

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal (AT) (Insolvency) No. 237 of 2020

(Arising out of Order dated 18th December, 2019 passed by National Company Law Tribunal, Mumbai Bench in M.A. No. 2954/2019 in Company Petition (IB) 4301 (MB)/ 2018)

In the matter of:

Tata Consultancy Services Limited

With its Corporate Office at
TCS House, Raveline Street, 21
D.S. Marg, Fort, Mumbai- 400001.

....Appellant

Vs.

Vishal Ghisulal Jain

Resolution Professional,
S.K. Wheels Private Limited,
Office No. 502, G Square Business Park,
Opp. Sanpada Station, Sector 30-A,
Vashi, Navi Mumbai- 400703

...Respondent

Present

**For Appellant: Ms. Foreshte D. Sethana, Mr. Suman Yadav
and Ms. Aditya Sareen, Advocates.**

For Respondent: Ms. Soumya Salkumar, Advocate.

J U D G M E N T
(24th June, 2020)

KANTHI NARAHARI, MEMBER (T):

1. The present Appeal arises against the Order dated 18th December, 2019 passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench) in Miscellaneous Application No. 2954 of 2019 in C.P. (IB) 4301(MB) of 2018.

2. The Learned Counsel appearing for the Appellant submitted that the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench) admitted the company petition bearing CP (IB) 4301 (MB) 2018 and vide Order dated 29th March, 2019 whereby, the CIRP proceedings initiated against the 'Corporate Debtor', namely, S.K. Wheels Private Limited. It is submitted that the Appellant is a leading Global Information Technology Company. Whilst, a facilities agreement dated 1st December, 2016 (Facilities Agreement) was entered into with 'Corporate Debtor' i.e. S.K. Wheels Private Limited, to avail services from the 'Corporate Debtor', in the nature of facilities, namely premises, computers, internet, broadband connection, air conditioners, furniture, staff for invigilation, housekeeping, maintenance, etc. to enable conduct of examinations deploying National Technology Infrastructure for the Appellant's clients.

3. It is submitted that the 'Corporate Debtor' failed to remedy contractual breaches, thereby, a notice of termination dated 10th June, 2019 issued by the Appellant in terms of Clause 11(b) of the Facilities Agreement.

4. It is submitted that the Respondent, herein, the 'Resolution Professional' filed an M.A. No. 2954 of 2019 dated 28th August, 2019, before the Adjudicating Authority (NCLT- Mumbai) seeking inter-alia to stay of the termination notice issued by the Appellant. The Adjudicating Authority by an Order dated 18th December, 2019 in the

above M.A. was pleased to grant interim stay of the termination notice issued by the Appellant.

5. The Learned Counsel for the Appellant submitted that the Appellant is aggrieved by the Order of the Adjudicating Authority dated 18th December, 2019 on the ground that the Adjudicating Authority failed to appreciate the arbitration agreement contained in Clause 12(d) of the Facilities Agreement, and failed to appreciate that a valid notice of termination was issued by the Appellant. The Adjudicating Authority failed to appreciate that the notice of termination was not in contravention of Section 14 of the Insolvency & Bankruptcy Code (in short I&B Code). In view of the submissions as made above the Learned Counsel for the Appellant sought direction to set aside the Impugned Order dated 18th December, 2019 passed in M.A. No. 2954 of 2019.

6. The Learned Counsel for the Respondent filed a detailed reply and submitted that the Corporate Debtor i.e. the S.K. Wheels Private Limited had entered into a build phase agreement dated 24th August, 2015. Consequently, the parties entered into a Facilities Agreement dated 1st December, 2016. The Learned Counsel submitted that in terms of the agreement the 'Corporate Debtor' was under the obligation to inter-alia fit the premises with the materials as per specification mentioned in the agreement and provide certain facilities. There were certain routine operational requirements which were pointed out from time to time by the Appellant to the 'Corporate

