

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
HYDERABAD BENCH-II, HYDERABAD**

**MISCELLANEOUS APPLICATION NO.425 OF 2021  
IN  
COMPANY PETITION NO.187/7/HDB/2020**

**In the matter of:**

Mr. V. Venkatachalam  
Resolution Professional of  
Raigarh Champa Rail Infrastructure Private Limited

.... Applicant

**Vs.**

1. Mr. Sumit Binani  
Resolution Professional of  
KSK Mahanadi Power Company Limited  
4<sup>th</sup> Floor, Room No.6, Commerce House  
2A, Ganesh Chandra Avenue  
Kolkata – 700 013
2. Committee of Creditors of  
Raigarh Champa Rail Infrastructure Private Limited  
8-2-293/82/A/431/A  
Road No.22, Jubilee Hills  
Hyderabad – 500 003

... Respondents

**Date of Order: 24.09.2021**

**Coram:**

Shri. Madan B. Gosavi, Member (Judicial)  
Dr. Binod Kumar Sinha, Member (Technical)

**Parties / Counsels present:**

For the Applicant : Mr. Y. Suryanarayana, Advocate  
For Respondent 1 : Mr. Allwin Godwin, Advocate  
For Respondent 2 : Mr. Krishna C.V.Grandhi, Advocate



[ Per: Bench ]

**ORDER**

1. The instant Application is filed by the Applicant herein under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 seeking the following reliefs:
  - i. Direct the Respondent No.1 to pay the Invoices dated July 24, 2021 alongwith the contractual rate of interest till realization; and
  - ii. Direct the Respondent No.1 to ensure that the invoices which will be raised by the Applicant on behalf of RCR IPL for the services provided by RCR IPL to KMPCL are paid in full and in priority;
2. The averments made in the Application filed by the Applicant are as follows:
  1. It is averred that the Applicant herein is the Resolution Professional of M/s. Raigarh Champa Rail Infrastructure Private Limited (RCR IPL). On 01.01.2021, this Adjudicating Authority admitted the Company Petition and initiated CIRP against RCR IPL. RCR IPL is engaged in the business of constructing and providing rail infrastructure for transportation of coal and other commodities through Indian Railways.
  2. It is averred that RCR IPL was set up in the year 2009 with KSK Mahanadi Power Company Limited (KMPCL) as 49% shareholder and balance 51% being held by KSK Energy Company Private Limited. On March 20, 2014, both the parties entered into an Agreement for Infrastructure Utilisation for Transportation of Coal, which was subsequently amended on 31.03.2014 ("Transportation Agreement"). The Transportation Agreement is valid for a period of 14 years from 2014 unless extended by mutual agreement by both the parties. In terms of the Transportation Agreement, KMPCL is obligated to pay for

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the services provided by RCRIPL on or before the due date i.e. within 10 days from the Bill Date. As per Clause 6.2 of the Agreement, KMPCL is obligated to pay to RCRIPL charges (on a monthly basis) on the actual quantity of coal transported or the Guaranteed Quantity (as defined therein) of coal, whichever is higher. The Agreement also provides that interest shall be payable in the event of non-payment in accordance with clause 10.3 of the Agreement.

3. It is averred that by an Order dated 03.10.2019, this Adjudicating Authority initiated CIRP against KMPCL and KMPCL has been availing the services of RCRIPL in terms of the Transportation Agreement without making payments for the services rendered by RCRIPL.
4. It is averred that on 01.01.2021, this Adjudicating Authority initiated CIRP against RCRIPL. During the CIRP period of RCRIPL, KMPCL has continued to avail the services under the Transportation Agreement for ensuring its going concern status and continued revenue generation.
5. It is averred that the sole business of RCRIPL is to provide infrastructure to transport coal for KMPCL. Therefore, despite being under CIRP, considering the national importance of power generation, RCRIPL has continued to provide its services to KMPCL in accordance with the Transportation Agreement.
6. It is averred that in the 4<sup>th</sup> COC meeting of RCRIPL held on 27.05.2021 with 78.59% of voting share, passed the following resolution was passed:

