IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA

IA (IB) No.537/KB/2021
in
CP (IB) No.634/KB/2017

In the matter of:
Application under section 60(5)(c) of the insolvency and Bankruptcy Code, 2016

CP (IB) No.634/KB/2017

In the matter of:

Flsmidth Private Limited	…	Operational Debtor
	Versus	
Jhabua Power Limited	…	Corporate Debtor

IA (IB) No.537/KB/2021

In the matter of:

Avantha Holdings Limited and another	…	Applicants
	Versus	
Abhilash Lall, Resolution Professional of Jhabua Power Limited & others	…	Respondents

Order reserved on: 14.12.2021

Order pronounced on: 08.03.2022

Coram (specially constituted Bench):[1]

Shri Rajasekhar V.K.	:	Member (Judicial)
Shri Harish Chander Suri	:	Member (Technical)

Appearances (through video conferencing):

For the Applicants	:	Mr. S.N. Mookherjee, Ld AG Mr. Shaunak Mitra, Adv Mr. Prateek Kumar, Adv Ms. Raveena Rai, Adv Ms. Smriti Nair, Adv
For Respondent No.1/RP	:	Mr. Ratnanko Banerji, Sr Adv Ms. Mamta Binani, Adv Mr. Rohit Sharma, PCS

[1] Constituted as per order dated 08.11.2021 in TP No.77/PB/2021 passed by the Hon'ble President.

Mr. Piyush Mishra, Adv
Ms. Anindita Roy Chowdhury, Adv
Mr. Raghav Chadha, Adv
Ms. Nikita Sinha, Adv
Mr. Kanishk Kejriwal, Adv
Mr. Abhilash Lall, RP

For the Committee of Creditors : Mr. Joy Saha, Sr Adv
Mr. Vaijayant Paliwal, Adv
Mr. Sagar Dhawan, Adv
Ms. Trisha Mukherjee, Adv
Mr. Nikhil Mathur, Adv
Ms. Prabh Simran Kaur, Adv

For the Successful Resolution Applicant : Mr. Ramji Srinivasan, Sr Adv
Mr. Ramakant Rai, Adv
Mr. Kushagra Shah, Adv
Mr. Somesh Srivastava, Adv
Mr. Rajshree Chaudhary, Adv
Mr. Shivkrit Singh, Adv
Mr. Varun Kumar Tikmani, Adv

ORDER

Rajasekhar V.K., Member (Judicial)

1. Prologue

1.1. **IA (IB) No.537/KB/2021** is an application filed by Avantha Holdings Limited and another, against the Resolution Professional **(RP)** of Jhabua Power Limited, the Corporate Debtor, and the Committee of Creditors **(CoC)**, under section 60(5) of the Insolvency & Bankruptcy Code, 2016 **("IBC" or "the Code")** *inter alia* seeking the following reliefs:-

a. Declare that NTPC is not compliant with section 29A of the Code and therefore, ineligible to participate in the CIRP of the Corporate Debtor;

b. Set aside the decision of the CoC arbitrarily rejecting the proposal of the Applicant;

c. Direct the CoC to consider the proposal submitted by Applicant No.1 under section 12A of the Code and call the Applicant for further negotiation and discussion.

2. The concern of the Applicants

2.1. The Applicant No.1, Avantha Holdings Limited, is the promoter and shareholder of Avantha Power and Infrastructure Limited which in turn holds 17.9% shares of Jhabua Power Limited ("JPL" or "the Corporate Debtor"). Applicant No.2 is a member of the suspended Board of the Corporate Debtor.

2.2. The Applicant No.1 had submitted its settlement offer to the Resolution Professional by way of letters dated 21.12.2020, 26.12.2020 and 25.01.2021 and requested the Resolution Professional to place the proposal before the Committee of Creditors (CoC) for its consideration. According to the Applicants, the CoC accorded unfair consideration to the Resolution Plan submitted by National Thermal Power Corporation Limited (NTPC), since NTPC was allegedly ineligible to submit the Resolution Plan under section 29A(c) of the Code.

2.3. The applicants allege that NTPC submitted its First Plan on 30.12.2019 without an affidavit certifying compliance under section 29A of the Code. As on that date, NTPC was the promoter of and held equity shares in Ratnagiri Gas and Power Private Limited (RGPPL) to the extent of 25.51% and Konkan LNG Limited (KLL) to the extent of 20.23%, and was in control and management of both RGPPL and KLL.

