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IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
PRINCIPAL BENCH

C.A No.244(PB)/2018, C.A. No. 186(PB)/2018,
C.A. No. 217(PB)/2018 & C.A. No. 176(PB)/2018
in C.P. (IB)-201(PB)/2017

IN THE MATTER OF:

State Bank of India Applicant/petitioner
vs.
Bhushan Steel Limited Respondent

Order under Section 7 of Insolvency & Bankruptcy Code, 2016

Order delivered on 15.05.2018

Coram:

CHIEF JUSTICE (RTD.) M.M. KUMAR
Hon'ble President

Sh. S.K. Mohapatra,
Hon'ble Member (T)

Presents:

For the Resolution Applicant: Mr. A.S. Chandhiok, Senior Advocate
-TSL Mr. Amit Chadha, Senior Advocate
Mr. Rajiv Nayar, Senior Advocate
Mr. Virendra Ganda, Senior Advocate with Mr. Gopal
Jain, Mr. V.P. Singh, Mr. Sahil Monga, Ms. Ruby
Singh, Ms. Tahira, Ms. Pallavi Kumar, Ms. Shweta
Kakkad, Mr. Angad Baxi, Mr. Sumesh Dhawan, Mr.
Rishi Mongia and Ms. Tanya Baranwal, Advocates
for Resolution Applicant-TSL

For Tata Capital Mr. Ramji Srinivasan, Senior Advocate with Mr.
Siddharth Sharma and Mr. Tushar Bhardwaj,
Advocates

For K.M.P.S. Ms. Ranjana Rai Gawai, Ms. Vasudha Sen and Mr.
Vivek Kumar, Advocates

For the RP Mr. Ravi Kadam, Senior Advocate with Mr. Manmeet
Singh, Ms. Anjali & Ms. Geetanjali, Advocates.



For Larsen & Tourbo

Mr. Mukul Rohatgi, Senior Advocate
Mr. Anand Chibbar, Senior Advocate with Mr.
Gaurav Malhotra, Mr. Rajeev Kumar & Ms. Aastha
Mehta, Advocates

For CoC

Mr. Tushar Mehta, Senior Advocate

For Bhushan Energy Ltd.

Mr. Rajeev Mehra, Senior Advocate with Mr.
Mayank Mishra, Mr. Ritunjay Gupta & Ms. Niti
Arora, Advocates

M.M.KUMAR, PRESIDENT

JUDGMENT

1. This order shall dispose of the following CA's:

(i). C.A. No.244(PB)/2018 filed by Resolution Professional (for brevity 'RP') under Section 30 & 31 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') with a principal prayer of accepting the resolution plan approved by the Committee of Creditors (for brevity 'CoC') submitted by H1 Resolution Applicant. The resolution plan has been filed by TATA Steel Limited (for brevity 'TSL') in the Corporate Insolvency Resolution Process (for brevity 'CIR Process') of the Corporate Debtor. A further relief has also been sought to grant various concessions as envisaged in the resolution plan and approved by the CoC. These concessions have been duly extracted in Annexure-8.

(ii). C.A. No. 186(PB)/2018 filed by Larsen & Toubro Limited with a prayer that the applicant therein shall be treated as secured



creditor as against their assigned status of unsecured/operational creditor.

(iii). C.A. No. 217(PB)/2018 filed by the Bhushan Employees seeking direction to the RP to decide the objection raised by them and;

(iv). C.A. No. 176(PB)/2018 filed by RP under Section 19(2) of the Code.

2. Brief facts of the case necessary for disposal of the controversy raised in the present proceeding may first be noticed. The State Bank of India filed C.P. No. (IB)-201(PB)/2017 against Bhushan Steel Limited under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code'). After issuance of notice and considering the reply of the Corporate Debtor we admitted the petition on 26.07.2017(Annexure-2). As a consequence, the CIR process commenced and moratorium in terms of Section 14 was imposed. In pursuance of Section 15 of the Code the Interim RP invited claim on 28.07.2017 (Annexure-3). It is pertinent to mention that Interim RP received claims of Rs. 56,080 crores from fifty three (53) financial creditors and further claims of Rs. 2846.52 crores from seven hundred and fifty one (751) operational creditors (including workmen, employees and statutory creditors) and Rs. 0.22 crores from two (2) other



creditors by 20.03.2018. The RP has convened 10 meetings of the CoC upto 20.03.2018.

3. It is also pertinent to mention that RP issued an advertisement which was published on 09.10.2017 and invited prospective resolution applicants to put forward their resolution plans in respect of the Corporate Debtor. A copy of thereof has been placed on record (Annexure-5). In response to the publication twenty two (22) potential resolution applicants expressed their interest to submit the resolution plans for the Corporate Debtor. A total number of nineteen (19) potential applicants also executed confidentiality undertakings with the RP. A Virtual Data Room (VDR) was set up wherein relevant documents, data and information in relation to the Corporate Debtor and the ongoing CIR process were provided to potential resolution applicants. The RP prepared an information memorandum in accordance with the provisions of the Code and uploaded the same on the VDR, for ready reference. There were total seventeen (17) potential resolution applicants who sought access to the VDR, in order to carry out necessary due diligence on the Corporate Debtor.
4. The RP has further disclosed that in obedience to Regulation 35 of the CIR Regulations, he appointed two registered valuers, namely (i) Duff and Phelps India Private Limited, and (ii) PWC, to



ascertain the liquidation value of the Corporate Debtor, after reviewing and comparing the quotations received from six valuation agencies. The CoC approved the process and evaluation criteria for evaluating a resolution plan in compliance with the requirements of the Code, in order to ensure a fair and transparent system of evaluation and also to ensure that the best resolution plan for the Corporate Debtor is selected in the most transparent manner. The CoC at its 4th meeting held on 27.11.2017 appointed KPMG India Private Limited ('KPMG') as the evaluator of the resolution plans ('CoC Evaluator') and Shardul Amarchand Mangaldas & Co. as its legal counsel ('CoC Legal Advisor'). A process document dated 27.12.2017 amended and clarified from time to time for submission of resolution plans for the Corporate Debtor was issued to the prospective resolution applicants by the RP on behalf of the CoC.

5. In the 6th meeting held on 15.12.2017 the CoC decided to seek extension of time beyond the period of 180 days for the CIR Process to facilitate interested resolution applicants to submit their resolution plans in respect of the Corporate Debtor. The aforesaid resolution was voted and carried by 99.17% e-voting (by voting share) held on 18.12.2017 and 19.12.2017. Accordingly, we had granted extension vide order dated 21.12.2017 (Annexure 4)





6. The RP had received three resolution plans as on 03.02.2018 which was the final deadline fixed. It is appropriate to mention that the initial deadline for receipt of resolution plans was 23.12.2017 which was later extended from time to time. Eventually the deadline was fixed at 03.02.2018. Even the promoter of the Corporate Debtor sent an envelope which was not opened on account of the doubt entertained by the RP with regard to the eligibility of the promoter to submit a resolution plan. The RP sought clarifications which were submitted by TSL and JSW Living Private Limited by providing certain addendum/clarification/confirmations. However, no clarifications/confirmations were received from the third resolution applicant i.e. Bhushan Employees. Consequently, only two resolution plans of TSL and JSW Living Private Limited were found compliant with the requirements of the Code and the CIRP Regulations. In the 9th CoC meeting held on 06.03.2018 the aforesaid resolution plans were discussed in consultation with CoC evaluators and Legal Advisors. Accordingly, on the recommendation of the CoC, TSL was notified as the highest scoring resolution applicant (H1 Resolution Applicant) in the CIR Process vide email dated 07.03.2018 (Annexure-6). Having being determined as the H1 Resolution Applicant, the CoC has held extensive negotiations and consultations with the H1 Resolution



Applicant, to improve and clarify its resolution plan. Pursuant to the negotiations, the H1 Resolution Applicant submitted a second addendum on 21.03.2018 after the first addendum dated 24.02.2018. The CoC approved the resolution plan with an affirmative voting share percentage of 99.80% which is much more than the minimum threshold of 75% as required by Section 30 (4) of the Code. A copy of the CoC approved resolution plan of H1 Resolution Applicant-TSL along with the voting pattern of financial creditors approving the resolution plan has been placed on record [Annexure-7 (Colly)]. In accordance with the process document, the H1 Resolution Applicant was issued a letter of intent subsequently. The aforesaid resolution plan approved by the CoC has now been placed before us for seeking our acceptance and approval in terms of the Code and CIRP Regulations.

7. The RP has also ascertained that in Part 10 of the CoC approved resolution plan the Resolution Applicant has sought certain reliefs and concessions and submission has been made that this Tribunal may approve and direct the grant of the reliefs and concessions envisaged in the CoC approved resolution plan (Annexure-8).

8. The RP states that from the date of the approval of the Resolution Plan by this Tribunal, this would be regarded as



effective date and until the date on which all the steps for the implementation set out in Annexure 5 would be completed (closing date). The plan envisaged *inter alia* the following:

“(a). that the RP, along with certain representatives of Deloitte Touche Tohmatsu India LLP shall be appointed by this Hon’ble Tribunal as the monitoring agency for the Corporate Debtor (“**Monitoring Agency**”). The Monitoring Agency shall have the same functions, powers and protections as ascribed to the RP under the Code. The CoC shall continue with its roles and responsibilities, and have protections, as set out in the Code including approving the matters as are being approved during the period prior to the Effective Date. The powers of the board of directors of the Corporate Debtor shall remain suspended until the Closing Date, and shall be exercised by the Monitoring Agency; and (b) the Corporate Debtor and all its facilities shall continue to receive supply of essential supplies, goods and services (as defined in the Code and regulations made thereunder) on an uninterrupted basis, and shall not for any reason be shut down or restricted in its activities in any manner. The steps set out in Annexure 5 of the CoC Approved Resolution Plan are extracted and set out in

Annexure-9.”

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9. The RP has also made a reference to C.A. No. 176(PB)/2018 which he had filed under Section 19(2) of the Code. We have issued notice and has recorded an assurance in the order dated 06.03.2018 given on behalf of the Corporate Debtor that every assistance was to be provided (Annexure-11).
10. The RP has appointed Deloitte Touche Tohmatsu India LLP as Forensic Consultant to assist in identifying suspect transactions involving the Corporate Debtor which may be preferential, undervalued, extortionate credit, and/or fraudulent, as mandated under Section 25(j), 43 to 51 and 66 of the Code (Avoidable Transactions). In that regard C.A. No. 176(PB)/2018 has been filed by the RP to seek certain reliefs including the avoidance of suspect transactions identified by the Forensic Consultant. A reference has also been invited to C.A. No. 186(PB)/2018 filed by Larsen & Toubro Limited which is awaiting disposal after the filing of reply. We have already observed in preceding para that C.A. No. 217(PB)/2018 filed by the Bhushan Employees is also pending and same shall also be disposed of with this order. The objection raised by the Bhushan Employees on the eligibility of the H1 Resolution Applicant and JSW Living Private Limited were discussed and deliberated upon. The RP has clarified that after receiving objections from Bhushan Employees he has sought clarifications

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from both the Resolution Applicants on the objections raised by Bhushan Employees prior to 9th meeting of CoC held on 06.03.2018. Both the Resolution Applicants namely TSL and JSW Living Private Limited responded to the clarifications sought by the RP. The H1 Resolution Applicant-TSL has also submitted legal opinions/advice obtained from various Legal Firms from India and Abroad and the opinion of Hon'ble Justice Mr. Deepak Verma (Retd.), Mr. Mukul Rohatgi, Senior Advocate and Former Attorney General of India and Mr. Ravi Kadam, Senior Advocate, on the eligibility of H1 Resolution Applicant-TSL. Both the Resolution Applicants submitted affidavits specifically declaring and affirming their eligibility under Section 29A of the Code. After considering the objections, the clarifications, legal opinions and the legal advice independently obtained by the RP he has reached the conclusion that H1 Resolution Applicant-TSL and JSW Living Private Limited were not ineligible under Section 29A of the Code on the grounds put forward by the Bhushan Employees. It was only after fully satisfying itself, the CoC reached the conclusion that no ground to disqualify the Resolution Applicant were made out in the objections raised by Bhushan Employees and JSW Living Private Limited. The decision of the CoC has been intimated to the authorized representative of Bhushan Employees and a copy of the order

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dated 09.03.2018 has been placed on record (Annexure-13). It is in the aforesaid facts and circumstances that the RP has made the prayer recorded in the opening para of this order.

