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NOVEMBER 2021

SECURITIES AND EXCHANGE BOARD OF INDIA

Securities and Exchange Board of India ("**SEBI**") in exercise of powers conferred under Section 11(1) of the Securities and Exchange Board of India Act, 1992 issued a circular dated *November 23, 2021 ("**Circular November 2021**")* under Regulation 299 of SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 ("**SEBI ICDR Regulations, 2018**") for partial modification of Circular dated August 19, 2019 bearing reference number SEBI/HO/CFD/DIL2/CIR/P/2019/94 ("**Circular August 2019**") which specified the fines to be imposed by the Stock Exchanges for non-compliance with certain provisions of SEBI (ICDR) Regulations, 2018.

Vide Circular November 2021 it has been clarified that the partial modification of Circular August 2019 wherein para 9A is inserted after para 9 i.e. *"9A. The Stock Exchanges may deviate from the provisions of the circular, wherever the interest of the investors are not adversely affected, if found necessary, only after recording reasons in writing."* shall always be construed to be the part of the original circular i.e. June 15, 2017 bearing reference no. CIR/CFD/DIL/57/2017.

Further, the Stock Exchange are advised to bring the provisions of the aforesaid circular to the notice of listed entities and also to disseminate the same on their website.

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SECURITIES AND EXCHANGE BOARD OF INDIA

Securities and Exchange Board of India ("**SEBI**") in exercise of powers conferred under Section 11(1) of Securities and Exchange Board of India Act, 1992 ("**SEBI Act, 1992**"), Regulation 11, Regulation 37, Regulation 94 read with Regulation 101(2) of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 and Rule 19(7) of Securities Contracts (Regulation) Rules, 1957 issued Circulars dated November 16, 2021 and November 18, 2021 ("**Circulars November 2021**") providing clarifications on processing draft schemes to be filed with stock exchanges and further amending SEBI Master Circular No. SEBI/HO/CFD/DIL1/CIR/P/2020/249 dated December 22, 2020 ("**Master Circular**").

Amendments carried out by virtue of Circulars November 2021 are summarized as follows:

1. Part I[1], Para A 2(b) which provides for a valuation report to be submitted has been further amended and the listed entities are now required to provide an undertaking stating that no material event impacting the valuation has occurred during the intervening period of filing the scheme of documents with stock exchange and period under consideration for valuation;

2. New provision, that is, Para 2(j) has been inserted which provides for a declaration from the listed entity regarding any defaults of listed debt obligations of the entities forming part of the scheme;

3. Para 2(k) has been inserted which provides for No Objection Certificate from lending scheduled commercial banks / financial institutions / debenture trustees; and

4. Part 1, Para D has been inserted to Master Circular which is as follows:

> *"1. The fractional entitlements, if any, shall be aggregated and held by the trust, nominated by the Board in that behalf, who shall sell such shares in the market at such price, within a period of 90 days from the date of allotment of shares, as per the draft scheme submitted to SEBI.*

[1] Part I to Master Circular deals with requirement before Scheme of arrangement is to be submitted for sanction by National Company Law Tribunal.

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2. The listed company shall submit to the designated stock exchange a report from its Audit Committee and the Independent Directors certifying that the listed entity has compensated the eligible shareholders. Both the reports shall be submitted within 7 days of compensating the shareholders.

3. The Exchange shall ensure compliance of the above and non-compliance, if any, shall be submitted to SEBI on a quarterly basis.

4. Any misstatement or furnishing of false information with regard to the said information shall make the listed entity liable for punitive actions as per the provisions of applicable laws and regulations."

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INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

Insolvency and Bankruptcy Board of India ("**IBBI**") in exercise of powers under Section 196 of Insolvency and Bankruptcy Code, 2016 ("**IBC, 2016**") issued *Circular dated November 15, 2021* ("**Circular**") providing clarification regarding requirement of seeking No Objection Certificate or No Dues Certificate from the Income Tax Department during Voluntary Liquidation Process under IBC, 2016.