**“RESOLVED THAT,** pursuant to the provisions of Section 28 of the Insolvency & Bankruptcy Code, 2016 and rules and regulations framed thereunder, consent of the members of the Committee of Creditors be and is hereby provided to the Resolution Professional to





raise monthly invoices effective April, 2021 for providing transport infrastructure of the Corporate Debtor to KSK Mahanadi Power Company Limited, related party as per the commercials agreed in terms of the contract entered into between both the aforesaid parties in the year 2014”.

In view of the above, from April, 2021 onwards RCRIPL is providing services to KMPCL under the Transportation Agreement, with the understanding that the same was to be invoiced by RCRIPL to KMPCL.

7. It is averred that the Applicant has raised the following invoices upon KMPCL for the services provided by RCRIPL under the Transportation Agreement, which were served on the Respondent No.1 vide e-mail dated 24.07.2021 stating that the following invoices have been raised as per the contractual terms and the same are to be cleared within 10 days from the receipt of the invoices.

S.No.	Service Month	Invoice No.	Date	Amount (Rs.)
1	April, 2021	24.07.2021	RCRIPL/2021-22/001	10,01,78,036
2	May, 2021	24.07.2021	RCRIPL/2021-22/002	10,01,78,036
3	June, 2021	24.07.2021	RCRIPL/2021-22/003	10,01,78,036

**Copies of the aforesaid invoices are shown as Annexure-E of the application.**

8. It is averred that Respondent No.1 addressed an email dated 29.07.2021 to the Applicant inter alia objecting to the Invoices raised by the Applicant and proposing to convene a meeting between the Applicant and the Respondent No.1 to discuss and renegotiate the terms of the commercial arrangement between RCRIPL and KMPCL. The Applicant communicated that only upon the payment of the invoices, the Applicant and the Respondent 1 can have a meeting to





discuss and renegotiate the commercial terms between RCRIPL and KMPCL. In response to that KMPCL stated that it is not in a position to pay the aforesaid invoices and that the Applicant should reconsider his decision to have a meeting with KMPCL in order to resolve the matter.

9. It is averred that as no payments were made by the Respondent No.1, the COC in its 9<sup>th</sup> meeting held on August 7, 2021 directed the Applicant to approach this Adjudicating Authority seeking payment of the invoices by KMPCL. Accordingly, the applicant had filed Miscellaneous Application No.425 of 2021.
10. It is averred that KMPCL has been generating power on the basis of the coal that is transported by utilizing the infrastructure of RCRIPL. Given that the services provided by RCRIPL have ensured the going concern status of KMPCL enabling it to generate revenue during its CIRP, there is no valid or tenable reason for KMPCL to deny the Applicant's legitimate dues.
11. It is averred that since KMPCL is generating revenue by producing power basis the coal transported by utilizing the infrastructure of RCRIPL, the services provided by RCRIPL is deemed 'critical' for protecting and preserving the value of KMPCL as per Section 14(2A) of the Code. Under Section 14(2A) of the Code, KMPCL is obligated to make payment for the services provided and the Respondent No.1 is in violation of Section 14(2A) of the Code.
12. The Applicant also placed reliance on the Order issued by this Adjudicating Authority in the matter of KWIPL (a group company of KMPCL and RCRIPL) vs. KMPCL, where KMPCL had failed to clear the invoices of KWIPL for transporting water to KMPCL, wherein it was held that -





*“4. So, the Law is very clear that supplier of goods or provider of service of 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 a going concern. We do not wish to add anything more than what has been stated under the Law”.*

