

# Ksk Mahanadi Power Company Limited vs Ksk Water Infrastructures Private ... on 29 March, 2022

National Company Law Appellate Tribunal,  
Chennai Bench  
Company Appeal (AT) (CH) (Insolvency) No. 234 of 2021

(Arising out of order dated 17th June, 2021 passed by National Company Law Tribunal, Hyderabad Bench in I.A. No. 270 of 2021 in CP (IB) No. 492/07/HDB/2019)

IN THE MATTER OF:

1. Mr. Sumit Binani,  
(RP of M/s KSK Mahanadi Power Company Ltd.)  
Commerce House, 4th Floor, Room No. 6, 2A  
Ganesh Chandra Avenue, Kolkata -700013 ...Appellant

Versus

1. Mr. V.Venkatachalam, RP, M/s KSK Water Infrastructures Pvt. Ltd.& Ors.  
R/o/ No. 12-13-205, Street No. 2, Tarnaka,  
Secunderabad, Telangana - 500017
2. Committee of Creditors, KSK Water Infrastructures Pvt. Ltd.  
Punjab National Bank, Large Corporate Branch, House No. 8-2-672, 4th Floor, Sufi Chambers, Road No.1, Banjara Hills, Hyderabad - 500034
3. Committee of Creditors, KSK Mahanadi Power Company Ltd.  
Cyril Amarchand Mangaldas, D-3, Prius Platinum, District Centre, Saket, New Delhi-110017. ...Respondents

Present:

For Appellant: Mr. Vaijayant Paliwal, Mr. Zeeshan Khan, Mr. Allwin Godwin, Ms. Charu Bansal, Ms. Simran Kaur, Mr. Sandeep Bajaj, Ms. Niranjana Pandian, Ms. Mohana Nijhawan, Advocates.

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Mr. Anoop Rawat for RP.  
Mr. Arun Kathpalia, Sr. Advocate for RP.

For Respondent            Mr. Y. Suryanarayanan, Advocate,  
No.1/RP:                    Ms. Aditi Deshpande, Advocate,  
                                  Mr. Tushar Nagar, Advocate,  
                                  Mr. Badri Narayanan, Advocate

For Respondent            Mr. Anirudh Krishnan, Mr. Advaidh Nelakanttan, Mr.  
No. 2                        K. Mohit Kumar, Ms. Lakshana Viravalli,  
                                  Mr. Adarsh Subramaniam, Shiva. K, Advocates For Mr.  
                                  P.S. Raman, Sr. Advcoate

For Respondent            Mr. Bishwajit Dubey, Ms. Srideepa Bhattacharyya, Ms.  
No. 3                        Neha Shivhare, Advocates  
                                  For Mr. Ramji Srinivasan, Sr. Advocate

With  
Company Appeal (AT) (CH) (Insolvency) No. 239 of 2021

IN THE MATTER OF:

1. Committee of Creditors of KSK Mahanadi  
Power Company Ltd through Power Finance  
Corporation Ltd. ...Appellant

Versus

1. Mr. V. Venkatachalam, RP of KSK Water  
Infrastructure Pvt. Ltd, R/o No. 12-13-205,  
Street No. 2, Tarnaka, Secunderabad  
Telangana- 500017
2. Committee of Creditors of KSK Water  
Infrastructures Pvt. Ltd.  
Punjab National Bank (Lead Member)having  
its registered office at 8-2-293/82/A/431/A,  
Road No. 22, Jubilee Hills, Hyderabad -  
500033
3. Mr. Sumit Binani,  
RP of KSK Mahanadi Power Company Ltd.

Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021

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4th Floor, Room No. 6,  
2A, Ganesh Chandra Avenue,  
Kolkata- 700013

...Respondents

Present:

For                            Mr. Cyril Amarchand Mangaldas & Co.

Appellant/CoC of KSK Mahanadi:	Mr. Bishwajit Dubey, Advocate Ms. Srideepa Bhattacharyya, Advocate Ms. Neha Shivhare, Advocate For Mr. Ramji Srinivasan, Sr. Advocate.
For Respondent No.1/RP:	Mr. Y. Suryanarayanan, Advocate& R1, Mr. Tushar Nagar, Advocate, Mr. Badri Narayanan, Advocate
For Respondent No. 2	Mr. Anirudh Krishnan, Mr. Advaidh Nelakanttan, Mr. K. Mohit Kumar, Ms. Lakshana Viravalli, Mr. Adarsh Subramaniam, Shiva. K, Advocates
For Respondent No. 3/(RP of KSK Mahanadi Power Company Ltd.)	Mr. Sandeep Bajaj Mr. Allwin Godwin Ms. Mohana Nijhawan Ms. Simran Kaur Mr. Anoop Rawat Mr. Zeeshan Khan Mr. Vijayant Paliwal Ms. Charu Bansal Ms. Niranjana Pandian, Advocates Mr. Arun Kathalia, Sr. Advocate for RP.

#### JUDGMENT

(29.03.2022) KANTHI NARAHARI, MEMBER (TECHNICAL) (A) Company Appeal (AT) (Ins) No. 234 of 2021 filed by Resolution Professional of KSK Mahanadi Power Company Ltd. challenging Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021 the impugned order dated 17.06.2021 passed in I.A. No. 270 of 2021 in CP (IB) No. 492 of 2019, and (B) Company Appeal (AT) (Ins) No. 239 of 2021 filed by Committee of Creditors of KSK Mahanadi Power Company Ltd. challenging the impugned order dated 17.06.2021 passed in I.A. No. 270 of 2021 in CP (IB) No. 492 of 2019.

(C) Since in both the Appeals the facts and issues are common and in both the Appeals the Appellants challenged the common impugned order, hence this Tribunal decided to take up both the Appeals together by addressing the common issues arises there under.

#### Preamble:

The Present Appeals are filed by the Appellants who are the RP and Committee of Creditors of M/s KSK Mahanadi Power Company Ltd. against the order dated 17.06.2021, passed by the Adjudicating Authority Hyderabad Bench in I.A. No. 270 of 2021 in CP (IB) No. 429 of 2019 whereby the Adjudicating Authority directed the Appellants to make the payments to Respondent No.1 i.e. M/s KSK Water Infrastructure Pvt. Ltd. in accordance with the Water Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021 Transport Agreement dated 14th March, 2014 as per invoices raised by the Respondents. Further the Adjudicating Authority directed

the Respondents to restart the water supply.

**Brief Facts:**

**Appellant's Submissions**

2. The Learned Senior Counsel appearing for the Appellants submitted the brief facts. It is stated that business of the M/s KSK Mahanadi Power Company Ltd. in short ('KMPCL') and the Respondent i.e. M/s KSK Water Infrastructure Pvt. Ltd. in short ('KWIPL') are dependent on each other since the water supplied by the first Respondent to the Appellant's, Power Generation Operations forms the major form of revenue generation from the first Respondent. It is submitted that the KMPCL is in the business of operating 1800 MW Coal based Thermal Power Project in Champa District Chhattisgarh. The Respondent is a Captive Project which includes infrastructure and Pipeline for transportation of up to 100 MCM water annually from the Mahanadi River specifically for supply to the Power Project being operated by KMPCL. Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021

3. The Learned Senior Counsel submitted that the KWIPL and KMPCL entered into an agreement dated 14.03.2014 for transport of water from KWIPL to KMPCL viz, Water Transport Agreement in short (WTA). Due to certain delay the KMPCL was able to operationalize only 2 units by March 2015. Accordingly, the parties entered into an amendment agreement dated 01.03.2015 namely 2015 Amendment Agreement to the Water Transport Agreement in terms of which the parties have revised the minimum off-take requirements for the next two years to 2.2 MCM Per Month. The same was to be reviewed on the commissioning of subsequent units of the Power Project.

