

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL AT CHENNAI**  
**(APPELLATE JURISDICTION)**  
**Company Appeal (AT) (CH) (INS) No. 272 of 2021**  
**(Under Section 61(1) of the Insolvency and Bankruptcy Code, 2016)**  
**(Against the Impugned Order dated 24.09.2021 passed in I.A. No. 425 of 2021**  
**CP (IB) No. 187/07/HDB/2020 passed by the Adjudicating Authority, (National**  
**Company Law Tribunal, Hyderabad Bench)**

**In the matter of:**

**Sumit Binani**

Resolution Professional  
KSK Mahanadi Power company limited  
Having correspondence address at  
Commerce house, 4<sup>th</sup> Floor, Room No. 6,  
2A, Ganesh Chandra Avenue,  
Kolkata, West Bengal – 700 013

... Appellant

V

**1.V. Venkatachalam**

Resolution Professional Raigarh Champa  
Infrastructure private limited  
Having correspondence address  
R/o/No.12-13-205, Street No.2,  
Tarnaka, Secunderabad,  
Telangana - 500017

...Respondent No. 1

**2. Committee of Creditors**

Raigarh Champa  
Infrastructure private limited  
Having correspondence address at:  
8-2-293/82/A/431/A, Road No. 22  
Jubilee Hills, Hyderabad,  
Telangana - 500003

...Respondent No. 2

**I.A No. 588,589,590 & 591 of 2021 in Comp App (AT) (CH) (INS) No.272 of 2021**

**In the matter of:**

**Sumit Binani**

Resolution professional  
KSK Mahanadi Power company limited  
Having correspondence address at  
Commerce house, 4<sup>th</sup> Floor, Room No. 6,  
2A, Ganesh Chandra Avenue,  
Kolkata, West Bengal – 700 013

**... Applicant/Appellant**

**V**

**1.V. Venkatachalam**

Resolution Professional Raigarh Champa  
Infrastructure private limited  
Having correspondence address  
R/o/No.12-13-205, Street No.2,  
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**...Respondent/Respondent No. 1**

**2. Committee of Creditors**

Raigarh Champa  
Infrastructure private limited  
Having correspondence address at:  
8-2-293/82/A/431/A, Road No. 22  
Jubilee Hills, Hyderabad,  
Telangana - 500003

**... Respondent/Respondent No. 2**

**Present:**

For Appellant : Mr. Sandeep Bajaj  
For Mr. Anoop Rawat  
Mr. Allwin Godwin  
Mr. Zeeshan Khan  
Ms. Mohana,

Ms. Niranjana Pandian  
M/s. Shardul Amarchand Mangaldas, Advocates

For Respondent No. 1 : Mr. Y. Suryanarayana, Advocate  
For Mr. Tushar Nagar, Advocate  
Mr. Badri Narayanan, Advocate  
Mr. Jash Shah, Advocate

For Respondent No.2 : Mr. Anirudh Krishnan, Advocate

**Coram : Mr. Justice M. Venugopal Member (J)**

**Mr. Kanthi Narahari Member (T)**

**ORDER**

**(VIRTUAL MODE)**

**Per: Kanthi Narahari Member (T)**

1. The present appeal is filed against the orders passed by the Adjudicating Authority (NCLT, Hyderabad Bench-II, Hyderabad) in MA No.425 of 2021 in CP No. 187/7/HDB/2020, on 24.09.2021 whereby the Adjudicating Authority directed the Respondent/Appellant to pay the amount raised in the invoices in accordance with a binding contract which is in force, within a week so as to enable the applicant (1<sup>st</sup> Respondent herein) to provide the rail services subject to due payment without interruption to keep both the Respondent/Appellant as well as the 1<sup>st</sup> Respondent/Applicant as going concerns. Further the Adjudicating Authority made clear that it was not dwelling into the dispute regarding alleged exorbitant pricing as the same is arising out of the Agreement entered into between both the parties prior to CIRP. With the above directions the MA filed by the 1<sup>st</sup> Respondent herein was disposed of.

