



SL. No.2

**NATIONAL COMPANY LAW TRIBUNAL  
HYDERABAD BENCH  
COURT HALL NO: II**

**Hearing Through: VC and Physical (Hybrid) Mode**

**CORAM: SHRI. RAJEEV BHARDWAJ, HON'BLE MEMBER (J)**

**CORAM: SHRI. SANJAY PURI, - HON'BLE MEMBER (T)**

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL,  
HYDERABAD BENCH, HELD ON 06.11.2024 AT 10:30 AM**

<b>TRANSFER PETITION NO.</b>	
<b>COMPANY PETITION/APPLICATION NO.</b>	<b>IA (IBC)/638/2024, IA (IBC)/784/2024 in CP(IB) No.492/7/HDB/2019</b>
<b>NAME OF THE COMPANY</b>	<b>KSK Mahanadi Power Company Ltd</b>
<b>NAME OF THE PETITIONER(S)</b>	<b>Power Finance Corporation</b>
<b>NAME OF THE RESPONDENT(S)</b>	<b>KSK Mahanadi Power Company Ltd</b>
<b>UNDER SECTION</b>	<b>7 of IBC</b>

**ORDER**

**IA(IBC)/638/2024**

Orders pronounced, recorded vide separate sheets. In the result, this application is dismissed.

**IA(IBC)/784/2024**

Orders pronounced, recorded vide separate sheets. In the result, this application is dismissed.

**Sd/-**  
**MEMBER (T)**

**Sd/-**  
**MEMBER (J)**



**NATIONAL COMPANY LAW TRIBUNAL  
HYDERABAD BENCH - II**

**IA No. 784 of 2024 in IA No.638 of 2024**

**&**

**IA No.638 of 2024**

**in**

**CP (IB) No. 492/7/HDB/2019**

*[U/s. 60(5) of IBC, 2016 r/w Rule 11 of NCLT Rules, 2016]*

**In the matter of M/s. Power Finance Corporation Limited vs. M/s. KSK  
Mahanadi Power Company Limited**

**Mr. Sumit Binani,**

**Resolution Professional of M/s.KSK Mahanadi Power Company Limited,**

Having its registered address at 8-2-293/82/A/431/A,

Road No.22, Jubilee Hills, Hyderabad - 500033

...Applicant

Vs.

**1. Water Resources Department,**

**The Executive Engineer,**

The Office of Executive Engineer,

Government of Chhattisgarh, Raipur – 492101

...Respondent No.1

**2. The Principal Secretary,**

**Office of Principal Secretary of WRD,**

Government of Chhattisgarh,

Mantralaya, Mahanadi Bhawan,

Atal Nagar, Nava Raipur, Raipur – 492101

... Respondent No.2

**Date of Order: 06.11.2024**

**Coram:**

Hon'ble Sri Rajeev Bhardwaj, Hon'ble Member (Judicial)

Hon'ble Sri Sanjay Puri, Hon'ble Member (Technical)



**Parties / Counsels Present:**

For the Applicant : Mr. S.R. Rajagopal, Senior Counsel along  
with Mr. Allwin Godwin, Ms. Niranjana  
Pandian, Mr. Vishrut Kansal and  
Ms. Snigda Saraff, Advocates

For the Respondent Nos.1 & 2 : Mr. Atul Jha, AAG

**[Per: Rajeev Bhardwaj, Member (Judicial)]**

**ORDER**

1. Both IA No.784 of 2024 in IA No.638 of 2024 and IA 638/2024 are being taken up together for decision as they are interlinked and interconnected.
2. In the IA No.638 of 2024, the Applicant has prayed for the following reliefs:
  - a. To pass an order restraining/prohibiting the Respondents from taking any coercive action against KSK Mahanadi Power Company Limited, including suspension/termination/interruption of water supply from the Mahanadi River to the power plant of KSK Mahanadi Power Company Limited;
  - b. To pass an order directing the Respondents to reconcile the demand with KMPCL, such that the Respondents cannot take any coercive or recovery action against KMPCL for Pre-ICD demand (for which, Respondent No.1 has filed its claim and that remains subject to its treatment under the Code) and further that there is no Post-ICD demand remaining outstanding against KMPCL;