4. The Learned Senior Counsel further submitted that the KMPCL and its lenders entered into the amended and restated Common Loan Agreement in October, 2016 in short (CLA) and in terms of which it was agreed that the Water Transportation Charges payable by KMPCL to KWIPL would be limited to certain Operation and Maintenance ('O & M') expenses being incurred by KWIPL for Water Transportation. In that regard the KMPCL had engaged the services of ACB India Power Ltd as the O & M Contractor to carry Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021 out the aforementioned O & M for the Water Transport Infrastructure. It is submitted that both KWIPL and KMPCL are related parties and are under Corporate Insolvency Resolution Process ('CIRP'), the Appellant and the first Respondent being the Resolution Professionals of KMPCL and KWIPL, cannot undertake any related party transaction between them without prior approval of Respondent No. 2 & 3 in line with the provisions of Section 28 (1)

(f) of the I & B Code, 2016.

5. It is submitted that pursuant to the Respondent No. 1 taking control of the management of KWIPL, there have been several correspondences that have been exchanged between the Appellant and the Respondent No.1 inter alia regarding the issue of payments to be made under the Water Transport Agreement failing which KWIPL would not supply water to KMPCL. The payments under the Water Transport Agreement are not required to be paid by KMPCL owing to the Commercial

arrangement existing between KMPCL and KWIPL since October, 2016. The communications received from Respondent No.1 regarding alleged mandatory payments to be made by KMPCL in order to ensure supply of water from KWIPL time and Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021 again, it has been time and again reiterated by the Appellant that the supply of water from KWIPL is essential for the Appellant to maintain KMPCL as a going concern and the demand for payments is not in conformity with the commercial arrangement existing between KMPCL and KWIPL since October, 2016.

6. While matter stood thus, the quantity of water actually supplied to KMPCL for the post CIRP Period by the Respondent No. 1 who took control of KWIPL as against the quantity of water billed for, is set out in the table below:

S. No.	Month	Quantity of Water Amount to be paid for the water actually (INR)	Amount billed actually supplied (Cu.M)	Amount billed actually supplied (INR)
1.	April-21	3,015,412	48,246,592	113,280,000
2.	May-21	2,350,067	37,601,072	113,280,000
3.	Jun-21	(No invoice was raised for water supply during the month of June 2021 due to unilateral suspension of water supply by the RP of KWIPL)		
4.	Jul-21	2,193,826	35,101,216	91,354,845
		Total		7,559,305 120,948,880 317,914,845

7. It is submitted that in absence of further Amendment both the parties are only contractually/obligated to a minimum take or pay Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021 for 2.55 MCM Per Month with minimum of 31 MCM Per Annum and maximum 42 MCM Per Annum beyond 31.03.2017 and since there is no provision for levy of minimum take or pay of 6 MCM Per Month as levied by the RP of KWIPL.

8. The Learned Senior Counsel submitted that the Respondent No. 1 issued an invoice dated 17.05.2021 for the month of April, 2021 demanding payment for supply of water. The Appellant was not able to clear the invoice since the matter was pending deliberation before the Respondent No. 3. The Respondent No.1 stopped supply of water to KMPCL and despite repeated request to resume the water supply, the Respondent did not supply the water, the Appellant constrained to file an Application being I.A. No. 270 of 2021 seeking directions against the First Respondent to continue the uninterrupted supply of water and ensure the going concern.

However, the Learned Adjudicating Authority vide impugned order directed the Appellant to make the payment of water supply charges as per the 2014 Water Transport Agreement and as per the invoices raised by the first Respondent to enjoy the uninterrupted supply of water to KMPCL.

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9. It is submitted that the Appellant made ad hoc payment to the first Respondent as follows:

(i) Invoice dated 17.05.2021 for the month of April, 2021 on 25.06.2021.

(ii) Invoice dated 25.06.2021 for the month of May, 2021 on 12.07.2021.

(iii) Invoice dated 02.08.2021 for the month of July, 2021 on 13.08.2021.

The above payments were made under protest.

10. It is submitted that the payments as made above does not amount to an admission of liability of KMPCL to make payments as per the invoice dated 17.05.2021.

11. The Learned Senior Counsel submitted that the KMPCL has been making rightful payments as per the terms of the revised Commercial Arrangement that existed between the parties since October, 2016 in due compliance of Law.

12. The Learned Senior Counsel submitted that the impugned order to the extent that it has directed the payment of water supply charges as per the Water Transport Agreement dated 14.03.2014 Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021 and any invoices raised by the first Respondent and not as per the revised commercials between KMPCL and KWIPL being followed since October, 2016 is erroneous and bereft of logic and completely contrary to the intent and objective of the Code.

13. It is submitted that the KMPCL is drawing only a monthly average of 2.2 MCM Water it cannot be expected to bear water supply charges for 6 MCM of water which is almost thrice the amount of water actually supplied to KMPCL which is currently under a Stressed Financial Condition and undergoing CIRP.

14. The Learned Adjudicating Authority failed to consider that a direction to KMPCL to bear the take or pay charges as per the Water Transport Agreement when there was a subsequent amendment to the Water Transport Agreement in 2015, and revised commercial understanding between the parties since 2016 which was existing between the parties.

15. The Learned Counsel further submitted that the direction passed by the Learned Adjudicating Authority to make the payments as per the Water Transport Agreement even though the same is not as per the existing arrangement continued since 2016 Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021 without giving an opportunity to Respondent No. 3 to consider the commercial as the same is a related party transaction.

16. It is submitted that the Section 14 (2A) of the I & B Code, 2016 cannot be interpreted to benefit one party i.e. KWIPL and disrupt the operations of the other party i.e. KMPCL. It is not in dispute

that the Corporate Debtor cannot be excused from making payments with regard to supply of critical goods/services. However, the payments sought for by the Respondent No.1 to be made by KMPCL will have to be as per the agreed commercial understanding between the parties since October, 2016 and not as per the overridden Water Transport Agreement 2014 which only contemplates a payment mechanism for six units whereas only three units of KMPCL or Operation as on today.

17. The Learned Senior Counsel in support of their case relied upon the Judgments.

(i) 'Tata Consultancy Services Ltd. vs Vishal Gishulal Jain RP, SK Wheels Pvt. Ltd.' (Civil Appeal No. 3045 of 2020) dated 23.11.2021 Paragraph no. 28, 29.

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(ii) 'Gujarat Urja Vikas Nigam Ltd. vs Amit Gupta & Ors.' Paragraph no. 165.

(iii) 'IJIN Automotive Pvt. Ltd. vs Assistant Commissioner of Income Tax' reported in Manu/IX/0171/2011.

(iv) 'Swiss Ribbons vs Union of India' WP (Civil No. 99 of 2018) dated 25.01.2019.

1st Respondent's Submissions (RP of KWIPL)

18. The Learned Counsel appearing for this Respondent submitted that the reliefs sought in the present Appeal cannot be granted by this Tribunal in exercise of its Appellate Jurisdiction for the reason that the Appellant is seeking grant of original reliefs and it never raised before the Learned Adjudicating Authority therefore there was no opportunity to consider the reliefs sought by the Appellant herein.