Debtor”. Those requirements were rectified within a reasonable time frame. It is not out of place to mention that the Appellant addressed a letter dated 11.10.2018 alleging certain deficiencies in services. A meeting between parties was held whereby all the issues were taken note of and remedied by end of October, 2018. Further, the Appellant on 19.11.2018 intimated the ‘Corporate Debtor’ that due to inefficient number of housekeeping staff, the Appellant was keeping the housekeeping staff from their end and the amount incurred would be deducted from the invoice of the Appellant. It is submitted that all the deficiencies were cured at the cost of the Corporate Debtor. It is submitted that the Corporate Insolvency Resolution Process (in short CIRP) against the Corporate Debtor was initiated on 29th March, 2019, the Appellant itself states that it allegedly became aware when the electricity was disconnected sometime in April 2019, which was due to non-payment of electricity charges during CIRP and was eventually restored. It is submitted that certain meetings were held in April and May, 2019, whereby, the Interim Resolution Professional intimated the Appellant that no prejudice would be caused to the Appellant and all the services and facilities would be provided as contained in the agreement. The Learned Counsel further submitted that the Appellant issued termination notice as per the Clause 11(b) of the Agreement, however, the same is not in accordance with the said clause. As per the above Clause, a 30 days’ notice needs to be given in the event of any material breach by either party. However, no notice was received by the ‘Corporate Debtor’

except the termination notice dated 11.06.2019. The Learned Counsel submitted that they have filed an application before the Adjudicating Authority seeking directions to the Appellant to continue the Facilities Agreement dated 01.12.2016, and staying of termination of Facilities Agreement dated 01.12.2016 till the expiry of Corporate Insolvency Resolution Process. After hearing the parties, the Adjudicating Authority by Order dated 18th December, 2019 stayed the termination notice and directed the Appellant to adhere to the terms of contract without fail.

7. Heard the Learned Counsel appeared for the respective parties perused the pleadings documents filed in their support. This Tribunal by Order dated 07.02.2020 when this appeal was filed and after hearing the parties passed the following order: -

“Resolution Professional will provide the same facilities to the Appellant-Tata Consultancy Services Limited in terms of the Agreement to keep the ‘Corporate Debtor’ as a going concern.

In mean time it will be open to the Resolution Professional to proceed with the Corporate Insolvency Resolution Process in accordance with law and any action shall be subject to the decision of this Appeal.”

8. It is not in dispute with the appellant and the 'Corporate Debtor' entered the build phase agreement dated 24.08.2015 (Annexure- A-2, Page- 30) and the Parties have signed the said agreement. In continuation of the said agreement, the Appellant and the Corporate Debtor had entered Facilities Agreement dated 1st December, 2016 signed by both the parties. Clause 11 stipulates the termination of the Facilities Agreement which is reproduce herein.

11(b): Termination for material breach:- Either party may terminate this agreement immediately by a written notice to the other party in the event of a material breach which is not cured within 30 days of the receipt of the said notice period.

As per the termination clause it is mandatory to issue notice to the party in the event of a material breach and if the same is not cured.

9. The Learned Counsel for the Respondent submitted that they had not received any notice asking to cure the material breach and the notice was without complying the said clause the notice for termination was issued. On the other hand, the Learned Counsel for the Appellant submitted that the Appellant noticed the material breaches of obligations by the Corporate Debtor including deployment of personal lacking requisite level of scale, non-adherence of design guidelines, non-replacement of furniture and air conditioners etc. The Learned Counsel contended that the Appellant issued multiple

notices seeking remedying of such breaches, however, the Corporate Debtor failed to remedy the contractual breaches which led to issue and serve termination notice. Prima-facie as sated (Supra) the Learned Counsel for the Respondent submitted that they have cured all the deficiencies and the termination notice after the initiation CIRP (Corporate Insolvency Resolution Process) is against the main object of the Code.

10. Admittedly, the CIRP process was initiated on 29th March, 2019 against the ‘Corporate Debtor’. The termination notice is subsequent to the admission of the initiation of the CIRP. In this Appeal the limited question is whether the order passed by the Adjudicating Authority staying the termination notice is legal or not. Therefore, we are confined to the limited question whether the order passed by the Adjudicating Authority staying the termination notice is legal or not. Before deciding the said issue, we have to look into the legal position. In the present case admittedly, moratorium was imposed as per Section 14(1) of the I&B Code 2016. Sub Section (1) reads thus:-

....

