

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

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DATED THIS THE 13TH DAY OF APRIL, 2023

BEFORE

THE HON'BLE MR. JUSTICE M. NAGAPPASANNA

WRIT PETITION No.20083 OF 2022 (GM - RES)

BETWEEN:

- 1 . THE PRINCIPAL CHIEF CONSERVATOR
OF FORESTS (HEAD OF FOREST FORCE)
"ARANYA BHAVAN"
18TH CROSS, MALLESWARAM
BENGALURU - 560 003.
- 2 . THE CHIEF CONSERVATOR OF FORESTS
BELLARI CIRCLE
KALAMMA STREET
MOTHI CIRCLE
BALLARI - 583 101.
- 3 . THE DEPUTY CONSERVATOR OF FORESTS
CHITRADURGA DIVISION
V P EXTENSION
CHITRADURGA - 577 501.
- 4 . THE PRINCIPAL CHIEF CONSERVATOR
OF FOREST (FOREST CONSERVATION)
AND NODAL OFFICER (FCA)
3RD FLOOR, "ARANYA BHAVAN"
18TH CROSS, MALLESWARAM
BENGALURU - 560 003.

5 . THE CHIEF SECRETARY
GOVERNMENT OF KARNATAKA
ROOM NO.320, 3RD FLOOR
VIDHANA SOUDHA
BENGALURU – 560 001.

... PETITIONERS

(BY SRI DHYAN CHINNAPPA, AAG A/W
SMT. SHWETHA KRISHNAPPA, AGA)

AND:

M/S. WIND WORLD (INDIA) LTD.,
THROUGH MR.SHAILEN SHAH
THE RESOLUTION PROFESSIONAL OF
WIND WORLD (INDIA) LIMITED
REGISTERED UNDER THE COMPANIES ACT, 1956
(NO.1071996)
(CIN-U31200DD2003PLC003236)

HAVING OFFICE AT:
2ND FLOOR, LODHA EXCELUS
APOLLO MILLS COMPOUND
N.M.JOSHI MARG, MAHAAXMI
MUMBAI – 400 011
MAHARASTRA.

... RESPONDENT

(BY SRI K.G.RAGHAVAN, SR.ADVOCATE FOR
SRI AJAY J.NANDALIKE, ADVOCATE)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND
227 OF THE CONSTITUTION OF INDIA PRAYING TO CALL FOR
RECORDS; QUASH THE IMPUGNED ORDER DATED 06.07.2022
PASSED BY THE HONBLE NATIONAL COMPANY LAW TRIBUNAL,
AHMEDABAD DIVISION BENCH IN I.A. 473(AHM) 2022 IN CP (IB)
NO. 14/2018 (ANNEXURE - A).

THIS WRIT PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 31.03.2023, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT MADE THE FOLLOWING:-

ORDER

The 1st petitioner is the Principal Chief Conservator of Forests, Government of Karnataka. The State calls in question an order passed by the National Company Law Tribunal, Ahmedabad ('the Tribunal' for short) on an application filed under Section 60 of the Insolvency and Bankruptcy Code, 2016 ('the Code' for short).

2. Brief facts that lead the petitioners to this Court in the subject petition, as borne out from the pleadings, are as follows:-

The respondent – M/s Wind World (India) Limited (hereinafter referred to as 'the Company' for short) was granted a lease by the Karnataka Renewable Energy Development Corporation Limited in respect of land measuring 221.80 Hectares under a lease deed dated 03-09-2003. The land granted for lease was a Forest land. The lease was for a period of 15 years and came to an end on 19-06-2018. The Company applies for renewal of lease on 09-01-2020 and the same was pending consideration before the

Competent Authority. Meanwhile the Company requests the State to permit it to start the wind mill as the same would get damaged if it is not put into functioning. The request of the petitioner was considered and to safeguard the interest, pending consideration of final liabilities, it was given such permission on 23-07-2020. The permission was subject to clearance of the Forest Department. The Forest clearance did not come about for a long time. The Company on declaration of it being an insolvent was before the Tribunal invoking Section 14 of the Code. The proceedings were pending before the Tribunal right from 2018 and all the above permissions were granted during the pendency of proceedings before the Tribunal.

3. The State noticing the fact that forest clearances were not placed before it for continuation of permission to run the windmill drew up certain proceedings on 07-05-2022. In the proceedings, the State resolves to immediately suspend operations of the windmill till further orders and directed that documents be placed before Government for continuance of operation of the windmill. The said proceeding led to a communication dated 07-05-2022

bringing it to the notice of the Company that it is a long pending issue and it may be treated as urgent, otherwise it would be recommended for closure of the file. The Company does not challenge these orders before any competent *fora* but knocks at the doors of the Tribunal in pending case by filing an application under sub-section (5) of Section 60 of the Code for passing of an interim order. The Tribunal by the impugned order dated 06-07-2022 directs the State Government to permit functioning of the windmill by holding that it was essential to resolve insolvency of the corporate debtor i.e., the Company. Pursuant thereto the State Government knocks at the doors of this Court calling in question the said order of the Tribunal.

