SLNo.1

NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH
COURT HALL NO: II

(PHYSICAL HEARING)

CORAM: JUSTICE TELAPROLU RAJANI – HON'BLE MEMBER (J)
CORAM: SHRI.CHARAN SINGH - HON'BLE MEMBER (T)

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL, HYDERABAD BENCH, HELD ON 08.06.2023 AT 02:30 PM

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	**IA (IBC)/28/2023 & IA (IBC)/119/2023 in CP (IB)No.420/7/HDB/2018**
NAME OF THE COMPANY	**Lanco Amarkantak Power Ltd**
NAME OF THE PETITIONER(S)	**Axis Bank Ltd**
NAME OF THE RESPONDENT(S)	**Lanco Amarkantak Power Ltd**
UNDER SECTION	**7 of IBC**

ORDER

IA (IBC)/28/2023
This application is allowed, vide separate orders.

IA (IBC)/119/2023
This application is closed consequent to the disposal of IA/28/2023.

Sd/- Sd/-

MEMBER (T) **MEMBER (J)**

Apoorva

IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH -II

I.A. No. 119 of 2023
In
IA No. 28 of 2023 in
CP (IB) No. 420/7/HDB/2018
U/s. 60(5) of the I&B Code, 2016
read with rule 11 of the National Company
Law Tribunal Rules, 2016.

In the matter of

Saurabh Kumar Tikmani
Resolution Professional , acting on
Behalf of Lanco Amarkantak Power Limited
KPMG Restructuring Services LLP,
Lodha Excelus Appollo Mills Compound,
N M Joshi Marg, Mahalaxmi,
Mumbai – 400 011 … Applicant

Vs.

South Eastern Coal Fields Limited,
Through its Chairman cum Managing Director
Seepat Road, Bilaspur, Chattisgarh -495 006.

Date of Order: 08/06/2023

Coram:

Hon'ble Justice Mrs. Telaprolu Rajani, Member (Judicial)
Hon'ble Shri Charan Singh, Member (Technical)
Counsel/Parties present:

For the Applicant : Ms. Rubaina Khatoon
For the Respondent : Mr. Khamar Kiran Kantamneni &
Mr. Mohammed Omer Farooq

[PER: BENCH]

ORDER

A. As I.A. No. 119 and I.A. No. 28 of 2023 are inter-connected, we pass a common order.

I. I.A.No. 28 of 2023:

1. This application is filed by the Resolution Professional (RP) under section 60(5) of I & B Code, 2016 read with Rule 11 of NCLT rules, 2016 seeking to i) direct the Respondent to withdraw its letter dated 22/12/2022 issued to Corporate Debtor (CD) thus nullifying the termination of fuel supply agreements (FSAs), ii) directions to the Respondent to refrain from invocation

of bank guarantees provided by CD as security deposit while signing the coal supply agreements/fuel supply agreements dated 28/08/2013, iii) directions to Respondent to act in accordance with the directives issued by Ministry of Power vice office Memorandum dated 08/03/2019 and 01/10/2019 and iv) pass such other orders as this Hon'ble Tribunal may deem fit and proper.

2. The facts, briefly, as mentioned in the Application, are as follows:

i) Pursuant to the application filed u/s 7 of the IBC by Axis Bank Ltd., the Corporate Debtor (CD) was admitted into Corporate Insolvency Resolution Process (CIRP) by this Tribunal by order dated 05/09/2019 and the applicant was appointed as the Interim Resolution Professional (IRP) and it was later confirmed as Resolution Professional (RP) and moratorium was declared with effect from 05/09/2019.

ii) On 06/06/2009, Respondent issued letter of assurance (LoA) for grant of long-term coal linkage for Unit 3 of Coal Based Pit Head, Supercritical Thermal Power Plant of the CD situated at Village – Pathadi in Korba District, Chattisgarh (Project).

iii) On 03/06/2010, the Respondent issued another LoA for grant of long-term coal linkage for Unit 4 of the Project of the CD. Later, Respondent executed the FSAs approved by Coal India Limited (CIL) for supplying coal for Unit 3 & 4 of CD's project. In terms of LoAs, the commitment guarantee submitted by the CD was converted to security deposit for the purposes of FSAs. Accordingly, the CD provided Bank Guarantees (BGs) dated 02/11/2013 for Unit 3 & 4 as security deposit. The said BGs were issued by Punjab National Bank and were extended multiple times and valid till 17/05/2023 for Unit 3 and 04/05/2023 for Unit 4 of the project.

iv) In accordance with Clause 2.8.3.1 of the FSAs, the CD was to fulfil the condition precedent within a period of 24 months or further period of 180 days as may be extended on account of Force Majeure. Any material change in the coal distribution system on the basis of directions issued by