13. It is averred that the various Orders passed by this Adjudicating Authority and the Hon'ble National Company Law Appellate Tribunal that as per Section 14(2A) payment must be made to the person for the critical services which are being provided. RCR IPL is also undergoing CIRP. The non-payment of dues by KMPCL is resulting in value erosion and zero revenue generation for RCR IPL. If the present circumstances are permitted to continue and RCR IPL is to transport coal for KMPCL against no consideration, RCR IPL shall be pushed into Liquidation.
  14. It is averred that if there is any further delay in receiving payments from KMPCL, the interest of the stakeholders of RCR IPL will be prejudiced and irreparable harm will be caused to all stakeholders if the going concern status of RCR IPL is interfered with.
3. The averments made in the Reply filed by the Respondent No.1 are as follows:
- i. It is averred that in the Agreement dated 31.03.2014 whereby KMPCL was required to pay charges for use of infrastructure of RCR IPL as prescribed in Schedule-I of the 2014 Agreement, being subject to the actual amount of coal transported to the plant site of KMPCL. This was subject to minimum guarantee amount that KMPCL was required to pay to RCR IPL. As per this Agreement, the last invoice was raised in

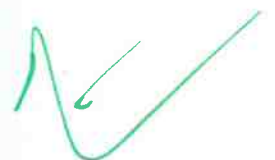
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September, 2016. Pursuant to an arrangement between the parties since October, 2016, KMPCL was entitled to use the infrastructure of RCRIPL and as a consideration it was bound to bear the O&M charges for maintaining RCRIPL's infrastructure.

- ii. It is averred that since the earlier agreement between KMPCL and O&M Contractor of the Infrastructure of RCRIPL expired on 31.05.2021, a fresh Letter of Intent was issued by the Applicant in July, 2021 to the O&M Contractor of RCRIPL. It is also averred that KMPCL has made payments to the O&M contractor directly for the months of April and May, 2021, which amounts to Rs.2,95,80,175/-.
- iii. It is averred that the present application is not maintainable due to concealment of material facts and false statements. In fact the averment that the commercial understanding between KMPCL & RCRIPL in the 2014 agreement has neither been amended nor modified is false in light of the following facts:
  - a) The applicant has in para 8 of the Application admitted that (a) no invoices have been raised by RCRIPL since September, 2016, separately for use of infrastructure of RCRIPL by KMPCL and (b) instead as consideration for the said service, KMPCL has paid operational costs incurred by RCRIPL since October, 2016. Further in para 25 of the application, the Applicant has admitted that KMPCL has directly entered into a contract with the then O&M Contractor of RCRIPL which was valid till 31.05.2021.
- iv. It is averred that the commercial arrangement as existed between KMPCL and RCRIPL since October, 2016 was with acquiescence of RCRIPL as also clear from the Audited Balance Sheet of RCRIPL for the financial years 2018-19 and 2019-2020.





- v. It is averred that KMPCL and RCRIPL are related parties as per the Code and the services provided by RCRIPL to KMPCL is a critical service as per Section 14(2) of the Code.
- vi. It is averred that the invoices cannot be enforced by the Applicant as there is vast difference in the actual quantity of coal supplied to KMPCL and the amount sought to be billed for the same in the invoices. The detailed statement is shown below:

Month for which invoices was raised	Actual quantity of coal supplied to KMPCL (MT)	Details of the invoices unilaterally raised by RCRIPL	
		Quantity of Coal (MTs)	Amount (Rs.)
April, 2021	2,97,298	10,00,000	10,01,78,036/-
May, 2021	4,39,435	10,00,000	10,01,78,036/-
June, 2021	2,47,535	10,00,000	10,01,78,036/-

The amount billed for by RCRIPL as per minimum take or pay is nearly 3 times the actual quantity of coal supplied to KMPCL. KMPCL being a company which is already undergoing CRIP cannot be forced to make such exorbitant payments which KMPCL is not bound to pay for. Moreover, the question of applicability of the 2014 Agreement does not have any bearing on KMPCL since KMPCL has been releasing O&M payments as per the 2016 arrangement until the Applicant has been appointed as the Resolution Professional of RCRIPL.

