

CASE BRIEFS

March 2021

Supreme Court upheld the jurisdiction of NCLT and NCLAT on matters pertaining to insolvency

Gujarat Urja Vikas Nigam Ltd. v. Mr. Amit Gupta & Ors. [C.A. No. 9241/2019]

10.03.2021

INTRODUCTION:

The instant Appeal before the Supreme Court arises out of the Judgment dated 15.10.2019 passed by the National Company Law Appellate Tribunal (**NCLAT**) whereby the Judgment dated 29.08.2019, passed by passed by the National Company Law Tribunal (**NCLT**) was upheld. In the Judgment dated 29.08.2019, NCLT stayed the termination Gujarat Urja Vikas Nigam Limited (**GUVNL**) of its Power Purchase Agreement (**PPA**) with Astonfield Solar (Gujarat) Private Limited i.e. (**CD/Corporate Debtor**). The said Order dated 29.08.2019 was passed in an application under Section 60(5) of the Insolvency Bankruptcy Code 2016 (**IBC/Code**) by Resolution Professional (**RP**).

GUVNL has challenged Impugned Judgment dated 15.10.2019 of NCLAT on the following two broad grounds:

- (a) NCLT and NCLAT do not possess requisite jurisdiction under IBC to adjudicate on a contractual dispute between GUVNL and CD.
- (b) The Termination of PPA was validly made under Article 9.2.1 (e) and Article 9.3.1 of the PPA.

BRIEF FACTS:

GUVNL and CD entered into a PPA on 30.04.2010, in accordance with which GUVNL had to purchase entire power from CD. The PPA was amended by two Supplementary Agreements dated 07.08.2010 and 13.04.2011, due to increase in the capacity of the Power Plant and change in location.

Article 5.2 of the PPA stated that in case the commissioning of the Power Plant is delayed beyond 31.12.2011, GUVNL shall pay tariff as determined by State Commission for Solar Projects effective on the date of Commissioning of the Plant or tariff provided under Article 5.2 of the PPA.

Post signing of PPA and after attaining financial closure from Power Finance Corporation (**PFC**), CD commissioned two power plants of 1.296 MW and 10.212 MW. The tariff applicable on the said project was INR 9.98 per unit for the first 12 years and INR 7 per unit for next 13 years.

The first major issue arose between July to December 2015. During this period, there was heavy rainfall and floods in the State of Gujarat, due to which the Plant of CD was shut down for two months. The Plant was severely damaged due to the floods, and the generation of electricity was temporarily paused. The plant was generating electricity at 70% of its total generating capacity. During June and July 2017, Gujarat was again affected by floods due to heavy rainfall. The Plant was severely damaged due to the floods. Resultantly, it was only able to operate at 10-15% of its original capacity.

Due to the financial stress caused by the disruptions and damage, the CD was unable to fully service its debt to the Financial Creditors (**FC**).

On 15.02.2018, in terms of Article 8.1 of the PPA, the CD intimated the GUVNL regarding the impact of the rainfall and floods on the Plant, and the

measures adopted by it. The CD requested the GUVNL to treat the letter as a formal communication regarding cause for failure in the performance of the CD's obligations under the PPA and to confirm that this event may be treated as a *Force Majeure* event in accordance with Article 8.1 of the PPA.

In the meanwhile, due to non-service of debt, CD was declared as a Non-Performing Asset (**NPA**) on 04.05.2018 by FC's. Subsequently, a Petition under Section 10 of IBC was filed by CD before NCLT and same was admitted on 20.11.2018. Accordingly, Moratorium under Section 14 of IBC was declared and Interim Resolution Professional (**IRP**) was appointed.

On 01.05.2019, GUVNL issued two default notices to the CD:

- (a) The basis of the First Notice was that under Article 9.2.1(e) of the PPA, the CD was undergoing CIRP under the IBC which amounts to an event of default. GUVNL called upon the CD to remedy this default within 30 days from the date of receipt of the said notice.
- (b) The basis of the Second Notice was that under Article 9.2.1(a) of the PPA, there was a default in the operation and maintenance of the Plant. GUVNL called upon the CD to remedy the O&M default within 90 days from the receipt of the notice.

In May 2019, Promoters of CD filed applications under Section 60(5) of IBC before NCLT and by an Interim Order dated 31.05.2019, NCLT restrained GUVNL from terminating the PPA. Further, NCLT *vide* its final Order dated 29.08.2019 issued the following directions:

- a) Restrained GUVNL from terminating the PPA.

- b) Held that clauses of PPA cannot be placed on a higher pedestal than the provisions of IBC. PPA is an instrument within the meaning of Section 238 of the IBC and in the present instance, the clauses of PPA are inconsistent with the provisions of IBC.