Government Authorities at any time after the execution of FSA was to be considered as an event triggering force majeure clause. Subsequent to signing with the FSAs, various projects, across the country, were stalled due to reasons beyond the control of project developer, such as policy changes, macro-economic situations, etc. and the same were acknowledged by the Standing Linkage Committee (Long Term) for power sector and was included in the letter dated 27/07/2016 issued by the Ministry of Coal (MoC).

v) In the light of the above, MoC vide letter dated 22/05/2017 introduced a new policy, pursuant to which the validity of the said FSAs were extended till 31/03/2022. While the project was under advance stage of completion with cumulative progress being more than 70%, its construction was stalled in August, 2017 on account of initiation of CIRP of Lanco Infratech Limited (LITL), which happens to be the promoter group company and EPC contractor for the project. The CIRP of LITL was initiated vide order dated 07/09/2017 passed by this Tribunal.

vi) On 12/11/2018 a report was submitted by a High level Empowered Committee, set up by Government of India, addressing the issues being faced by stressed assets/thermal power projects in India.

vii) On 08/03/2019, MoP issued an office memorandum wherein it acknowledged the report dated 12/11/2018 and issued directions pursuant to which authorities were directed not to terminate the FSAs for projects referred to NCLT.

viii) Subsequently, the CD was admitted to CIRP by virtue of admission order dated 07/08/2017 by this Tribunal.

ix) On 01/10/2019, the MoP issued another office memorandum capturing the minutes of review meeting dated 24/09/2019 held to discuss the issues pertaining to stressed assets/thermal power projects in India. In accordance with the office memorandum dated 01/10/2019 issued by MoP,

stressed power project assets in India were recategorized under three broad heads wherein the CD was classified as Category II of the stressed projects.

x) On 30/03/2022, a letter was issued by the CD to MoC and MoP, specifically highlighting the ongoing CIRP and thereby requesting for an extension of validity of FSAs for satisfaction of condition precedents with regard to completion of construction of projects and power project agreements, till 48 moths from the date of resolution of the CD. It is paramount to note that the position posited by the CD in the letter dated 30/03/2022 was never disputed by either the MoP or MoC.

xi) On 22/11/2022, letters were issued by the Respondent to the CD regarding termination of FSAs and subsequent forfeiture of BGs on grounds of non-fulfilment of condition precedents as set out in the FSAs by the CD.

xii) On 28/11/2022, letter was issued by the CD to the Respondent wherein, while requesting for withdrawal of the show cause notices, it was highlighted that the CIRP of CD is in its advanced stage and that the termination of FSAs would be in sheer disregard of directives issued by MoP.

xiii) The CD approached the Hon'ble High Court of Delhi by way of a Writ Petition bearing No. W.P.(C) 16553/2022 praying for directions to be issued to Respondent, inter-alia, to withdraw the show cause notices and to act in accordance with directives issued by MoP vide office memorandum dated 08/03/2019. However, the Hon'ble Delhi High Court was not inclined to go into the merits and directed the Petitioners to approach this Tribunal.

xiv) The Respondent issued a letter dated 07/12/2022 to the applicant in relation to representing the CD's case before the Respondent on 08/12/2022.

xv) On the said date, termination order was issued by the Respondent to the CD in sheer disregard and contravention of directives issued by MoP.

xvi) In the letter dated 22/12/2022, the Respondent identified the applicant claiming to be authorized representative of LAPL. It is to be noted that

identifying the applicant in the manner above is a departure from the manner of identifying the applicant in past exchanges between CD and the Respondent. In the above letter, the Respondent proceeds on a wholly inaccurate and baseless assertion that CD's CIRP is being run by the erstwhile management. Review of the aforesaid letter reveals that the Respondent has reached the afore-mentioned inaccurate and baseless conclusion on account of SECL not being provided with minutes of COC Meeting. The Respondent also stated that LAPL's suspended management has been taking unilateral steps with the activities of LAPL which demonstrates that the CIRP is being run by the previous management which is clearly contrary to the provisions of IBC, 2016.

xvii) There is no concept of suspension of management of the CD during CIRP as the Respondent is confusing suspension of the 'powers of the Board of Director' with the suspension of management. In this regard, the Applicant referred section 17(3) of the Code, which provides that "*The officers and managers of the Corporate Debtor shall report to the interim resolution professional".* Accordingly, the applicant submitted that the employees, management and including erstwhile board of directors are statutorily required to aid and assist the resolution professional under the Code. Even discounting Respondent's erroneous understanding of the provisions of the Code as above, the Respondent's conclusion that the CIRP is being run by the previous management, solely on the ground that Respondent's personnel have interacted with LAPL's officials and management, is reflective of Respondent's superficial and insincere consideration of peculiar and unique challenges faced by the CD owing to its CIRP.

xix) Section 20(1) of the IBC Code states that IRP shall make every endeavour to protect and preserve the value of the property of the CD and manage the operations of the CD as a going concern and he has to take all such actions as are necessary to keep the CD as a going concern. Termination of order is in violation of section 15 of the Code.