4. Heard Sri Dhyan Chinnappa, learned Additional Advocate General appearing for the State and Sri K.G.Raghavan, learned senior counsel appearing for the respondent/Company.

5. The learned Additional Advocate General would submit that the Tribunal could not have acted as a constitutional Court to suspend the order or the proceeding of the State Government and permit functioning of the windmill. All these are powers vested in

the constitutional Courts and not on the Tribunal. The law in this regard is very clear that if there are statutory clearances to be given, those clearances cannot be given a go by by an order of the Tribunal. He would contend that the order of the Tribunal is one without jurisdiction and, therefore, the State need not approach the Appellate Tribunal against the impugned order, as an order which is without jurisdiction is a nullity in law.

6. On the other hand, the learned senior counsel appearing for Company would submit that what the Tribunal is empowered to do is clearly spelt out under Section 60 of the Code and its interpretation by the Apex Court in plethora of judgments. He would contend that merely because proceedings are drawn up by the Government it would not fructify into an order. It is not an order and as such the Tribunal was well within its jurisdiction to pass appropriate orders protecting the interests of the proceedings before it. He would contend that the entire issue is covered by plethora of judgments rendered by the Apex Court.

7. Both the learned Additional Advocate General for the State and the learned senior counsel for the Company would place

reliance upon common judgments to buttress their respective submissions.

8. I have given my anxious consideration to the submissions made by the respective learned counsel and have perused the material on record. In furtherance whereof, the only issue that falls for consideration is:

"Whether the Tribunal has exceeded its jurisdiction by passing the impugned order?"

9. To consider the issue that is raised, it is germane to notice the provisions of the Code. Section 60 of the Code deals with Adjudicating Authority for Corporate persons and reads as follows:

"60. Adjudicating Authority for corporate persons. —

(1) The Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of the corporate person is located.

(2) Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in this Code, where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or liquidation or bankruptcy of a corporate guarantor or personal guarantor, as the case may be, of such corporate

debtor shall be filed before such National Company Law Tribunal.

(3) An insolvency resolution process or liquidation or bankruptcy proceeding of a corporate guarantor or personal guarantor, as the case may be, of the corporate debtor pending in any court or tribunal shall stand transferred to the Adjudicating Authority dealing with insolvency resolution process or liquidation proceeding of such corporate debtor.

(4) The National Company Law Tribunal shall be vested with all the powers of the Debts Recovery Tribunal as contemplated under Part III of this Code for the purpose of sub-section (2).

(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—

- (a) any application or proceeding by or against the corporate debtor or corporate person;**
- (b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and**
- (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.**

(6) Notwithstanding anything contained in the Limitation Act, 1963 (36 of 1963) or in any other law for the time being in force, in computing the period of limitation specified for any suit or application by or against a corporate debtor for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded."

(Emphasis supplied)

Sub-section (5) of Section 60 directs that notwithstanding anything to the contrary contained in any other law, the Tribunal shall have jurisdiction to entertain and dispose of any application by or against the corporate debtor or corporate person. It has jurisdiction to entertain any claim by or against the corporate debtor including a claim by or against all its subsidiaries situated in India. It is under this provision that an application comes to be filed by the corporate debtor, the Company before the Tribunal and the Tribunal has passed the impugned order. The impugned order insofar as it is germane reads as follows:

*"5. Since no one appeared on behalf of the respondents in this proceedings despite service of notice, we do not know respondent No.1's stands on the proposal dated 09-01-2020 submitted by the Corporate Debtor for renewal of the lease. **We consider it proper to direct the Respondents to allow the Corporate Debtor to run the windmills as per the Respondents own order dated 23.07.2020 on the same conditions as mentioned therein. We hold so because in our considered view to keep windmills working is essential part in relation to resolve insolvency of the Corporate Debtor.***

6. With this, we allow this application to the above extent and dispose of this IA with no order as to costs."

(Emphasis added)

Therefore, passing of the impugned order is necessary to be considered on the touch stone of the statute *supra* and its interpretation by the Apex Court in several judgments.

10. The learned senior counsel for the Company contends that the entire issue stands covered by the judgment rendered by the Apex Court in the case of **EMBASSY PROPERTY DEVELOPMENTS PRIVATE LIMITED v. STATE OF KARNATAKA AND OTHERS**¹. The Apex Court in the said judgment holds as follows:

"3.2. By an order dated 12-3-2018 [Udhyan Investments (P) Ltd. v. Tiffins Barytes Asbestos & Paints Ltd., 2018 SCC OnLine NCLT 13809] , NCLT, Chennai admitted the application, ordered the commencement of the Corporate Insolvency Resolution Process and appointed an Interim Resolution Professional. Consequently, a moratorium was also declared in terms of Section 14 of the IBC, 2016.