2. Aggrieved by the said order, the Appellant preferred the Appeal.

3. The Learned Counsel for the Appellant submitted that the Learned Adjudicating Authority has re-written the terms of commercial arrangements between the parties, instead of upholding the commercial arrangement that was prevailing between the parties immediately before commencement of the CIRP of both the parties as provided by Section 14(2A) of the Insolvency and Bankruptcy Code, 2016 (Code).

4. The Learned Counsel for the Appellant submitted that prior to commencement of CIRP of M/s. KSK Mahanadi Power Company Limited, transportation of coal was being made to the Plant of KSK Mahanadi by using the Railway Infrastructure of Raigarh Champa from Alkatara Railway Station, against which payment of the stipulated running expenses of the Respondent/Applicant were being borne by KSK Mahanadi directly in accordance with '2016 arrangement'. Even after commencement of CIRP of KSK Mahanadi the commercial arrangement continued. However, the CoC of Raigarh Champ and its Resolution Professional, the 1<sup>st</sup> Respondent herein raised invoices dated 24.07.2021 for the services that was provided in the month of April, May and June 2021 by relying on the terms of transportation agreement dated 31.03.2014 ('2014 Agreement'). He submitted that the agreement has not been enforced by the parties since 2016. As a result of the unlawful action, the Appellant was being asked to make payment for supply of coal identified as Minimum Guaranteed Quantum of Coal i.e. 10 Lakh MT, which is almost three times more than the supply of coal actually being delivered to KSK Mahanadi.

5. The Learned Counsel for the Appellant further submitted that the 1<sup>st</sup> Respondent herein filed the Application (MA/425/2021) before the Adjudicating Authority against the Appellant herein seeking directions to pay the invoices dated 24.07.2021 along with contractual rate of interest till realization and sought directions against the Appellant to ensure that the invoices which will be raised by the 1<sup>st</sup> Respondent are paid in full and in priority. The Appellant filed its reply and made submissions before the Adjudicating

Authority stating that the KSK Mahanadi and Raigarh Champa are related parties as per the Code and the services provided by the Respondent to the Appellant is a critical service as per Section 14 (2) of the Code. It is also averred that the amount billed by the Respondent is three times the actual quantity of coal supplied to the Appellant and the Appellant which is already undergoing CIRP cannot be forced to make such exorbitant payments and the 2014 Agreement does not have any bearing on the Appellant since the Appellant has been releasing O&M Payments as per the 2016 arrangement.

6. Further, the Learned Counsel for the Appellant submitted that as per Section 14(2A) of the Code, which mandates only payment for the actual payment of coal supplied to the Appellant during the period of moratorium. It is submitted that it is only trite to demand payments for critical supplies on a reasonable commercial basis for the actual quantity of coal transported by the Respondent (Raigarh Champa) to the Power Plant of the Appellant i.e. KSK Mahanadi. The Learned Counsel for the Appellant submitted that the invoices raised for the months from January 2021 to October 2021 vide invoices dated 19<sup>th</sup> October, 2021, 24<sup>th</sup> July 2021, 4<sup>th</sup> October 2021 and 2<sup>nd</sup> November 2021 for an amount of Rs.99,58,87,533/- has been paid under protest. The actual amount payable by the Appellant for the actual quantity supplied is Rs.24,76,06,770/- however the invoices raised by the Respondent for Rs.99,58,87,533/- and the said amount has been paid under protest as per the invoices raised by the Respondents. It is submitted that the Appellants have paid in excess of Rs.74,82,80,763/-.

7. The Learned Counsel for the Appellant submitted that in a similar case, this Hon'ble Tribunal on 01.10.2021 passed the Interim Order directing the Appellant therein to pay 50% of the outstanding dues to the Resolution Professional of the Respondent therein within one month from the date of passing of the order and further

the Appellant therein was directed to pay bills invoices to be raised or raise by the Respondent therein periodically without fail.

8. In view of the reasons stated above, the Learned Counsel prayed this Bench to pass similar Interim Orders to protect the interests of the Appellant since the Appellant is in CIRP.