11. Replies to the application have been filed by Bhushan Energy Limited, Bhushan Employees and TSL.

Reply by Bhushan Energy Limited

12. In the reply filed by the Bhushan Energy Limited which itself is under CIR Process it has been submitted that the resolution plan adversely effect the rights of BEL which arise under the power purchase agreements dated 29.03.2007 as amended on 30.06.2014 and dated 26.10.2010 as amended on 05.05.2014 (PPA-1 & PPA-2). These agreements were entered into between BEL and the Corporate Debtor. The objection raised is that the resolution plan submitted by TSL seeks to terminate the said power purchase agreements unlawfully and the reply has been filed objecting to the resolution plan filed by the Resolution Applicant.

13. It has been pointed out that BEL is a group company of the Corporate Debtor and its sole business is to own and operate a coal-based thermal power project (300 MW and 185 MW). These projects have been set up within the premises of the Corporate Debtor's integrated steel plant at Meramandali, Dhenkanal District, Odisha. It was established to meet the demand of the



Corporate Debtor's integrated steel plant and the Corporate Debtor and BEL had entered into the aforesaid two PPAs. The main salient features of the PPAs have been listed with the emphasis that there was no provision for their early termination.

Main features have been highlighted as under:-

- i. The term of supply under PPA-1 is from April 1, 2014 till September 30, 2024, and the term of supply under PPA-2 is from April 1, 2013 till December 31, 2024. Pertinently, there is no provision for early termination of the PPAs.
- ii. The recitals of the PPAs record that the Corporate Debtor's industrial unit requires power to run, and can consume the entire net electricity output of the CPP. In this regard, under Clause 3 of the PPAs, the Corporate Debtor has agreed and undertaken to mandatorily purchase the entire power generated by BEL. Clause 3(h) of the PPAs stipulates that, in the event the Corporate Debtor fails to consume the entire output generated, the Corporate Debtor is liable to be compensate BEL:
 - a. for the shortfall in units purchased by the Corporate Debtor;



b. in the event that BEL sells any such power to a third party, for the unsold units as well as any inferior price realized by BEL pursuant to such sale.

The compensation is to be decided on the basis of the amount that ought to have been received/realized by BEL had there been no default on the part of the Corporate Debtor. Furthermore, in case of any shortfall in offtake, the Corporate Debtor is required to provide BEL with the necessary transmission facility to transport power to the grid.

- iii. In terms of Clause 3(i) of PPA-1, the power is to be supplied to the Corporate Debtor at the cost of generation or INR 2.50 per Kwh, whichever is higher. In terms of Clause 3(i) of the PPA-2, the power is to be supplied to the Corporate Debtor at grid rate or INR 3.35 per Kwh, whichever is earlier.
- iv. Clause 3(i) expressly states that the lenders of BEL have agreed to provide funds to BEL for implementation and operation of the CPP on the basis of the PPAs. Further, the Corporate Debtor is contractually bound to make good any shortfall on



the part of BEL in meeting its obligations to its lenders on account of the above rate(s).

- v. Under Clause 3(i) of the PPAs, the Corporate Debtor is contractually bound to make minimum payment to BEL towards supply of power under the PPAs that will be sufficient for BEL to meet its expenses, taxes and debt-service obligations to the lenders. Such minimum payments are to be adjusted by the Corporate Debtor against future payments to be made to BEL.”

14. On account of financial stringency and to meet lenders' obligations BEL sought to revise its price for supply of power from 01.04.2017 and it sent a letter dated 06.06.2017 to the Corporate Debtor (Annexure R-1). However, a petition under Section 7 of the Code thereafter was admitted on 26.07.2017 and the CIR Process was initiated. BEL being an operational creditor submitted its claim on 09.08.2017 in Form B to the RP for a sum of Rs. 1,14,59,83,000. This amount was owed by the Corporate Debtor to BEL under the PPAs. Form B submitted on 09.08.2017 has been placed on record (Annexure R-2). The allegation of the objector-BEL is that the RP failed to respond despite repeated reminders by emails and failed to consider its Form B. Subsequently BEL was inducted as an operational



creditor as could be seen from the list of creditors dated 17.01.2018 uploaded on the Corporate Debtor's website. The claim of the BEL is stated to be rejected by the RP.

15. It is further asserted that RP of BEL also wrote to the RP of the Corporate Debtor as a follow up action on 22.02.2018 to enquire about the reasons for rejection of BEL's claim. While various resolution plans were being considered for the Corporate Debtor the RP of BEL wrote to the RP of the Corporate Debtor reminding him of contractual obligations of the Corporate Debtor towards BEL under the PPAs and keeping in view the contractual relationship between them a request was made to keep the interest of the BEL in mind while assessing and analysing resolution plans received for Insolvency resolution of the Corporate Debtor. Even the revised plan was filed on 20.03.2018 in Form B again by BEL by increasing the claim amount. On account of revised rates per unit, the price of power supply pursuant to the tariff arrived at was based on a study conducted by a power sector expert appointed by the RP of BEL. Despite that the RP failed to induct BEL as an operational creditor, despite the claim being filed within time as per Regulation 12 of the CIRP Regulations. A copy of Form B submitted on 20.03.2018 has been added as Annexure R-3. The prayer made in the application which the Resolution Applicant of BEL seeks



through this Tribunal is the non-enforcement of clauses of the Resolution Plan which adversely affect the claims of BEL and its rights under the PPAs. The RP of the BEL claims that he is saddled with the duty to preserve and protect its assets (Section 20(1) read with Sections 25(1) and 23(2) of the Code). It has been asserted that the power purchase agreements must not be permitted to be terminated being onerous and if at all it is permitted then the same shall take effect from the expiry of three months of the closing date on the completion of CIR Process of BEL. According to further averments such a clause in the resolution plan is illegal and unenforceable. Reference has been to the provisions of Section 30 of the Code and Regulations 37 and 38 of the CIRP Regulations which set out the contours within which a resolution plan may be approved and given effect to. There is no power with the RP or CoC to annul contractual arrangements entered into by the Corporate Debtor with a 'related party'. According to BEL it is different matter that provision has been made to avoidance of transaction which might be qualified as either 'preferential transactions' under Section 43 of the Code or 'under value transactions' under Section 45 of the Code. The contractual rights are recognized and protected under Article 300A of the Constitution and cannot be abrogated, superseded or taken away without due process of



law. The claim has been unfairly rejected by the RP without due consideration without even acknowledging the claim which was filed on 20.03.2018. Reliance has also been placed on Regulation 37 of the CIRP Regulations and prayer has been made that the RP of Corporate Debtor must accept BEL's claim of Rs. 438,32,00,00,000 submitted to him on 20.03.2018 and he should ensure that the claim of the BEL as an operational creditor are duly recognized and provided for in the resolution plan.

16. Apart from filing reply to the application of the RP, the Bhushan Employees have also filed C.A. No. 237/2018 as part and parcel of this reply. The employees have taken support of Section 31 of the Code that this Tribunal must be satisfied before according approval to the resolution plan. It has also been highlighted that every resolution plan received by the RP must be examined threadbare by him and after confirming the eligibility the process can be advanced. The affidavit filed in support of the application C.A. No. 244/2018 is vague as the verification is to the best of his knowledge and belief. The Bhushan Employees have also asserted that their locus standi has been questioned by the RP when the employees raised objections on the eligibility of the resolution applicant by filing objection dated 22.02.2018 sent by email on 23.02.2018. A decision on their objections was taken



but no minutes of the meeting dated 06.03.2018 showing the ground of rejection has been communicated nor it could be shown that on what basis the locus of the employees has been questioned.

17. The Employees have submitted that the application filed by the RP is incomplete as there is non compliance of Section 30(6) of the Code which mandates the RP to submit the resolution plan as approved by the CoC before the Adjudicating Authority-NCLT. It is alleged that the resolution plan filed by the RP along with the instant application is incomplete as many of the annexures have not been placed before the Adjudicating Authority with the instant application which have vital information and bearing on the resolution plan. Reference has been made to Regulation 38 of the CIRP Regulations to submit that it is mandatory on the part of the RP to provide the details of the resolution applicant and other connected persons and many annexures relating to mandatory information have not been filed. It is prayed that the application must be dismissed on that ground alone. A reference has been invited to Annexure 6 which contains details relating to compliance of Section 29A of the Code which has been withheld from the Tribunal. Despite information given to the RP and its counsel the documents have not been supplied.



18. There are further allegations of misrepresentation of facts and reference has been made to the averments made in para 23 of the application and order dated 19.03.2018 has been deliberately misquoted. Likewise, objection has been raised that there is no compliance of order dated 21.12.2017 and 19.03.2018 passed by this Tribunal. In the order dated 21.12.2017 we have directed the RP to bring to the notice of the CoC about the latest developments which have emerged from the issuance of ordinance on 23.11.2017. As the ordinance requires fulfilment of additional conditions it has to be taken into account during the progress of the CIR Process (Annexure R-2).

19. The stand taken in the reply is that examination of the resolution plan involves a serious public interest, as most of the members of the CoC belong to Public Sector Undertakings and fall within the purview of State as defined under Article 12 of the Constitution. Therefore, the proceedings before the Tribunal has to be regarded as adversarial in nature. However, it has been stated that Bhushan Employees are in the favour of the rehabilitation of the company as it is in their own interest and in the interest of all other stakeholders.

20. In C.A. 217(PB)/2018 filed under Section 60(5)(a) & (c) of the Code the Bhushan Employees have sought direction to the RP to decide their objections dated 22.02.2018 filed by them and no

decision has been taken [Annexure R-3 (colly)]. The application was heard by the Adjudicating Authority on 19.03.2018. A submission was made before us by the counsel for the RP that the decision was to be taken by the CoC in the meeting which was held on 20.03.2018 (Annexure R-4) which according to the RP were discussed in the meeting of the CoC held on 20.03.2018. TSL also submitted various legal opinions before the RP/CoC to show its eligibility in terms of Section 29A of the Code. Their allegation is that the resolution applicants are not ineligible as per the requirements of Section 29A of the Code. It also does not fulfil ostensibly mandate of qualifications. The opinions of the Foreign Law Firms or Indian experts would be useless in the face of prima-facie satisfaction of its requirements. It has also been asserted that the decision taken by the RP/CoC on 20.03.2018 is not an informed decision as were directed by the Adjudicating Authority in its order dated 19.03.2018 (Annexure R-4).