3. In view of the above submissions, the applicant seeks for the reliefs as mentioned above.

4. The Respondent filed Counter denying the contents of the application and further contended as follows:

i) The rights and obligations of the applicant and the respondent under the FSAs were subject to the satisfaction, in full, of the Conditions Precedent. The applicant's condition precedent to the implementation of the FSAs was that it was required to furnish long term power purchase agreements (PPA) entered into with Distribution Companies (Discoms) and further ought to have completed the construction and completion along with readiness of the power plant within the Condition Precedent Period of twenty four months from the date of entering into the FSA, which was further extendable up to a maximum period of 180 days.

ii) FSAs shall only come into force on the effective date i.e. completion of the CPs under the FSAs or waiver of the CPs jointly by both the parties. Till date only 70% of the plant has been completed and no long term PPA has been entered into by the Petitioner with Discoms. As such, the applicant has miserably failed to comply with the CPs and other terms and conditions of the FSAs even after a lapse of over nine years from the date of execution of the FSAs.

iii) The letter dated 22/05/2017 issued by the MoC being the Nodal Agency of the Respondent, distinguishes the LoA-FSA regime of coal allocation and introduced a more transparent coal allocation policy for the Power Sector called as the SHAKTI (Scheme for Harnessing and Allocating Koyala (cola) Transparently in India). It was clarified in the said letter that under the FSA regime, the outer time limit within which the power plan of LoA holders must be commissioned for consideration of FSA shall be 31/03/2022, failing which LoA would stand cancelled. Further, it stipulated that about 19000 MW capacities out of 68000 MW could not be commissioned by 31/03/2015. Coal

supply to these capacities may be allowed at 75% of ACQ against FSA, provided these plants are commissioned within 31/03/2022. No further extension was provided subsequently. The object and intent behind the issuance of the letter dated 22/05/2022 by the MoC was to do away with the old regime of LoA-FSA and bring about a new and more transparent coal allocation policy for the power sector in India.

iv) The Power Sector has deliberated extensively on the issue of extension of timelines for execution of PPAs as per the CPs mentioned in the FSAs and held that "in view of the deliberation in the meeting, the Committee recommended that the request for extension of Condition Precedent clause for 2 years from 31/12/2021 cannot be agreed to. However, in view of the provisions of SHAKTI Policy where timelines have been prescribed and also the guidelines on fading away of the old regime of the LoA-FSA, SLC (LT) recommended for extension of timeline for obtaining PPA as per CP clause under FSA till 31/03/2022.

v) MoC, through Standing Linkage Committee for power sector has subsequently, once again decided against any further extension of timelines for obtaining PPAs. In its meeting held on 28/10/2022, it was recommended that in view of the deliberations in the meeting and in view of the provisions of the SHAKTI Policy which mandates fading away of the old regime of LoA-FSA, SLC(LT) recommenced that irrespective of the Condition Precedent Clause of furnishing a PPA in the FSAs of the power plants signed under the erstwhile nomination basis regime, only those eligible PPAs entered up to 31/03/2022 may be accepted for supply of linkage coal by the coal companies.

vi) Based on the directives and the recommendations of the MoC, Coal India Limited vide its letter dated 05/11/2022 has directed for action to be taken towards cancellation and consequential forfeiture of the security deposit in cases where no power purchase agreements have been submitted on or before 31/03/2022.

vii) Though the Condition Precedent Period for the applicant to comply with the CPs under the FSAs expired in March, 2016, the FSAs were not terminated nor was the security deposit forfeited in accordance with and in compliance of MoC's letter dated 22/05/2017. Since the extensions granted by the MoC have lapsed, the FSAs were subsequently terminated in terms of the FSAs and the directives issued by the MoC.

viii) The applicant seeking to attribute the delays caused in complying with the CPs under the FSAs and relying on the CIRP of its promoter group and its alleged EPC contract, which was admitted only in August 2017 is misplaced. The Resolution Professional has to keep the Company as a going concern, which includes performance of the Company's obligations under FSAs.

ix) Referring to section 14 & 25 of IBC, the applicant submitted that section 14 & 25 of IBC have no relevance and application to the facts and circumstances of the present case. Explanation to Section 14(1) of the IBC Code is only applicable to the section 14(1). In any case, the explanation provides for a bar on suspension or termination being done on the grounds of insolvency, but, not for its failure in complying with the CPs and its contractual obligations under the FSA's.