- c. To pass an order directing the Respondent No.1 to refund the excess amounts aggregating to INR 37.86 crore (as on 31 January 2024), that have been remitted by KMPCL during CIRP, or to adjust the same against future dues to following months for actual water drawl by KMPCL from Mahanadi River – Basantpur Barrage during CIRP of KMPCL;
  - d. To pass an order quashing/setting aside the Letter dated 21.02.2024 issued by the Respondent No.1 to the extent it threatens suspension of critical supply of water to KMPCL;
  - e. To pass an order directing the Respondents to provide all co-operation and support to the Applicant in conducting CIRP of KMPCL and preserving the assets of KMPCL, and critical supply of water to KMPCL; and
  - f. Pass any order granting such further and other reliefs as this Ld. Adjudicating Authority deems fit and as the nature and circumstances of the present case may require.
3. In the IA No.784 of 2024, the prayers of the Applicant are as below:
- a. To pass an interim stay on any coercive action that the Respondents may take during the pendency of the present application pursuant to letters dated 21.02.2024 and 05.03.2024 issued by the Respondent No.1, including suspension/termination/interruption of water supply from the Mahanadi River to the power plant of KSK Mahanadi Power Company



Limited, pending disposal of IA No.638 of 2024 in CP (IB) 492/07/2019 on the file of this Hon'ble Tribunal;

- b. To pass an order restraining/prohibiting the Respondents from levying any penalty or excess amounts from KMPCL during CIRP and pending disposal of IA No.638 of 2024 in CP (IB) 492/07/2019 on the file of this Hon'ble Tribunal;
- c. Pass any order granting such further and other reliefs as this Ld. Adjudicating Authority deems fit and as the nature and circumstances of the present case may require.

4. **Case of the Applicant:**

- i. M/s.KSK Mahanadi Power Company Limited (**Corporate Debtor**) is a Thermal Power Generating Company incorporated under the Companies Act, 2013. The Corporate Debtor entered into Power Purchase Agreements with TANGEDCO (Tamil Nadu), UP Discoms (Uttar Pradesh) and CSPDCL (Chhattisgarh) for the supply of power to three States.
- ii. For generation of power, two associate companies of the Corporate Debtor were established, namely, M/s.KSK Water Infrastructures Power Limited ("**KSK Water**") for transportation of water from Mahanadi River to the power plant and Raigarh Champa Rail Infrastructures Private Limited ("**RCRIPL**") for rail transportation services of coal to the power plant.



- iii. Accordingly, Memorandum of Understanding dated 15.02.2008 was entered into between the Government of Chhattisgarh (“GoCG”), KSK Energy Ventures Limited (“KSKEVL”) and Wardha Power Company Limited (“WPCL”) for establishing and operating a 1750 MW coal based Thermal Power Plant in the State of Chhattisgarh.
- iv. The Water Resources Department, Bilaspur (“WRD”) granted approval to use 73 Million MCM water for the project from Mahanadi river and when the capacity of the project was allowed to increase to 3600 MW, permission to use extra 27 MCM water was also granted.
- v. On 13.08.2009, the Government of Chhattisgarh, WPCL and KSKEVL entered into an Implementation Agreement, **Annexure A-6**. On 26.02.2010, the Hon’ble High Court of Andhra Pradesh approved Scheme of Arrangements vide **Annexure-9** whereby the WPCL was demerged into KMPCL.
- vi. In consequence of permission granted for the use of 100 (73 and 27) MCM water, the CD was allowed temporal withdrawal of 17.52 MCM water from Mahanadi river for one unit of 600 MW till the construction of Basantpur barrage.
- vii. The CD entered into a formal agreement in Form 7A, **Annexure A-13** dated 20.10.2014 with the Governor of Chhattisgarh to draw 17.52 MCM water from the Mahanadi river to run one unit of 600 MW. This permission was granted till completion or start of first



storage i.e Basantpur barrage at the rate of Rs. 10.50 per cubic meter/  
per unit.

- viii. The CD was informed vide letter dated 13.10.2017 that the Basantpur barrage has been completed and therefore long term agreement was required to be executed and accordingly the agreement dated 20.10.2014 stood terminated.
- ix. It is claimed that the long term agreement could not be executed because of the issue of re-shuffling of water (i.e., adjustment of quantum of allocation of water between reservoirs based on non-summer and non-monsoon seasons) was under process with the government. Despite this, the WRD wrote a letter **Annexure-A14** dated 22.11.2018 that billing of water drawl will be raised for 100 MCM and in absence of a valid contract, water duty shall be charged at 3 times.
- x. The CD wrote a letter **Annexure A-15** dated 04.12.2018 wherein KMPCL inter alia stated: (a) penal rate has been imposed on KMPCL for unauthorized lifting of water, (b) amounts paid by KMPCL as advances towards construction of barrages at Basantpur and Seorinarayan be adjusted and agreement for meeting the water requirements entirely from Basantpur barrage. On the same day, the WRD asked the CD to enter into an agreement after the expiry of the earlier agreement.