2.4. The accounts of RGPPL and KLL had been classified as Non-Performing Assets (NPAs) by their respective lenders and prior to the insolvency commencement date, *i.e.,* 27.03.2019, and that the same has not been cleared as on the date of submission of the First Plan. NTPC also failed to disclose this in its preliminary affidavit dated 22.10.2019 but subsequently brought it to the notice of the RP *vide* letter dated 06.12.2019 and not in the form of an affidavit.

2.5. Thereafter, KLL entered into a tripartite settlement agreement dated 23.03.2020 and a Deed of Novation dated 23.03.2020 with GAIL (India) Limited (GAIL) and its lenders for debt restructuring. There was a one-time settlement of the dues by KLL and the remaining debts were novated to GAIL. In consideration

of the part payment made by KLL, the lenders transferred their equity to KLL (KLL's One Time Settlement).

2.6. Similarly, RGPPL entered into a Term Debt Settlement Agreement dated 31.12.2020, Deed of Novation dated 31.10.2020, amendment of Compulsorily Redeemable Preference Shares (CRPS) Agreement dated 31.12.2020 and Share Purchase Agreement dated 31.12.2020 with NTPC for a one time settlement of dues. Subsequently, the balance debt stood novated to NTPC. In consideration of the part payment made by RGPPL, the Lenders transferred their equity to NTPC (RGPPL One Time Settlement).

2.7. It is alleged that despite being aware of NTPC's ineligibility as on the date of submission of the First Plan, the RP and the CoC continued to engage with NTPC and favoured it with several concessions allowing it to submit further revised Resolution Plans on 30.11.2020, 16.04.2021 and 14.06.2021. This was on the strength of No Dues Certificates (NDCs) issued by the lenders of RGPPL and KLL, pursuant to the respective One Time Settlement (OTS) pursued with them.

2.8. The applicants have specifically stated that there is no evidence that the accounts of RGPPL and KLL were upgraded from Non-Performing Asset (NPA) status on the dates of submission of the Second Plan and the Third Plan.

2.9. On the other hand, the Applicant No.1 had offered a solution to resolve the insolvency of the Corporate Debtor with unlocking of its fair value and consideration. Approval of this proposal by the CoC would also avoid pushing the Corporate Debtor into liquidation.

2.10. It is in this factual conspectus that the present application has come to be filed.

3. Submissions of Mr S.N. Mookherjee, Ld AG appearing for the Applicants

3.1. Mr S.N. Mookherjee, Ld Advocate General appearing for the Applicants, submitted that he would pursue two broad lines of submissions –

(1) on the disqualification under section 29A of the Code which attaches to the Resolution Plan submitted by NTPC; and

(2) on the decision of the Committee of Creditors (CoC) not to entertain the section 12A proposal submitted by the Applicants.

A. On section 29A disqualification

3.2. Opening his arguments, Mr Mookherjee submitted that NTPC submitted its first Resolution Plan on 30.12.2019 (First Plan). As on that date, NTPC was disqualified under section 29A(c) & (j) of the Code. On 30.11.2020, pursuant to negotiations held with CoC, NTPC submitted a second Resolution Plan (Second Plan). Again, on that date, *ex facie*, NTPC was disqualified. In any event, being disqualified on the date of submission of the First Plan, the Second Plan arising out of negotiation would really not be relevant. They would continue to be disqualified as on the date of the Second Plan automatically. On a standalone basis also, on the date of submission of the Second Plan, NTPC was disqualified.

3.3. On 16.04.2021, the third Resolution Plan (Third Plan) was submitted by NTPC, which was modified on 14.06.2021 (Fourth Plan). On both those dates, the Resolution Plans were submitted pursuant to negotiations with the CoC. Therefore, if NTPC was disqualified on the date of submission of the First Plan, they automatically stood disqualified on 16.04.2021 and 14.06.2021. Again, considering from a standalone perspective, NTPC remained disqualified as on the date of submission of the Third Plan (16.04.2021) and the Fourth Plan (14.06.2021).

RGPPL's financial statements

3.4. Mr Mookherjee referred to the financial statement of RGPPL as at 31.03.2019, and elaborated that the admitted facts are as follows:

(a) At the time of submission of the First Plan, NTPC was in management and control of Ratnagiri Gas and Power Limited (RGPPL). The second thing that is admitted apropos this relationship is that RGPPL is a connected party

to NTPC, with NTPC holding 25.51% of RGPPL's shares.[2] The relationship between the parties is described as – *person on whose advice, directions or instructions a director is accustomed to act*.[3] It is a related party.