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3.6. During the pendency of the writ petition, the Government of Karnataka passed an Order dated 26-9-2018, rejecting the proposal for deemed extension, on the ground that the corporate debtor had contravened not only the terms and conditions of the lease deed but also the provisions of Rule 37 of the Mineral Concession Rules, 1960 and Rule 24 of the Minerals (Other than Atomic and Hydro Carbons Energy Minerals) Rules, 2016.

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¹ (2020) 13 SCC 308

3.9. By an order dated 11-12-2018 [Tiffins Barytes Asbestos & Paints Ltd. v. State of Karnataka, 2018 SCC OnLine NCLT 4386] , NCLT, Chennai allowed the miscellaneous application setting aside the order of the Government of Karnataka on the ground that the same was in violation of the moratorium declared on 12-3-2018 [Udhyaman Investments (P) Ltd. v. Tiffins Barytes Asbestos & Paints Ltd., 2018 SCC OnLine NCLT 13809] in terms of Section 14(1) of the IBC, 2016. Consequently the Tribunal directed the Government of Karnataka to execute supplement lease deeds in favour of the corporate debtor for the period up to 31-3-2020.

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29. Therefore as rightly contended by the learned Attorney General, the decision of the Government of Karnataka to refuse the benefit of deemed extension of lease, is in the public law domain and hence the correctness of the said decision can be called into question only in a superior court which is vested with the power of judicial review over administrative action. The NCLT, being a creature of a special statute to discharge certain specific functions, cannot be elevated to the status of a superior court having the power of judicial review over administrative action. Judicial review, as observed by this Court in Sub-Committee on Judicial Accountability v. Union of India [Sub-Committee on Judicial Accountability v. Union of India, (1991) 4 SCC 699] flows from the concept of a higher law, namely, the Constitution. Para 61 of the said decision captures this position as follows: (SCC pp. 738-39)

"61. But where, as in this country and unlike in England, there is a written Constitution which constitutes the fundamental and in that sense a "higher law" and acts as a limitation upon the legislature and other organs of the State as grantees under the Constitution, the usual incidents of parliamentary sovereignty do not obtain and the concept is one of "limited government". Judicial review is, indeed, an incident of and flows from this concept of the fundamental and the higher law being the touchstone of the limits of the powers of the various organs of the State which derive power and authority under the Constitution and that the judicial wing is the interpreter of the Constitution and, therefore, of the limits

of authority of the different organs of the State. It is to be noted that the British Parliament with the Crown is supreme and its powers are unlimited and courts have no power of judicial review of legislation.”

30. The NCLT is not even a civil court, which has jurisdiction by virtue of Section 9 of the Code of Civil Procedure to try all suits of a civil nature excepting suits, of which their cognizance is either expressly or impliedly barred. Therefore NCLT can exercise only such powers within the contours of jurisdiction as prescribed by the statute, the law in respect of which, it is called upon to administer. Hence, let us now see the jurisdiction and powers conferred upon NCLT.

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41. Therefore in the light of the statutory scheme as culled out from various provisions of the IBC, 2016 it is clear that wherever the corporate debtor has to exercise a right that falls outside the purview of the IBC, 2016 especially in the realm of the public law, they cannot, through the resolution professional, take a bypass and go before NCLT for the enforcement of such a right.

42. In fact the resolution professional in this case appears to have understood this legal position correctly, in the initial stages. This is why when the Government of Karnataka did not grant the benefit of deemed extension, even after the expiry of the lease on 25-5-2018, the resolution professional moved the High Court by way of a writ petition in WP No. 23075 of 2018. The prayer made in WP No. 23075 of 2018 was for a declaration that the mining lease should be deemed to be valid up to 31-3-2020. If NCLT was omnipotent, the resolution professional would have moved the NCLT itself for such a declaration. But he did not, as he understood the legal position correctly.

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46. 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.”

(Emphasis supplied)

Paragraphs 3.2 to 3.9 are the facts before the Apex Court. At paragraph 29 the Apex Court clearly holds that the Tribunal is creature of a special statute to discharge certain specific functions and cannot be elevated to the status of a superior Court having power of judicial review over administration action. The Apex Court further observes that the Tribunal is not even a civil Court which has jurisdiction by virtue of Section 9 of the CPC to try all suits of a civil nature. It is held that the Tribunal can exercise only such powers within the contours of jurisdiction as prescribed in the statute. The Apex Court holds that in the light of the Code it was clear that whenever the corporate debtor has to exercise its right that falls outside the purview of the Code, especially in the realm of the public law, the Tribunal cannot bypass the same and grant enforcement of such a right. The Apex court holds that the Tribunal did not have jurisdiction to entertain any application against Government of Karnataka for a direction to execute supplemental lease deeds for extension of mining lease.