21. Substantiating the allegations, it has been pointed out by Bhushan Employees that the RP should have insisted on TSL to disclose all facts, circumstances including orders passed by the Court at the United Kingdom and the bankruptcy proceedings against Mr. C. Shiva Shankaran who continues to be an undischarged insolvent. The 100% subsidiary of TSL suffered a



disability which is covered by the ambit of Section 29-A of the Code on account of conviction of its wholly owned subsidiary company as it been convicted under Section 33(1)(a) of the Health and Safety at Work Act 1974 by Crown Court at Kingston upon Hull, United Kingdon vide the judgment dated 02.02.2018. Equally reference has been made to the declaration given by Hon'ble the Supreme Court of Seychelles in August, 2014 declaring Mr. C. Shiva Shankaran as bankrupt which has more than 10% shareholding in the group companies of Corporate Debtor i.e. Tata Teleservices Limited a company connected with and part of the resolution applicant-TSL. The TATA Sons executed an enforceable guarantee in favour of the creditor of the said company. Mr. Shankaran having been declared bankrupt and TSL being a related party would attract disqualification of TSL. In terms of schedule under Regulation 7(2)(g) of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016, the Resolution Professional must ensure that he maintains contemporaneous records for any decision taken, the reasons for taking the decision, and the information and evidence in support of such decision. The decision taken by the RP pertaining to the eligibility of the resolution applicants patently violated the Code of Conduct by which the RP is bound. The decision of the RP/CoC is also liable



to be set aside being pre-meditated. According to RP if the decision on the eligibility under Section 29A of the Code was to be taken by the CoC in the meeting held on 20.3.2018 then how TSL was declared as compliant H1 Resolution Applicant in the CoC meeting held on 06.03.2018. The relief sought in the form of Annexure-8 can also not be granted.

22. According to the averments made the principles of natural justice stand violated. The objections have not been considered with the seriousness it deserves. It was not an empty formality and from the Minutes of Meeting dated 20.03.2018 what was stated before this Tribunal was a mere farce and there was already an impenetrable wall of pre-judged opinion. Such a procedure is a negation of principles of natural justice and unfair.

23. The resolution plan has also been attached and it appears that it is full of conditions and contrary to the interest of other stake holder especially the CoC and Employees. There is no provision to grant relief which has been claimed by the RP as set forth in Annexure-8 which seeks waiving of taxes, duties etc. The resolution plan which is conditional cannot be regarded as complete.

24. Parawise reply on merits has also been given and there is no new fact which may be worth notice.



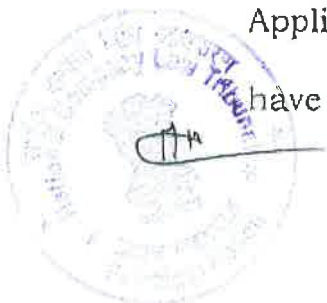
25. CoC has also filed affidavit in reply. The affidavit firstly notes the facts as narrated by the RP and then supported in letter and spirit all that the RP has submitted in the application. It has been highlighted that on 06.03.2018 in the ninth meeting of the CoC the RP informed that the plans submitted by TSL and JSW Living Private Limited were the only plans which were found compliant with the provisions of the Code and CIRP Regulations. The one submitted by Bhushan Employees was found to be non-compliant with the Code *inter alia* for the reasons that the mandatory contents as prescribed under Regulation 38 of the CIRP Regulations were not fulfilled by the aforesaid resolution plans. There was no disclosure made with regard to source of funds, bid bond, identity of resolution applicant as well as connected persons, details of convictions, investigations pending etc. despite meetings and follow ups conducted by the RP. A copy of the minutes of the meeting of the CoC dated 06.03.2018 has been placed on record (Annexure-1). The aforesaid two resolution plans submitted by TSL and JSW were evaluated extensively by the CoC advisor on the evaluation criteria set forth in the process document. The plan submitted by TSL emerged as the highest evaluated plan and after discussion by CoC in accordance with the provisions of the process document and negotiations held with TSL being the highest bidder. The



resolution plan submitted by TSL was also amended on various dates which have now been annexed with the application filed by the RP. A copy of the process document and evaluation conducted in respect of two plans in the light of the criteria set up in the process document have been placed on record in a separate sealed cover. All other averments are the repetition of what the RP has stated in the application.

Reply of Resolution Applicant-TSL

26. Reply to the objections raised by Bhushan Employees has also been filed Resolution Applicant-TSL. It has been urged that Bhushan Employees have no locus standi to challenge the decision taken by the CoC with respect to the eligibility of the Resolution Applicant as a successful bidder. The Bhushan Employees has not challenged the decision of the RP rejecting its resolution plan on the ground that Bhushan Employees failed to disclose its source of fund despite repeated clarifications sought.
27. It has also been submitted that the resolution plan submitted by Resolution Applicant-TSL contemplates that all employees on the roll of the BSL-Corporate Debtor would continue to be employed with the Corporate Debtor w.e.f. the date of transfer of the management/control of the Corporate Debtor to the Resolution Applicant. The interest of the employees of the Corporate Debtor have been taken care of and there is no conflict of interest at any



stage. The dues of the employees are paid off although liquidation value as computed by the valuer under Regulation 35 of the CIRP Regulations read with Section 53 of the Code does not mandate the same.

28. TSL also has questioned the locus standi of BEL under Section 30 and 31 of the Code. Referring to an order dated 28.03.2018 directing the RP to supply a copy of the application to BEL and Bhushan Employees, the Resolution Applicant-TSL has submitted that the resolution plan contains certain confidential and business proprietary information pertaining to the Resolution Applicant which cannot be put in public domain. It has been shared by the TSL with the RP under the cover of confidentiality in accordance with the provisions of Section 29 of the Code. It has therefore been suggested that the RP is duty bound to maintain confidentiality by not sharing the resolution plan of TSL in any manner whatsoever with a third party. Accordingly, a direction has been sought to the RP, BEL and Bhushan Employees to refrain from sharing the resolution plan belonging to the TSL and/or the information contained therein in any manner whatsoever with any party who is not present before this Tribunal and is not entitled to receive the same under the provisions of the Code.



C.A. No. 186(PB)/2018-Larsen & Tourbo Limited

29. Larsen & Tourbo Limited has filed C.A. No. 186(PB)/2018 under Section 60(5)(c) of the Code asserting that it must be regarded as a secured creditor and the resolution plan must provide for its full dues. It has sought directions to the RP and the CoC to accord L&T the same priority which is accorded to secured creditors in respect of its due amounting to Rs. 961,56,79,356 (Rupees nine hundred and sixty one crores fifty six lakhs seventy nine thousand three hundred and fifty six only) owed by the Corporate Debtor for supply and erection of the steel plant. As a consequence of its treatment as secured creditor direction be issued to the RP and CoC to provide payment of full dues to L&T in the resolution plan.
30. This application has been contested and reply has been filed by the RP citing various provisions of the Code. The RP has questioned the locus standi of the L&T to file such an application and has averred that the provisions of Section 60(5) of the Code are completely misinterpreted and misused which is abundantly clear in its intent. The applicant-L&T is trying to seek the relief which it should have sought in arbitration proceedings prior to the commencement of the CIR Process. The status of the L&T is clearly that of a supplier of goods and services and it would fall in the category of Operational Creditor of the Corporate Debtor.



By no stretch of imagination, it could be regarded as a secured creditor which is patently against the provisions of the Code and invocation of Section 55(4)(b) of the Transfer of Property Act is wholly misuse of the process which has no relationship with the issue arising for consideration. Even the claim made by the L&T in its quantum and nature has been disputed. In the parawise comments similar reply has been tendered by the RP. The RP has also filed lists of documents.

31. The L&T has reiterated its assertions by filing a rejoinder.

Submissions made by Shri Ravi Kadam, Learned Senior Advocate and Mr. Tushar Mehta, Learned Senior Advocate on behalf of RP and CoC.

32. Opening the arguments on behalf of the RP & CoC, Mr. Kadam & Mr. Mehta learned Senior counsel respectively have highlighted various steps taken by Mr. Vijay Kumar V. Iyer as an IRP/RP which culminated into an approval of resolution plan by CoC submitted by TSL as a highest scoring resolution applicant (H1 resolution applicant) (Annexure-6). The CoC considered in its 9th meeting held on 06.03.2018 and identified the Resolution Applicant-TSL whose resolution plan supports the highest score in terms of the evaluation parameters set out by the CoC in the evaluation matrix. It was accordingly notified as the highest scoring resolution applicant. On its determination as H1



resolution applicant, the CoC held engaged discussions with H1 resolution applicant, to seek further clarifications concerning the resolution plan. A second addendum dated 21.03.2018 in addition to the resolution plan dated 03.02.2018 as amended and supplemented, was submitted by the Resolution Applicant. The e-voting process was conducted for the 10th meeting of the CoC held on 22.03.2018 with an affirmative voting percentage of 99.80%. The Tata Capital Financial Services Limited, IndusInd Bank and ING Bank NV, which were members of the CoC could not vote but subsequently sent their affirmative vote supporting the CoC approved resolution plan. An application by the IndusInd Bank being C.A. No. 250(PB)/2018 was filed with a prayer to this Tribunal that the affirmative vote of the IndusInd Bank on the CoC approved resolution plan be considered and included. The Tribunal passed an order on 28.03.2018 and accepted the explanation tendered. The Tata Capital Financial Services Limited also filed a similar application on 09.04.2018 for recording their consent to the CoC approved resolution plan for including the final voting percentage in favour of the CoC approved resolution plan. Thus, the Resolution Plan of Resolution Applicant-TSL has backing of 100% share voting of the members of the CoC. The resolution plan and the e-voting pattern is annexed [Annexure-7 (Colly)],



33. Mr. Kadam & Mr. Mehta have then highlighted salient features of the CoC approved resolution plan. The resolution debt amount based on claims received from various creditors as on 20.03.2018 has been specified. The total outstanding financial debt of the Corporate Debtor received as on 20.03.2018 and admitted has also been specified along with outstanding operational debt of its workmen. The total claims received from other Creditors as on the aforesaid date has also been noted and the liquidation value of the Corporate Debtor is stated to be Rs. 14541,00,00,000/-.

34. The H1 Resolution Applicant has offered upfront payment of Rs. 35,200 crores in respect of the Financial Debt owed to the Financial Creditors and admitted by the RP. In addition, the H1 Resolution Applicant has also provided for the following equity to the Financial Creditors in respect of the Financial Debt admitted by the RP, as a consequence of which, the Financial Creditors shall hold 12.27% (in the event that the erstwhile promoter group shareholding is not counted towards promoter shareholding for the purposes of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 or 13.43% of the equity shares of the Corporate Debtor (in the event that SEBI does not allow the erstwhile existing promoter group shareholding to be counted towards public shareholding. The



claims of the Operational Creditors admitted by RP is approximately Rs. 1,332 crores and the Resolution Applicant has offered to pay Rs. 1,200 crores to the Operational Creditors (other than Employees, Workmen and Related Parties) over a period of one year post completion of transaction. The liquidation value entitlement of the Operational Creditors as per the provisions of Section 30(2)(b) of the Code is nil. It has further been pointed out that Rs. 200 Crore is to be paid to all operational creditors on a pro-rata basis and Rs. 1000 Crores is to be paid to them based on critically vis-a-vis the continued business viability of the Corporate Debtor. Significantly the Resolution Applicant intends to retain all employees on-roll of the Corporate Debtor. The admitted claims of the employees amounting to Rs. 0.29 crore as against the claimed amount of Rs. 1.89 crore has been set out. A sum of Rs. 0.27 crores towards the workmen and employees claims based on the claims admitted by the RP till 08.01.2018 is to be paid. Any additional dues of the employees would be adjusted from the amount payable to the Financial Creditors i.e. Rs. 35,200 crores in case the amount cannot be met through cash flows of the Corporate Debtor. It is thus clear that the entire dues of employees and workmen, are proposed be paid to the extent admitted by the RP.

