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NCLAT: TERMINATION OF A PPA DURING SUBSISTENCE OF MORATORIUM IS IN VIOLATION OF THE IBC

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On 24 July 2020, the National Company Law Appellate Tribunal (NCLAT), in its decision in *GRIDCO Limited v Surya Kanta Sathapathy and Others* [C.A. (AT) (Insolvency) 1271 of 2019] (GRIDCO judgement), held that the termination of a Power Purchase Agreement (PPA) during the subsistence of a moratorium would be in violation of Section 14(1) of the Insolvency and Bankruptcy Code 2016 (IBC).

FACTUAL BACKGROUND

As per the factual circumstances, the sole business of the corporate debtor was to supply power to the GRIDCO Limited (Appellant) as per the provisions of a PPA. This arrangement had received approval from the Odisha Electricity Regulatory Commission. The corporate debtor had stopped supplying power to the Appellant in June 2018 due to extreme weather conditions which had damaged the solar power plant. Subsequently, insolvency proceedings had been initiated against the corporate debtor before the NCLT, Kolkata and a moratorium was imposed under Section 14(1) of the IBC in February 2019. However, despite this and with knowledge of the subsisting moratorium and admission of insolvency, the Appellant terminated the PPA in August 2019. Such termination was challenged by the resolution professional before the NCLT, Kolkata. The NCLT *vide* order dated 14 October 2019 (which was the order impugned in the present appeal) held that the termination was in violation of Section 14(1) of the IBC and the PPA was restored.

After the order of the NCLT restoring the PPA, a resolution plan was submitted by the successful resolution applicant, on the basis that the PPA was valid and subsisting, which was approved by the by the NCLT, Kolkata on 25 November 2019. The Appellant had not challenged the order of the NCLT approving the resolution plan but had filed an appeal against the order of the NCLT restoring the PPA. In this background, the NCLAT set aside the termination of the PPA and upheld the order passed by the NCLT, holding, *inter alia*, that such termination pending the moratorium would be in violation of Section 14(1) of the IBC.

OUR COMMENTS AND LEGAL ANALYSIS

At the outset, Section 31(1) of the IBC makes it clear that once a resolution plan is approved by the committee of creditors it shall be binding on all stakeholders, including guarantors. This position of law has been crystallised by the Hon'ble Supreme Court in *Swiss Ribbons Pvt. Ltd. v Union of India* [W.P. (Civil) No. 99 of 2018] and subsequently in *Committee of Creditors of Essar Steel India Limited v Satish Kumar Gupta* [C.A. No. 8766-67 of 2019]. In this factual background, given that the order of NCLT approving the resolution plan had attained finality, giving effect to the termination of the PPA would render the approval of the resolution plan infructuous.

It is also important to note the scope of Section 14 of the IBC which provides for the declaration of a moratorium once insolvency has been admitted against a corporate debtor.

As per Section 14(1), such moratorium includes, *inter alia*, a prohibition on the institution or continuation of legal proceedings against the corporate debtor and the transfer, creation of encumbrance, alienation or disposal of any assets, legal rights or beneficial interests. Such moratorium is imposed with a view to aid the revival of the corporate debtor.

Further, Section 238 of the IBC provides that the provisions of the IBC 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. In another case pertaining to the termination of a PPA, the NCLT, New Delhi, in *Astonfield Solar (Gujarat) Private Ltd v Gujarat Urja Vikas Nigam Limited*, [C.A. 700-701/ND/2019] while interpreting the scope of "instrument" under Section 238 of the IBC concluded that a PPA is an "instrument" for the purpose of Section 238 of IBC and consequently, any terms of the PPA in direct contravention of the IBC could not be enforced. In the said case, the PPA had been terminated on the sole ground that of the initiation of the corporate insolvency resolution process (CIRP) against the corporate debtor (which was an event of default under the PPA) and their failure to rectify such default within 30 days from having received a notice of such default. The NCLT was of the view that giving effect to such termination of the PPA would reduce the statutory period that was available for completion of the CIRP from 330 days to 30 days. The NCLT therefore set aside the termination of the PPA on such ground which was in direct contravention of the IBC, in view of Section 238 of the IBC. The NCLAT upheld the decision of the NCLT, in an appeal filed from the said order [*Gujarat Urja Vikas Nigam Ltd. v Amit Gupta*, C.A. (AT) (Insolvency) No. 1045 of 2019], while acknowledging that the subsistence of the PPA as also imperative to ensure that the corporate debtor was kept as a going concern.

In view of the interpretation accorded by the NCLT in *Astonfield Solar (Gujarat) Private Ltd v Gujarat Urja Vikas Nigam Limited* to an "instrument" under Section 238 of the IBC read with the decision of the NCLAT in its decision in the GRIDCO judgement, it may be concluded that Section 14(1) of the IBC would have effect notwithstanding the provisions of the PPA. Consequently, even if the termination was in terms of the PPA, the same would be in violation of Section 14(1) of the IBC, once insolvency had been admitted against the corporate debtor, given that the purpose of the CIRP is the revival of the corporate debtor.

In this background, keeping in mind the basic objective of the IBC, being, *inter alia*, the maximisation of value of assets of the corporate debtor and the fact that the sole business of the corporate debtor was to supply power to the Appellant, the termination of the PPA by the Appellant during insolvency proceedings would have rendered the CIRP redundant. Therefore, the termination of the PPA by the Appellant, during the subsistence of the moratorium was found to be in violation of Section 14(1) of the IBC, notwithstanding the fact that the corporate debtor had been unable to supply power in terms of the PPA. In *GRIDCO*, the NCLAT appears to have further strengthened its approach to dealing with insolvency matters by favouring the alternative that allows keeping the corporate debtor as a going concern, while adopting a purposive interpretation of Section 14(1) of the IBC.

Note: *Khaitan & Co represented the successful resolution applicant, Fortis Chemicals Private Limited in the above matter before the NCLAT.*

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