11. The aforesaid judgment is further followed and amplified in **GUJARAT URJA VIKAS NIGAM LIMITED v. AMIT GUPTA AND OTHERS**² wherein it is held as follows:

"G. Submissions of counsel

G.1. Submissions on behalf of the appellant

35. *The case of the appellant has been presented initially in the articulate and carefully reasoned submissions made by Ms Ranjitha Ramachandran, learned counsel. Mr Shyam Diwan, learned Senior Counsel has then urged his submissions. The following submissions were urged in relation to the jurisdiction of NCLT/NCLAT under Section 60(5) of IBC:*

35.1. Section 60(5) must be interpreted in the context of Section 25(2)(b) of IBC, which provides that the RP has to "exercise the rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings". Hence, if NCLT is conferred with the exclusive jurisdiction in relation to the corporate debtor, this section would be rendered redundant. This Court in Embassy Property Developments (P) Ltd. v. State of Karnataka [Embassy Property Developments (P) Ltd. v. State of Karnataka, (2020) 13 SCC 308] (hereinafter referred to as "Embassy Property") has held that the RP cannot sidestep the jurisdiction of other authorities and approach NCLT for the enforcement of the corporate debtor's rights. Although this judgment was in the context of a renewal of a mining lease by a statutory authority, the interpretation of Section 60(5) would not be limited to statutory authorities particularly in the backdrop of Sections 18 (duties of interim resolution professional) and 25(2)(b). In the present case, Article 10.4 of PPA has granted jurisdiction to the State Commission, the regulatory authority under the

² (2021) 7 SCC 209

Electricity Act, to entertain disputes relating to PPA. Article 10.4 provides:

"In the event that such differences or disputes between the parties are not settled through mutual negotiations within sixty (60) days, after such dispute arises, then it shall be adjudicated by the Commission in accordance with law."

35.2. Section 86(1)(f) of the Electricity Act provides that the State Commission shall discharge the function of adjudicating "the disputes between the licensees, and generating companies and to refer any dispute for arbitration". Therefore, any issue in relation to PPA must be raised before the State Commission, and not NCLT. Further, the second respondent has no locus to file a petition before NCLT in relation to PPA.

35.3. NCLT cannot preclude the appellant from exercising its contractual rights under PPA read with the Electricity Act.

35.4. If Section 60(5) is given a broad interpretation to include contractual disputes, it would disrupt the streamlined and time-bound process under IBC. Although NCLT, being conscious of its limitations, has not proceeded to adjudicate on whether the termination of PPA was valid, or dwelt on the interpretation of PPA, it has still erroneously set aside the termination of PPA by the appellant without any basis under IBC.

35.5. Even if it is assumed that NCLT has jurisdiction over disputes relating to PPA, the adjudication of such disputes should be in accordance with PPA. The sanctity of the contracts must be upheld unless there is a statutory provision interdicting such contracts. There can be no exercise of any inherent or residual power by NCLT to set aside the termination of a contract absent a statutory interdict. The resolution applicant or NCLT have no powers to modify PPA through a resolution plan. The formation, novation or alteration of the contract must be in accordance with Section 30(2)(e) of IBC, which provides that the resolution plan cannot contravene any provision of law

which is in force. The provisions of the Contract Act, 1872 ("the Contract Act"), require mutual agreement of the parties for such a modification.

35.6. The submission of the respondents that "property" under Section 3(27) of IBC includes an actionable claim and hence the dispute falls under the jurisdiction of NCLT is erroneous in view of the judgment in Embassy Property [Embassy Property Developments (P) Ltd. v. State of Karnataka, (2020) 13 SCC 308] .

35.7. The contention of the respondents that there is a direct connection between the termination of PPA by the appellant and the insolvency resolution process should be rejected because the issue in the present case is not of interpretation of the insolvency resolution process but of PPA, and only the State Commission has the jurisdiction to interpret PPA.

35.8. The respondents have relied on judgments under other statutes like the Companies Act, 1956, the Banking Regulation Act, 1949 and the Provincial Insolvency Act, 1920 with provisions corresponding to Section 60(5). However, these statutes do not contain any provisions equivalent to Sections 18 and 25(2)(b) of IBC. The interplay between these provisions and Section 60(5) must be considered for the purpose of determining NCLT's jurisdiction. Further, the facts of these judgments are also distinguishable from the present case.

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H. Issues arising from the dispute

43. The following two issues arise for determination:

43.1. (i) Whether NCLT/NCLAT can exercise jurisdiction under IBC over disputes arising from contracts such as PPA.

43.2. (ii) Whether the appellant's right to terminate PPA in terms of Article 9.2.1(e) read with 9.3.1 is regulated by IBC.