Allocation has also been made to other Creditors and the



amount admitted is Rs. 59,50,11,151.21 and nothing is payable under the resolution plan to other Creditors. The funding mechanism has also been provided.

35. It has also been requested that the monitoring agency may be appointed by this Tribunal to perform with the same functions, powers and protections as the RP under the Code. In that regard the continuation of the present RP along with its delegates as the Monitoring agency from the effective date until the closing date in accordance with the terms of the plan be made. The CoC should also continue with its roles and responsibilities, and have protections, provided in the Code.
36. In the resolution plan reliefs and concessions have been claimed which are listed in Annexure-8. The resolution plan is not made subject to the condition of grant of reliefs and concessions as clarified in Section 8.9 and 10.2 of the CoC approved resolution plan. The RP has annexed his compliance report with the written submissions (Annexure-A). Certain annexures/sub-annexures of the resolution plan of TSL which were inadvertently missed out while filing the resolution plan with C.A. No. 244(PB)/2018 have since been filed in a sealed cover supported by an affidavit.
37. Mr. Kadam & Mr. Mehta, learned Senior counsel have also emphasized that the RP has certified in para 13 of C.A. No. 244(PB)/2018 and para 3 of the affidavit filed by Diary No.



1946/2018 and para 3 of the Diary No. 1923/2018 that the contents of the resolution plan meet all the requirements of the Code and the CIRP Regulations.

38. Mr. Kadam & Mr. Mehta, learned Senior counsel have then replied the objections raised by Bhushan Employees in their application No. 237(PB)/2018 and also in reply to the RP's application C.A. No. 244(PB)/2018. It has been submitted that the application and objections are not maintainable and it is a malafide obstruction to derail the time sensitive CIR Process of the Corporate Debtor which is nearing imminent fruition. Learned counsel highlighted that the objections have been signed by one Mr. Rahul Sengupta alone. The objections raised by the Bhushan Employees vide its email dated 23.02.2018 do not contain any power of attorney/letter of authority/vakalatnama authorizing Mr. Sengupta to file any such application and objections on behalf of unnamed 352 employees of the Corporate Debtor. Therefore, the application is severely defective and is liable to be dismissed in limine. C.A. No. 217(PB)/2018 filed by Bhushan Employees is without any vakalatnama and an attempt was made to provide a separate PDF file along with purported resolution plan of the Bhushan Employees in a pen drive. In para 4 (d) of the cover letter it was stated that Mr. Nittin Johari, CFO who is the former member of



the suspended Board, Mr. Rahul Sengupta and Mr. Pankaj Batra are the contact person for the purposes of resolution plan and Mr. Rahul Sengupta is a director on the board of directors of the Corporate Debtor since 2005, along with the promoters of the Corporate Debtor who are barred by virtue of provisions of Section 29A of the Code. Thus, he is a part of the management which has overseen the degeneration of the Corporate Debtor setting in the current situation showing that their loan account with the banks is one of the largest NPA in the entire banking sector in India.

39. According to the record the RP and the CoC had duly considered the objections raised by Bhushan Employees regarding H1 Resolution Applicant and JSW Living Private Limited before concluding that the two resolution applicants were not ineligible under Section 29A of the Code on the ground alleged by the Bhushan Employees. In order to confirm compliance with Section 29A of the Code, the RP and the CoC sought and obtained affidavits from the Resolution Applicants specifically declaring and affirming their eligibility under Section 29A of the Code which have been duly submitted by H1 Resolution Applicant and JSW Living Private Limited as part of their respective resolution plans confirming that they were not disqualified by virtue of the provisions of Section 29A of the Code



(affidavit of the H1 Resolution Applicant is at page 1481 of Diary No. 1923).

40. The Bhushan Employees insisted by email dated 23.02.2018 on the RP that both the aforesaid Resolution Applicants were not eligible. The H1 Resolution Applicant-TSL sent its response on 27.02.2017 along with legal opinions/ advice obtained from AZB & Partners and also Herbert Smith and Norton Rose, English Solicitor Firms and opinion from Hon'ble Justice Shri Deepak Verma, Former Judge of the Hon'ble Supreme Court, and Mr. Mukul Rohatgi, Learned Senior Advocate and Former Attorney General of India. Separate opinion was sought from Mr. Ravi Kadam, a Former Advocate General, State of Maharashtra and an English Solicitor Firm, Burges Salmon LLP. Accordingly, both the Resolution Applicants were found eligible without suffering from any disability contemplated by Section 29A of the Code. C.A. No. 217(PB)/2018 was filed by the Bhushan Employees which was disposed of vide order dated 19.03.2018 with direction to the RP to consider the objections of the Bhushan Employees in accordance with the law and the CoC in its 10th meeting held on 20.03.2018 thoroughly deliberated upon the objections on the eligibility of the two resolution applicants and it concluded that there were no grounds to disqualify either of the two Resolution Applicants on the basis of the objections



raised by the Bhushan Employees. Accordingly, the RP provided an update to the Bhushan Employees vide his email dated 23.03.2018 (Annexure R-4 at page 75 of the RP's reply).

Conviction of Tata Steel UK and disability of TSL

41. The Bhushan Employees raised an objection that a wholly owned subsidiary of TSL-Resolution Applicant is a connected person and the entity is known as Tata Steel UK. The aforesaid connected person has been found guilty on two counts under the Health and Safety at Work Act, 1974 (for brevity 'HSW Act') vide an order dated 02.02.2018 for failing to discharge its duties under Section 2(1) of the HSW Act, UK. The objection raised is that since Tata Steel UK has been convicted by order dated 02.02.2018 passed by the Crown Court at Kingston Upon Hull of an offence punishable with imprisonment for two years or more it attracted disqualification under Section 29A of the Code. Mr. Kadam & Mr. Mehta have argued that on the language of Section 29A (b) read with explanation (iii) of the Code no such disqualification is contemplated. It has firstly been argued that under the sentencing guidelines in respect of offences under the HSW Act, the English Court cannot impose a sentence of imprisonment on a company and thereby the only available penalty is that of a fine which has actually been done. A Court can also impose a fine and/or a custodial sentence on a Director



of the Company if the Director is being prosecuted in addition to the Company which is not the position in the present case. Highlighting the distinction between the provisions of Section 33 of HSW Act and 29A (b) of the Code Mr. Kadam & Mr. Mehta have argued that the Indian Law only talks of imposition of sentence of two years or more in order to attract disability whereas under the English Law both have been provided. It has accordingly been argued that where sentence and fine are envisaged the Courts have the discretion to impose fine and where the imprisonment is the only punishment a company cannot even be prosecuted as imposition of custodial sentence is a legal impossibility. In support of his submissions learned counsel has placed reliance on the observations made by Hon'ble the Supreme Court in the case of **Standard Chartered v. Directorate of Enforcement and Ors.**, (2005) 4 SCC 530.

42. It has then been submitted that the expression 'punishable' must be interpreted to mean capable or liable to punishment. In other words, the punishment must be capable of being inflicted by punishing by law and reliance has been placed on the observations made in the case of **Sube Singh and Ors. V. State of Haryana and Ors.**, 1989(1) SCC 235 to argue that a company is not capable of suffering punishment by imprisonment. Therefore, in the present case also where the



sentence of imprisonment could not be imposed and was a legal impossibility and therefore, the offence committed by Tata Steel UK was not capable of being punished by imprisonment at all. Referring to the provisions of Section 29A (d) of the Code, learned counsel have submitted that it is to be presumed that the legislature was aware of the legal position on the issue of impossibility of awarding of a custodial sentence to a company yet it prescribed only for sentence and had the legislature intended to cover a juristic person like a company within the scope of Section 29A (d) of the Code in addition to natural persons, it would have expressly specified punishment by imposition of a fine. Having not done that Section 29A (d) of the Code is inapplicable to juristic persons and would only cover natural persons. It was then contended that Section 3(23) of the Code which defines the term 'person' also includes the term 'company' and the same has been made subject to the term 'unless the context otherwise requires'. In this regard, reference has also been made to Section 29A (e) of the Code which too *ex facie* applies to natural persons and not to corporate persons. It has also been submitted that conviction under the provisions of Section 33 (1) (a) of the HSW Act, UK cannot be categorized and treated equivalent to the one contemplated by Section 29A (d) of the Code as the UK Act provides for 'imprisonment for a term not



exceeding two years, or a fine, or both'. It thus prescribes a maximum term of two years whereas Section 29A (d) of the Code contemplates offence punishable with imprisonment for two years or more. It has thus been argued that it cannot be concluded that TATA Steel UK was convicted for an offence punishable with imprisonment for two years or more.

43. Explaining the allegations of concealment, learned counsel have clarified that the proceedings regarding Tata Steel UK were disclosed when the judgment was received on 02.02.2018 by the Resolution Applicant-TSL after the submission of its resolution plan on 03.02.2018. Accordingly, conviction could not have been disclosed earlier. However, the factum of proceedings pending against TATA Steel UK were disclosed.

Allegations of Bhushan Employees in respect of Mr. C.

Sivasankaran and reply by the RP/CoC

44. Another allegation levelled by the Bhushan Employees was that TSL had a relation with Mr. C. Sivasankaran who was declared bankrupt by the Supreme Court of Seychelles in August, 2014. Mr. Sivasankaran through his company, Sterling Infotech Private Limited had purchased shares in Tata Teleservices Limited. It was alleged that he had taken a loan of Rs. 650 crores from Standard Chartered Bank and the Resolution Applicant-TSL



stood guarantee. It was also alleged that Mr. Sivasankaran made a post-bankruptcy composition offer and came out of the bankruptcy in 2016 which would not cure the embargo imposed by the provisions of Section 29A of the Code. In that regard Bhushan Employees has placed reliance on a newspaper report in support of the allegation.

45. Mr. Kadam and Mr. Mehta have argued that no fact have been brought on the record to show that Mr. Sivasankaran or Sterling Infotech Private Limited would qualify as a 'related party' or 'associate company' or otherwise a 'connected person' of the Resolution Applicant. In that regard reference has been invited to the letter dated 22.02.2018 sent to the RP, employees application and objections. Learned counsel have submitted that even during oral arguments no reference has been made to any material nor there is anything on record. There is no imputation that Mr. Sivasankaran and/or Sterling Infotech Private Limited are acting jointly or in concert with TSL-Resolution Applicant in submitting the resolution plan. The H1 Resolution Applicant-TSL specifically clarified that neither Mr. Sivasankaran nor Sterling Infotech Private Limited as a 'related person' or 'connected person' of the Resolution Applicant-TSL. As per Annul Report 2016 for Tata Teleservices Limited only 0.52% shares were held by Sterling Infotech Private Limited at the end of Financial Year



2016-17. It has also been clarified that Sterling Infotech Private Limited had taken a loan from SCB and pledged its shares in Tata Teleservices Limited to SCB. In order to prevent the shares from being sold to an undesirable entity, Tata Sons provided an undertaking to SCB that it would purchase the shares at a pre-determined price in the event of an invocation and did not guarantee any repayment of loan taken by Sterling Infotech Private Limited from SCB. It was only seeking to purchase the shares which were in the nature of a pre-emption right and the undertaking lapsed almost nine years ago as it ceased to operate in March 2009 and was not acted upon by SCB. In any case that Seychelles Bankruptcy Order was subsequently revoked in 2016 and current status of Mr. Sivasankaran or Sterling Infotech Private Limited has not been placed on record. Therefore, the argument is liable to be rejected.

