moratorium cannot be applied. For this proposition of law, he placed reliance on the Judgment of this Appellate Tribunal in the case of GAIL (India) Limited VS Rajeev Manaadiar & Ors. (CA (AT) (Ins) No. 319 of 2018 order dated 24.07.2018). Thus, the direction of Ld. Adjudicating Authority in respect of performance bank guarantee is erroneous.

10. Lastly, Ld. Counsel for the Appellant submitted that against the termination orders the Respondent No. 1 first approach Civil Court and High Court for seeking stay on the termination of the work orders when the Courts denied for granting any relief then the Respondent No. 1 has preferred the Application before the Adjudicating Authority with unclean hands and concealing material facts. Therefore, the Application was not maintainable before the Adjudicating Authority. The Corporate Debtor even after several extensions was not able to complete the work. Therefore, the Corporation was having no other option except to terminate the work assigned to Corporate Debtor. Ld. Adjudicating Authority has erroneously allowed the Applications and passed the direction in favour of the Corporate Debtor. Hence, the impugned order is liable to be set aside.

11. On the other hand, Ld. Counsel for the Respondent No. 1 submitted that the Corporation vide letter dated 30.03.2020 extended the period for completion of Work Order No. 1 till 30.06.2020, however, inviolation of its

own extension and being aware about the moratorium period terminated the Work Order No. 1 before the stipulated extended date. The Work Order No. 2 was terminated vide letter dated 04.08.2020 in violation of provisions of Section 14 of IBC. It is also to be noted that the Rajasthan Government in the light of nationwide lockdown due to Covid-19 Pandemic issued a Government Order dated 08.06.2020 and had granted extension of six months to discharge the obligations under the contract of supply of affected goods and services. However, the Corporation acted in the defiance of the said order, illegally terminated both the work orders. It is also contended that the Corporate Debtor was on the verge of completing the work which only got halted owing to the nationwide lockdown due to Covid-19 Pandemic. Hence, the Corporate Debtor was not in a position to complete the work with the stipulated period as extended by the Corporation (Appellant).

12. It is submitted that in the review meeting held on 26.03.2019 and 12.12.2019 a new understanding was arrived between the Corporate Debtor and the Corporation for execution of work orders. Therefore, a fresh/renewed understanding emerged with contract extension till March, 2020 and then till June, 2020, therefore, the earlier letters are insignificant. However, the Corporation has arbitrarily terminated the work orders of the Corporate Debtor.

13. Ld. Adjudicating Authority has rightly held that work order is an instrument within the definition of Section 2 (14) of Indian Stamp Act, 1899 and that Section 238 of IBC has an overriding effect over such instrument (i.e.

work order). The invocation of bank guarantee by the Appellant has a consequence of illegal termination of work orders, is per se illegal and invalid. It is settled law that if the basic act is itself unlawful, all resultant steps in pursuance of the action are illicit, unacceptable and prohibited as held by the Hon'ble Supreme court in the case of State of Punjab Vs. Davinder Pal Singh Bhullar &Ors AIR 2012 SC 364. The Respondent No. 1 has never concealed any fact in respect of earlier litigation before Civil Court. Ld. Adjudicating Authority has rightly held that the termination of work orders are a nullity and ab-initio void. Consequently, invocation of bank guarantee was illegal and liable to be set aside.

14. After hearing Ld. Counsels for the parties, we have gone through the record.

15. Following issues arose for our consideration:

- (i) Whether termination of Work Order No. 1 is in violation of provisional extension letter dated 30.03.2020 and/or Government's order dated 08.06.2020?
- (ii) Whether the termination of Work Order No. 2 is in violation of Government Order dated 08.06.2020?
- (iii) Whether termination of work orders are in violation of provisions of Sections 14 & 238 of IBC?
- (iv) Whether the invocation of bank guarantee was illegal?

Issue No. (i)

Whether termination of Work Order No. 1 is in violation of provisional extension letter dated 30.03.2020 and/or Government's order dated 08.06.2020?

16. On 28.03.2017 the Work Order No. 1 was awarded to the Corporate Debtor by the Corporation for construction of building for State of Art Capacity Building and Training Centre and Help Desk Commercial Tax Department, Jaipur for an amount of Rs. 2,99,50,904.12 Paisa. The date of commencement was 10.04.2017 and the date of completion was 09.07.2018. After granting many extensions the Corporate Debtor could not complete the work, ultimately, vide letter dated 30.03.2020 the provisional time was extended and granted upto 30.06.2020 without prejudice to the right of Corporation to recover the compensation as per the agreement. Thereafter, vide letter dated 11.6.2020 the Corporation has terminated the work under clauses 59, 60 & 61 of SBD Agreement.