- vii. The invoices raised by RCRIPL are beyond the scope of the 2016 Arrangement between the parties and RCRIPL has not raised any invoices under 2014 Agreement until 24.07.2021.
- viii. It is averred that even KMPCL is undergoing CIRP and any payments to be made by KMPCL cannot be fixed at exorbitant amounts solely to benefit RCRIPL for revenue generation purposes. It is undisputed that KMPCL is to make payments for availing any essential services as per Section 14(2A) of the Code and the mandate of 28(1)(f) will also have to

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be followed by the respondent No.1 in order to release any payments to RCR IPL.

- ix. The Applicant has relied on the Order passed by this Adjudicating Authority in IA 270 of 2021 in CP 492/7/HBD held that in order for the Corporate Debtor to avail the essential services, then the Resolution Professional must pay for the expenses or services to keep the Corporate Debtor as a going concern, which was presently before the Hon'ble NCLAT.
- x. The Respondent No.1 also averred that by way of Section 25(1) read with Section 23(2) of the Code, the Respondent No.1 is also required to maintain KMPCL as a going concern and that KMPCL cannot be made to bear expenses beyond the purview of the 2016 Arrangement.
- xi. The Respondent No.1 further submits that it was the applicant, pursuant to the expiry of the contract between KMPCL and the contractor, who has approached the O&M Contractor for entering into the Letter of Intent (LOI) so as to make RCR IPL liable for O&M expenses. The Respondent No.1 has ensured payments to the O&M contractor, until the expiry of the said contract in May, 2021 and is also still willing to reimburse RCR IPL for the O&M expenses incurred by RCR IPL for transportation of coal to KMPCL. Therefore, the Applicant cannot state that RCR IPL will be pushed into liquidation solely due to non-payment of invoices raised by RCR IPL.
- xii. It is averred that in case Respondent No.1 is coerced to make such excessive payments to RCR IPL, then the same might even push KMPCL to liquidation, since KMPCL will be forced to bear such inflated amounts, which is charged beyond the scope of services provided by RCR IPL to KMPCL. It is also averred that going concern nature of KMPCL is also being affected while RCR IPL raises invoices as per the 2014 Agreement. Keeping in mind that the only source of revenue of RCR IPL is to supply coal to KMPCL, ever since the 2016 Agreement





KMPCL has been ensuring that RCRIPL is not burdened with dealing with any O&M expenses. Therefore, as per the 2016 Arrangement, KMPCL has ensured the going concern nature of RCRIPL and is also willing to reimburse RCRIPL with respect to the O&M services provided to RCRIPL.

4. Heard both sides and perused the record.
5. This application is filed by the Resolution Professional of the Corporate Debtor, M/s. Raigarh Champa Rail Infrastructure Private Limited for direction to the Resolution Professional of M/s. KSK Mahanadi Power Company Limited to pay the amounts of invoices dated 24.07.2021. It is not in dispute that the Applicant herein has been providing rail transport services to the Respondent Company to keep the Respondent Company as a going concern. We heard Learned Counsel for the Applicant/RP and Learned Counsel for the Respondents at length.
6. Section 14 (2A) of Insolvency & Bankruptcy Code, 2016 states that –  
*“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”.*
7. So, the Law is very clear that the supplier of goods or provider of service of the Corporate Debtor cannot stop such supply or stop to provide services, provided the RP has to make the payment of expenses for such procurement of services or supply of goods to keep the Corporate Debtor as a going concern. We do not wish to add anything more than what has been stated in the Law.
8. In view of the above, we direct the Respondent to pay the Applicant the amount raised in the said the Invoice, in accordance with a binding






contract which is in force, within a week so as to enable the Applicant to provide the rail services subject to due payment without interruption to keep both the Respondent as well as the Applicant as going concerns. It is also made clear that this Adjudicating Authority is 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.

9. With this, application stands disposed of.

  
**BINOD KUMAR SINHA**  
**MEMBER (TECHNICAL)**

  
**MADAN B. GOSAVI**  
**MEMBER (JUDICIAL)**