46. Learned counsel then argued that principles of natural justice in respect of Bhushan Employees have been religiously complied with and the Bhushan Employees have no locus standi in the present matter as they have on their own accord, withdrawn from the CIR Process. They have thus no right to object to the resolution plan which is otherwise compliant. No resolution applicant with a defective plan is permitted to attend the CoC meetings where the compliant resolution plans are being



discussed. Each of the two resolution applicants whose plans were found to be compliant were provided with an opportunity to present their respective resolution plans to the CoC, in accordance with the provisions of Section 30(5) of the Code and no preferential treatment was accorded to any of the aforesaid two applicants. In any case there is no right of personal hearing and no vested right has been violated.

47. Dealing with the objection filed by the BEL, learned counsel have argued that the objection raised by BEL is that the RP should accept its claim for outstanding dues against the Corporate Debtor and ensure that adequate provision is made for the same in the resolution plan as per the BEL objections filed vide Diary No. 3078/2018. The objections have been duly replied by the RP vide its reply registered at Diary No. 1927/2018. Learned counsel has submitted that the objections are liable to be rejected for the following reasons:

A. The Adjudicating Authority has to act in accordance with the requirements of Section 31(1) of the Code and considered a resolution plan submitted for its approval. The BEL has sought redetermination of its claims rejected by the RP. Such a redetermination is not envisaged under Section 30 and 31 of the Code.



- B. The objections were rejected by the RP in January, 2018 and the present application was filed on 03.04.2018 which suggests that it lacks bonafide and is aimed at extract an advantage by delaying and obstructing the CIR Process of the Corporate Debtor.
- C. The basis of rejection of claim for Rs. 114.59 crores made on 09.04.2017 was that the basis of the claim amount was a unilateral and retrospective increase of the tariff under the two power purchase agreements entered into with the Corporate Debtor dated 29.03.2007 and 26.10.2010 respectively. The rates were unilateral increase from Rs. 5 per unit to Rs. 6.5 per unit w.e.f. financial year 2015 by way of a debit note dated 01.07.2017.
- D. No proof was provided showing approval from the Corporate Debtor regarding the revised billing and Debit Note nor any invoices were provided by the objector-BEL for the financial years 2015-2016 or 2016 corresponding to the Debit Note. It also failed to take note of Rs. 90,00,00,000 paid towards security deposit by the Corporate Debtor to BEL during the financial year 2015 which was over and above the aforementioned advance of Rs. 228.225 crores.



E. Reliance has been placed on clause 3(i) of the tariff provision of the PPA-2 to argue that the tariff rate under the PPA was to be the rate equivalent to the grid rate or Rs. 3.35 per unit, whichever is higher. The unilateral revision is evidently not on account of any change in the grid rate as BEL has not so far claimed that the grid rate is higher than the tariff under the PPAs. It was further submitted that the treatment of PPAs under the resolution plan has been duly considered and approved by CoC in its commercial wisdom while approving the resolution plan and there cannot be any treatment different than the one provided in the resolution plan could be given to the PPAs by virtue of the provisions of Section 31 read with Regulation 37 of the CIRP Regulations. Accordingly, the termination of PPAs under Section 10.1.16 and 10.1.17 of the Resolution Plan form part of the specific reliefs and concessions sought by the Resolution Applicant from the Adjudicating Authority. Although such concessions and reliefs have not made a condition for implementation of the Resolution Plan as provided under Section 8.9 of the second addendum to the Resolution Plan. Replying to the arguments of the BEL that the performance of the PPAs cannot be avoided



on account of provisions of Section 20 of the Specific Relief Act, 1963. It has been submitted that it amounts to effectively seeking specific performance of the PPAs which cannot be accepted. It has been submitted that commercial contracts are, by their nature, determinable even if there is no specific provision in the contract authorising/enabling with a party terminate the contract. It can be terminated without assigning any reason for the same by serving a reasonable notice and the contract which are determinable cannot be specifically enforced as provided by Section 14(1)(c) of the Specific Relief Act. In that regard, specific reliance has been placed on para 11 of the judgment rendered in the case of **Indian Oil Corporation Limited v. Amritsar Gas Service and Ors.**, (1991) 1 SCC 533 and on the observation made by Hon'ble Delhi High Court of the judgment rendered in the case of **Rajasthan Breweries Limited v. The Stroh Brewery Company**, AIR 2000 Del 450.

48. Learned counsel have also replied the submissions made on behalf of L&T by arguing that there is no possibility of altering the status of L&T from that of unsecured creditor into a secured creditor. According to the learned counsel a supplier of goods is



covered by the meaning assigned to it by Section 5(21) which deals with operational debt and Section 5(20) which defines operational creditor. Therefore, they would fall in the category of operational creditor who are the unsecured creditors.

49. Mr. A.S. Chandhok has placed reliance on proviso to Section 30(4) of the Code and argued that the CoC should not have approved a resolution plan submitted before the commencement of the IBC (Amendment) Ordinance, 2017 where the Resolution Applicant is ineligible under Section 29A of the Code and it would require the RP to invite a fresh resolution plan where no other resolution plan is available with it. According to the learned counsel the resolution plan in this case have not been submitted in accordance with the provisions of Ordinance and amended Section 25(2)(h) of the Code. The order passed by this Tribunal in C.A. No. 237(PB)/2018 on 19.03.2018 have also not been complied with as there is not a word in the application with regard to the aforesaid decision. Learned counsel has maintained his objection with regard to conviction of Tata Steel UK under the provisions of HSW Act, UK and insisted that disqualification would be attracted by virtue of provisions of Section 29A (d) of the Code. Highlighting the lapse on the part of the Resolution Professional, learned counsel has drawn our attention to the Code of Conduct in the first schedule appended



to the IBBI (Insolvency Professional) Regulations, 2016 in as such much as no informed decision has been taken as per the direction issued by this Tribunal in the order dated 19.03.2018 nor any of the opinion expressed by legal firms have been discussed. According to the learned counsel para 16 of the Code of Conduct under the first schedule an obligation on the RP is contemplated to maintain written contemporaneous records in such a manner as to sufficiently enable a reasonable person to take a view on the appropriateness of his decision and actions. By not discussing the opinions on the issue of conviction of a 'connected person' the RP has violated the aforesaid provision of the Code.

50. On behalf of L&T, Mr. Rohatgi and Mr. Chibbar, Learned Senior Counsel have reiterated their arguments that they are for all intents and purposes secured creditor as there is a charge created on the plant and machinery. It has also been argued that the charge is in respect of immovable property within the meaning of Section 55(4) (b) of the Transfer of Property Act. On query raised by the Bench it could not be substantiated by relying on any document that the charge has been created in accordance with S. 132 of the Companies Act, 2013 and how the plant and machinery could be regarded as immovable property.



Submissions made on behalf of the Resolution Applicant-TSL

51. Mr. Rajiv Nayar, learned Counsel for the Resolution Applicant-TSL has at the outset submitted that all the submissions made by RP and the CoC may also be regarded as submission of Resolution Applicant-TSL. In addition learned counsel has submitted that after the RP has find the resolution plan of TSL as compliant with the provisions of the Code and the CIRP Regulations he forwarded the same to CoC for its consideration. The CoC independently evaluated the resolution plan with the help of consultants engaged by it in accordance with the well-defined evaluation criteria laid down in the process document and approved the same in its 10th meeting held on 20.03.2018. Learned counsel has prayed that the same be approved by the Adjudicating Authority as it has backing of 100% vote share of the CoC.
52. In respect of Bhushan Employees it has been argued that they have no locus standi. There are approximately 5,546 employees on the rolls of the Corporate Debtor and the applicant Mr. Rahul Sengupta, a Former Executive Director has failed to provide any list of these employees, much less an authority or approval from such employees to file C.A. No. 237 on their behalf. The argument is that once the employees have been given full protection by the resolution plan then there was hardly any



scope for making grievances. It appears that Mr. Sengupta is aggrieved by the fact that he has been working as Executive Director of the Corporate Debtor since 25.07.2005 and on account of loss of office as a director, he has an axe to grind. Accordingly, he suffered disqualification in terms of Section 29A(c) of the Code. In that regard reliance has also been placed on the observations at page 364 of the judgment rendered in the case of **Balco Employees Union (Regd.) v. Union of India**, (2002) 2 SCC 333 and argued that the Bhushan Employees' group has no locus standi to raise objection to the resolution plan submitted by TSL.

53. Mr. Nayar has also submitted that the application C.A. No. 237 in fact goes against the interest of the employees and an attempt has been made to drive the Corporate Debtor into liquidation by raising frivolous objection so that the period of 270 days expires. In case there is liquidation then the large number of employees would be on the road as they would lose their jobs and livelihood whereas the resolution plan has ensured that they received their huge dues and also to continue to work in the company. It has also been submitted that the Adjudicating Authority is only to examine whether the resolution plan meets the statutory requirements contemplated by Section 30 and 31 of the Code and if it is satisfied then to approve the same. In that regard



reliance has been placed on the observations made in para 33, 58 and 59 of the judgment of Hon'ble the Supreme Court rendered in the case of *Innoventive Industries Ltd. v. ICICI Bank*, (2018) 1 SCC 407

54. In respect of the objections raised by the Bhushan Employees regarding the disability under Section 29A (d) of the Code on account of conviction, Mr. Nayar has adopted the arguments of Mr. Kadam and Mr. Mehta and has submitted that no disability would be attracted. Learned counsel has referred to Sentencing Guidelines relating to Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences Definitive Guidelines issued by the Sentencing Council in accordance with Section 120 of the Coroners and Justice Act, 2009. The aforesaid guidelines prescribed for offences committed by Corporate Organization only the imposition of fine and no imprisonment has been prescribed for such offences. Therefore, the order passed by the Court in United Kingdom cannot be regarded as an order of conviction for any offence punishable with imprisonment for two years or more. Learned counsel has placed reliance on a judgment of Hon'ble Madras High Court rendered in the case of *S.P.K. Dhamodhar v. Narayanaswamy & Anr.*, 2010-4-L.W. 897, Madras High Court. Learned counsel has adopted the submissions made on behalf of the RP and the CoC



with regard to Mr. C. Sivasankaran and disqualification of TSL-Resolution Applicant on that basis under Section 29A (a) of the Code.