- xi. In the meanwhile, the CD was admitted into CIRP on 03.10.2019 in the Company Petition No. 492/7/HDB/2019 under Section 7 of IBC filed by one of the Financial Creditors i.e., Power Finance Corporation Limited. As per the books of accounts of CD, an amount of Rs.25.89 crores remained pending from KMPCL to the Respondent No.1, but the WRD filed a claim of Rs.757.97 crore.
- xii. During the pendency of the CIRP, the WRD raised water bill every month at 3 times of the actual water drawl by KMPCL. However, the Applicant who is the RP of the CD is liable to pay only for the actual water drawl amount and not at three times of the actual rate.
- xiii. The Applicant received letters dated 21.02.2024 and 05.03.2024 from the Respondent No.1 for the payment of the arrears. In response, the Applicant sent reply that payments have been made and further that out of total demand of Rs.698.58 crores, the Applicant had already paid Rs.493.58 crores.
- xiv. The Applicant has further pleaded that he is not liable to pay the penalty which is 2 times more than the actual rate. Such imposition is unauthorised, illegal and arbitrary. Until the long term agreement is executed, withdrawal of water by the CD cannot be termed as unauthorised usage of water and till then the parties are bound by agreement dated 20.10.2014. The stoppage of water drawl services to the CD would be in contravention of moratorium under Section 14 of IBC and in hindrance of the duty of the Applicant to maintain the CD as a going concern. In this regard, reference is made to Sections 14, 17 and 23 and further decision of Hon'ble Supreme





Court in *Swiss Ribbons Private Limited & Anr. V. Union of India & Ors. (2019) 4 SCC 17* and *Gujarat Urja Vikas Nigam Limited v. Amit Gupta and Ors. (2021) 7 SCC 209*.

- xv. The Respondent No.1 has already filed its claim of Rs.493.58 crores with respect to Pre-CIRP dues which shall be dealt with in accordance with the provisions of IBC. On this point, the Applicant has relied upon the decision of Hon'ble Supreme Court in *Chitra Sharma and Ors. v. Union of India Ors. 2018 SCC Online SC 874*. Therefore, the Applicant cannot be forced to make payment for purported liabilities incurred prior to the commencement of the CIRP.
- xvi. It is submitted that any excess demand during the CIRP is in the nature of penalty which cannot be treated as Insolvency Resolution Process Costs. The CD cannot be asked to bear penalty or pay any amount other than for the actual rate of Rs.10.50 per cubic meter/per unit, which is towards actual quantity of water drawn by the CD during CIRP.
- xvii. The Applicant has also placed reliance on the provisions of Section 14 and 238 of the IBC along with the decision in *Principal Commissioner of Income Tax v. Monnet Ispat and Energy Limited (2018) 18 SCC 786* that the demand of the Respondents is in violation of IBC.



5. **Case of the Respondent No.1:**

- i. The CD was allowed to draw 2000 cubic meter of water per hour from the water resources of Respondent No.1 at the rate of Rs.10.50 per cubic meter/per unit, till the completion or start of the Basantpur barrage. The said permission was granted subject to the provisions of the Chhattisgarh Irrigation Act, 1931 and any executive orders issued on behalf of the Government. The Basantpur barrage was completed in 2016 and accordingly, the CD was informed and requested on 13.10.2017 to enter into a long term agreement. The CD was reminded again, vide letters dated 22.11.2018, 13.07.2018, 13.11.2018, 11.08.2018 & 04.12.2018. It is claimed that as the arrangement was temporary, the CD was bound to execute the long term agreement in view of the agreement executed on 20.10.2014 and various letters written by the Respondents to the CD regarding drawl of water from Mahanadi river till the completion of Mahanadi barrage.
- ii. When the Applicant failed to enter into long term agreement, the Respondent No.1 was within its right to charge the drawl of water at higher rate in accordance with Sections 40 and 44 of the Chhattisgarh Irrigation Act, 1931 and Rules 71 and 73 of the Chhattisgarh Irrigation Rules, 1971.
- iii. In view of violations of terms and conditions of the Agreement, this Authority has no jurisdiction to interfere with the contractual rights of the parties. In this regard, the Respondents have also referred to