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69. *The institutional framework under IBC contemplated the establishment of a single forum to deal with matters of insolvency, which were distributed earlier across multiple fora. In the absence of a court exercising exclusive jurisdiction over matters relating to insolvency, the corporate debtor would have to file and/or defend multiple proceedings in different fora. These proceedings may cause undue delay in the insolvency resolution process due to multiple proceedings in trial courts and courts of appeal. A delay in completion of the insolvency proceedings would diminish the value of the debtor's assets and hamper the prospects of a successful reorganisation or liquidation. For the success of an insolvency regime, it is necessary that insolvency proceedings are dealt with in a timely, effective and efficient manner. Pursuing this theme in Innoventive [Innoventive Industries Ltd. v. ICICI Bank, (2018) 1 SCC 407: (2018) 1 SCC (Civ) 356] this Court observed that: (SCC p. 422, para 13)*

"13. One of the important objectives of the Code is to bring the insolvency law in India under a single unified umbrella with the object of speeding up of the insolvency process."

The principle was reiterated in ArcelorMittal [ArcelorMittal (India) (P) Ltd. v. Satish Kumar Gupta, (2019) 2 SCC 1] where this Court held that: (SCC p. 88, para 84)

"84. ... The non obstante clause in Section 60(5) is designed for a different purpose : to ensure that NCLT alone has jurisdiction when it comes to applications and proceedings by or against a corporate debtor covered by the Code, making it clear that no other forum has jurisdiction to entertain or dispose of such applications or proceedings."

Therefore, considering the text of Section 60(5)(c) and the interpretation of similar provisions in other insolvency related statutes, NCLT has jurisdiction to

adjudicate disputes, which arise solely from or which relate to the insolvency of the corporate debtor. However, in doing so, we issue a note of caution to NCLT and NCLAT to ensure that they do not usurp the legitimate jurisdiction of other courts, tribunals and fora when the dispute is one which does not arise solely from or relate to the insolvency of the corporate debtor. The nexus with the insolvency of the corporate debtor must exist.

70. *It is appropriate to refer to the observations in the report of the BLRC, wherein it noted the role of NCLT, as the adjudicating authority for CIRP, in the following terms:*

"An adjudicating authority ensures adherence to the process

At all points, the adherence to the process and compliance with all applicable laws is controlled by the adjudicating authority. The adjudicating authority gives powers to the insolvency professional to take appropriate action against the Directors and management of the entity, with recommendations from the creditors committee. All material actions and events during the process are recorded at the adjudicating authority. The adjudicating authority can assess and penalise frivolous applications. The adjudicator hears allegations of violations and fraud while the process is on. The adjudicating authority will adjudicate on fraud, particularly during the process resolving bankruptcy. Appeals/actions against the behaviour of the insolvency professional are directed to the regulator/adjudicator."

As such, it is important to remember that NCLT's jurisdiction shall always be circumscribed by the supervisory role envisaged for it under IBC, which sought to make the process driven by trained resolution professionals.

71. *In the present case, 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 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.

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74. Therefore, we hold that the RP can approach 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 NCLT under 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 IBC.

I.2. Jurisdiction of NCLT and GERC

75. It has been urged on behalf of the appellant that in terms of Article 10.4 of PPA, GERC is entitled to entertain the disputes relating to PPA.

76. Our attention has also been drawn to Section 86(1)(f) of the Electricity Act, which provides that GERC shall discharge the function of adjudicating "the disputes between the licensees, and generating companies and to refer any dispute for arbitration". It has been submitted that, therefore, any issue in relation to PPA must be raised before GERC and not NCLT.

77. Reliance has also been placed on the judgment of this Court in Embassy Property [Embassy Property Developments (P) Ltd. v. State of Karnataka, (2020) 13 SCC 308] , where this Court held that 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. This Court held : (SCC p. 331, para 37)

"37. ... Clause (c) of sub-section (5) of Section 60 is very broad in its sweep, in that it speaks about any question of law or fact, arising out of or in relation to insolvency resolution. But a decision taken by the Government or a statutory authority in relation to a matter which is in the realm of public law, cannot, by any stretch of imagination, be brought within the fold of the phrase "arising out of or in relation to the insolvency resolution" appearing in clause (c) of sub-section (5)."

(emphasis in original)

In the present case the decision to terminate 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.

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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].”

(Emphasis supplied)

The Apex Court again considering sub-section (5) of Section 60 of the Code holds that the Tribunal will not have jurisdiction to entertain any issue arising out of any statutory requirement. It is clearly held that the Tribunal cannot exercise its jurisdiction over matters *de hors* insolvency proceedings, since the matter falls outside the realm of the Code.

12. Again the Apex Court in the case of **TATA CONSULTANCY SERVICES LIMITED v. SK WHEELS PRIVATE LIMITED RESOLUTION PROFESSIONAL, VISHAL GHISULAL JAIN**³ has held as follows:

"28. In Gujarat Urja [Gujarat Urja Vikas Nigam Ltd. v. Arnit Gupta, (2021) 7 SCC 209 : (2021) 4 SCC (Civ) 1] , 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 corporate debtor and it was amenable to the jurisdiction of NCLT under Section 60(5)(c). This Court observed that : (SCC pp. 262-63, para 69)

³ (2022) 2 SCC 583

"69. ... NCLT has jurisdiction to adjudicate disputes, which arise solely from or which relate to the insolvency of corporate debtor... The nexus with the insolvency of corporate debtor must exist."