55. Referring to the observations made by the Principal Bench in the case of Clutch Auto Limited, C.P. (IB) No. 15(PB)/2017 decided on 15.02.2018 learned counsel has argued that the decision of the CoC and RP ought not to be interfered with as the interference is exception and approval is the rule. According to the learned counsel the commercial wisdom of the CoC cannot not be subject matter of judicial review and the Bhushan Employees are absolutely denuded of any right to seek confidentiality material. In that regard reliance has been placed on the observations made by Hon'ble the Supreme Court in the case of *Innoventive Industries Limited* (supra) where the report of the Bankruptcy Law Review Committee has been regarded as a basis for interpretation of provisions of the Code. In that regard reference has been made to the UNCITRAL Guide to argue that the commercial decision of the CoC should not be interfered with and law should not permit the Court to review the economic and commercial basis of the decision. According to the learned counsel by virtue of the resolution plan the financial creditors would be able to get back about 67% of their loans and all the employees would continue to work and even otherwise the



plan meets all requirements of Section 30 & 31 of the Code and also all the requirements of the Regulations. Learned counsel has prayed that the resolution plan be approved by the Tribunal.

Submissions made on behalf of the Bhushan Energy Limited

56. Mr. Rajeeve Mehra, learned Senior counsel has appeared on behalf of the RP of BEL and has argued that right in property cannot be snatched even by an act of Parliament as has been held in the case of *ICICI Bank Limited v. SIDCO Leathers Ltd.*, (2006) 10 SCC 452. Elaborating his stand, learned counsel has submitted that valid contracts are 'property' within the meaning of Article 300A of the Constitution and no person can be deprived of his property save by authority of law. Article 300A provides that property includes valid contracts and intangibles such as intellectual property. According to the learned counsel vested right created in favour of a party under a valid contract cannot be taken away. Highlighting another aspect, learned counsel has submitted that Insolvency Code does not enable termination of valid contracts by way of a resolution plan. Nor there is any provision under Section 30 and 31 read with Regulations 37 and 38 of the CIRP Regulations. The termination on the ground that the PPAs are onerous is wholly unsustainable and the resolution plan cannot avoid the transaction on account



of increase in the rates merely because it is a contract between related parties. Even for a related party transaction Section 188 of the Companies Act, 2013 provides for fulfilment of certain pre-conditions and there is no absolute bar. According to the learned counsel Section 25(1) of the Code provides that the RP of the Corporate Debtor-BEL is under a legal obligation to preserve and protect the assets of the Corporate Debtor and must run it as a going concern. The RP can represent and act on behalf of the Corporate Debtor in judicial proceedings. The liquidation value available to the Operational Creditor like the BEL is stated to be nil in clauses 8.2.1 & 8.2.2 and there are no liability owed to related parties as per clause 8.6.8. Learned counsel has placed reliance on the terms of both PPAs. PPA-1 is to operate from 01.04.2014 to 30.09.2024 and PPA-2 is to operate from 01.04.2013 to 31.12.2024. According to the learned counsel there is no clause warranting termination whereas on the contrary the Corporate Debtor has undertaken to buy the entire power generated from BEL's Power Plant and there are clauses which provide for compensation to BEL for any shortfall in consumption of power and the Corporate Debtor has to make minimum payment to BEL towards power supply sufficient to meet expenses, taxes and debt service obligations etc. Therefore,



it has been argued that the resolution plan in so far as takes away the right of BEL to terminate the contract be rejected.

57. Having heard the learned counsel for the parties at a considerable length in many sessions we are of the view that it would be first necessary to study the provisions of the Code and CIRP Regulations in order to find out whether the requirements of the statute and subordinate legislation have been fulfilled or not. Section 30 and 31 of the Code are set out in ex tenso which read as under:-

“Section 30

Submission of resolution plan. (1) A resolution applicant may submit a resolution plan to the resolution professional prepared on the basis of the information memorandum.

(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan—

(a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the repayment of other debts of the corporate debtor;

(b) provides for the repayment of the debts of operational creditors in such manner as may be specified by the Board which shall not be less than the amount to be paid to the



operational creditors in the event of a liquidation of the corporate debtor under section 53;

(c) provides for the management of the affairs of the Corporate debtor after approval of the resolution plan;

(d) the implementation and supervision of the resolution plan;

(e) does not contravene any of the provisions of the law for the time being in force;

(f) conforms to such other requirements as may be specified by the Board.

(3) The resolution professional shall present to the committee of creditors for its approval such resolution plans which confirm the conditions referred to in sub-section (2).

(4) The committee of creditors may approve a resolution plan by a vote of not less than seventy five per cent of voting share of the financial creditors, after considering its feasibility and viability, and such other requirements as may be specified by the Board:

Provided that the committee of creditors shall not approve a resolution plan, submitted before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 (Ord. 7 of 2017), where the resolution applicant is ineligible under section 29A and may require the resolution professional to



invite a fresh resolution plan where no other resolution plan is available with it:

Provided further that where the resolution applicant referred to in the first proviso is ineligible under clause (c) of section 29A, the resolution applicant shall be allowed by the committee of creditors such period, not exceeding thirty days, to make payment of overdue amounts in accordance with the proviso to clause (c) of section 29A.

Provided also that nothing in the second proviso shall be construed as extension of period for the purposes of the proviso to sub-section (3) of section 12, and the corporate insolvency resolution process shall be completed within the period specified in that sub-section.

(5) The resolution applicant may attend the meeting of the committee of creditors in which the resolution plan of the applicant is considered:

Provided that the resolution applicant shall not have a right to vote at the meeting of the committee of creditors unless such resolution applicant is also a financial creditor.

(6) The resolution professional shall submit the resolution plan as approved by the committee of creditors to the Adjudicating Authority.”



“Section 31

Approval of resolution plan. (1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan.

(2) Where the Adjudicating Authority is satisfied that the resolution plan does not conform to the requirements referred to in sub-section (1), it may, by an order, reject the resolution plan.

(3) After the order of approval under sub-section (1),—

- (a) the moratorium order passed by the Adjudicating Authority under section 14 shall cease to have effect; and
- (b) the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its database.”

58. According to the scheme of the Code a resolution applicant is required to submit a resolution plan to the RP prepared on the basis of information memorandum. The information



memorandum is a document envisaged under Section 29 and it is required to contain such relevant information as may be specified by the Insolvency and Bankruptcy Board of India. Accordingly, in Regulation 36 of the CIRP Regulations details have been provided with regard to the contents of information memorandum. On the submission of resolution plan the RP is under mandatory obligation to examine each resolution plan received by him under Section 30(2) of the Code and he is to confirm that each resolution plan provides for all item listed under Section 30(2) (a) to (f). If the aforesaid conditions as envisaged by Section 30(2) are fulfilled then such a resolution plan is to be presented to the CoC. The CoC may then approve a resolution plan by a vote of not less than seventy five percent of voting share of the financial creditors, after considering its feasibility and viability along with other requirements as may be specified by Board. Under Section 30(6) the RP is obliged to submit the resolution plan as approved by the CoC to the Adjudicatory Authority.

59. When the resolution plan as approved by the CoC is placed before the Adjudicatory Authority-NCLT then it is to record its satisfaction as to whether the requirements as referred to in sub-section 2 of section 30 are fulfilled. On its satisfaction the Adjudicatory Authority-NCLT is to approve the resolution plan



which is to be binding on the Corporate Debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan. As per section 31(3) of the Code a further provision has been made that after the approval of a resolution plan the moratorium order passed under Section 14 would cease to have effect and the RP is under obligation to forward the whole record relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Insolvency and Bankruptcy Board of India to be recorded on its database. The conclusion of the aforesaid discussion is that Adjudicatory Authority-NCLT must feel satisfy with a resolution plan that it answers the requirements given in Section 30(2) of the Code.

60. It is pertinent to notice the mandatory requirements of Section 30(2) of the Code for a resolution plan to fulfil. Firstly, the resolution plan approved by the CoC must provide for payment of insolvency resolution process cost in a manner specified by the Board in priority to the repayment of other debts of the corporate debtor. (i) With his application i.e. C.A. No. 244(PB)/2018 the RP has placed on record a copy of the CoC approved resolution plan (Annexure-7) of the highest bidder i.e. H1 Resolution Applicant-TSL. Under the sub title 'Mandatory Contents of the Plan' (para 5) the RP has clarified that in



accordance with the provisions of Section 30(2) and Regulation 38 of the CIRP Regulations and as per the requirements of paragraphs 1.11 and 1.11.1 of the process document the resolution plan provides for payment of CIRP cost in priority to the repayment of any other debts of the company and identifies the specific sources of fund that would be used for such payment. In that regard reference has been made to Section 6.4 and 8.1.2 (i) of Annexure-3 and Annexure-5 of the plan. Therefore, this condition stands satisfied. Indly The resolution plan must provide for repayment of the debts of operational creditors in such a manner as may be specified by the Board which are not to be less than the amount to be paid to the operational creditors in the event of liquidation of the corporate debtor under section 53. It is appropriate to mention Section 53 of the Code envisaged the waterfall and the priorities in which distribution of assets of a Corporate Debtor is to take place in case of liquidation. The RP in the resolution plan (supra) has stated that it provides for the repayment of the liquidation value due to operational creditors within the period prescribed under Regulation 38 (1) (b) of the CIRP Regulations. The plan also identifies the specific sources of funds which are to be used for such payment. Reference in that regard has been made to Section 6.2, 6.3, 6.5, 8.2 and 8.3 of Annexure-3 as well as to



Annexure-5. The resolution plan also provides for payment of the liquidation value due to dissenting financial condition in priority to the financial creditor who voted in favour of the plan and also identifies the specific sources of fund that would be used for such payment. In that regard reference has been made to Section 6.3, 6.5 and 8.1.2 (iv) Annexure-3 and Annexure-5 of this plan. It also specifies the term of the plan and its implementation schedule in Section 4.2 of this plan. Therefore, we find that the second condition stand fulfilled.

61. The (iii) third requirement is that resolution plan must provide for the management of the affairs of the corporate debtor after approval of the resolution plan. There is specific provision made for the management and control of the company after the approval of the resolution plan by the Adjudicating Authority. A reference in that regard has been made to Section 4.1 and paragraph 10, 11 and 12 of Annexure-13 of the plan. The manner and implementation of the supervision of the plan and adequate means for implementation have also been provided in Section 4 of this plan. Therefore, the third condition stand fully complied with.

62. The (iv) fourth condition envisaged by Section 30(2) is that it must provide for implementation and supervision of the



resolution plan. Section 4 of the plan adequately takes care of this aspect and the fourth condition stand also satisfied.

63. The fifth condition also requires the RP to confirm that the resolution plan does not contravene any of the provisions of the law for the time being in force. In Annexure-6 of the plan the resolution applicant has confirmed that the resolution plan is not in contravention of the provisions of the law for the time being in force and fully complied with the provisions of the Code and the CIRP Regulations. In that regard the RP has also stated in para 13 of the application (C.A. No. 244(PB)/2018) that the resolution plan of TSL and JSW Living Private Limited were found compliant with the requirements of the Code and the CIRP Regulations and on the recommendation of the CoC resolution applicant-TSL was notified as the H1 resolution applicant. An affidavit by RP has also been filed on 10.04.2018 vide Diary No. 1923 of 2018 and para 3 of Annexure-A appended therewith certifies that the contents of the resolution plan meet all requirements of the Code and CIRP Regulations. Likewise, in para 3 of another affidavit filed vide Diary No. 1946 of 2018 same facts have been reiterated. Therefore, we find that the fifth requirement has also been fulfilled.

64. The resolution applicant also confirms that the resolution applicant and its connected person are not disqualified to from



submit a resolution plan under Section 29A of the Code and any other law applicable which further shows that the resolution plan conforms to the provisions of the law for the time being in force and does not contravene any such provision.