x) The Respondent is neither supplying any goods or services to the CD in terms of section 14(2) and 14(2A) of the IBC. The supply of coal under the FSAs never commenced since the date of agreement in 2013 due to the failure of the CDs compliance with its CPs and obligations under the FSAs. Section 14(2) states that only the supply of essential goods or services shall not be terminated during the CIRP. Since there is no supply of any essential goods or services critical to protect and preserve the value of the CD and manage it as a going concern, section 14 is inapplicable to the present case. Contingent performance and consequent supply of coal cannot be interpreted as being essential goods or service critical to protect and preserve the value of the CD. The coal sought to be supplied under the FSAs can always be procured by the CD after the completion of the project/plant as per the existing policy since

there is no bar for it to participate in the new regime of coal supply after the FSAs are terminated.

xi) The applicant did not choose to make Ministry of Power a party, though, it has sought speaking order from this Hon'ble Court to implement and direct the Respondent to act in accordance with the directives issued by the Ministry of Power. The submissions made by the counsel representing the MoP and the MoC as recorded in the Hon'ble Delhi High Court order as follows:

> "*He, however, points out that in so far as the decision for non-cancellation taken in March, 2019 was concerned, the same related to only PPAs and not Fuel supply Agreements or Coal supply agreements. It is further submitted by him that the Minutes which are relied upon by the Petitioner dated September, 2019 do not give any further extension beyond 31st March, 2022 to the Petitioner."*

xii) Despite the above submissions made by the counsel representing the MoC and MoP before the Hon'ble High Court, the applicant has sought to mislead this Tribunal by stating that MoP vide its Memorandum dated 08/03/2019 had issued directions pursuant to which authorities were directed not to terminate the FSAs for projects referred to NCLT's and further tried to fabricate the scenario to show that the Respondent has passed the Termination Order in complete disregard and contravention of the directives issued by MoP. The Hon'ble High Court further observed that, prima-facie, there appears to be no extension beyond the date of 31st March, 2022, which has been given to the Petitioner.

5. In view of the above submissions, the Respondent prays this Hon'ble Tribunal to dismiss the present application.

6. The applicant filed rejoinder against the objections raised by the Respondent in the Counter, which are as under:

i) As regards the contention of the Respondent that the jurisdiction of this Tribunal to adjudicate the issues raised in the application, it is stated that

the reliefs sought by the applicant in the application filed u/s 60(5) of the IBC code are intrinsically connected with the CIRP of the CD.

ii) As regards the termination of the FSAs by the Respondent that the FSAs have been terminated purely on contractual terms and not on account of the ongoing CIRP of the CD, it is stated that the FSAs were executed between the CD and Respondent on 28/08/2013. Although, the FSAs contemplated fulfilment of conditions precedent within 24 months, this requirement came to be waived pursuant to new policy issued by the Ministry of Coal on 22/05/2017, pursuant, to which the validity of the FSAs was extended until 31/03/2022. The coal allocation forming subject matter of the present dispute pertains to Unit 3 & 4 of the Project, construction of which was already commenced and is 70% complete. Non-fulfilment of the conditions precedent in the present case is intrinsically linked with the incidence of CIRP.

iii) As regards the contention of the Respondent that the applicability of section 14 in the present case, it is stated that the Respondent failed to appreciate the language of section 14(2) and 14(2A) of the IBC. While section 14(2) provides that supply of essential goods or services cannot be suspended, section 14(2A) separately provides that where the resolution professional considers that a particular arrangement/contract is critical to protect and preserve the value of the CD, the same shall not be terminated or suspended during the moratorium unless dues arising during moratorium are unpaid or there is no assertion to the effect that the CD has defaulted in payment of dues that have arisen during the moratorium.

iv) A reading of section 14 clarifies that the RP has the power to categorize even those services as critical. Section 14(2A) is distinguishable from that of section 14(2) and is provided with the intent to bestow the RP with maximum discretionary power to decide upon critical nature of the supply of goods for the CD. While the CD stands to be affected seriously by the termination, no loss or damage accrues upon the Respondent due to subsistence of the FSAs.

v) As regards the non-joinder of the Ministry of Power, it is stated that the said objection deserves no consideration as no reliefs are sought against the Ministry of Power.

7. In view of the above submissions made in the rejoinder, the applicant, once again, prays the Hon'ble Tribunal to allow the application.

8. We have heard both the counsels and perused the record. We have also gone through the written submissions submitted on either side. The contents of the written submissions would be discussed while we deal with the issues in dispute. On the conspectus of the pleadings, documents and arguments, the following points would emerge for our consideration:

1) Whether this Tribunal has jurisdiction to adjudicate upon the dispute involved in this application.

2) Whether the show cause letter issued by the Respondent to the applicant dated 22/11/2022 calling upon him to justify as to why the FSAs should not be terminated and Bank Guarantees invoked, is legal.

3) To what result.

9. POINT NO 1:

Whether this Tribunal has jurisdiction to adjudicate upon the dispute involved in this application.