the decisions of the Hon'ble Supreme Court in *Tata Consultancy Services Ltd. vs Vishal Gisulal Jain, Resolution Professional, SK Wheels Pvt. Ltd. Civil Appeal No.3045 of 2020 dated 23.11.2021* and *Gujarat Urja Vikas Nigam Limited v. Amit Gupta and Ors. (2021) 7 SCC 209*.

- iv. It is submitted that executing Loan Term Agreement is not a formality and further it will not alter/hinder moratorium under Section 14 of the Act. The supply of water by the Respondents to the CD does not fall within the purview of the essential goods and services but it is a direct input to the output produced by the CD, which is electricity. The water in the instant case is not for drinking or sanitation purpose but for enabling generation of the electricity to be sold by the CD. Respondents have also relied upon the decisions in *Uttar Gujarat Vij Company Ltd vs. Mr. Devang Sampat, RP of M/s. Kanoovi Foods Pvt. Ltd. dated 27.05.2021 in Company Appeal (AT) (Ins.) No. 371 & 372 of 2021 and Civil Appeal No.4098-4099 of 2022 decided on 13.06.2022 by the Hon'ble Supreme Court*.
- v. The CD is bound to pay charges at higher rate after the expiry of the agreement and accordingly, the Applicant cannot claim to stop the Respondents from recovering dues on the plea that it will become part of Insolvency Resolution Process Costs.
- vi. The jurisdiction of this Authority as per Section 60 (5) of the IBC is only in relation to matters arising out of the Insolvency Resolution Proceedings. However, the present dispute dehors the insolvency of the CD. The CD was required to execute the Long Term Agreement



after the expiry of the Temporary Agreement on the construction of the Mahanadi barrage in the year 2017. Therefore, there is no link between the present dispute with the insolvency resolution process. Here, the Respondents also placed reliance on the decisions in *Gujarat (Supra)* and *Tata Consultancy (Supra)*.

xviii. It is submitted that the Applicant has erroneously dealt with the pre and post CIRP in complete disregard to the rules of law. It is submitted that the pre and post CIRP dues are to be calculated at the rate of Rs.31.50 per cu m from November 2018. The proposed calculation by the Applicant is against the mandate of law. The amount received from the Applicant is utilized for the welfare of the Society and such unauthorised use of water will also impact the arrangement of water circulation in the State. Hence, the drawl of the water has to be calculated at the rate of Rs.31.50 per cu m instead of Rs.10.50 per cubic meter/ per unit.

6. We have heard the Ld. Counsel for both the parties and have also gone through the entire records including written submissions filed by the parties.
7. For establishing 1750 MW coal based Thermal Power Plant, the Government of Chhattisgarh, M/s. KSK Energy Ventures Pvt Limited and M/s. Wardha Power Company Pvt Limited executed Memorandum of Understanding, **Annexure A-1** dated 15.02.2008. The state of Chhattisgarh was to supply water from the Mahanadi river for the said project. Accordingly, the State of Chhattisgarh granted approval for the drawl of 73.00 cubic meter water from Mahanadi river to M/s. KSK Energy



Ventures Ltd and M/s.Wardha Power Co. Pvt. Ltd vide letter, **Annexure-A2**, dated 23.06.2008 subject to construction of two anicuts and further certain other conditions. The relevant conditions are reproduced as below:

- 9. Before starting to utilize water, institute has to take prior approval/instruction in standard format – 7(A) form Chief Engineer, Hasdev Kachar Water Resource Division Bilaspur.*
  - 10. Institute has to compulsory pay the water tax on water rate and commitment charges for industrial use from government source as decided by the government time to time and it is obligatory to execute the commitment charge as per the government letter dated 20.04.2007.*
  - 12. As per commitment charges by the government in the letter dated 20.04.2007, the institute after receiving approval has to withdraw water within 4 years. If the institute is unable to draw water within this period, then a maximum extension period of 2 years can be allowed for which an extra commitment charges of 5% of total approved quota of water for 1<sup>st</sup> year and 10% for 2<sup>nd</sup> year of water tax has to deposit at the end of respective year within 3 months. Even after depositing extra commitment charges for 2 years delay, if the institute is still unable to withdraw water and incapable to oblige the above conditions then water allotment approval will stand cancel with immediate effect of its own and government will be free to allot/reserve the water to any other organization for use.*
8. The capacity of the power plant was enhanced from 1750 MW to 3600 MW and the Government on its part has also allowed additional 27 cubic meter of water vide **Annexure A-4** dated 29.07.2009 and **Annexure A-5** dated 30.07.2009. The two anicuts to be constructed at the expenses of the CD were Seorinarayan barrage and Basantpur barrage. After all the formalities were completed, the parties executed Implementation Agreement, **Annexure A-6** dated 13.08.2009.