19. It is submitted that the following reliefs sought by the Appellant in the Application before the Learned Adjudicating Authority and in the present Appeal is set out hereunder:

Reliefs sought before Ld. Reliefs sought in the present Adjudicating Authority Appeal [2 Pg. 447-448 of Application] [@Pg. 30 of Appeal] Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021

(a) As an interim measure, (a) As an interim direction, direct Respondent No. 1 to to direct continuous supply of provide uninterrupted supply of water from KWIPL to KMPCL;

water from KWIPL to KMPCL as far as KMPCL reimburses the (b) Direct status quo operation and maintenance and between the parties as was other payments to KWIPL subsisting since October 2016 aligned with the terms of the per the commercial commercial arrangements that arrangement between the has subsisted between the parties, for payments to be parties since October 2016 as made by KMPCL for costs detailed in paragraph 11 above; towards the O & M for the water transport

infrastructure,

(b) Direct Respondent no. 1 in addition to bearing certain to refrain from taking any such other operational expenses of action which adversely affects KWIPL, such as towards the ongoing corporate insurance costs, fees of legal insolvency resolution process of advisors, employees exclusively KMPCL, including disruption of performing duties on behalf of water supply to KMPCL. KWIPL, as was the existing position until May 2021 (including CIR period);

(c) Direct KWIPL to raise invoice on an arm's length basis for per cubic meter of actual water supply be KWIPL instead of Rs. 16 per cubic meter charges by KWIPL which is comparatively at a higher side, pending disposal of this Appeal.

(d) Direct payment by KWIPL for a total amount of INR 252 crores to KMPCL as damages due to daily EBITDA loss os INR 6 crores per day for non-

supply of water for 42 (Forty Two) days during the months of June and July (until 6 July 2021) due to which KMPCL was unable to operate its power plant for want to supply of Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021 essential services of water to KMPCL by KWIPL;

(e) Direct KWIPL to refund the amounts paid under protest by KMPCL towards the invoices dated 17 May 2021, 25 June 2021 and 02 August 2021 raised by KWIPL, to the extent that they are in excess of the amounts to be paid as per the October 2016 arrangement between the parties;

(f) Set aside the Impugned Order passed by the Hon'ble National Company Law Tribunal, Hyderabad on 17 June 2021 in I.A. 270 of 2021 in C.P. (IB) 492/7/HBD/2019 in so far as the direction to pay the transport charges as per the Agreement (2014) and invoices raised consequently, and substitute the same with a direction for payments to be made by KMPCL as per the commercial arrangement between the parties since October 2016;

20. The Learned Counsel submitted that the reliefs that are sought in this Appeal namely c, d, e supra are original reliefs which were neither raised before the Ld. Adjudicating Authority nor argued by the parties, hence no findings in this regard have been given by the Ld. Adjudicating Authority, therefore, the Appellant cannot raise these fresh reliefs in the Appeal for the first time. Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021

21. The Learned Counsel submitted that it is an admitted fact that KWIPL and KMPCL entered into an agreement dated 14.03.2014 for transport of water through pipeline to the power plant of KMPCL. Since the terms and conditions of the Agreement were agreed between KMPCL and KWIPL related parties, no specific approval under Section 188 of the Companies Act, 2013 was required.

22. In terms of Article 2.1 of the Agreement dated 14.03.2014 (WTA) KWIPL was responsible for undertaking the transportation of water to KMPCL. Under Article 5.2 of the agreement KMPCL had a minimum take or pay obligation for a quantity of 6 MCM of water on and from 1st April, 2017 to 31st March, 2018 and every year thereafter. In accordance with the said Article the KMPCL was



obligated to pay for a minimum of 6 MCM of water irrespective of whether it took supply of such quantity and irrespective of its project size. The billing and payment mechanism is set out under Article 11.

23. Owing to delay in implementation of Power Project of KMPCL, both KMPCL and KWIPL entered into an Amendment Agreement on 01.03.2015 whereby Article 5.1 (a) and 5.2 (a) were amended and in Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021 terms of the Amendment the minimum and maximum quantity of water to be transported by KWIPL to KMPCL was revised for the interim period for an initial period of two years based on 2 Units of KMPCL in operation. Accordingly, the minimum take or pay quantity from 1st April, 2015 to 31st March, 2017 was revised to 2.55 MCM Per Month. The Amended Article 5.1 (a) extracted here at:

".....Since, the power project being implemented by KMPCL has been delayed, the above arrangement is agreed among the parties for the initial period of two years based on 2 units of KMPCL in operation, which will be reviewed on the commissioning of the subsequent units of the power project...."

24. It is submitted that before expiry of the tenure of Amendment Agreement dated 01.03.2015, the lenders of KMPCL entered into an amended and restated Common Loan Agreement ('CLA') for KMPCL on 22.11.2016.

25. While matter stood thus, the KWIPL issued a letter dated 30.03.2017 to the KMPCL that the Amendment dated 01.03.2015 to the Agreement was valid up to 31.03.2017 and the terms of original Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021 Agreement dated 14.03.2014 is effective thereafter. The content of the letter dated 30.03.2017 is extracted hereunder:

"....

Considering the above-referred executed agreements to enable to transportation of water to the project of KSK Mahanadi Power Company Limited, we would like to submit that the first amendment of Water transportation agreement is valid till 31st March 2017.

In absence of any further arrangement, we consider that the first amendment agreement will expire on 31st March 2017.

Accordingly from 1st April 2017, the agreements executed on 14th March 2014 will become effective till the tenor of the respective agreement...."

26. It is submitted that the above letter was accepted and acknowledged by KMPCL and the minimum take or pay quantity was no longer applicable from 01.04.2017 and under Article 5.2. (a) of the Original Agreement i.e. 6 MCM continues to be applicable and binding on the parties. While so from October, 2016 till February, 2018 KMPCL was directly incurring cost towards the O & M for water transport infrastructure in addition to bearing all other operational expenses of KWIPL

including servicing of the debt obligations of KWIPL directly.

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27. It is submitted that the CIRP of KWIPL commence vide order dated 01.01.2021 and IRP was appointed. After going through the records by the first Respondent of KWIPL, this Respondent informed the CoC that no invoices were being raised on KMPCL in accordance with an understanding under the CLA and no payments were made by KMPCL resulting repayment defaults by KWIPL to its lenders. In view of the aforesaid reasons the this Respondent after deliberations with the CoC of KWIPL and having not received any response from the Appellant despite repeated requests, the CoC of KWIPL advised this Respondent to stop water supply to KMPCL and raise an invoice for the services rendered by KWIPL to KMPCL during the CIRP in the interest of KWIPL. However, in good faith the Respondent No.1 took immediate steps to restore water supply to KMPCL. Thereafter, extensive correspondences were exchanged between the Appellant and this Respondent and set out in Table No. 2 at pages 19 to 25 of the first Respondent's Reply Affidavit.

28. The Learned Counsel further submitted that the Appellant is required to pay for the services availed by it from KWIPL in terms of Section 14 (2A). It is submitted that from the reading of Article Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021 5.1.2.2 of CLA it is clear that the lenders have stipulated certain arrangements in CLA was only an interim arrangement whereby the charges of water transportation were limited to payment of O & M Cost and debt servicing of KWIPL until the proposed merger of KWIPL with KMPCL. The merger did not fell through in 2017 since PNB as security agent invoked its pledge and took over its 51% shareholding in KWIPL. The Appellant stopped servicing KWIPL's debt post February, 2018, thereby reneging on its obligation under the CLA, the CLA has no binding affect on the parties.