9.1 As regards the point whether the Tribunal has jurisdiction to adjudicate upon the dispute involved in this application, it can be seen that this dispute, in fact, comes before us for adjudication on the direction of the Hon'ble High Court of Delhi, to the applicant, in its order dated 01/12/2022. The said order has not been challenged by the Respondent and has attained its finality. The objection raised on jurisdiction, in fact, has not been raised in the written arguments by the Respondent in a tenable way and it was merely mentioned that the argument of the applicant that the Respondent is estopped from raising the issue of jurisdiction since it had submitted before the Hon'ble High

Court of Delhi that NCLT would have jurisdiction, is wholly erroneous, misplaced and legally impermissible. It is also contended that for an order or a judgment to operate as res-judicata, the finding must be one disposing off a matter directly and substantially in issue in earlier proceedings. However, it is not refuted by the counsel for the respondent that the respondent has raised no objection before the Hon'ble High Court of Delhi as regards the jurisdiction of NCLT and the contention of the applicant's counsel that it is the respondent, in fact, that has raised the issue of jurisdiction before the Hon'ble High Court of Delhi stating that it is only NCLT which would have jurisdiction to deal with this issue, is not denied. For better appreciation, at this juncture, it would be profitable to look into the judgment of the High Court of Delhi.

9.2 The Hon'ble Delhi High Court has clearly recorded the submission, which is the second submission before the said Court, that the Respondents have submitted that the writ petition is not maintainable in view of section 14 of IBC and that the ld. Senior counsel submitted that NCLT would have jurisdiction to even for non-parties and members who are not even part of COC if filed before the NCLT. Even if it is assumed that the contention that the observations of the Hon'ble High Court do not amount to res-judicata since the finding is not the one disposing of the material and directly consequential in issue in earlier proceedings is correct, it is, however, evident that based on the contention made by the counsel for the respondent before the Hon'ble High Court of Delhi, it was held that NCLT is the forum which has jurisdiction to resolve this issue and it is also not disputed that the same was not questioned before any appellate forum. Even for the reasons for which the matter was sought to be referred to NCLT, which are mentioned before the Hon'ble High Court of Delhi by no other than the counsel for the Respondent, it can be concluded that this Tribunal has jurisdiction to entertain this application.

9.3 That apart, section 60(5)© of IBC vests jurisdiction in this Tribunal to dispose of any question of priorities or questions of law of facts arising out of or in relation to insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under the Code. It is an undisputed fact that the applicant company is taken into Corporate Insolvency Resolution Process (CIRP). Whether the questions raised in this application relate to insolvency or not have to be adjudicated, before holding that the application is not maintainable u/s 60(5) of the Code. For this purpose, this Tribunal has to assume jurisdiction.

9.4 In view of our above observations, we hold that this Tribunal has jurisdiction to entertain this application and accordingly, this point is decided in favour of the applicant.

10. POINT NO2:

Whether the show cause letter issued by the Respondent to the applicant dated 22/11/2022 calling upon him to justify as to why the FSAs should not be terminated and Bank Guarantees invoked, is legal.

10.1 As regards the 2nd point whether the show cause letter issued by the Respondent to the applicant dated 22/11/2022, is legal, the facts so far as relevant to decide this point are as follows:

10.2 The Corporate Debtor (CD) runs a thermal power plant in Korba, Chhattisgarh, which is bifurcated into 3 phases. Phase – I is fully operational, Phase – II is under construction and completed 70% and Phase – III is nascent stage.

10.3 For Phase – II of the project, the CD executed 2 FSAs with identical provisions with the Respondent to secure allocation of coal once the Phase was constructed and ready for commissioning. The FSAs provided that the CD should have completed construction of Phase II and should have entered

into a long term power purchase agreement (PPA) in respect of the plant within 24 months of execution of the FSAs, which would be ending by 28/08/2015. Following the execution of the FSAs, there was an industry-wide slowdown across India due to policy changes, cost escalation, delays in land acquisition etc. and the same was acknowledged by the Ministry of Coal (MoC) in a circular dated 27/07/2016. The situation prompted the MoC and Ministry of Power (MoP) to issue several important circulars, altering the regime. By Circular dated 22/05/2017 issued by the MoC, policy guidelines extending the time limit for fulfilling the conditions under the FSAs for all the project developers was extended upto 31/03/2022.

10.4 MoP issued the Office Memorandum dated 08/03/2019 wherein it directed the Coal India Limited (parent company of the Respondent) and appropriate governments not to cancel FSAs granted to developers even if the project is referred to the NCLT. MoP issued Office Memorandum dated 01/10/2019, classifying the projects under three categories. Category – 1 projects, which are mostly commissioned, Category – II projects which are only partly commissioned and referred to the NCLT and Category – III projects at a very nascent stage of construction and totally stalled. The CD falls under Category II Project. The Memorandum provided that MoP support should be withdrawn only in respect of Category III projects and not for projects falling under any other category.