17. According to the Ld. Counsel for the Respondent No. 1 the period was extended to complete the work upto 30.06.2020 vide letter dated 30.03.2020, however, in violation of its own extension order, they have terminated the contract before the extended period on 11.06.2020 which is illegal.

18. We have considered the argument, to resolve this controversy it is useful to reproduce the letter dated 30.03.2020 and termination letter dated 11.06.2020. They are as under:-



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ANNEXURE-A-5

Rajasthan State Road Development & Construction Corporation Ltd.

(Formerly RSBCC Ltd.)

(A GOVERNMENT OF RAJASTHAN UNDERTAKING)

GSTIN 08AABCR9650F1Z8

CIN NO. U45203RJ1979SGC001853

UNIT-IV JAIPUR

Regd. Office : Setu Bhawan, Opposite Jhalana Doonguri, Jaipur-Agra Bypass, Jaipur-302004

Phones : EPBX - 2711386-90

E-mail: pdrsrdcunit4@gmail.com

Fax : 0141-2711178

No. PD/JPR-IV/2019-20/ 349-50

Date: 30.03.2020

M/s. Aesthetic Stone Arts India Pvt. Ltd.,
Plot No. 9, 22 Godown Circle,
Behind Nehru Sahakar Bhawan,
JAIPUR 302 001

Sub. **Provisional Time Extension for the work "Construction of Building for State of Art "Capacity Building of IT Training Centre" at Head Office of Commercial Taxes Department, Jaipur."**

Ref:- Work Order No. PD/JP-II/2016-17/31 Dated 28.03.2017

Sir,

With reference to the above, it is to inform you that work order No.31 dated 28.03.2017 amounting to Rs. 2,99,50,904.12 was awarded to you for Construction of Building for State of Art "Capacity Building of IT Training Centre" at Head Office of Commercial Taxes Department, Jaipur with date of commencement & stipulated date of completion 10.04.2017 & 09.07.2018

Since the work is not yet completed, the provisional time extension already given upto 31.03.2020, is hereby extended and granted upto 30.06.2020 without prejudice to the right of the corporation to recover the compensation as per agreement.

It is therefore, requested to please complete the work within the extended period as per terms & conditions of the agreement.

Thanking you.

Yours Faithfully

(Sateesh Chand Gupta)

Project Director

RSRDC Ltd., Unit-IV, Jaipur

Date:

No. PD/JPR-IV/2019-20/

Copy for information and necessary action please:-

1. Sh. Subhash Bairwa, Project Officer RSRDC Ltd., Unit-IV, Jaipur.

Project Director



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ANNEXURE. A-6

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Rajasthan State Road Development & Construction Corporation Ltd.
 (Formerly RSBCCL Ltd.)
 (A GOVERNMENT OF RAJASTHAN UNDERTAKING)
 GSTIN 08AABCR9650F1Z8 CIN NO. U45203RJ1979SGC001853
 UNIT-IV JAIPUR

Regd. Office : Setu Bhawan, Opposite Jhalana Dooargah, Jaipur- Agra Bypass, Jaipur-302004
 Phone : L.P.B.X. 2711386-90 E-mail: pdesrdcunit4@gmail.com Fax : 0141-2711178
 No.: PD/IPR-IV/2020-21/ 233 Date: 11-6-2020

By Email Also

M/s. Aesthetic Stone Arts India Pvt. Ltd.,
 Plot No. 9, 22 Godown Circle,
 Behind Nehru Sahakar Bhawan,
 Jaipur 302001
 E-mail :- info@asaai.in

Sub:- Construction of Building for State of Art "Capacity Building of IT Training Centre" at Head Office of Commercial Taxes Department, Jaipur.
 Ref:- Work order no. PD/IP-II/2016-17/31 dt. 28.03.2017.