29. One of the grounds raised by the Learned Counsel for the Appellant that the supply of water is critical to protect and preserve the value of KMPCL in view of imposition of moratorium under Section 14 of the I & B Code, 2016. In Reply, the Learned Counsel for the Respondent submitted that 'Water' in the present case does not fall within the ambit of essential goods and services as set out in Section 14 (2) of the Code. Regulation 32 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 lists, inter alia water as essential supplies covered under Section 14 (2) of the Code, it Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021 categorically provides that the same is an essential supply only to the extent it is not a direct input to the output produced are supplied by the Corporate Debtor.

30. In view of the above provision and the Regulations, the Supply of water by KWIPL does not fall within the purview of essential goods and services but it is a direct input to the output produced by KMPCL which is electricity. Further, it is made clear that the water in the instant case is not for drinking or sanitation purpose but for enabling generation of electricity to be sold by KMPCL to generate revenue and make profits. Therefore, it is submitted that restrictions under Section 14(2) is not applicable to KWIPL.

31. In support of the contention, the Learned Counsel for the Respondent relied upon the Judgments of this Tribunal in the matter of:

(i) 'Uttar Gujarat Vij Company Ltd vs. Mr. Devang Sampat, RP of M/s Kanoovi Foods Pvt. Ltd.' dated 27.05.2021.

(ii) 'Dakshin Gujarat Vij Company Ltd vs. M/s ABG shipyard Ltd. & Anr.' Dated 08.02.2018.

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32. Adverting to Section 14 (2A) of the I & B Code, 2016, the Learned Counsel for the Respondent submitted that Section 4 (2A) of the I & B Code, 2016 mandates that where the Resolution Professional considers the supply of certain goods/ services critical to protect and preserve the value of Corporate Debtor and managed the Operations of such Corporate Debtor as a going concern, then the supply of such goods/services cannot be terminated, suspended or interrupted during the period of moratorium, except in cases where the Corporate Debtor has not paid dues arising from such supply during the moratorium. Therefore, it is submitted that the KMPCL is statutorily mandated to pay KWIPL for the transportation of water during moratorium of KMPCL (w.e.f 03.10.2019) failing which KWIPL is well within its right to suspend the supply until receipt of such payment and the same is also settled position of law.

33. It is submitted that the Hon'ble Adjudicating Authority while passing the impugned order enforced payment of legitimate consideration as per terms of valid and subsisting agreement for upholding spirit of Section 14(2A) of I & B Code, 2016 and has not interfered in the commercials or terms of contract. Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021

34. It is submitted that the Respondent No.1 being the RP of the KWIPL is duty bound to ensure going concern status of KWIPL.

35. The Learned Counsel submitted that there is no illegality in the order passed by the Ld. Adjudicating Authority and the Appeal is devoid of any merits and liable to be dismissed. 2nd Respondent's Submissions (CoC of KSKWIPL)

36. The Learned Senior Counsel appearing for the Respondent submitted that the prayers as made in the Appeal is beyond the scope of Section 61 of the I & B Code, 2016 for the reason that the scope of Section 61 of the I & B Code, 2016 is limited to being aggrieved by the order of the Adjudicating Authority. However, in the present case the Appellant prayed for a direction against the Respondent No. 1 to continue the uninterrupted supply of water from KWIPL to KMPCL and for a direction against Respondent No.1 to refrain from taking any such action which adversely affects the ongoing CIRP of KMPCL.

37. It is an admitted fact that KWIPL and KMPCL entered into an agreement dated 14.03.2014 (WTA) for supply and transport of Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021

water through pipelines from Mahanadi River to KMPCL Plant to meet KMPCL's water requirements for generation of electricity from its Thermal Power Plant. The Agreement records the commercial terms for such water supply and transport and the commercial terms of the agreement were based in ordinary course of business with the knowledge of lenders of KMPCL and KWIPL and an arm's length basis.

38. It is also an admitted fact that the Amendment Agreement dated 01.03.2015 was valid for a limited period of 2 years i.e. from March, 2015 to March, 2017. While so KWIPL vide its letter dated 30.03.2017 has reiterated that all the original terms of Agreement dated 14.03.2014 would continue from April, 2017 till the subsistence of the agreement. The above letter was in line with the sanction of lenders of KWIPL wherein the lenders revised the repayment schedule based on the continuation of rates under original agreement dated 14.03.2014. The content of the letter is extracted here at:

"....

Considering the above-referred executed agreements to enable to transportation of water to the project of KSK Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021 Mahanadi Power Company Limited, we would like to submit that the first amendment of Water transportation agreement is valid till 31st March 2017.

In absence of any further arrangement, we consider that the first amendment agreement will expire on 31st March 2017.

Accordingly from 1st April 2017, the agreements executed on 14th March 2014 will become effective till the tenor of the respective agreement...."

39. It is submitted that the KMPCL and its lenders unilaterally entered into an amended and restated Common Loan Agreement ('CLA') on 22.11.2016 whereby the Water Transportation Charges payable to KWIPL for the interim period prior to the proposed merger of KWIPL and KMPCL was limited to operation and maintenance.

40. While so on 17.05.2021 the R-1 raised an invoice for services rendered in April, 2021. However, the Appellant was unable to release payments against the May, 2021 invoice and the R-1 forced to suspend water transport service to KMPCL on 02.07.2021 temporarily and as per the directions of Hon'ble NCLT the water transportation services was resumed subject to payment of transport charges as agreed between the parties under Water Transport Agreement of 2014.

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41. It is submitted that the commercial arrangement under the Water Transportation Agreement dated 14.03.2014 was only amended vide Amendment Agreement dated 01.03.2015 on a temporary basis but not novated. The said Amendment Agreement was applicable for a period of two years and subject to review once the remaining units of KMPCL's Power Plant were commissioned. Further, clauses 5.1.(a) and 5.2.(a) does not contemplate quantities under the said clauses and it is valid only

for a period of two years and it is not a substitution of original transportation agreement.

42. It is to state that the Articles as contained in Common Loan Agreement was only an interim arrangement until the proposed merger of KMPCL and KWIPL. Once the merger falls through the said clauses of the CLA automatically stand invalidated. It is reiterated that the amended agreement is not a novation and substitution for the water transport agreement and in support of the said contention the Learned Counsel relied upon the Judgement of the Hon'ble Supreme Court in

(i) 'Union of India vs. Kishori Lal Gupta & Ors.' (1960 1 SCR

493) Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021

(ii) 'RN Kumar vs. RK Soral' (1988 2 SCC 508)

(iii) 'Lata Construction & Ors. vs. Doctor Ramesh Chandra Ramniak Lal Shah & Anr.' (1 SCC 586)

43. The Learned Counsel submitted that the contention of the Appellant that the Water Transport Agreement ought to be declared as onerous, is beyond the jurisdiction of this Tribunal. Such a declaratory relief will have to be adjudicated first by Learned Adjudicating Authority. It is submitted that even assuming that this Tribunal has the power to declare a contractual arrangement onerous then the conditions imposed under the CLA qua KWIPL ought to be declared as onerous giving the fact that KWIPL was never a party to it.