9. The present CD became the exclusive Company for generating the electricity by virtue of the Order vide **Annexure A-9** dated 26.02.2010 as the Wardha Power Company Limited was demerged into M/s.KSK Mahanadi Power Company Limited.
10. The Respondents temporarily allowed drawl of 2000 cubic meter of water from Mahanadi river for the operation of one unit of 600 MW till the construction of the Basantpur barrage at the rate of 17.52 MCM per hour vide **Annexure A-11** dated 12.07.2013 on the conditions which we have already been detailed above in relation to **Annexure A-2**.
11. Finally, Form 7A **Annexure- A13** dated 20.10.2014 was executed between the Government of Chhattisgarh and the CD granting permission to draw 2000 cubic meter water from Mahanadi River to run one unit of 600 MW. The conditions which are relevant in the present context are reproduced as below:
  1. *In consideration of the Company duly making payment to the Government as hereinafter specified and duly observing and performing the covenants and conditions, both herein contained Government hereby give permission to the Company to draw 2000 cubic meter of water per hour (17.52 million cubic meter per annum temporarily) from the said natural or Government water source to the Company's said plan till completion or start of first storage in Basantpur Barrage on the terms and conditions herein contained. The permission hereby granted shall be subject to the provisions of Chhattisgarh irrigation Act 1931 (3 of 1931) and any executive orders issued in this behalf by the Government from time to time and for the time being in force.*
  2. *The company shall pay to the Government water rates for water drawn by it from said natural or Government water sources at the rates fixed by Water Resources Department No.3843/7-ए/ज.सं./त.शा./औजप्र /०2/डी-4, dated 31.05.2010 which is Rs.10.50 (Rupees ten and paise fifty only) per cubic meter/ per unit.*



*20. On the expiry of term of this agreement, Government may renew this agreement for such further period and on such terms and conditions, as the Government may in its absolute discretion deem fit.*

12. Therefore, it is clear that the CD was to temporarily draw water directly from the Mahanadi river till the completion of the Basantpur barrage subject to the provisions of the Chhattisgarh Irrigation Act and any executive orders issued by the State Government.
13. The Basantpur barrage was completed in 2016 and the CD was intimated about this vide **Annexure A-2**, dated 13.10.2017 of the counter. The Applicant has also admitted that the Basantpur barrage was completed and the CD was accordingly informed.
14. Dispute started between both the parties after the completion of the Basantpur barrage because the CD did not enter into long term agreement which was the condition precedent for giving further permission to draw water from the Mahanadi river to the CD.
15. The consequences for not entering into the fresh agreement after the construction of the Basantpur barrage are that the drawl of water from the Mahanadi river would become unauthorised and illegal. Section 44 of the Chhattisgarh Irrigation Act, 1931 contains express provisions for unauthorised use of water. Rule 73 of the Chattisgarh Irrigation Rules, 1971 framed under the Chhattisgarh Irrigation Act, 1931 says as how water exceeding five Mcft for more than one year for purposes other than irrigation can be used by executing agreement in Form 7. Rule 73 provides that charges for unauthorized use of water shall be 3 times of actual rate and the relevant rule is reproduced as below:



*73.(1) The charge for water which has been used in any unauthorised manner, otherwise than, on cultivated land shall be made at thrice the volumetric rate fixed under section 37 read with section 39 or under section 40 as the case may be.*