(emphasis supplied)

Thus, the residuary jurisdiction of NCLT cannot be invoked if the termination of a contract is based on grounds unrelated to the insolvency of corporate debtor.

29. *It is evident that the appellant had time and again informed 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 corporate debtor. The trajectory of events makes it clear that the alleged breaches noted in the termination notice dated 10-6-2019 were not a smokescreen to terminate the agreement because of the insolvency of corporate debtor. Thus, we are of the view that NCLT does not have any residuary jurisdiction to entertain the present contractual dispute which has arisen dehors the insolvency of corporate debtor. In the absence of jurisdiction over the dispute, NCLT could not have imposed an ad interim stay on the termination notice. NCLAT has incorrectly upheld [Tata Consultancy Services Ltd. v. Vishal Ghisulal Jain, 2020 SCC OnLine NCLAT 484] the interim order [BMW Financial Services (P) Ltd. v. S.K. Wheels (P) Ltd., 2019 SCC OnLine NCLT 28273] of NCLT.*

30. *While in the present case, the second issue formulated by this Court has no bearing, we would like to issue a note of caution to NCLT and NCLAT regarding interference with a party's contractual right to terminate a contract. Even if the contractual dispute arises in relation to the insolvency, a party can be restrained from terminating the contract only if it is central to the success of CIRP. Crucially, the termination of the contract should result in the corporate death of corporate debtor. In Gujarat Urja [Gujarat Urja Vikas Nigam Ltd. v. Amit Gupta, (2021) 7 SCC 209 : (2021) 4 SCC (Civ) 1] , this Court held thus : (SCC pp. 309-10, paras 176-177)*

"176. Given that the terms used in Section 60(5)(c) are of wide import, as recognised in a consistent line of authority, we hold that NCLT was empowered to

restrain the appellant from terminating PPA. However, our decision is premised upon a recognition of the centrality of PPA in the present case to the success of CIRP, in the factual matrix of this case, since it is the sole contract for the sale of electricity which was entered into by corporate debtor. In doing so, we reiterate that NCLT would have been empowered to set aside the termination of PPA in this case because the termination took place solely on the ground of insolvency. **The jurisdiction of NCLT under Section 60(5)(c) of IBC cannot be invoked in matters where a termination may take place on grounds unrelated to the insolvency of 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 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 corporate debtor, and not push it to its corporate death by virtue of it being corporate debtor's sole contract (as was the case in this matter's unique factual matrix).

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

(emphasis supplied)

31. The narrow exception crafted by this Court in Gujarat Urja [Gujarat Urja Vikas Nigam Ltd. v. Amit Gupta, (2021) 7 SCC 209; (2021) 4 SCC (Civ) 1] must be borne in mind by NCLT and NCLAT even while examining prayers for interim relief. The order of NCLT dated 18-12-2019 [BMW Financial Services (P)

Ltd. v. S.K. Wheels (P) Ltd., 2019 SCC OnLine NCLT 28273] does not indicate that NCLT has applied its mind to the centrality of the facilities agreement to the success of CIRP and corporate debtor's survival as a going concern. NCLT has merely relied upon the procedural infirmity on the part of the appellant in the issuance of the termination notice i.e. it did not give thirty days' notice period to corporate debtor to cure the deficiency in service. NCLAT, in its impugned judgment [Tata Consultancy Services Ltd. v. Vishal Ghisulal Jain, 2020 SCC OnLine NCLAT 484] , has averred that the decision of NCLT preserves the "going concern" status of corporate debtor but there is no factual analysis on how the termination of the facilities agreement would put the survival of corporate debtor in jeopardy."

(Emphasis supplied)

Following the judgment in the case of **GUJARAT URJA VIKAS NIGAM LIMITED** the Apex Court holds that the Tribunal cannot overstep its jurisdiction.

13. In the light of the judgments rendered by the Apex Court *supra* it is germane to notice the proceedings of the State and the order notified upon the Company by the State. The proceedings dated 07-05-2022 reads as follows:

"Proceedings of the meeting held on 07-05-2022 regarding the running of Wind World (India) Limited Windmills in Chitradurga district under the Chairmanship of Principal Chief Conservator of Forests Head of Forest Force)

Attended by

- 1) *Principal Chief Conservator of Forest (Forest Conservation)*
- 2) *Additional Principal Chief Conservator of Forests (Working Plan)*
- 3) *Additional Principal Chief Conservator of Forests (CAMPA)*
- 4) *Additional Principal Chief Conservator of Forests (NFP & BM)*
- 5) *Additional Principal Chief Conservator of Forests (Legal Cell)*
- 6) *Additional Principal Chief Conservator of Forests (Wild Life) and Nodal officer Bellary*
- 7) *Additional Principal Chief Conservator of Forests (Administration & Coordination)*
- 8) *Chief Conservator of Forests (Bengaluru) Ex Chief Conservator of Forests, Bellary*

The issue under discussion was continuance of running of the wind mills at Chitradurga by Wind World (India) Lid., company without renewal of the lease under FC Act by the Government of India.