44. The Learned Counsel also relied upon the Judgement of the Hon'ble Supreme Court in 'Tata Consultancy Services vs. Vishal Gisulal Jain' reported in 2021 SCC Online SC 1113.

45. In view of the reasons as stated above the Learned Counsel prayed this Bench to dismiss the Appeal with cost. Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021 Analysis/Appraisal

46. Heard the Learned Counsel appeared for the respective parties perused the pleadings, documents and Citations relied upon by them. After analysing the pleadings the following issues felt for consideration and need to be addressed.

(i) Whether the issues/reliefs as prayed/sought by the Appellants can be adjudicated upon by this Tribunal?

(ii) Whether the order passed by the Adjudicating Authority is required any interference by this Tribunal?

(iii) Whether the Appellant has made out any case to grant the reliefs as prayed for?

Now we deal with the issues:

Issue No. (i)

47. The Appeals are emanated against the order passed by the Adjudicating Authority in I.A. No. 270 of 2021 in CP (IB) No. 492 of 2019 filed by the Appellant (in CA 234 of 2021) herein against the first Respondent herein. The Adjudicating Authority vide its order dated 17.06.2021 passed the following order which is impugned in these Appeals and recapitulated as under:

Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021 "1. This application by the RP of M/s. KSK Mahanadi Power Company Ltd. requesting inter-alia to give directions to the Respondents to resume uninterrupted flow of water to the Corporate Debtor so as to enable the Corporate Debtor to generate electricity, which is the business of the Corporate Debtor.

2. It is submitted that in order to keep the Corporate Debtor as going concern, free flow of the water requires but the Respondent stopped water supply on the ground of non-payment of water transport charges.

3. We heard the Learned Senior Counsel for the Applicant, Learned Sr. Counsel for CoC and the RP/Respondents.

Section 14(2A) of the Insolvency and Bankruptcy Code, 2016 states as under:

"(2A) Where the interim resolution professional or resolution professional as the case may be, considers 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, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified."

4. So, the Law is very clear that supplier of goods or provider of service of the Corporate Debtor cannot stop such supply or stop to provide service but the RP has to pay the expenses to procure such supply or services to keep the Corporate Debtor as going concern. We do not Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021 wish to add anything more than what has been stated under the Law.

5. In view of the above provision of Law, we direct the Respondents to restart the water supply subject to payment of the transport charges as claimed as per 2014 water supply agreement and as per invoices raised by the Respondent.

The application stands allowed and stands dispose of.

48. The Appellant who filed an application before the Adjudicating Authority sought relief to direct the Respondent No.1 therein to provide uninterrupted supply of water from KWIPL to KMPCL in

terms of commercial arrangements that has been subsisted between the parties since October, 2016. Further, the Appellant sought direction to the Respondent to refrain from taking any such action which adversely affects the ongoing Corporate Insolvency Resolution Process of KMPCL including disruption of water supply to KMPCL.

49. The Appellant sought following reliefs in this Appeal as under:

Reliefs sought in the present Appeal [@ Pg. 30 of Appeal]

(a) As an interim direction, to direct continuous supply of water from KWIPL to KMPCL;

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(b) Direct status quo between the parties as was subsisting since October 2016 per the commercial arrangement between the parties, for payments to be made by KMPCL for costs towards the O & M for the water transport infrastructure, in addition to bearing certain other operational expenses of KWIPL, such as towards insurance costs, fees of legal advisors, employees exclusively performing duties on behalf of KWIPL, as was the existing position until May 2021 (including CIR period);

(c) Direct KWIPL to raise invoice on an arm's length basis for per cubic meter of actual water supply by KWIPL instead of Rs. 16 per cubic meter charges by KWIPL which is comparatively at a higher side, pending disposal of this Appeal.

(d) Direct payment by KWIPL for a total amount of INR 252 crores to KMPCL as damages due to daily EBITDA loss of INR 6 crores per day for non-supply of water for 42 (Forty two) days during the months of June and July (until 6 July 2021) due to which KMPCL was unable to operate its power plant for want of supply of essential services of water to KMPCL by KWIPL;

(e) Direct KWIPL to refund the amounts paid under protest by KMPCL towards the invoices dated 17 May 2021, 25 June 2021 and 02 August 2021 raised by KWIPL, to the extent that they are in excess of the amounts to be paid as per the October 2016 arrangement between the parties;

(f) Set aside the Impugned Order passed by the Hon'ble National Company Law Tribunal, Hyderabad on 17 June 2021 in I.A. 270 of 2021 in C.P. (IB) 492/HBD/2019 in so far as the direction to pay the transport charges as per the Agreement (2014) and Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021 invoices raised consequently, and substitute the same with a direction for payments to be made by KMPCL as per the commercial arrangement between the parties since October 2016;

50. Incorporation of Companies and its present status:

The KMPCL was incorporated and is in the business of operating 1800 MW Coal based Thermal Power Project at Nariyara Village, Janjgir Champa District,

Chhattisgarh is to generate Power and supply to various states. The KWIPL incorporated as a captive project includes infrastructure and pipeline for transportation of 100 MCM water annually from the Mahanadi River specifically for supply to the Power Project being operated by KMPCL. The major supply of water to the Power Project i.e. KMPCL is only through the services of KWIPL.

51. Start of Disputes:

It was stated that KMPCL would be setting up a 6 x 600 MW (600 Units) Power Plant and on that basis KMPCL and KWIPL entered into a Water Transport Agreement dated 14.03.2014 for transportation of water by KWIPL through Pipelines from the off- take points of KSK Water to the designated point at the Power Plant Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021 of KSK Mahanadi. It is stated that due to certain delays KMPCL was able to operationalize only 2 units by March, 2015. Accordingly, the parties entered into an Amendment Agreement on 01.03.2015, in terms of which the parties have revised the minimum off-take requirements for the next 2 years to 2.2 MCM per month. One of the point raised is that the 2015 Agreement contemplated a review process after 2 years pursuant to subsequent commissioning of the remaining units of KSK Mahanadi. It is apt to mention the preamble of the Agreement dated 14.03.2014. The Agreement entered into between KSK Mahanadi Power Company Ltd. (KMPCL) and KSK Water Infrastructure Pvt. Ltd. (KWIPL) which contains 19 Articles and both the parties have signed the Agreement. The Preamble of the Agreement is recapitulated as under:

"Whereas

- KMPCL is setting up a 6 x 600MW Coal-based power plant in Nariyara, Janjgir-Champa District in Chhattisgarh (hereinafter referred to as 'Power Plant');
- KWIPL is engaged, inter alia in the business of transportation and supply of water to various users and developing, operating and maintaining the required water infrastructure facilities to achieve the same; Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021
- KMPCL to meet the requirement of water for operations of the Power Plant, has been allocated 100 Million Cubic meter per annum of water from river Mahanadi ("Water Allocation") in the state of Chhattisgarh by Water Resources Department, Government of Chhattisgarh (WRD, GoCG) vide its letters dated 23/06/2008 and 29/07/2009;

52. From the above agreement it is clear that the KWIPL undertook to supply water to KMPCL and the terms are governed in the Articles. Article 2 deals with Water Transportation and Article 5 deals with quantity of Water. Since, the Articles which deal with quantity and the main issues/disputes start with regard to Article 5.1 and 5.2 the same is reproduced here for beneficial reference:



"5.1 (a) Subject always to availability of water in Mahanadi River and Article 9, KWIPL agrees to transport water, at the Delivery Point to KMPCL as detailed below.