“14(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 judgement, 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.*

...

It is evident from the Order dated 29th March, 2019 of the Adjudicating Authority the application under Section 7 IBC was admitted and prohibited the transactions as contemplated under

above Provision. Following is the operative portion of the Impugned Order which reads under:

...

“7. This Adjudicating Authority, on perusal of the documents filed by the Creditor, is of the view that the Corporate Debtor defaulted in repaying the loans availed and also placed the name of the Insolvency Resolution Professional to act as Interim Resolution Professional to act as Interim Resolution Professional and there being no disciplinary proceedings pending against the proposed resolution professional, therefore the Application under sub-section (2) of Section 7 is taken as complete, accordingly this Bench hereby admits this Petition prohibiting all of the following of item-I, namely:

- (I) (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 (SARFAESI Act);

(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.

(II) That the supply of essential goods or services to the Corporate Debtor, if continuing, shall not be terminated or suspended or interrupted during moratorium period.

(III) That the provisions of sub-section (1) of Section 14 shall not apply to such transactions as may be notified by the Central Government in consultation with any financial section regulator.

(IV) That the order of moratorium shall have effect from 29.03.2019 till the completion of

the corporate insolvency resolution process or until this Bench approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of Corporate Debtor under section 33, as the case may be.

(V) That the public announcement of the corporate insolvency resolution process shall be made immediately as specified under section 13 of the Code.

(VI) That this Bench hereby appoints Mr. Vishal Ghisulal Jain, B03/7/1-2, Section- 15, Vashi, Navi Mumbai- 400703, Email:- vishal@cavishaljain.com, having Registration No. IBBI/IPA-001/IP-P00419/2017-18/1072 as Interim Resolution Professional to carry the functions as mentioned under Insolvency & Bankruptcy Code.”

...

From the order it is seen that the Respondent herein was appointed as Interim Resolution Professional (in short IRP) to carry out the functions as per law. In view of Section 14 once a moratorium was imposed by the Adjudicating Authority and on appointment of Interim Resolution Professional the Interim Resolution Professional

will be at the helm of affairs of the company in view of the suspension of the Board of Directors of the 'Corporate Debtor'. As on the date of the imposition of moratorium the business and activities of the 'Corporate Debtor' will have to be carried out for smooth functioning of the company and the company shall remain as a going concern. Apart from that the Resolution Professional shall ensure for smooth running of the company as a going concern and the Resolution Professional shall perform the duties as per Section 25 of the I&B Code. Sub- Section (2)(a) of Section 25, the Resolution Professional take immediate custody and control of all the assets of the Corporate Debtor, including the business records of the Corporate Debtor. Further sub-section 2 (b) of Section 25 of the I & B Code states that

...

“(b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi- judicial or arbitration proceedings;”

...

Further, the said provision sets out the duty of Resolution Professional to preserve and protect the assets of the 'Corporate Debtor' and lays down the functions he may perform the same. In view of the duties cast upon the Resolution Professional, the Resolution Professional to keep the Corporate Debtor as a going concern and filed an application being C.A. (M.B.)- 2954 of 2019 before the Adjudicating Authority seeking stay of termination of notice

and sought direction to the Appellant to continue the Facilities Agreement dated 01.12.2016.

11. The Adjudicating Authority after hearing the parties stayed the termination of notice and directed the Appellant herein to adhere to the terms of contract without fail. In view of the law, after initiation of the CIRP the 'Corporate Debtor' shall function and continue its business activities. It is the duty of the Resolution Professional to keep the Corporate Debtor as a going concern. It is the main objective of the Code to keep the Corporate Debtor as a going concern. The Adjudicating Authority rightly stayed the termination of notice and there is no illegality in the Order passed by the Adjudicating Authority dated 18.12.2019.

12. We find there is no substance in the Appeal. Accordingly, the Appeal is disposed of. No orders as to costs.

[Justice A.I.S. Cheema]
Member (Judicial)

[Justice Anant Bijay Singh]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

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