10.5 The above position with regard to the Circulars and the contents therein are not refuted by the Respondent's counsel. The contention of the applicant's counsel is that in view of the above Circulars, the CD had time till 31/03/2022 for commissioning Phase – II of the project and furnishing a PPA as per the FSAs, which is not disputed by the Respondent. During the said extended period 2 critical events occurred, viz., on 07/08/2017, Lanco Infratech Limited (LITL), which is parent company of the CD and EPC contractor for construction of Phase II was admitted into CIRP and on

05/09/2022, the CD was admitted into CIRP by this Tribunal and moratorium u/s 14 of the IBC was imposed.

10.6 On 30/03/2022, the applicant addressed a letter to the Respondent seeking further time for fulfilment of the conditions in the FSAs. The respondent neither acknowledged nor replied to the said letter. Later, the Respondent issued show cause notices on 22/11/2022 as mentioned above.

10.7 The CD approached the Hon'ble Delhi High Court by way of a Writ Petition, seeking for quashing of the Show cause notice and the Hon'ble Delhi High Court directed the Respondent to approach this Tribunal. The contention of the Respondent's counsel is that the termination is a contractual dispute, which has arisen dehors the CIRP of CD. The FSAs are subject to satisfaction of the Conditions Precedent (within the time stipulated under the FSAs. The applicant's condition precedent to the implementation of the FSAs was that it was required to furnish long term PPAs entered into with Distribution Companies (DISCOMS) and ought to have completed the construction and the completion along with readiness of the power plant within the Condition Precedent Period being a period of twenty-four months from the date of entering into the FSA which was further extendable up to a maximum period of 180 days.

10.8 i) Clause 2.8.2 is FSAs condition precedent.

ii) Clause 2.8.2.1 is that the purchaser shall have obtained from the lawful authority all necessary clearances authorizations, approvals and permission required for, construction, commissioning, operation and maintenance of the Plant.

iii) Clause 2.8.2.2 – The purchaser shall have completed the construction and the completion of such construction along with readiness of the power plant for lighting up has been certified by an Independent Engineer within the Condition Precedent Period.

iv) Clause 2.8.2.3 – Applicable to the Purchaser who has signed FSA without entering into long term PPA. The Purchaser shall have to furnish the long term PPA either directly with Distribution Companies or through Power Trading companies (PTC) who have signed back to back PPAs (long term) with DISCOMs within the condition precedent period.

v) Under clause 2.8.3.1 it is stated that the conditions precedent shall be fulfilled within a period of 24 months from the Signature Date or such further period up to a maximum of 180 days as may be extended on account of Force Majeure under clause 17 of this agreement.

vi) Clause 2.8.3.4 stipulates that if within the condition precedent period, the purchaser does not fulfil the condition precedent set out in clause 2.8.2 due to any reasons other than force majeure or the said condition precedents in clause 2.8.2 have not been jointly waived by the parties in writing. The seller shall have the right to forfeit the security deposit amount submitted by the purchaser without any further notice to purchaser. It is under this clause when the respondent take refugee on the ground that the show cause notice was issued due to non-fulfilment of the obligations by the applicant under the FSAs. It is admitted that 70% of the plant has been completed and no long term PPA has been entered into by the Petitioner with the DISCOM. The contention of the Respondent's counsel is that the applicant has failed to comply with the CPs and other terms and conditions of the FSAs even after a lapse of over nine years from the date of execution of the FSAs. But, the point that has to be remembered is that there are directives of Ministry of Coal by letter dated 22/05/2017 introducing transparent coal allocation policy for the Power Sector called as the SHAKTI Policy. It is clarified in the said letter that under the FSA regime, the outer time limit within which the power plan of LoA holders must be commissioned

for consideration of FSA was fixed on 31/03/2022 failing which LoA would stand cancelled.

vii) The Memorandum of the Ministry of Power dated 08/03/2019 and 01/10/2019 would clearly show that the FSAs are directed to be continued and a direction to DISCOMs, CIL, PGCIL, Ministry of Environment and Forests and appropriate Governments was given, not to cancel PPA, FSA, transmission connectivity, EC/FC and all other approvals including water, even if the project is referred to NCLT or is acquired by another entity. The contention of the Respondent's counsel is that the above office memorandum was issued by the Ministry of Coal on 22/05/2017 and the letter states that FSAs were only to be considered if the plants were commissioned before 31/03/2022 failing which they would stand terminated/cancelled. But, it can be seen that during the extended period up to 31/03/2022, the CD was admitted into CIRP by order dated 05/09/2019 and the moratorium has come into operation.