65. The sixth requirement is that it conforms to all such requirements which may be specified by the Insolvency and Bankruptcy Board. The aforesaid statement has been made by the RP in para 23 of the written statements filed on 13.04.2018 vide Diary No. 2112. In view of the above we are satisfied that all the requirements of Section 30(2) are fulfilled and no provision of the law for the time being in force has been contravened.

66. However, it is necessary to refer to the provisions of Regulation 38 & 39 of CIRP Regulations to conclude that the requirements specified therein are also fulfilled and the same reads as under:-

Regulation 38

Mandatory contents of the resolution plan. (1) A resolution plan shall identify specific sources of funds that will be used to pay the –

- (a)
- (b)
- (c)

(2)



(3) A resolution plan shall contain details of the resolution applicant and other connected person to enable the committee to assess the credibility of such applicant and other connected persons to take a prudent decision while considering the resolution plan for its approval.

Explanation.- For the purpose of this sub-regulation,-

(i) 'details' shall include the following in respect of the resolution applicant and other connected person, namely :-

(a) identity;

(b) conviction for any offence, if any, during the preceding five years;

(c)

(d)

(e)

(f)

(g)

Regulation 39

Approval of resolution plan. (1) A resolution applicant shall submit resolution plan(s) prepared in accordance with the Code and these Regulations to the resolution professional within the



time given in the invitation made under clause (h) of sub-section (2) of section 25.

(2) The resolution professional shall submit to the committee of resolution plans which comply with the requirements of the Code and regulations made thereunder along with the details of following transactions, if any, observed, found or determined by him:-

- (a) preferential transactions under section 43;
- (b) undervalued transactions under section 45;
- (c) extortionate credit transactions under section 50;
- and
- (d) fraudulent transactions under section 66;

and the orders, if any, of the adjudicating authority in respect of such transactions.

(3) The committee may approve any resolution plan with such modifications as it deems fit.

(4) The resolution professional shall submit the resolution plan approved by the committee to the Adjudicating Authority with the certification that:

- (a) the contents of the resolution plan meet all the requirements of the Code and the Regulations; and
- (b) the resolution plan has been approved by the committee.



(5) The resolution professional shall forthwith send a copy of the order of the Adjudicating Authority approving or rejecting a resolution plan to the participants and the resolution applicant.

(6) A provision in a resolution plan which would otherwise require the consent of the members or partners of the corporate debtor, as the case may be, under the terms of the constitutional documents of the corporate debtor, shareholders' agreement, joint venture agreement or other document of a similar nature, shall take effect notwithstanding that such consent has not been obtained.

(7) No proceedings shall be initiated against the interim resolution professional or the resolution professional, as the case may be, for any actions of the corporate debtor, prior to the insolvency commencement date.

(8) A person in charge of the management or control of the business and operations of the corporate debtor after a resolution plan is approved by the Adjudicating Authority, may make an application to the Adjudicating Authority for an order seeking the assistance of the local district administration in implementing the terms of a resolution plan.

67. A perusal of Regulation 38 would clearly show that by virtue of mandatory contents of the resolution plan discussed under



Section 30 and 31 of the Code the requirement of Regulation 38 stand fulfilled. However, the objections raised under Section 29A (a) and (d) of the Code which are discussed separately. Even the requirement of Regulation 39 stand fulfilled as the RP has submitted the resolution plan of H1 resolution applicant as approved by the CoC to this Tribunal with the certification that the contents of the resolution plan meet all requirements of the Code and the CIRP Regulations and that the resolution plan has been duly approved by the CoC. There is no scope for argument left that shareholder, or parties to joint venture agreement or anyone holding similar document need to accord sanction in view of the provisions of Regulation 39(6) of the CIRP Regulations. Regulation 39 (6) clarifies that the resolution plan as approved by the CoC must take effect notwithstanding the requirement of consent of the members or partners of the Corporate Debtor under the terms of the constitutional documents of the Corporate Debtor, shareholders' agreement, joint venture agreement or other document of a similar nature.

68. As per the requirement of Section 29 of the Code read with Regulation 36 of the CIRP Regulations an information memorandum is required to be prepared in accordance with the requirement of Regulation 36 of the CIRP Regulations providing



that document has been duly prepared and a certification by the RP was furnished to the CoC as well as before this Tribunal.

69. Now we proceed to deal with two objections raised under S. 29A of the Code by Bhushan Employees. The first objection is based on Section 29A (a) of the Code. It has been alleged that Mr. C. Sivasankaran is an undischarged insolvent and he must be treated as a 'connected person' within the meaning of Explanation (i) of Section 29A of the Code as he is in control of the resolution applicant. According to the allegation Mr. C. Sivasankaran through his company Sterling Infotech Private Limited had purchased shares in Tata Teleservices Limited (TTL) which constitute 0.52% of the shares. It was alleged that Mr. C. Sivasankaran had taken a loan of Rs. 650 crores from Standard Chartered Bank and the Resolution Applicant-TSL had furnished guarantee. In the reply it has been explained that Sterling Infotech Private Limited has merely pledged its shares in Tata Teleservices Limited to SCB and in order to prevent the shares from being sold to an undesirable third party, the Resolution Applicant-TSL provided an undertaking to Standard Chartered Bank that it would purchase the shares at a pre-determined price in the event of an invocation. It never furnished any guarantee for repayment of loan taken by Sterling Infotech Private Limited from Standard Chartered Bank. The Resolution



Applicant-TSL merely sought to purchase the shares which were in the nature of pre-emptory rights. Even that undertaking had lapsed nine years ago as it ceased to operate in March 2009 and has not been acted upon by Standard Chartered Bank. In any case the order of Bankruptcy issued by Supreme Court of Seychelles has been subsequently revoked in 2016. Therefore, it cannot be concluded firstly that Sterling Infotech Private Limited qualifies as a 'connected person' or 'related party' or 'associated company'. There is not even an imputation that Mr. Sivasankaran and/or Sterling Infotech Private Limited are acting jointly or in concert with TSL-Resolution Applicant in submitting the resolution plan. Moreover, there are serious doubt with regard to the locus standi of Bhushan Employees as the application has been filed only by Mr. Rahul Sengupta who has been the Executive Director of the Corporate Debtor since 2005. The application has not been filed by the Bhushan Employees authorizing anybody. The allegation even otherwise on facts is not sustainable. Accordingly, it is held that the objection is frivolous and the same is hereby rejected.

70. The second issue pertains to prosecution and conviction of Tata Steel UK which is a 100% subsidiary of H1 Resolution Applicant-TSL and obviously is a 'connected person' under Section 29A (d) of the Code and explanation (iii). The Tata Steel UK has been



convicted under Section 33(1)(a) of the HSW Act 1974 by Crown Court at Kingston upon Hull, United Kingdom. It is an offence punishable in U.K. with imprisonment for two years or more or fine. However, on account of the sentencing guidelines issued the Court has imposed fine proceeding on the age old principle that the Corporate Entity cannot be visited with the sentence of imprisonment. We could have rejected this argument raised by Bhushan Employees as their locus standi is in doubt. However, we have proceeded to deal with the arguments as somewhat serious allegation has been brought to the notice of this Tribunal. Section 33 of HSW Act 1974 applies to both juristic and natural person and makes a provision for custodial sentence as well as imposition of fine.

71. Mr. Ravi Kadam and Mr. Tushar Mehta have vehemently argued that Section 29A (d) of the Code only talks of an offence punishable with imprisonment for two years or more and does not provide for fine. The provision of Section 29A (d) of the Code read as under:-

Section 29A

Persons not eligible to be resolution applicant.- A person shall not be eligible to submit a resolution plan, if such person,

or any other person acting jointly or in concert with such person,-



(a)

(b)

(c)

(d) has been convicted for any offence punishable with imprisonment for two years or more;

(e)

(f)

(g)

(h)

(i)

(j)

72. A perusal of the aforesaid clause (d) would show that the expression used is 'punishable with imprisonment for two years or more' whereas under Section 33(1) (a) of the HSW Act the expression used is 'imprisonment for a term not exceeding two years or a fine or both'. The provisions of Section 29A (d) of the Code would not be applicable to cover a juristic person and could be applied only to a natural person because it contemplates visiting the convict with imprisonment for two years or more. As there is no provision for imposition of fine and a corporate body like a company cannot be visited with imprisonment/custodial sentence. In that regard we find that



reliance has been rightly placed on the majority view taken by Hon'ble the Supreme Court in the case of **Rakesh Kumar Paul v. State of Assam**, (2017) 15 SCC 67. In paragraph 25 the relevant observations have been made which reads thus:-

“While it is true that merely because a minimum sentence is provided for in the statute it does not mean that only the minimum sentence is imposable. Equally, there is also nothing to suggest that only the maximum sentence is imposable. Either punishment can be imposed and even something in between. Where does one strike a balance? It was held that it is eventually for the court to decide what sentence should be imposed given the range available. Undoubtedly, the Legislature can bind the sentencing court by laying down the minimum sentence (not less than) and it can also lay down the maximum sentence. If the minimum is laid down, the sentencing judge has no option but to give a sentence “not less than” that sentence provided for. Therefore, the words “not less than” occurring in Clause (i) to proviso (a) of Section 167(2) of the Cr.P.C. (and in other provisions) must be given their natural and obvious meaning which is to say, not below a minimum threshold and in the case of Section 167 of the Cr.P.C.



these words must relate to an offence punishable with a minimum of 10 years imprisonment.”

73. According to the aforesaid view if minimum sentence is provided (not less than) then the Sentencing Court is bound to award that sentence and it has no option. However, in cases where no minimum or maximum sentence is provided then it is eventually for the Court to decide what sentence should be imposed. Learned counsel has rightly argued that in order to suffer inability by the Resolution Applicant could have used the expression not less than two years whereas to the contrary it says two years or more. On that basis it appears to us that Mr. Kadam and Mr. Tushar have rightly urged that there is difference in drafting of statute. The offences have been categorized accordingly by use of the word in English statute which provide for ‘imprisonment for a term not exceeding two years’. In that regard further reliance have been rightly placed on the judgment of Hon’ble the Supreme Court rendered in the case of *Rajeev Chaudhary v. State (N.C.T.) of Delhi*, (2001) 5 SCC 34 and a judgment of Hon’ble the Andhra Pradesh High Court rendered in the case of *Amarnath Vyas v. State of A.P.*, (2007) CriLJ 2025. The Hon’ble High Court held that the expression “punishment for a term which may extend to



three years" is certainly not similar to the expression "punishment for three years and upwards". However more plausible argument by the learned counsel of the RP and CoC was the one which is based on the judgment of Hon'ble the Supreme Court rendered in the case of **Standard Chartered Bank (supra)**. In that case Hon'ble the Supreme Court held that a Corporate Entity might be prosecuted but if the sentence of imprisonment alone is provided then no sentence could be awarded. In such a case it is to be visited with custodial sentence and we find that a Corporate Entity like a company cannot be visited with custodial sentence and therefore, sentence could be awarded. In that regard we place reliance on the observations made in para 63 and 64 of the said judgment which read as under:-

"63. There appears to be a difference of opinion amongst the learned counsel assailing the correctness of majority view in *Valliappa* as to whether the task of the Court in the case on hand is one of statutory interpretation. Some counsel have argued that it is open to the Court to read the words 'imprisonment and fine' as 'imprisonment or fine'. In our view, such a construction is impermissible. First, it virtually amounts to rewriting of the section. The Court



would be reading the section as applicable to different situations with different meanings. If the offender is a corporate entity, then only fine is imposable; if the offender is a natural person, he shall be visited with both the mandatory term of imprisonment and fine. The exercise would then become one of putting a fluctuating or varying interpretation on the statute depending upon the circumstances. That is not permissible for the Court, either on principle, or on precedent. While it may be permissible for the court to read the word 'and' as 'or', or vice versa, whatever the interpretation, it must be uniformly applied to all situations. If the conjunction 'and' is read disjunctively as 'or', then the intention of Parliament would definitely be defeated as the mandatory term of imprisonment would not be available even in the case of a natural person. We have not been shown any authority for the proposition that it is open to the Court to put an interpretation on a statute which could vary with the factual matrix.