Regulation 14 of IBBI (Voluntary Liquidation Process) Regulations, 2017 ("**IBBI VLR, 2017**") requires the liquidator to issue a public announcement within five (5) days from the date of liquidator's appointment, calling for submission of claims by stakeholders within thirty (30) days from the date of commencement of liquidation. Regulations, 2017 also necessitate all financial creditors, operational creditors including government, and other stakeholders to submit their claims within specified period. If the claims are not submitted within time, the corporate person may get dissolved without dealing with such claims and such claims may consequently get extinguished.

It has been noticed by IBBI that even after providing opportunity for filing of claims, the liquidators seek 'No Objection Certificate' ("**NOC**") or 'No Dues Certificate' ("**NDC**") from the Income Tax Department despite the fact that the IBC, 2016 or the Regulations, 2017 do not envisage such requirement. In this regard, Section 178 of Income Tax Act, 1961 ("**ITA, 1961**") which *inter alia* requires the liquidator to fulfil certain income tax related requirements, explicitly states that the provisions of Section 178, ITA, 1961 shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force except the provisions of IBC, 2016.

Therefore, it has been clarified vide Circular that as provisions of IBC, 2016, IBBI VLR, 2017 and read with IA, 1961, an Insolvency Professional handling voluntary liquidation process is not required to seek any NOC / NDC from Income Tax department as part of compliance in the said process.

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RESERVE BANK OF INDIA

Reserve Bank of India ("**RBI**") in exercise of powers under Section 10(4) and Section 11(1) of the Foreign Exchange Management Act, 1999 has issued a *Notification dated November 08, 2021* ("**Notification**") wherein it has permitted the Foreign Portfolio Investors ("**FPI**") to invest in debt securities issued by Infrastructure Investment Trusts ("**INVITs**") and Real Estate Investment Trusts ("**REITs**").

RBI invited the attention of Authorised Dealer ("**AD**") Category-1 banks to its *Notification dated October 17, 2019* wherein Schedule 1 to the Foreign Exchange Management (Debt Instruments) Regulations, 2019 ("**FEMDIR 2019**") was notified, *Notification dated June 15, 2018* wherein RBI had provided operational flexibility as well as transition path for FPIs/custodians and also to *Notification dated May 24, 2019* wherein it revised the directions of Voluntary Retention Route ("**VRR**") enabling the Foreign Portfolio Investors ("**FPI**") to invest in debt markets in India.

Subsequent to the announcement made in the Union Budget 2021-22 which stated that debt financing of INVITs and REITs by FPIs would be enabled, RBI through this Notification has permitted the FPIs to invest in debt securities issued by INVITs and REITs. All the necessary amendments regarding the same have also been made to the FEMDIR 2019.

Vide this Notification, RBI has now permitted the FPIs to acquire debt securities issued by INVITs and REITs under the Medium-Term Framework ("**MTF**") or through VRR. However, it has been directed that such investments shall be reckoned within the limits and shall be subject to the terms and conditions for investments by FPIs in debt securities under the respective regulations of MTF and VRR. Further, RBI also directed the AD Category-1 banks to inform their concerned customers/constituents regarding the contents of this Notification.

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MINISTRY OF POWER

Ministry of Power vide its letter dated November 08, 2021 addressed to Secretary of the Department of Legal Affairs, has confirmed that insolvency proceedings can be initiated against the state-owned electricity distribution companies as well as generation firms in case of default of payment by the creditors. The aforesaid clarification was given in reference to the case filed by Tamil Nadu Generation and Distribution Company ("**TANGEDCO**") against Union of India ("**UOI**") before Hon'ble High Court of Madras wherein, Corporate Insolvency Resolution Process ("**CIRP**") was initiated against TANGEDCO by South India Corporation Private Limited ("**SICPL**").

TANGEDCO opposed the initiation of CIRP against it under the pretext that it is a government owned enterprise and therefore it should be exempted from Section 9 of the Insolvency and Bankruptcy Code, 2016 ("**IBC 2016**"). TANGEDCO further argued that Section 86(1)(f) of Electricity Act, 2003 ("**EA 2003**") provides only for the adjudication of disputes between Distribution Licensees ("**DISCOMS**") and generating companies by the respective State Electricity Regulatory Commission ("**SERC**") and EA 2003 being a special statute would prevail over the Companies Act, 2013 and also over IBC 2016 in case of a conflict arising between them.