10.9 The ld. Counsel for the Petitioner takes us through section 14(2A) of IBC, which is as follows:

> *"[(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."*

10.10 There is no doubt that FSAs are critical to protect and preserve the value of the CD and manage the operations of such CD as a going concern. Under these circumstances, the supply of power shall not be terminated. The contention of the Respondent's counsel is that the provisions and mandate of section 14 and 25 of the IBC do not apply to the applicant, more

particularly, the explanation to section 14(1) has no relevance and application to the facts of the case. The explanation to section 14(1) of the IBC is only applicable to the section 14(1). The explanation provides for a bar on suspension or terminations being done on the grounds of insolvency. The termination in the present case has not been done on the grounds of insolvency of the CD but rather for its failure in complying with CPs and its contractual obligations under the FSAs. Show cause notice issued for termination of the contract is no doubt due to the failure of the CD to comply with the terms of the contract, which is due to the CD being taken into insolvency. It may be noted at this point that there are no dues from the CD to the Respondent.

10.11 The judgment of the NCLT, New Delhi Bench in the matter of M/s Shapoorji Pallonji & Co. Pvt. Ltd. Vs. M/s Sinnar Thermal Power Limited (Formerly known as Rattan India Nasik Power Limited) and in the matter of Mr. Jeevagan Narayana Swami Nadar Vs. South Eastern Coalfields Limited & Ors., Respondents (IA No. 177/ND/2023 in CP No. (IB)-2561/ND/2019, order dated 29/03/2023) is relied upon by the counsel for the applicant. In the above said case, the NCLAT, relied upon the judgement of the Hon'ble Supreme Court in the case of Tata Consultancy Services ltd. Vs. Vishal Ghisulal Jain, RP, SK Wheels Pvt. Ltd., [2021] ibclaw.in 167 (SC), wherein the Hon'ble Apex Court held as follows:

> *"In Gujarat Urja (supra), the contract in question was terminated by a third party based on an ipso facto clause, i.e., the fact of insolvency itself constituted an event of default. It was in that context, this Court held that the contractual dispute between the parties arose in relation to the insolvency of the corporate debtor and it was amenable to the jurisdiction of the NCLT under Section 60(5)(c). This Court observed that "….NCLT has jurisdiction to adjudicate disputes, which arise solely from or which relate to the insolvency of the corporate debtor… The nexus with the insolvency of the corporate debtor must 22 exist" (para 69). Thus, the residuary jurisdiction of the NCLT cannot be invoked if the termination of a contract is based on grounds unrelated to the insolvency of the Corporate Debtor.*

Admittedly, this Court has clarified the law on the present subject matter in Gujarat Urja (supra) after the pronouncements of the NCLT and NCLAT. Going forward, the exercise of the NCLT's residuary powers should be governed by the above decision."

10.12 We have to see whether the issuance of show cause notice is due to the CD not fulfilling the terms of the FSAs or due to the insolvency of the CD. It can be seen from the sequence of events in this case, that non-fulfilment of the terms of FSAs by the applicant is due to the insolvency of the CD. Speaking on the jurisdiction of this Tribunal, it was held in the above judgments that the nexus between insolvency must exist with disputes which arise solely or which relates to the insolvency of the CD. The judgment of the Hon'ble Supreme Court in the case of Gujarat Urja Vikas Nigam Limited Vs. Amit Gupta, [2021] 7 SCC 209 was relied upon. But, however, no ruling was made on the basis of the said judgment as it was held by the NCLAT that the impugned termination was not based on the fact of insolvency, but, due to failure of the CD to adhere to the conditions precedent in clause 2.8 of the impugned FSA.

10.13 Respondent admits that if the termination is the basis of insolvency, section 14(1) operates as above. Going on the facts of this case, we hold that failure of the CD to fulfil the conditions under the FSAs was due to insolvency. The judgement of the Hon'ble Supreme Court in the case of Sandeep Khaitan, RP for National Plywood Industries Ltd. Vs. JSVM Plywood Industries Ltd and Another, [2021] 9 SCC 401 clarified on section 14(2A) and held that under this provision goods or services not covered by section 14(2) are also covered. The judgment of the NCLAT, New Delhi in CA (AT)(Ins.) No. 383/2022 has also clarified and held as under:

"11. When we look into the Statement of Objects and Reasons as extracted above, one of the objects as expressly recorded was "in order to fill the critical gaps in the corporate insolvency framework". Explanation to sub-Section (1) of Section 14 and insertion of sub-section (2-A) of Section 14 was with the object to fill the critical gap in the corporate insolvency framework. Section 14, sub-section (2) as contained in the Code only provided for supply of essential goods or services to the

Corporate Debtor contained an indication that supply of essential goods or services to the Corporate Debtor shall not be terminated or suspended or interrupted during moratorium period, brought a substantive provision that when Interim Resolution Professional or Resolution Professional consider the supply of goods or services critical to protect and preserve the value of the Corporate Debtor, the same shall not be terminated or suspended or interrupted during the period of moratorium except where Corporate Debtor has not paid such dues arising from such supply during the moratorium period. The insertion of sub-section (2-A) in the Section 14 has been brought with a purpose and object. Section 14, sub-section (1) explanation also clarifies that a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the same. The scheme delineated by Section 14(1) explanation as well as Section 14(2-A) is same, that is, all benefits, which were enjoyed by the Corporate Debtor given by Government or authority should be continued, but subject to condition that there is no default of payment of current dues. Sub-section (2-A) also envisage continuation of the essential supply and provides for such termination, suspension or extension when payment has not been made for the such supply during the moratorium.