PCCF (FC) briefed the members at the meeting regarding the case.

The Lease was granted by Government of India for 221.80 ha on 02.04.2003 and formal grant of lease was made by GOK on 20.06.2003 in Jogimatti and Marikanive RF in Chitradurga District in favour of KREDL for a period of 15 years. This was sub leased to ENERCON (India) limited (presently Wind World (India) limited). The FC lease period ended on 19-06-2018.

Wind World (India) Limited applied for renewal of FC lease on 09-01-2020 which was accepted by the office of the PCCF on 07-03-2020 and online link was transferred to the DCF on 22-05-2020 for field verification and further processing of the proposal.

Meanwhile, the user Agency had requested this office to permit them to start the Wind Mills stating that the wind mills, if not worked for long time, will get damaged. The user Agency had also requested to issue direction to the BESCO to release the revenue which was withheld on the directions of the DCF.

The request of the User Agency was examined by this office. It was observed that the FC renewal proposal involved some deviations from the approved lease area and was likely to attract penalty from Government of India in the form of regularization under the Forest (Conservation) Act, 1980. The request of User Agency was considered provided that the Government interests could be safeguarded to take care of the financial liabilities arising at the time of FC renewal.

It was felt that the Government interest under Forest (Conservation) Act 1980 could be safe guarded if the Bangalore Electricity Supply Company (BESCO) withheld the revenue likely to be shared with the User Agency for the power generation to the tune of approximately Rs.370.00 lakh as per a tentative estimation. If so, the wind mills could be permitted to run so that there was no disruption of power generation and minimum required maintenance of the machines could be carried out.

Under the above circumstances, PCCF (Hoff) directed the DCF Chitradurga to permit the user agency to undertake the minimum maintenance of the Wind Mills to keep them running and inform the BESCO to withhold an amount of Rs.370.00 lakh from the power revenue due to the user agency till proper clearance under Forest Conservation ACT 1980 is in place.

FC proposal was uploaded on 09-01-2020 the same has been verified and accepted by PCCF (FC) on 07-03-2020 and the proposal forwarded to DCF Chitradurga on 22-05-2020. DCF Chitradurga submitted the proposal to CCF, Bellary Circle on 27-06-2021.

In response, CCF, Bellary circle had raised EDS query to DCF Chitradurga on 08-09-2021 the same was communicated by DCF Chitradurga to UA on 05-08-2020. User Agency replied to the EDS query on 25-03-2022. Now the proposal is pending at DCF, Chitradurga for further processing.

PCCF (FC) mentioned to the members at the meeting that since the restart of the wind mills, more than 21 months has lapsed. Thus a reasonable opportunity which was given by PCCF (HoFF) on 24/7/2020 and 11/08/2020 to carry out the maintenance of the wind mill and produce power has lapsed. Further PCCF (Hoff) had also permitted the BESCO to release the payments after withholding 3.70 crores with itself and after deducting 10% of the amount payable towards power purchase from future bills on 07-11-2020.

All the above was done in good faith so that the state is not deprived of power and the investment infrastructure of the company does not go waste and Government interest was sought to be safeguarded by withholding 3.70 crores and by retaining 10% of future bills with BESCO.

However, it appears that the company has taken undue advantage of this and has not taken proactive steps to submit the completed FC proposal in a form such that the same can be sent to Government of India for renewal.

The members deliberated in detail and came to a consensus that continuation of the windmill is not tenable in this situation. Hence, following decisions were taken:-

- 1. To immediately suspend the operations of the Wind Mills till further orders.**
- 2. The User Agency to comply to all EDS queries raised by Chief Conservator of Forests Bellary and CCF to submit the completed FC proposal within a week without fail.**
- 3. Chief Conservator of Forests, Bellary to contact BESCO for Withholding all further payments in respect of the project.**

Sd/-

**Principal Chief Conservator of Forests
(Forest Conservation)"**

(Emphasis added)

The proceedings are that the Company has been taking undue advantage of indulgence of the State and has not taken any steps to submit a complete forest clearance proposal for renewal of the lease and has been continuing with the operation on ad hoc basis. This is communicated to the Company by the Forest Department on 07-05-2022. The Communication reads as follows:

To,

M/s Wind World (India) Ltd.,
Wind Towers, Plot No.A-9,
Veera Industrial Estate,
Veera Desai Road,
Veera desai Road
Andheri (West), Mumbai - 400 053.