Particulars	FY 2014-2015	FY 2015-16	FY 2016-17 and onwards
Minimum Quantity	23 MCM	59 MCM	72 MCM
Maximum Quantity	31 MCM	67 MCM	80 MCM

(b) Further, KWIPL shall have the necessary

infrastructure to draw water (i) to undertake temporary storage at Intermediate reservoir for at least 7 MCM and

(ii) capabilities to draw up to maximum quantity of 100 MCM from the off take point throughout any year and (iii) KMPCL may request for supply of water beyond the Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021 Minimum Quantity as stated in above table, but the supply of water over and above the Maximum Quantity, will be at the sole discretion of KWIPL.

## 5.2 Take or Pay Quantity Obligation (TOPQ Obligation)

(a) Notwithstanding Article 11, Article 16, for each Year for quantities mentioned under Article 5.1 (a) there shall be Minimum Take or Pay Quantity (MTPQ), to be taken or paid for, on monthly basis, if not taken by KMPCL to be calculated as follows:

Financial Year	Minimum Take or Pay Quantity ("MTPQ")
1st April 2014 to 31st March 2015	1.92 MCM per month
1st April 2015 to 31st March 2016	4.92 MCM per month
1st April 2016 to 31st March 2017 and every year thereafter	6 MCM per month

53. Subsequent thereto the Water Transport Agreement (2014) was amended on 01.03.2015 (Amended Agreement) and as per the Amended Agreement the minimum and maximum quantity of Water to be transported was revised for the initial period of two years.

Further, it is stated that the amendment agreement included a review process for considering prolonging of the amendments. The Amended Agreement was based upon certain developments

taken place subsequent to 2014 Agreement and according to the parties Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021 the same have impacted the project's its functioning which required the said amendments. The parties to the 2014 Agreement are the same to the Amendment Agreement. Basically, the quantity which encapsulated under Article 5 of 2014 Agreement i.e. 5.1 and 5.2 have been amended vide Amendment Agreement as under:

"5.1.a Subject always to availability of Water in Mahanadi River and Article 9, KWIPL agrees to transport water, at the Delivery Point to KMPCL as detailed below.

Particulars March 2015		April 2015- March 2016	April 2016- March
Minimum Quantity	1 MCM	31 MCM	31 MCM
Maximum Quantity	1 MCM	42 MCM	42 MCM

Since, the power project being implemented by KMPCL has been delayed, the above arrangement is agreed among the parties for the initial period of two years based on 2 units of KMPCL in operation, which will be reviewed on the commissioning of the subsequent units of the power project.

5.2.a Notwithstanding Article 11, Article 16, for each Year for quantities mentioned under Article 5.1 (a) there shall be Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021 Minimum take or Pay Quantity (MTPQ), to be taken or paid for, on monthly basis, if not taken KMPCL to be calculated as follows:

Financial Year	Minimum Take or Pay Quantity ("MTPQ")
For March 2015	1.00 MCM per month

1st April 2015 to 31st March 2.55 MCM per month 1st April 2016 to 31st March 2.55 MCM per month The annual take or pay will be subject to the reconciliation at the end of close of each financial year.

#### 54. Contractual Disputes:

The bone of contention of the Learned Senior Counsel for the Appellant that in pursuance of the Amendment to the Agreement dated 14.03.2014, the Amended Agreement only subsists. On the other hand the Learned Senior Counsel for the Respondents contend that the Amendment Agreement of 2015 valid for a period of 2 years and after completion of 2 years i.e. 31.03.2017, the original Agreement i.e. 2014 will be enforceable. The Learned Senior Company Appeal (AT) (CH) (Insolvency)

Nos. 234, 239 of 2021 Counsel for the Appellants contend that in view of the Amendment Agreement (2015), the (2014) Agreement is not a valid and novated automatically. In answer to this argument the Learned Counsel appearing for the Respondents submitted that the Amendment Agreement of 2015 is only a substitution to the 2014 Agreement for a period of 2 years and it is not a novation as contended by the Appellants. This Tribunal will deal with this issue after deliberating on 'Common Loan Agreement' ('CLA') dated 22.11.2016 and the letter of the Respondents dated 30.03.2017.

55. Now we advert to the Common Loan Agreement (2016) and the letter of the Respondent dated 30.03.2017. Page 72 of the Appeal Paper Book of Vol. 1 the Amended and Restated and Common Loan Agreement is enclosed. The Common Loan Agreement (CLA) is amongst KMPCL (as Borrower) and the lenders i.e. the Banks, Power Finance Corporation Ltd., Rural Electrification Corporation Ltd. and Power Finance Corporation Ltd. From the CLA it is evident that the KWIPL is not a party. The Learned Counsel for the Appellant contend that as per clause 5.1.2.2 with regard to conditions precedent for remaining cost overrun facility and the Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021 borrower shall comply with the terms as stipulated under this clause. The sub clause A (XXIII) of Clause 5.1.2.2 states that the water transport charges payable by borrower i.e. KMPCL to KWIPL for the interim period prior to the merger of KWIPL with borrower would be limited to O & M expenses being incurred by KWIPL for water transportation infrastructure and its interest and debt repayment. Further, the Learned Counsel contend that the same clause is incorporated in clauses 5.2.2.2 A (VII) thereof. However, the Learned Counsel for the Respondents contend that the above CLA was executed between KMPCL and its lenders and the same was an interim arrangement premised on a proposed merger however, it is submitted that the merger never took place. The Learned Counsel for the Respondents contend that the KWIPL ceased to be a subsidiary of KMPCL. Having gone through the CLA and admittedly the KWIPL is not a party to the said CLA and one of the stand of the Respondents that the certain lenders of KMPCL were also lenders of KWIPL therefore, it is contended that such lenders cannot be termed as Common lenders for the reason that Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021 the facilities advanced to KMPCL and KWIPL were on separate and distinct terms.

56. Now we advert to the 2014 and 2015 agreements:

The Learned Counsel for the Respondents contend that the basis for supply of water to KMPCL by KWIPL is based on the Water Transport Agreement dated 14.03.2014 and the same is very much in vogue. It is also contended that by way of Amendment Agreement dated 01.03.2015 certain clauses were amended only for a period of two years and the same has been intimated to the Appellant vide letter dated 30.03.2017 page 47 of the Reply filed by the first Respondent. However, the Learned Counsel for the Appellants vehemently opposed the existence of such letter and receipt of the

same by the Appellant. In view of rival submissions it is apt to extract the said letter here under:

"Date: 30th March 2017 KSK Mahanadi Power Company Ltd., 8-2- 293/82/A/431/A, Road No. 22, Jubilee Hills, Hyderabad- 500033.

Sir, Sub: Water Transportation Agreement Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021 Ref: Water Transportation Agreement dated 14th March First Amendment to Water Transportation Agreement dated 1st March 2015.

Considering the above-referred executed agreements to enable to transportation of water to the project of KSK Mahanadi Power Company Limited, we would like to submit that the first amendment of Water Transportation agreement is valid till 31st March 2017.

In absence of any further arrangement, we consider that the first amendment agreement will expire on 31st March 2017. Accordingly from 1st April 2017, the agreement executed on 14th March 2014 will become effective till the tenor of the respective agreement.

Therefore, you are requested to note the arrangement. Thanking you, Yours faithfully, For KSK Water Infrastructures Pvt. Ltd.