16. Therefore, it is clear that the State Government of Chhattisgarh is fully competent to enhance the charges for unauthorised use of water at 3 times of the actual charges. However, the Respondents have given such bills from November 2018 instead of from 03.10.2019. There is clear distinction between Pre CIRP and Post CIRP dues. It is settled law that Pre CIRP dues cannot be recovered because of moratorium under Section 14 of the IBC.
17. Before adverting to the objections/counter-objections raised about legality of the demand for payment of the water charges at a higher rate, it is to be noted that since the Applicant came in control of the affairs of the CD, he did nothing to resolve the matter by executing fresh agreement, despite knowing well that water supply is lynchpin for the sustainability of the project. However, he sat over the matter and recently started dilly dallying by playing the blame game.
18. Coming to the contention of the Ld. Counsel for the Applicant that the charges demanded by the Respondents are not dues but penalty and therefore it is hit by Section 14 of the IBC, it is already explained that when the agreement was not executed as per the contract, the Respondents were within their right to charge at a higher rate within the parameters of law.
19. The Respondents have invoked the provisions of Chhattisgarh Irrigation Act, 1931 to charge three times the rate already fixed. This is not penalty but the higher rate of charge because of inaction or misfeasance on the part of the Applicant in not adhering to the contractual obligations of the CD.





Section 14 of the IBC is the pivot around which the entire controversy revolves, but the Applicant cannot take use it as shield to avoid contractual obligations.

20. Section 14 of the Code provides for a moratorium commencing from the insolvency commencement date *i.e.* 05.09.2019 when the application for initiating corporate insolvency resolution process was admitted. Section 14 (1) inter alia entails various actions which are prohibited on account of the moratorium:

- (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 Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; and*

21. Apart from the above actions which are prohibited during moratorium, there are some more actions which are prohibited:

- (e) suspension or termination of a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, on the grounds of insolvency. However, this relief is available only when there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period. [Explanation to sub-section (1)]*
- (f) suspension or termination or interruption of supply of essential goods or services to the corporate debtor as may be specified during moratorium period. (Sub-section (2) of section 14). When the interim resolution professional or resolution professional, as the case may be, considers that the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the*



*supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium. The only exception being where such corporate debtor has not paid the dues arising from such supply during the moratorium period or in such circumstances as may be specified. [Sub-section (2A)]*

*(g) such transactions, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority and a surety in a contract of guarantee to a corporate debtor. [Sub-section (3) of section 14]*

22. The Applicant has tried to bring his case within the clause (f) and (g). The terms “essential supplies” falling under clause (f) and critical supplies” under clause (g) have different meaning and connotations. The supplies which are not specific to the business of the CD but which are needs, fall under the definition of the essential supplies. The essential goods or services is limited in scope in view of Regulation 32 of the IBBI by Regulation 2016, which says that such supplies should not constitute direct input to the output produced or supplied by the CD. The supply of (1) electricity, (2) water, (3) telecommunication services, and (4) information technology services are covered within this purview. This has further been explained by giving illustration under Regulation 32:

*Illustration: Water supplied to a corporate debtor will be essential supplies for drinking and sanitation purposes, and not for generation of hydro-electricity.*

23. In the present context, the water supply is not direct input to the output produced by the CD. Therefore, the case of the Applicant is not covered under clause (f). The term “critical supply” has not been explained anywhere in IBC. With the introduction of Section 14(2)(A) by the IBC Amendment Act, 2020, it is open for the RP to determine that the supply of certain goods and services are critical to protect and preserve the value of the CD, but this is subject to payment of dues arising from such supply



during the moratorium period. Section 14(2A) states that critical supplies can be considered as such if they are critical:

- a) *to protect and preserve the value of a corporate debtor; and*
- b) *to manage its operations as a going concern.*

24. However, there is lack of guidance as how to determine as what is critical. In the absence of definition of critical supply, certain tests suggested by the Insolvency Law Committee, 2020 are material, which are reproduced as below:

*8.17. The supplies that would be considered critical should be identified by the resolution professional, who is entrusted with the responsibility of running the corporate debtor as a going concern. In identifying critical supplies, the resolution professional should consider factors such as **whether the supplies have a significant and direct relationship with keeping the corporate debtor running as a going concern, and whether the supplies may be replaced easily or efficiently.** (emphasis added)*

25. Therefore, the term critically is to be defined as per the facts and circumstances of each case. Supply of water is critical for running 600 MW power project, otherwise, it is to be shutdown which will ultimately affect electricity supply to 3 states i.e. Chhattisgarh, Tamil Nadu and Uttar Pradesh. But in the garb of this, the Applicant cannot refuse to pay current dues. It was condition of Agreement **Annexure A-13** dated 20.10.2014 and other related correspondences exchanged between the CD/Applicant and the Respondents that old rates were applicable only upto the construction of the Mahanadi barrage. The Applicant can't be allowed to take advantage of his own wrongs on the plea that supply of water is critical for the survival of the CD. The management of the CD was handed over to the Applicant



with the hope that there will be improvement in its working, but we are sorry to say that there is little impact or change.