Sir,

Sub: Submission of Renewal of Lease proposal for 106.769 Ha of Forest Land for Wind Power Project in jogimatti and Marikanive Reserve forest. Earlier the same land has been diverted in favor of M/s KREDL for sub lease to M/s Enercon (India) Limited presently Wind World (india) limited on BOT basis for the total area of 221.80 Ha in Chitradurga district of Karnataka Proposal No.FP/KA/WIND/43786/2020.

Ref: 1 Principal Chief Conservator of Forests (Forest Conservation) and Nodal Officer (FCA), Aranya

Bhavan, Bengaluru online communication to this office Dated: 22-05-2020.

2.This office even letter no dated:16-09-2021 and 08-03-2022.

3. Your letter Dated: 25-03-2022

With reference to the above subject, M/s Wind World (India) Ltd., has submitted a proposal through web portal mode for Renewal of Lease proposal for 106.769 Ha of Forest Land for Wind Power Project in Jogimatti and Marikanive Reserve forest, earlier the same land has been diverted in favor of M/s KREDL for sub lease to M/s Enercon (India) Limited presently Wind World (india) limited on BOT basis for the total area of 221.80 Ha in Chitradurga district for approval under Forest (Conservation) Act, 1980. Accordingly, a communication through online was received to process the said proposal and to submit specific opinion vide ref (1).

The Chief Conservator of Forests, Ballari Circle, Ballari has directed the undersigned to submit relevant information/documents for further processing of the proposal vide letter dated: 07-09-2021. Further, this office has raised query on 16-09-2021 and 08-03-2022

Further, You have requested to this office to give one month time to execute the pillar erection work vide letter under Ref (3).

But, however you have not submitted the compliance report vide this letter dated:08-03-2022. The following observations were made during the site inspection.

1. No demarcation was done for the electric transmission lines in above site.

2. No demarcation was done at Vacuum Circuit Breakers (VCB) sites.

It is a long pending issue, which has to be treated as urgent. Hence, the user agency has to submit compliance report for the site inspection memo with necessary justification within 15 days as sought by the Chief Conservator of forests, Baliari Cicie, Ballari. Otherwise under signed will recommended(sic) to the higher authorities for closure of life.

*Yours faithfully,
Sd/-
Deputy Conservator of Forests,
Chitradurga Division, Chitradurga"*

(Emphasis added)

Challenging this, the Company could not have knocked at the doors of the Tribunal as it completely falls beyond the purview of the Code, being in the realm of public law, since the State has exercised its jurisdiction in drawing up the proceedings and directing forest clearances to be submitted by the corporate debtor, the petitioner, in exercise of powers conferred under the statute. Therefore, they are in the realm of public law. The Tribunal had no jurisdiction to direct functioning/continuing of the windmill without the forest clearances, merely because the State had granted such permission at an earlier point in time.

14. The submission of the learned senior counsel for the Company is that if the State had passed an order, then the Tribunal would have no jurisdiction. According to him, the one that is passed is not an order. The said submission is noted only to be rejected, as it is a communication from the hands of the State and it is understood by the Company also to be an order only, as the averments in the application filed before the Tribunal demolishes the contention of the learned senior counsel for the Company. The narration before the Tribunal in the application is as follows:

"During pendency of the above actions, Impugned Order passed by the Respondent No.1 during moratorium in contravention of IBC

8.16 *To the surprise of the Applicant, while the above actions were pending and approval of the Third Application for Lease of the Subject land was pending on part of the Respondents, the Respondent No.1 vide the impugned order on 7 May 2022 passed directions to the Respondent No.2 to suspend all operations of the 127 WTGs operated and maintained by the Applicant, apparently on the basis of pendency of the border demarcation requirement raised only in September 2021.*

8.17 ***On the Impugned Order being notified to the Applicant, the Applicant promptly on 12 May 2022 wrote a detailed letter to the Respondent No. 1 with all the above details and the corresponding documents and intimated the Respondent No. 1 that the said Impugned Order and even the compliance***

thereof leading to the suspension of operations of the 127 WTGs operated and maintained by the Applicant is in contravention of the Section 14 of the IBC due to the ongoing CIRP of the Applicant. A copy of the letter dated 12 May 2022 along with all annexures thereto is annexed hereto and marked as Exhibit K.

Rejection of the Applicant's request to restart the 127 WTGs"

(Emphasis added)

Therefore, none of the contentions of the learned senior counsel for the Company would merit acceptance. It is open to the Company to produce all the necessary clearances as is sought by the State if the Company wants to continue with the operations. In the event, the Company would furnish its documents for forest clearances, it is open for the State to consider the same and pass appropriate orders in accordance with law.

15. For the aforesaid reasons, the following:

ORDER

(i) Writ Petition is allowed.

- (ii) Impugned order dated 06.07.2022 passed by the National company Law Tribunal, Ahmedabad Division stands quashed.

Consequently, I.A.No.1 of 2023 also stands disposed.

**Sd/-
JUDGE**

bkp
CT:MJ