GUVNL, filed an Appeal against the Order dated 29.08.2019 before NCLAT. However, NCLAT *vide* its judgment dated 15.10.2019 dismissed the Appeal and held that:

- a) GUVNL attempted to terminate the PPA on the sole ground that the Corporate Insolvency Resolution Process (**CIRP**) has been initiated for the CD.
- b) It was observed that during the CIRP, The RP has to maintain the CD as a going concern and termination of the PPA would render the CD defunct. Therefore, GUVNL could not terminate the PPA solely on the ground of the initiation of CIRP of the CD, which was supplying power to the appellant during CIRP.

Aggrieved by the Judgment dated 15.10.2019, GUVNL approached the Supreme Court.

RULING:

The Supreme Court framed two issues for determination:

- a) Whether the NCLT/NCLAT can exercise jurisdiction under the IBC over disputes arising from contracts such as the PPA; and
- b) Whether GUVNL's right to terminate the PPA in terms of Article 9.2.1(e) read with 9.3.1 is regulated by the IBC.

Re. Jurisdiction of NCLT on matters of insolvency

The Supreme Court, considering the text of Section 60(5)(c) of the IBC and the interpretation of similar provisions in other insolvency related statutes,

held that NCLT has jurisdiction to adjudicate disputes, which arose solely from, or which relate to, the insolvency of the CD. Merely because a duty has been imposed on the IRP or the RP, does not mean that the jurisdiction of the NCLT is circumscribed under section 60(5)(c) of the IBC. (*Para 64-71 of the Judgment*)

While making the above observation, the Supreme Court directed that for adjudication of disputes that arise *dehors* the insolvency of the Corporate Debtor, the RP must approach the relevant competent authority. In the peculiar circumstances of the present case, since the PPA was terminated solely on the ground of insolvency, NCLT was empowered to adjudicate the dispute under Section 60(5)(c) of the IBC. (*Para 72 of the Judgment*)

Re. Scope of Section 60(5)(c) of IBC

The residuary jurisdiction of the NCLT under Section 60(5)(c) of the IBC provides it a wide discretion to adjudicate questions of law or fact arising from or in relation to the insolvency resolution proceedings. If the jurisdiction of the NCLT were to be confined to actions prohibited by Section 14 of the IBC, there would have been no requirement for the legislature to enact Section 60(5)(c) of the IBC. However, at the same time, the Supreme Court clarified that NCLT cannot exercise its jurisdiction over matters *dehors* the insolvency proceedings since such matters would fall outside the realm of IBC. (*Para 87 of the Judgment*)

Re. Invalidation of ipso facto clauses during insolvency proceedings

The Supreme Court analysed the invalidation of *ipso facto* clauses during pendency of insolvency proceedings in various jurisdictions and it was observed that many jurisdictions follow the US model of legislatively invalidating *ipso facto* clauses to protect the dilution of value of company in debt. (*Para 128 of the Judgment*)

However, it was observed that in India, the invalidation of *ipso facto* clauses is limited till Section 14 of IBC (Moratorium) is in operation. The Supreme Court, in due regard to separation of power envisaged under the Constitution of India, held that question of the validity/invalidity of *ipso facto* clauses is one which the court ought not to resolve exhaustively in the present case. Rather, an appeal in earnest to the legislature was made to provide concrete guidance on this issue, since the lack of a legislative voice on the issue will lead to confusion and reduced commercial clarity. (Para 129-143 of the Judgment)

Re. Right to termination of GUVNL during insolvency proceedings

In the peculiar circumstance of the case, since GUVNL was the sole purchaser of the power from Plant of CD, it was held that termination of the PPA

will have the consequence of cutting the legs out from under the CIRP. (Para 152 of the Judgment)

However, it is clarified that jurisdiction of NCLT under Section 60(5)(c) cannot be invoked in matters where a termination may take place on ground unrelated to the insolvency of the corporate debtor. Even more crucially, it cannot even be invoked in the event of a legitimate termination of a contract based on an *ipso facto* clause like Article 9.2.1(e) herein, if such termination will not have the effect of making certain the death of the corporate debtor. (Para 165 of the Judgment)

In view thereof, the Supreme Court dismissed the Appeal filed by GUVNL and has set aside the termination of the PPA and directed GUVNL to make payment for the electricity procured.

Please find link for Judgment [here](#)



In our opinion, this judgment has made a sweeping remark on the jurisdiction of NCLT/NCLAT in matters relating to insolvency. However, at the same time, much emphasis has been laid on the fact that NCLT/NCLAT cannot usurp jurisdiction of competent authorities over matters de hors the insolvency proceedings.

This Judgment is likely to have a positive effect on the electricity sector as the Distribution Companies, in the past, have resorted to termination of PPAs on account of initiation of insolvency proceedings. Even though, termination being a contractual right, rendered the entire insolvency proceedings, especially in electricity sector, nugatory. However, the Judgment has been delivered in a peculiar situation where the termination would have the death of the generating company as there was only one beneficiary.

Accordingly, this Judgment clearly recognises the need of a clear legislative mandate with respect to operation of ipso facto clauses during insolvency proceeding in order to abide by the objectives of IBC. Even though contractual rights of a party should not ideally be meddled with, the purpose of IBC must not be diluted due to invocation of such ipso facto clauses.

SKV Comment