26. Accordingly, the stand of the Applicant is baseless and meritless that they are not liable to pay the higher rate of water charges in the absence of execution of fresh agreement.
27. Besides, there is also issue of jurisdiction of this Authority to entertain the present application. Section 60(5)(c) of the IBC says that –

*(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-*

*(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.*

28. Similar type of prohibition is also under Section 14 which provides that a license, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency.
29. These provisions make it clear that no party can invoke the jurisdiction of this Authority when the matter is not arising out of or in relation to the insolvency resolution.



30. The Applicant cannot say that the Respondents are not authorised to cancel the agreement or impose water charge at higher rate in the absence of execution of fresh agreement after the completion of Basantpur barrage.
31. In *Embassy Property Developments Pvt. Ltd. versus State of Karnataka and Ors. (2020)13 SCC 308*, the Hon'ble Supreme Court held that the 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. It concluded that the non-renewal of a mining lease was not within the ambit of Section 14. It was observed:

*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)...*

*(Own emphasis)*

32. In another case *Municipal Corporation of Greater Mumbai (MCGM) versus Abhilash Lal and Ors. (2020)13 SCC 23*, the Hon'ble Apex Court held that the contract in question was terminated due to defaults unrelated to the insolvency of the corporate debtor.
33. Both *Embassy Property (supra)* and *Abhilash Lal (supra)* were referred in the case of *Gujarat Urja Vikas Nigam Limited versus Amit Gupta and Ors. (2021)7 SCC 209* wherein the Article 9.2.1 of the PPA enumerates the Events of Default by the Corporate Debtor, within which Article 9.2.1(e) states that the Corporate Debtor becoming voluntarily or involuntarily, the subject of a proceeding in any bankruptcy or insolvency laws, constitutes an Event of Default. Therefore, it was held that termination of the PPA



solely on the ground of insolvency gives the NCLT jurisdiction Under Section 60(5)(c) to adjudicate this matter and invalidate the termination of the PPA as it is the forum vested with the responsibility of ensuring the continuation of the insolvency resolution process, which requires preservation of the Corporate Debtor as a going concern. It was further observed:

165. 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 the NCLT was empowered to restrain the Appellant from terminating the PPA. However, our decision is premised upon a recognition of the centrality of the PPA in the present case to the success of the 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 the NCLT would have been empowered to set aside the termination of the PPA in this case because the termination took place solely on the ground of insolvency. The jurisdiction of the NCLT Under Section 60(5)(c) of the 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 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).

(Own emphasis)

34. Thus, it becomes clear contract can be terminated if it is not related to insolvency. We want to quote Para 69 of *Gujarat Urja (Supra)*

“69. 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 for a 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.”



35. This judgement was followed by the Hon'ble Supreme Court in *Tata Consultancy Services Ltd. vs Vishal Gisulal Jain, Resolution Professional, SK Wheels Pvt. Ltd. Civil Appeal No.3045 of 2020* that the NCLT has no jurisdiction if the dispute arose on the grounds unrelated to the insolvency of the CD. The relevant Para No.27 is reproduced as below:

“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. Thus, we are of the view that the NCLT does not have any residuary jurisdiction to entertain the present contractual dispute which has arisen dehors the insolvency of the Corporate Debtor. In the absence of jurisdiction over the dispute, the NCLT could not have imposed an *ad-interim* stay on the termination notice. The NCLAT has incorrectly upheld the interim order of the NCLT”.

36. In conclusion, the NCLT cannot intervene where there is dispute about contractual rights of the parties. Accordingly, the Applicant cannot claim that the CD is not liable to pay higher water charges as it would be against the contractual obligations of the parties, which is outside the jurisdiction of this Authority.
37. As a result of above findings, both the applications are dismissed.

**Sd/-**

**SANJAY PURI**  
**MEMBER (TECHNICAL)**

**Sd/-**

**RAJEEV BHARDWAJ**  
**MEMBER (JUDICIAL)**