Madam,

In reference above cited under subject, work order no. PD/IP-II/2016-17/31 Dated 28.03.2017 was awarded to your firm, amounting to Rs.2,99,50,904.12 with stipulated date of start as 10.04.17 and stipulated date of completion as 09.07.2018. You have failed to maintain the prorata progress as you did the work of about Rs. 194.12 Lacs vide 10th Running Bill upto stipulated date of completion and Rs. 229.34 Lacs vide 17th Running Bill dated 02.09.2019. Your work was remain closed for six months from Sep-2019 to Feb-2020. Your attention had been drawn time to time viz letter No. 2017-18-420 dt. 29.06.2017, 2017-18-463 dt. 12.07.2017, 2017-18-623 dt. 18.08.2017, 2017-18-651 dt. 30.08.2017, 2018-19-207 dt. 08.08.2018, 2018-19-310 dt. 12.10.2018, 2018-19-378 dt. 22.11.2018, 2018-19-423 dt. 19.12.2018, 2018-19-437 dt. 24.12.2018, 2019-20-83, 86 & 89 dt. 16.05.2019, 2019-20-101 & 103 dt. 20.05.2019, 2019-20-330 dt. 13.08.2019, 2019-20-731 dt. 11.10.2019, 2019-20-1073 dt. 28.11.2019 Final notice 9/11/2019-गुगल/2019-20/1175 दिनांक 09.12.2019 for improvement of progress of work.

There after a meeting was called in the chamber of commissioner sales tax in your presence, on dated 19.02.2020 and you promised to complete the remaining work within 2 months, conveyed to you by this office letter no. 1736 dt. 06.03.2020, but you are not able to do complete even one activity of false ceiling work within one month upto date of Lockdown i.e. 24.03.2020.

Since no substantial progress was shown at site at any stage, therefore I am directed to convey the approval of the competent authority vide their letter No.A-6(1200)I/Vol-II/2606 Dated 10.06.2020 to terminate the work under clause no. 59, 60 & 61 of SBD agreement.



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Rajasthan State Road Development & Construction Corporation Ltd.
 (Formerly RSBCC Ltd.)
 (A GOVERNMENT OF RAJASTHAN UNDERTAKING)
 GSTIN 08AABCR9650F1ZS CIN NO. U45203RJ1979SGC001853
 UNIT-IV JAIPUR

Head Office : Sani Bhawan, Opposite Jhalana Dargah, Jaipur - Agri Bypass, Jaipur-302001
 Phone : 2211386-70 E-mail: pdrsrcunit4@gmail.com Fax : 0141-2711178

(2)

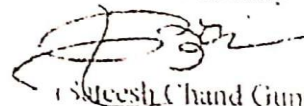
Therefore in exercise of the powers given in the conditions of the contract, I hereby terminate work order no. PD/JP-II 2016-17 31 dt. 28.03.2017 as per clause 59.60 & 61 of agreement.

You are hereby further informed that concerned Project Officer has been directed to take final measurements of your work executed by you. You are requested that either you or your authorized representative should be present at site of work on 16.06.2020 at 10.30 am. If you will fail to be present, the measurement of the work will be taken by him in your absence and these measurements will be binding and conclusive against you.

Please note that RSRDC shall commence work soon after recording final measurements of work. The provisional time extension vide this office letter no 1849-50 dt 30.03.2020, upto 30.06.2020 shall be treated null and void after termination of the work.

The receipt of letter may be acknowledged.

Yours faithfully



Satish Chand Gupta
 PROJECT DIRECTOR
 R.S.R.D.C. LTD. UNIT-IV
 JAIPUR

19. The language of letter dated 30.03.2020 is clear, the provisional time extended and granted upto 30.06.2020 without prejudice to the right of Corporation to recover compensation as per the agreement and the Corporate Debtor was required to complete the work within extended period as per terms and conditions of the agreement. The Corporate Debtor was awarded this work order on 20.03.2017 and has to complete the work within 15 months whereas after lapse of three years the construction has not been completed and thereafter, another three months upto 30.06.2020 was extended even though till 11.06.2020 the Corporate Debtor has completed only 76% of the work (See Pg. 29 of the Rejoinder). In exercise of the power given in clauses 59, 60 & 61 of the agreement, the Corporation terminated the contract. In the termination letter it is also mentioned that the provisional time extension vide office letter dated 30.03.2020 upto 30.06.2020 shall be treated as null and void after termination of work. The Corporation vide letter dated 30.03.2020 provisionally extended the period upto 30.06.2020. The Corporate Debtor has to complete the work within 15 months whereas after lapse of 38 months could not complete the work. There is nothing on record to presume that the clauses 59, 60 & 61 of the agreement were deleted, modified or varied. Thus, we are of the view that the termination of Work Order No. 1 is not in violation of extension order dated 30.03.2020.