12. Sub-section (2) of Section 14 has to be read with the legislative intent, which is now reflected by Explanation to Section 14(1) and 14(2-A). In the facts of the present case, when Corporate Debtor took a decision that supply of electricity is necessary to make the value of Corporate Debtor as has been specifically pleaded in IA No.1661 of 2021 as noticed above, the Corporate Debtor is obliged to make payment."

10.14 The condition precedent under section 14 seems to be that there shall not be any default or payment of current dues, which is not alleged in this case.

The judgment of the Hon'ble Supreme Court relied upon by the Respondent's counsel in the case of Tata Consultancy Services Ltd. Vs. SK Wheels (P) Ltd., [2022] 2 SCC 583 does not help the Respondent's case as the facts dealt with by the Hon'ble Supreme Court in the said case did not indicate that the termination of the facilities agreement was motivated by the insolvency of the CD and that the alleged breaches noted in the termination notice were not a smokescreen to terminate the agreements because of the insolvency of the

CD. It was further observed that 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 CIRP. Crucially, the termination of the contract should result in the corporate death of the CD. The argument of the ld. Counsel for the applicant that termination of FSAs would result in the corporate death, as, the sale of the CD as a going concern would become difficult if the FSAs are terminated, which would consequently lead to the corporate death of the CD impresses us. The ld. Counsel for the Respondent also relies on the judgment of the NCLT, New Delhi Bench in the matter of M/s Shapoorji Pallonji & Co. Pvt. Ltd. Vs. M/s Sinnar Thermal Power Limited (Formerly known as Rattan India Nasik Power Limited), wherein the New Delhi Bench refused to set aside the termination of FSAs by SECL. But, as rightly pointed out by the ld. Counsel for the applicant, the said judgment can be distinguished on facts. In the said case, the CD was admitted into CIRP on 31/03/2022 as stipulated in the MoP guidelines, after the extended time period has elapsed. As such, the CD therein had already defaulted prior to the imposition of moratorium. In the present case, moratorium was imposed on 05/09/2019 itself i.e. much prior to the extended period of 31/03/2022 stipulated under the MoC policy guidelines.

The other contention raised is that services are not being rendered by the Respondent as rendering of services has not been commenced due to the failure of the applicant to fulfil the terms of FSAs and, hence, section 14 cannot be applied. It can be seen that agreement to render services is nevertheless existing between the parties and as already observed, if the agreement is permitted to be terminated, it is likely to result in the corporate death of the CD. In the case of Sandeep Khaitan, RP for National Plywood Industries Ltd. Vs. JSVM Plywood Industries Ltd. & Anr., [2021] 9 SCC 401, the Hon'ble Supreme Court has held that raw material supply also could fall within the provision. The call, however, is to be taken by the IRP/RP. The applicant's counsel has also relied upon the judgment of the NCLAT in the

case of Writer Business Services Pvt. Ltd. Vs. Mr. Ashutosh Agrawala, RP for Cox & Kings Ltd., CA (AT)Ins.) No. 956/2021, wherein it was held that record management services were also found to be falling within the ambit of section 14(2A). Hence, we hold that termination letter dated 22/12/2022 issued by the Respondent, nullifying the termination of coal supply agreements/fuel supply agreements dated 28/08/2013 is illegal and direct the Respondent to withdraw its letter dated 22/12/2022 and refrain from invocation/encashment/forfeiture of bank guarantees provided by the CD as security deposit as well as to act in accordance with the directives issued by the Ministry of Power vide office memorandum dated 08/03/2019 and 01/10/2019.

11. To what result:

11.1 Non-joinder of MoP as party is not fatal since no reliefs are claimed against it.

12. In the result, **I.A. 28/2023 in CP(IB) No. 420/7/HDB/2018 is allowed and accordingly disposed of.**

II. I.A. No. 119 of 2023

13. In view of the order pronounced in I.A. No. 28 of 2023, as above, this I.A. No. 119 of 2023 stands closed.

Sd/-
CHARAN SINGH
MEMBER (TECHNICAL)

Sd/-
JUSTICE TELAPROLU RAJANI
MEMBER (JUDICIAL)

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