The Hon'ble High Court of Madras dismissed the arguments of TANGEDCO stating that neither Companies Act, 2013 nor the IBC 2016 expressly exempts the initiation of insolvency proceedings against a government company. Also, it stated that government companies as defined under Section 2(45) of the Companies Act, 2013 would fall under the Section 3(7) of the IBC 2016, which defines a "corporate person" as, *inter alia*, a company as defined in Section 2(20) of the Companies Act, 2013 which refers to any company incorporated under the Companies Act, 2013 or any previous company law thereby including government companies.

Further, the Hon'ble High Court also held that SICPL was a creditor of TANGEDCO and therefore it did not fall under the ambit of Section 86(1)(f) which makes it clear that that there is no conflict between EA 2003, Companies Act, 2013 and IBC 2016 National Company Law Tribunal ("**NCLT**") will have jurisdiction over any dispute arising out of insolvency proceedings instituted by a creditor against any company.

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CASE SUMMARY

Case Name : TATA Consultancy Services Limited Vs. Vishal Ghisulal Jain, Resolution Professional, SK Wheels Private Limited - C.A. No. 3025 of 2020.

Court Name : Supreme Court of India

Order dated : November 23, 2021

Sections cited : Section 14 of Insolvency and Bankruptcy Code, 2016 ("**IBC, 2016**"); Section 25 of IBC, 2016; Section 60(5)(c) of IBC, 2016; Section 238 of IBC, 2016; Section 14 of Specific Relief Act, 1963 ("**SRA, 1963**").

Facts of the Case

1. The appeal arises out of a judgment dated June 24, 2020 ("**Impugned Order**") passed by National Company Law Appellate Tribunal ("**NCLAT**") whereby the Hon'ble NCLAT upheld interim order dated December 18, 2019 of National Company Law Tribunal ("**NCLT**") which stayed the termination of the Facilities Agreement dated December 01, 2016 ("**Facilities Agreement**") between the Appellant and SK Wheels Private Limited ("**SK Wheels**" / "**Corporate Debtor**").

2. The Appellant and the Corporate Debtor entered into a Build Phase Agreement dated August 24, 2015 and Facilities Agreement. Under the Facilities Agreement, the Corporate Debtor was obligated to provide premises with certain specifications and facilities to the Appellant for conducting examinations for educational institutions.

3. As per Clause 11(b) of Facilities Agreement, either party was entitled to terminate the agreement immediately by written notice to the other party provided that a material breach committed by the latter is not cured within thirty (30) days of the receipt of the notice. The Appellant issued the termination notice on June 10, 2019 which came into effect immediately.

4. The Appellant called upon the Corporate Debtor on multiple occasions highlighting its concerns regarding the insufficiency of housekeeping staff, its malpractices in respect of entering attendance and that it would be constrained to invoke the penalty and termination clauses under the Facilities Agreement. The Appellant also raised issues of power supply and shortage of housekeeping staff, among other deficiencies. Corporate

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Debtor. The Appellant came to know about CIRP against the Corporate Debtor when the Electricity Board disconnected the supply of electricity to Corporate Debtor. The Appellant could not initiate proceedings on account of moratorium imposed under Section 14 of IBC, 2016.

5. The termination notice was contested by the Corporate Debtor on the ground that no material breaches have occurred, and in any event, a thirty (30) days' period is to be given to a party to cure the defects before the agreement can be terminated under Clause 11(b) of Facilities Agreement.

6. The Corporate Debtor instituted a miscellaneous application before the Hon'ble NCLT under Section 60(5)(c) of IBC, 2016 for quashing termination notice. The Hon'ble NCLT granted an ad-interim stay on termination notice and directed the Appellant to comply with the terms of Facilities Agreement. The Hon'ble NCLAT thereafter passed the Impugned Order, observing that the main objective of IBC, 2016 is to ensure that the Corporate Debtor remains a going concern. Section 14 of IBC, 2016 is imposed for the smooth functioning of the Corporate Debtor and it is the responsibility of Resolution Professional ("**RP**") under Section 25 of IBC, 2016 to preserve the Corporate Debtor as a going concern. The Impugned Order is under appeal.