20. Now, we have considered whether the termination of work order No. 1 is in violation of Government order dated 08.06.2020. The Government order is

reproduced in Para 8 of the impugned order. In the order, it is mentioned that six months extensions is granted to discharge obligation under contract to those awardees of contracts/tenders who are not in default for their obligations prior to 19.02.2020. In the present contract, the Corporate Debtor has failed to discharge the obligations within 15 months i.e. till 09.07.2018. Thus, the Corporate Debtor is defaulter prior to 19.02.2020. Therefore, the Corporate Debtor is not entitled to get the advantage of the said Government order.

Issue No. (ii)

Whether the termination of Work Order No. 2 is in violation of Government Order dated 08.06.2020?

21. The Work Order No. 2 was awarded to the Corporate Debtor dated 13.03.2019 for Rs. 11.12 Lacs with the date of commencement as 13.03.2019 and the date of completion as 12.05.2019. Since, the Corporate Debtor unable to complete the work within stipulated period and also even after several extensions. The Corporation observed that the work was remain closed for 10 months from May, 2019 to February, 2020 and even after lockdown phase 1 since 01st June, 2020. Therefore, final notice was served upon the Corporate Debtor on 30.06.2020 to complete the work, even thereafter, no substantial progress was shown at the site, therefore, in exercise of clauses 2 & 3 of the agreement vide letter dated 04.08.2020 the work order was terminated.

22. According to the Ld. Counsel for the Respondent No. 1 the period was extended by the Government order dated 08.06.2020 for 6 months to discharge

obligations under contract, in the light of nationwide lockdown due to Covid-19 Pandemic. Therefore, the termination of work order is in violation of Government order dated 08.06.2020.

23. In the Government order 6 months extension is granted to discharge the obligation under the contract to those awardees of contracts who are not in default for their obligation prior to 19.02.2020, whereas, the Corporate Debtor is defaulter prior to 19.02.2020. Therefore, the Corporate Debtor is not entitled to get the advantage of aforesaid Government order. Thus, we are unable to convince that the termination of Work Order No. 2 is in violation of Government order.

Issue No. (iii)

Whether termination of work orders are in violation of provisions of Sections 14 & 238 of IBC?

24. Ld. Adjudicating Authority held that the instrument is defined in Section 2 (14) of Indian Stamp Act, 1899. Such definition is wide enough to cover the agreement between the Corporate Debtor and Corporation in respect of work order as it created a right or an obligation(liability). Therefore, work order is an instrument. Section 238 of IBC provides that 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. The work order is an instrument for the purpose of Section 238 of IBC and consequently any terms of work orders in contravention of the

provisions of IBC could not be enforced as the provisions of IBC shall have overriding effect. For this interpretation, the Adjudicating Authority has placed reliance on the Judgment of Astonfield Solar (Gujarat) Pvt. Ltd. Vs. Gujarat Urja Vikas Nigam Ltd. CA-700/ND/2019 decided by NCLT. The decision upheld by this Appellate Tribunal in Appeal namely Gujarat Urja Vikas Nigam Ltd. Vs. Amit Gupta CA (AT) (Ins) No. 1045 of 2019.

25. The finding of the Ld. Adjudicating Authority is solely depend on the Judgment of this Appellate Tribunal in Gujarat Urja Nigam Ltd.(Supra). This Judgment was assailed before the Hon'ble Supreme Court in Civil Appeal No. 9241 of 2019 Gujarat Urja Vikas Ltd. Vs. Amit Gupta & Ors. The Judgment is reported in (2021) 7 SCC 209. In this Judgment, Hon'ble Supreme Court held that the Adjudicating Authority'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) of IBC to adjudicate on question of law and fact that relate to or arise during an insolvency resolution process. Subsequently, Hon'ble Supreme Court in the Judgment Tata Consultancy Services Ltd. Vs. Vishal Ghisulal Jain, RP SK Wheels Pvt. Ltd. (Civil Appeal No. 3045 of 2020 decided on 23.11.2021) has clarified the law on the subject matter in Gujarat Urja (Supra). Hon'ble Supreme Court in this case has held that the Adjudicating Authority does not have any residuary jurisdiction under Section 60(5) (c) of IBC to entertain the contractual dispute which has been arisen dehors the insolvency of the Corporate Debtor.

26. With the aforesaid for deciding the present controversy the Judgment of Hon'ble Supreme Court in Tata Consultancy Services Ltd. (Supra) is a authority.