57. The Learned Counsel for the Appellants contends that the above letter is not a genuine letter and cannot be relied upon by the Respondents. On the other hand, the Learned Counsel for the Respondents submitted that the above letter is genuine one and the Amendment Agreement dated 01.03.2015 is valid for a period of Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021 only two years and from 01.04.2017 the original water transport agreement will be enforceable. As stated supra the water transport agreement dated 14.03.2014 contained Article 5.1 and 5.2 with regard to take or pay quantity obligation (TOPQ). As per the said original agreement the minimum take or pay quantity (MTPQ) from 01.04.2014 to 31.03.2015 is 1.92 MCM per month, and from 01.04.2015 to 31.03.2016 is 4.92 MCM per month and from 01.04.2016 to 31.03.2017 and every year thereafter is 6 MCM per month. The original transportation agreement was amended vide amendment agreement dated 01.03.2015 to Article 5.1 and 5.2 by incorporating 5.1 a and 5.2 a and as per the said amendment Article 5.1 a is stated as under:

"Since the Power Project being implemented by KMPCL has been delayed, the above arrangement is agreed among the parties for the initial period of two years based on 2 units of KMPCL in operation, which will be reviewed on the commissioning of the subsequent units of the power project".

While so as per Article 5.2 a of the amendment agreement, the minimum take or pay quantity for the financial year for March 2015 is 1.00 MCM per month from 1.4.2015 to 31.03.2016 is 2.55 MCM Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021 per month from 01.04.2016 to 31.03.2017 is 2.55 MCM per month. It is further stated that the annual take or pay will be subject to the reconciliation at the end of close of each financial year.

58. The sequence of events that led to file the application before the Adjudicating Authority is that the letter addressed by the Respondent No. 1 dated 31.03.2017 supra to the Appellant after taking over as IRP and invoice dated 17.05.2021 for the month of April, 2021 and the Appellant replied to the said letter on 25.05.2021 and also various correspondences took place between the Appellant and the first Respondent. The first Respondent vide letter dated 31.05.2021 intimated the Appellant that the water supply from KWIPL shall stand suspended from 01.06.2021 due to non-payment of invoice dated 17.05.2021 and absence of an O & M Contract. Aggrieved by the same the Appellant filed the application before the Adjudicating Authority and the Adjudicating Authority passed the order which is impugned.

59. Reference to Section 62 of Indian Contract Act, 1872:

That be so the Counsel for the Appellant contend that the amendment agreement dated 01.03.2015 is a substitution to the Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021 original agreement and the original agreement automatically novated as per Section 62 of the Indian Contract Act, 1872 in view of amendment agreement dated 01.03.2015. On the other hand, the Learned Counsel for the Respondents contend that the amended agreement dated 01.03.2015 is valid for a period of 2 years i.e. up to 31.03.2017 and the original WTA 2014 will become effective with effect from 01.04.2017 and submitted that the amendment agreement is not a whole substitution of WTA 2014 it is only a partial modification/ amendment to the WTA 2014. In view of question of law raised by the Learned Counsel for the Appellant it is apt to refer to Section 62 of the Indian Contract Act, 1872. Section 62 reads as:

"Effect of novation, rescission, and alteration of Contract--

If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

As per the above provision one of the essential requirements of novation as contemplated under Section 62 is that there should be complete substitution of a new contract in place of the old, it is in Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021 that situation that the original contract need not be performed. As per Black's Law Dictionary, Sixth Addition at page 1064 defines novation thus "Novation-- A type of substituted contract that has the effect of adding a party, either as obligor or obligee, who was not a party to the original duty. Substitution of a new contract, debt or obligation for an existing one, between the same or different parties. The

substitution by mutual agreement of one debtor for another are of one creditor for another, whereby the old debt is extinguished. A novation substitutes a new party and discharges one of the original parties to a contract by agreement of all parties.

The requisites of a novation are a previous valid obligation, an agreement of all the parties to a new contract, the extinguishment of the old obligation, and the validity of the new one. *Blyther vs. Pentagon federal credit union*, d.c.mun. App. 182 A.2d 892, 894".

However, in the present case no such clauses evinced with regard to complete substitution. With such avowed limitations, this Tribunal has dealt with this matter on the plain reading of the provisions of Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021 contract agreement and law on the contract as such the above expression is made out.

60. It is not in dispute that the KMPCL is into CIRP vide order dated 03.10.2019 and the KWIPL is into CIRP, vide order dated 01.01.2021 and imposed moratorium in respect of both the Corporate Debtors. In respect of both KWIPL the first Respondent was appointed as RP vide order dated 08.04.2021. While so after taking over the affairs of the Corporate Debtor i.e. KWIPL the first Respondent vide letter dated 23.04.2021 addressed to the KMPCL requesting for payment of outstanding dues with reference to water transported to KMPCL and also made a note with regard to the water transport agreement and amended agreement. In its letter the first Respondent stated that the minimum take or pay quantity from 01.04.2017 to 31.03.2018 and onwards 6.00 MCM per month and stated that as per the invoices till September 2016 an amount of aggregating to Rs. 1,11,76,581/- is due from KMPCL. The Learned Counsel for the Appellant submitted that the minimum take or pay quantity as mentioned 6.00 MCM per month w.e.f 01.04.2017 to 31.03.2018 and onwards is not mentioned in the Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021 amendment agreement. It is seen that the Appellant replied to the said letter on 01.05.2021. It is also seen that the various correspondences made between the Appellants and the Respondents with regard to above disputes.

61. Now we deal with the Provisions of Law Section 14 (2A) of IBC:

The Adjudicating Authority while passing the order also dealt with Section 14(2A) of the I & B Code, 2016. To elaborate and discuss and to address the said provision of law, in this regard it is apt to refer to Section 14 of the Code which deal with moratorium. Sub-Section 1 of Section 14 reads as under:

"Subject to provisions of Sub-Sections 2 and 3, on the Insolvency Commencement date, the Adjudicating Authority shall by order declared moratorium for prohibiting all of the following namely, (a), (b), (c), (d)".

"Sub-Section 2 of Section 14 reads as; "the supply of essential goods or services to the Corporate Debtor may be specified shall not be terminated or suspended or interrupted during moratorium period".

"Sub-Section (2A) of Section 14 reads as under:

"Where the interim resolution professional or resolution professional, as the case may be considers the supply of goods or services critical to protect and preserve the Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021 value of the Corporate Debtor and 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, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified".

The above provision i.e. Sub-Section (2A) of Section 14 has been inserted by Act 1 of 2021 with effect from 28.12.2019.

62. The Learned Counsel for the Appellant by defining the above provision stated that the said provision provides for (i). Continuation of supply of critical service, (ii). In order to protect the Corporate Debtor being run as a going concern, (iii) by making payment against 'such supply'. The above provision was amended on the basis of suggestions made by the Insolvency Law Committee in the month of February, 2020. The Learned Counsel for the Appellant strongly contend that the word such supply mean the quantity which supplied to the Corporate Debtor i.e. (KMPCL). He further submitted that as per the amendment agreement dated 01.03.2015 the water supplied as per the said agreement would continue to operate in perpetuity, in view of the substitution to Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021 the main WTA, 2014 and there is no novation as such. On the other hand, the Learned Counsel for the Respondents opposed the said stand and submitted that the term "such supply" cannot be interpreted to mean payment for "actual supply" only in the teeth of the agreed commercial terms between the parties. Further, the Learned Counsel for Respondents contend that Section 14(2A) empowers/emphasises to protect and preserve the value of the Corporate Debtor and manage the operations of such Corporate Debtor as a going concern, the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium. It is an admitted fact that the KWIPL is admitted into CIRP and the payments due to supplier cannot be stopped taking into account if KMPCL failure to pay its outstanding dues, thereby taking away KWIPL's revenue stream and pushing the KWIPL into financial stress, at the same time KMPCL is admitted into CIRP as such the supply of water cannot be stopped to it to keep the Corporate Debtor as a going Concern.