Issues before Hon'ble Supreme Court

The Hon'ble Supreme Court after analyzing the facts, laid down the following two (2) issues:

1. Whether NCLT can exercise its residuary jurisdiction under Section 60(5)(c) of IBC, 2016 to adjudicate upon the contractual dispute between the parties?; and

2. Whether in the exercise of such a residuary jurisdiction, it can impose an ad-interim stay on the termination of the Facilities Agreement?

Submissions of Parties

Following submissions were advanced on behalf of Appellant:

- that Hon'ble NCLT has misread the provisions of Section 14 of IBC, 2016. In the present case, the Appellant had been availing services of the Corporate Debtor to which Section 14 of IBC, 2016 has no application. The Facilities Agreement which is a determinable contract has now become a non-terminable contract overlooking the mandate of Section 14 of SRA, 1963;

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- the termination notice was issued on account of material breaches of the agreement and not on account of CIRP against the Corporate Debtor. Facilities Agreement is not sole contract of Corporate Debtor which would lead to corporate death. The Corporate Debtor is in the business of automotive parts as per its main object of its Memorandum of Association;

- that NCLT cannot invoke residuary powers under Section 60(5)(c) of IBC, 2016 where there is a patent lack of jurisdiction;

- the duty of RP under Section 25 of IBC, 2016 is not determinative of the jurisdiction of NCLT and such duty cannot be stretched to convert a determinable commercial contract into a non-terminable contract; and

- in ***Gujarat Urja Vikas v. Amit Gupta & Ors. (2021) 7 SCC 2019*** ("**Gujarat Urja Case**"), the Hon'ble Supreme Court had injuncted a third party from terminating its contract with the corporate debtor because there were concurrent findings of NCLT and NCLAT holding that the contract in question was the sole contract of the corporate debtor and the termination of the contract by the third party was merely on the ground of initiation of CIRP without there being any contractual default on part of corporate debtor.

Following submissions were advanced on behalf of Respondent:

- NCLT is vested with jurisdiction under Section 60(5)(c) of IBC, 2016 to adjudicate issues relating to fact or law in respect of a company undergoing CIRP;

- The Appellant's argument that the contractual dispute can be decided only through arbitration and provisions of Indian Contract Act, 1872 and SRA, 1963 are attracted is incorrect. Reference was made to a decision in ***Ashoka Marketing v. PNB (1990) 4 SCC 406;*** and

- In Gujarat Urja Case has held that the residuary jurisdiction of NCLT under Section 60(5)(c) of IBC, 2016 provides it a wide discretion to adjudicate questions of law or fact arising from or in relation to the insolvency resolution proceedings.

Held by the Hon'ble Supreme Court of India

1. The Hon'ble Supreme Court of India has held that NCLT does not have any residuary jurisdiction to entertain the present contractual dispute which

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has arisen dehors the insolvency of the Corporate Debtor. In the absence of jurisdiction over the dispute, NCLT could not have imposed an ad-interim stay on the termination notice. The Hon'ble Supreme Court of India observed that NCLAT has incorrectly upheld the interim order of the NCLT as under:

> *"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…"*

2. The Hon'ble Supreme Court of India has also issued a note of caution to NCLT and NCLAT regarding the interference with a party's contractual right to terminate a contract.

3. The Hon'ble Supreme Court of India dismissed the present appeal by observing that exercise of the NCLT's residuary powers should be governed by the narrow exception as determined in its judgement of Gujrat Urja Case wherein it was held that:

> *"176. Given that the terms used in Section 60(5)(c) are of wide import, as recognized in a consistent line of authority, we hold that 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 the 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 the corporate debtor. Even more crucially, it cannot even be invoked in the event of a legitimate termination of a contract based on an ipso facto clause like Article 9.2.1(e) herein, if such termination will not have the*

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effect of making certain the death of the corporate debtor. As such, in all future cases, NCLT would have to be wary of setting aside valid contractual terminations which would merely dilute the value of the corporate debtor, and not push it to its corporate death by virtue of it being the corporate debtor's sole contract (as was the case in this matter's unique factual matrix).

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 the corporate debtor, governing the supply of electricity which it generates, it will pull the rug out from under CIRP, making the corporate death of the corporate debtor a foregone conclusion****."*

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Warm Regards,

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