27. Whether the termination of work orders are in violation of provisions of Section 14 of IBC. We would like to refer the relevant para of the Judgment of Tata Consultancy Services Ltd. (Supra):-

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].”

28. Admittedly, the Appellant (Corporation) 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). This is not a case in which IRP/RP considers that the supply of goods or services critical to protect and preserve the value of the Corporate Debtor and managed the operations of such Corporate Debtor as a going concern, then supply of

such goods or services shall not be terminated. In the present case, the Appellant (Corporation) was availing the services of the Corporate Debtor for construction of building. Thus, Section 14 is indeed not applicable to the present case.

29. Now, we have considered whether the termination of work orders are in violation of provisions of Section 238 of IBC? For this purpose, it is useful to again refer the Judgment of Tata Consultancy Services Ltd. (Supra):-

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 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.....

25.....

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.”

30. Hon’ble Supreme court in Gujarat Urja Vikas (Supra) 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. Whether there is a nexus between the termination notice and the Insolvency Resolution Proceeding for this we have to examine the terms of the termination notice. The residuary jurisdiction of the Adjudicating Authority cannot be invoked if the termination of a contract is based on grounds unrelated to the Insolvency of the Corporate Debtor.

31. In the light of the aforesaid parameters laid down by the Hon’ble Supreme Court, we have examined the facts of this case. In this case, the Corporate Debtor was awarded two works contract. Before initiation of CIRP, the Appellant (Corporation) had on multiple instances communicated to the Corporate Debtor that the work of the Corporate Debtor is very slow and there were several extensions granted to the Corporate Debtor for completion of work, even in the extended period of almost two years, the Corporate Debtor was not able to complete the work. For this purpose, it is useful to see the Annexure 5 & 6 which are reproduced herein above. The termination notices dated 11.06.2020 (for Work Order No. 1) and 04.08.2020 (for Work Order No. 2) also clearly lays down the defaults committed by the Corporate Debtor in completion of work. In this matter, there is no nexus of work orders with the

Insolvency of the Corporate Debtor. There is nothing to indicate that the termination of work orders was motivated of the Insolvency of the Corporate Debtor. The Appellant had time and again informed the Corporate Debtor that they are committed default in completing the construction and therefore, as per clause 59, 60 & 61 of the SDB agreement the Appellant are entitled to terminate the work orders. The trajectory of events makes it clear that the alleged breaches noted in the termination notices dated 11.06.2020 and 04.08.2020 were not a smokescreen to terminate the agreement because of the Insolvency of the Corporate Debtor. Thus, we are of the view that the Adjudicating Authority does not have any residuary jurisdiction to entertain the present contractual dispute which has been arisen dehors the Insolvency of the Corporate Debtor. In the absence of jurisdiction over the dispute, the Adjudicating Authority could not have held that the termination of work orders are inconsistent with Section 20 of IBC are in valid and prohibited under Section 238 of IBC. Moreover, Section 14 is not applicable to the present case.

32. Even if the contractual dispute arises in relation to the Insolvency, a party can be restrained from terminating the contract only if it's central to the success of the CIRP. Crucially, the termination of contract should result in the corporate death of the Corporate Debtor.

33. In the present case, there is no factual analysis on how the termination of work orders would put survival of the Corporate Debtor in jeopardy. We are of the view that the termination of work orders are not in violation of government order dated 08.06.2020 and Section 14 and 238 of IBC. Hence, the

Adjudicating Authority does not have any residuary jurisdiction under Section 60 (5) (c) of IBCE to entertain the contractual dispute between the Appellant (Corporation) and the Corporate Debtor.

Issue No. (iv)

Whether the invocation of bank guarantee was illegal?

34. As we have already held that the termination of work orders are not in violation of provisional extension letter dated 30.03.2020 and Government order dated 08.06.2020, so also in violation of provisions of Sections 14 and 238 of IBC, the findings of Ld. Adjudicating Authority are erroneous. Resultantly, the invocation of bank guarantee by the Appellant was not illegal.

35. With the aforesaid, in the present facts, the Adjudicating Authority cannot exercise the jurisdiction under Section 60(5) (c) of IBC in relation to contractual dispute between the Appellant (Corporation) and the Corporate Debtor. Accordingly, the Judgment of Adjudicating Authority is set aside. The Appeal is allowed with no order as to costs.

[Justice Jarat Kumar Jain]
Member (Judicial)

[Dr. Ashok Kumar Mishra]
Member (Technical)

New Delhi
06th December, 2021.
SC