63. The Law is very clear on the aspect and cannot be interpreted to suit either to the Appellants or the Respondents. However, we are Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021 unable to accept the contentions of the Learned Counsel for the Appellants that "such supply" meaning thereby the quantity mentioned in the amended agreement dated 01.03.2015. As per the definition of Black's Law Dictionary Sixth Addition, the word 'such' defined as "of that kind, having particular quality or character specified". "Identical with, being the same as what has been mentioned". Be that as it may, this Tribunal cannot interpret "such supply to actual supply" in view of clear and unambiguous provision as enshrined in Section 14 (2A) of I & B Code. Further, this Tribunal acknowledges that there is a contractual dispute between the parties and it is an admitted

fact that the 2014 WTA and amended agreement dated 01.03.2015 and CLA 2016 are pre CIRP of both the Corporate Debtors i.e. KMPCL and KWIPL. While so, the dispute arises after the initiation of CIRP's of both the Corporate Debtors.

64. One of the point raised is that the KMPCL and KWIPL are related parties and the R-1 cannot undertake any related party transaction without the prior approval of the KWIPL's CoC. It is stated that the CoC of KWIPL in its 4th Meeting ratified and Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021 approved the transportation of water to KMPCL in terms of the water transportation agreement under Section 28 (1) (f). As per the said provision the approval of CoC for certain actions i.e. to undertake any related party transaction is required. Accordingly, the CoC ratified the same. Once the CoC has exercised its commercial wisdom it is neither open to the Appellant nor the Respondent no.1 to alter the terms contrary to such ratification under Section 28 (1) (f). In catena of decisions of the Hon'ble Supreme Court held that the commercial wisdom of CoC cannot be interfered with.

65. The Powers of the RP:

During the course of hearings, it is contended that the RP exercised its jurisdiction beyond the scope of powers is concern, Section 18 of the Code, 2016 specifies the duties of IRP to inter alia to take control and custody of the assets over which the Corporate Debtor has ownership rights, including assets which may are may not be in the possession of the Corporate Debtor and monitor the assets of the Corporate Debtor and manage its operations until an IRP is appointed. Further, Section 20, 23 & 25 empowers the RP to Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021 take all efforts to manage the operations of the Corporate Debtor as a going concern to protect and preserve the value of the property of the Corporate Debtor. Section 23 empowers RP to conduct CIRP and Section 25 casts a mandatory obligation on the RP to perform the duties as enshrined in that provision. Therefore, the RP has to perform his duties as mandated under the Code in true spirit to protect the interest of the Corporate Debtor.

66. After Hearing the Learned Counsel appearing for the respective parties on the issues as raised by them in this Appeal, this Tribunal is of the view that Whether such issues can be adjudicated upon by this Tribunal sitting as an Appellate Authority on the Jurisdiction vested with the Adjudicating Authority who decides the matters in a summary jurisdiction. In this regard, this Tribunal relies upon the Judgments of the Hon'ble Supreme Court on the issues.

Precedents:

The Hon'ble Supreme Court in Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021

(i) 'Tata Consultancy Services Ltd. vs Vishal Gisulal Jain, Resolution Professional, SK Wheels Pvt. Ltd.' Civil Appeal No. 3045 of 2020 dated 23.11.2021 held paragraph 28,



29.

"28. While in the present case, the second issue formulated by this court has no bearing, we would like to issue a note of caution to the NCLT and NCLAT regarding interference with a party's contractual right to terminate a contract. Even if the contractual dispute arises in relation to the insolvency, a party can be restrained from terminating the contract only if it is central to the success of the CIRP. Crucially, the termination of the contract should result in the corporate death of the Corporate Debtor. In Gujarat Urja (supra), this Court held thus:

"176. Given that the terms used in Section 60(5)(c) are of wide import, as recognised 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 effect of making certain the death of the corporate debtor. As Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021 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."

(emphasis supplied)

29. The narrow exception crafted by this court in Gujarat Urja (supra) must be borne in mind by the NCLT and NCLAT even while examining prayers for interim relief. The order of the NCLT dated 18

December 2019 does not indicate that the NCLT has applied its mind to the centrality of the Facilities Agreement to the success of the CIRP and Corporate Debtor's survival as a going concern. The NCLT has merely relied upon the procedural infirmity on part of the Appellant in the issuance of the termination notice, i.e. it did not give thirty days' notice period to the Corporate debtor to cure the deficiency in service. The NCLAT, in its impugned judgment, has averred that the decision of the NCLT preserves the 'going concern' status of the Corporate Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021 Debtor but there is no factual analysis on how the termination of the Facilities Agreement would put the survival of the Corporate Debtor in jeopardy.

(ii)'Gujarat Urja Vikas Limited vs. Amit Gupta & Ors.' Civil Appeal No. 9241 of 2019 dated 08.03.2021. The Hon'ble Supreme Court at paragraph 165 held as under:

"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 matters unique factual matrix)."

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67. As the law laid down by the Hon'ble Supreme Court in the decisions above, the NCLT and NCLAT should not interfere with a parties contractual right.

68. Findings/Conclusions Admittedly the parties have entered into a WTA dated 14.03.2014 and Amendment Agreement dated 01.03.2015 whereby certain amendments made to Articles by incorporating Article 5.1 a and Article 5.2 a to the original Agreement. However, there is a dispute with regard to substitution to the original agreement by way of amendment agreement and the amendment agreement only subsists. On the other hand, the stand of the Respondents that the amendment agreement is valid only for a period of two years i.e. up to 31.03.2017 and from 01.04.2017 the original agreement will be enforceable automatically. As stated supra both the Corporate Debtors are in CIRP and the critical services are essential to continue to be provided to

keep the corporate debtor's as a going concern. However, the moot issue is that which of the agreements Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021 to be followed by the parties cannot be decided by this tribunal in view of contractual obligations between the parties including not limited to interpretation and enforcement of the terms of the contract between the parties as held by the Hon'ble Supreme Court supra. Accordingly, this Tribunal is not expected to function as original and Appellate Jurisdiction to decide and adjudicate upon the disputes pertaining to the contractual obligations. Accordingly, the issue is answered against the Appellants.

69. Now we deal with issue no. (ii) & (iii) together This Tribunal comes to an irresistible and inescapable conclusion that the view taken by the Adjudicating Authority with regard to passing of the order is free from any legal and factual error and therefore, does not warrant any interference.

70. This Tribunal comes to a resultant conclusion that the Appellants have not made out any case to be interfered with accordingly both the Appeals stand dismissed. However, no order as Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021 to costs. The interim order passed by this tribunal dated 01.10.2021 stand vacated. All pending applications are closed.

[Justice M. Venugopal] Member (Judicial) [Kanthi Narahari] Member (Technical) sr Company Appeal (AT) (CH) (Insolvency) Nos. 234, 239 of 2021