64. Secondly, when a statute says the Court shall impose a term of 'imprisonment and a fine', there is no option left in the Court to say that under certain circumstances it would



not impose the mandatory term of imprisonment. It is trite principle that punishment must follow the conviction.

74. In view of the above we find that Section 29A (d) does not provide for imposition of fine and therefore, it would not be applicable to the facts in the present case because a Corporate Entity cannot be subjected to any custodial sentence which is the only provision made by sub section (d) of Section 29A of the Code.

75. We do not feel persuaded by the argument advanced by Mr. Chandhiok that the expression punishable should mean that conviction alone is sufficient as the word punishable is immaterial and does not contemplate whether there is actual sentence or not. We are afraid that such an argument would not be sustainable. Hon'ble the Supreme Court in the case of **Sube Singh and Ors. V. State of Haryana and Ors.**, (1989) 1 SCC 235 has held that the word 'punishable' would ordinarily mean deserving of or capable of punishment. Therefore, conviction alone would not attract any disability. In para 8, 9, 10 & 11 of the judgment in **Sube Singh's case** the following observations have been made:

"8. In Bouvier's *Law Dictionary*, the meaning of the word 'punishable' has been given as 'liable to punishment'. In



'Words and Phrases-Permanent Edition', the following meaning has been given:

The word 'punishable' in a statute stating that a crime is punishable by a designated penalty or term of years in the state prison limits the penalty or term of years to the amount or term of years stated in the statute.

9. The word 'punishable' is ordinarily defined as deserving of or capable or liable to punishment, punishable within statute providing that defendant may have ten peremptory challenges if offence charged is 'punishable' with death or by life imprisonment; means deserving of or liable to punishment; capable of being punished by law or right, may be punished, or liable to be punished, and not must be punished.

10. *Corpus Juris Secundum* gives the meaning as:

Deserving of, or liable to, punishment; capable of being punished by law or right; said of persons of offences. The meaning of the term is not 'must be punished', but 'may be punished', or 'liable to be punished'

In the absence of a definition of 'punishable' we have referred to these for gathering the exact meaning of the



word. In the sense given to the word, as above, there can be no doubt that the offence of murder is punishable with death even though the punishment awarded is not death but imprisonment for life.

11. An earlier decision of this Court in *Kunwar Bahadur and Ors. v. State of Uttar Pradesh*: 1980CriLJ831 , where a two-Judge Bench dealt with the provisions of the United Provinces Borstal Act 7 of 1938 was also relied upon. The judgment is a short one. Detailed reference to the provisions of the United Provinces Act has not been made but Section 7 of the Act was referred to and it was observed: (SCC p.340, para 2)

Under this Section where a prisoner is sentenced for transportation i.e. life imprisonment and is below the age of 21 years he should be sent to Borstal School where he cannot be detained for more than five years. The law thus contemplates that for such an offender the sentence of five years will be equivalent even to a higher sentence of life imprisonment.

Obviously in the United Provinces Act, there is no definition of 'offence' as available in the Punjab Act.



Therefore, the decision in *Kunwar Bahadur's* case (supra) is not really material for our purpose.

76. It is true that the argument raised by Mr. Chandhiok has arisen on account of the language used in Regulation 38(3) explanation (i) (b) of the CIRP Regulations (supra). The argument based on the aforesaid regulation completely ignores the substantive provisions of the Principal Act made in Section 29A (d) of the Code. It is well settled that subordinate legislation like CIRP Regulations cannot run contrary to the Principal Act and the expression 'punishable with imprisonment for any offence for two years or more' has to be implied in the aforesaid Regulation. It is for the aforesaid reason we regret our inability to accept the objection raised by Mr. Chandhiok.

77. We also find that when a resolution plan is submitted and the rights of employees are protected by such a plan then raising objections by the Employees is a self-defeating proposition. The resolution plan retrieves about 67% of the NPA's and takes care of the existing employees by continuing their employment and also provide for payment of their back wages. In such a situation the argument of Mr. Rajiv Nayar based on the judgment rendered in the case of *Balco Employees Union (Regd.)* (supra)

would commend to us. Discarding the grievance made by Balco



Employees Hon'ble the Supreme Court held that if by disinvestment in a public sector company employees of a company are adversely affected then they have to accept it as an incidence of service. It is not permissible to tinker with the resolution plan which protect the rights of all employees and there cannot be any possible grievance. Moreover, it is at the instance of one person alone namely Mr. Rahul Sengupta that a hue and cry has been raised. It appears to us that over 5000 employees appear to be satisfied with the resolution plan as rightly contended by Mr. Nayar and as a matter of right no objection to the resolution plan could be raised which is otherwise binding on all the stakeholders including the employees by virtue of provisions made in Section 31(1) of the Code once it is approved by the Adjudicating Authority-NCLT.

78. The objections raised by BEL would also not be sustainable it has also been made clear by Regulation 39(6) of the CIRP Regulations (supra) that a resolution plan which would otherwise require consent of members of the Corporate Debtor under the terms of the constitutional document, shareholders' agreement, joint venture agreement or other document of a similar nature shall take effect notwithstanding that such consent has not been obtained. Regulation 39(6) of the CIRP Regulations in fact takes care of the provisions made for



termination of PPAs which were entered into between the Corporate Debtor and the BEL. Sub regulation 6 of Regulation 39 is couched in very wide language and provides in categorical terms that no consent from the BEL or its RP is required. The case of the RP would fall within the expression of 'or other document of a similar nature'. If the Resolution Applicant has found the terms of PPAs as onerous and it has been approved by the CoC then it is no ground for the BEL to argue that it is a constitution right conferred by the Article 300A and the same cannot be taken away without due process of law. The IBC Code provides for due process of law. As a matter of fact, the provisions of Regulation 39 (6) fully back up the claim of the Resolution Professional and therefore, we have no hesitation to reject the objection raised by BEL.

79. On behalf of L&T argument was advanced by Mr. Mukul Rohatgi and Mr. Anand Chibbar, learned Senior counsel claiming that L&T must be treated as secured creditor within the meaning of Section 30(2) and 31 of the Code. In that regard reliance has been placed on Section 55(4) (b) of the Transfer of Property Act, 1882. The expression 'immovable property' has been used in the opening part of S. 55 and all sub-sections must first fulfil the requirements of opening part. The aforesaid provision reads as

under:



55. Rights and liabilities of buyer and seller.—In the absence of a contract to the contrary, the buyer and the seller of immovable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold:—

(1) The seller is bound—

(a)

(b)

(c)

(d)

(e)

(f)

(g)

(2).....

(3).....

(4) The seller is entitled—

(a)

(b) where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer, [any transferee without consideration or any transferee with notice of the non-payment], for the amount of the purchase-money,



or any part thereof remaining unpaid, and for interest on such amount or part [from the date on which possession has been delivered].

A perusal of the aforesaid provision shows that it applies to 'Immovable property'. The plant and machinery cannot be regarded as immovable property. Moreover, to attract application of sub-section 4 (b) a charge must be shown to be created. It is not disputed that L&T has supplied plant and machinery and a feeble attempt has been made to argue that any property which is attached to earth must be regarded as immovable property as has been defined in Section 3(26) of the General Clauses Act. It has been claimed that charge has been created by supply, erection and installation of the plant and machinery on the respondent premises.

80. We are afraid that the claim made on behalf of L&T on the face of it appears to be wholly unsustainable. There is no document placed on record showing any creation of charge or security warranting a view that the L&T should be regarded as a secured creditor and not as the operational creditor. The charge is created by execution of a document as per the requirements of S. 132 of the Companies Act, 2013. In the absence answering the basic description of S. 55(4)(b) of Transfer of Property Act no



benefit could be gained by L&T. It is well settled that any supplier of goods and services would fall within the meaning of expression 'operational creditor' and the claim made by L&T would amount to rewriting the provisions of the statute which is an impossible proposition. Therefore, we do not find any substance in the aforesaid argument and same is hereby rejected.

81. In view of the above we accept and approve the CoC approved resolution plan of H1 Resolution Applicant-TSL. We also approve the appointment of monitoring agency from the date of the approval of the CoC approved resolution plan to function until the closing date i.e. the date on which the implementation of the steps set out in Annexure-5 of the CoC approved resolution plan would be completed. The monitoring agency shall have the same function, power and protection as conferred on the resolution professional under the Code and the CoC shall continue with its role and responsibility and have protection as set out in the Code including approving the matter as has been approved during the period prior to effective date.

82. In respect of the relief and concession as set forth in Annexure-8 it is not possible for us to issue any directions except to say that the monitoring agency along with the resolution applicant may make a claim before the authorities which shall be considered in



accordance with law. Moreover, these reliefs and concessions are also not condition precedent for the acceptance of resolution plan and would not be any impediment for us to accept the Resolution Plan.

83. As a sequel to the above discussion we pass following directions:-

(i) C.A. No. 244(PB)/2018 - The application filed by the Resolution Professional for accepting the resolution plan approved by the CoC submitted by Resolution Applicant-TSL is accepted and it is clarified that the relief and concession set forth in Annexure-8 must abide by the directions issued in the preceding paras. The Monitoring Agency and the Resolution Applicant-TSL may file appropriate applications before the Public Authorities/Government Authorities and it is needless to say that their applications would be duly considered in accordance with law. We make it clear that we are not expressing any opinion on the claim concerning reliefs and concession nor any part of this order shall be understood in that spirit.

(ii) C.A. No. 186(PB)/2018 filed by Larsen & Tourbo Limited is dismissed with cost of Rs. 1/- lakh. The cost be deposited in the account of Corporate Debtor.



- (iii) C.A. No. 217(PB)/2018 filed by Bhushan Employees is also dismissed with cost of Rs. 1/- lakh to be paid by Mr. Rahul Sengupta personally. The cost be deposited in the account of Corporate Debtor.
- (iv) The objection raised by the BEL are rejected and it is held that the claim made by BEL is wholly frivolous and cannot be sustained.
- (v) C.A. No. 176(PB)/2018 - The Ex-Management is directed to cooperate in all respects during the implementation of the resolution plan. Liberty is granted to the Monitoring Agency to apply for any further direction against the Ex-Management, its Directors or any other officers, if such a necessity arises.

All other applications are also disposed of.

84. The sealed covers which have been furnished during the course of hearing shall be returned after re-sealing by the Bench Officer to the learned Counsel for the RP and acknowledgment of receipt may be obtained.

FREE OF COST COPY

15.05.2018
Vineet



Sd-
(M.M. KUMAR)
PRESIDENT

Sd-
(S.K. MOHAPATRA)
MEMBER (TECHNICAL)

15.5.2018
Registrar
National Company Law Tribunal
New Delhi