9. Shri Y. Suryanarayana Learned Counsel appearing for the 1<sup>st</sup> Respondent filed detailed reply opposing the interim relief stating that the order passed in Company Appeal (AT(CH)(INS) No.234 of 2021 dated 01.10.2021 is not similar to the present appeal. He submitted that the Raigarh Champa is undergoing CIR Process and the CIRP is coming to an end on 18<sup>th</sup> December 2021. The balance of convenience does not lie in favor of the appellant and no harm /loss /prejudice could be caused to the Appellant in the event that Interim Relief sought herein are not granted. In fact, any interim relief granted in favor of the Appellant, at this stage it would greatly prejudice the ongoing CIRP of the Respondent, since 9 Expression of Interests received from Potential Resolution Applicants and they will be hesitant to submit Resolution Plans due to lack of clarity on the commercial arrangement between the KMPCL and RC RIPL.

10. Shri Anirudh Krishnan, Learned Counsel appearing for the 2<sup>nd</sup> Respondent filed Reply and submitted that the CIRP of RC RIPL comes to an end on 18.12.2021. He submitted that the Impugned Order was passed on 24.09.2021 and the present appeal and applications came up for hearing only on 24.11.2021 after a period of two months therefore, there is no urgency in passing the Interim Orders in favor of the Appellant. He further submitted that this Hon'ble Tribunal passed the Interim Order in Company Appeal No.234 of 2021 on 01.10.2021 directing the Appellant therein to pay only 50% of the invoice amounts and the said Interim Order come to an end on 06.12.2021 therefore the Appellant cannot rely upon the order passed by this Hon'ble Tribunal. He further submitted that when the Interim Order was passed on 01.10.2021 and 15.10.2021

in Company appeal No.234 of 2021, the Hon'ble Supreme Court had not yet passed its decision in Tata Consultancy Services v Vishal Ghisulal Jain 2021 SCC online SC 1113, wherein the Hon'ble Supreme Court unequivocal terms has set out that the NCLT and NCLAT cannot rewrite the terms of the Contract/Arrangement between the parties.

11. He further submitted that the Interim Order passed by this Tribunal was based on principles of equity and in the present case the Appellant has sufficient funds to meet the expenses due to the Respondent as per the terms of the Contract. In view of the submissions the Learned Counsel requested the Bench not to grant Interim Reliefs.

12. Heard the Learned Counsel appeared for the respective parties. At this stage, we are not going into delving deep into the merits of the main Appeal and also not expressing any opinion about the merits of the matter, for the reason that this Tribunal cannot decide the contractual matters in a summary jurisdiction. However, taking into consideration, the paramount interest of the parties for the reason that both the Companies i.e. KSK Mahanadi and Raigarh Champa are under CIRP, the supplies are to be made by the Raigarh Champa to the KSK Mahanadi and in turn the KSK Mahanadi has to pay the charges for the supplies to keep both the companies as a going concern. This Tribunal is conscious of the decision of the Hon'ble Supreme Court in re-Tata Consultancy Services where the Hon'ble Supreme Court held that the NCLT and NCLAT cannot rewrite the terms of Contract Agreement. However, as stated supra, keeping in view of paramount interests of the Company this Bench pass the following order:

- a. The Appellant is hereby directed to pay 50% of the outstanding due to the Resolution Professional of the 1<sup>st</sup> Respondent within one month from today;
- b. The Appellant is hereby directed to pay 50% of the bills/invoices to be raised or raise by the Respondent No.1 periodically without fail;

c. The Appellant cannot ask for any adjustments of the amount already paid to the 1<sup>st</sup> Respondent.

13. The matter is posted on 15.12.2021.

14. The parties are hereby directed to complete their pleadings and exchange the same before the next date of Hearing.

15. Accordingly, the Interim Application No. 591 of 2021 is disposed of.

**[Kanthi Narahari]**  
**Member (Technical)**

**[Justice M. Venugopal]**  
**Member (Judicial)**

**03.12.2021**  
**SE**