(b) The representatives on the board of RGPPL are all NTPC's nominees, as per clauses 13.6, 13.7, 13.8, 13.10 and 13.11 of the financial statement of RGPPL as at 31.03.2019.[4]

(c) At clause 53, paras 2, 3 and 4 of the financial statement of NTPC as at 31.03.2019,[5] it is stated that as follows: *"In the meantime, Canara Bank vide its letter dated 21st May 2018, 20th July 2018, 30th July 2018 and 18th August 2018 have been informing that they have downgraded the account of the company from 'standard assets' to NPA as per RBI circular dated 12th February 2018 withdrawing 5/25 Scheme and that their participation/ implementation of 5/25 Scheme (including conversion of debt into CRPS) is put on hold. Further, Canara Bank sought fresh resolution plan under the revised framework of RBI for resolution of stressed assets…. Further, Hon'ble SC vide its judgment dated 02.04.2019 in the matter pertaining to power companies, has declared February 12, 2018 RBI Circular ultra vires and disposed off the application. In view of the Hon'ble Supreme Court judgement Company has approached Canara Bank to reconsider classification of loan in its books and give its acceptance for issuance of CRPS (compulsorily redeemable preference shares)."*

(d) In the Notes under the heading, *Entities with joint control or significant influence over entity*, NTPC is described as a related party.[6]

3.5. Mr Mookherjee submitted that what emerges from the above are that –

(a) NTPC was in control and management of RGPPL;
(b) RGPPL and NTPC were connected entities; and
(c) The account of RGPPL was classified as an NPA.

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[2] Pages 104 & 110 of the IA

[3] Page 113 of the IA

[4] Page 127 of the IA

[5] Page 388 of the IA

[6] Page 412 of the IA

Therefore, both under section 29A(c) & (j) of the Code, NTPC was disqualified as on 31.03.2019.

3.6. Mr Mookherjee adverted to the financial statement of RGPPL as at 31.03.2020, submitted that name of related party contains the names of GAIL and NTPC.[7] The relationship is stated to be *"body corporate whose board of directors, managing director or manager is accustomed to act in accordance with the advice, directions or instructions of a director or manager."* The composition of the Board at clauses 14.1, 14.2, 14.3, 14.4 and 14.5 indicates that they are all nominee directors of NTPC.[8]

3.7. Mr Mookherjee then placed the Directors' Report in the financial statements of RGPPL relating to status of account with lenders. It has been admitted therein that the account of RGPPL has been declared as NPA due to technical reasons, *i.e.*, incomplete implementation of scheme of restructuring within the allowed date of 31.03.2018 in the books of three lenders, *viz.*, IDBI Bank, State Bank of India (SBI) and Canara Bank.[9] On the next page also, there is an identical recording. The shareholding of NTPC is also reflected in the financial statements.[10] So as far as RGPPL is concerned, its account was and continues to remain as NPA. NTPC is a connected party by virtue of being a related party.

3.8. Therefore, Mr Mookherjee submitted, contrary to the affidavit affirmed on 22.10.2019[11] by NTPC before submission of the First Plan, there was an NPA in the NTPC's subsidiary. This is a crucial document, because on the basis of this document and undertaking NTPC was permitted to file a Resolution Plan. If NTPC is found to be in breach, then the entire process has to fail.

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7 Page 441 of the IA

8 Page 449 of the IA

9 Page 453 of the IA

10 Pages 620-622 of the IA; NTPC's shareholding is at page 620.

11 Page 98 of the IA

3.9. Mr Mookherjee emphasised that RGPPL and KLL are both connected persons. He referred to the list of Joint Ventures (JV) – KLL[12] is one of them, RGPPL is another.[13] Connected persons status in respect of both are admitted. This is contrary to the affidavit filed by NTPC, he stated.[14]

3.10. Mr Mookherjee then placed the letter dated 06.12.2019[15] from NTPC to the RP, wherein NTPC stated that in line with the Process Document, NTPC had submitted its undertaking under section 29A of the Code on 22.10.2019. The letter indicates that in order to ensure transparency as a responsible corporate, NTPC would like to apprise that RGPPL and KLL had informed NTPC that their accounts have been downgraded as NPA by the lenders with effect from varying dates due to technical reasons. In view of this, NTPC requested the RP and CoC to extend the deadline for submission of plans.

KLL's financial statements

3.11. Mr Mookherjee then focussed his attention on KLL's financial statements on 2018-19. He submitted that –

(a) NTPC has 25.503% shares in KLL;[16]

(b) There is admission in the financial statements that Canara Bank *vide* its letter dated 21.05.2018 and 20.07.2018, had informed that they have downgraded KLL from 'standard asset' to NPA as per RBI circular dated 12.02.2018 withdrawing 5/25 scheme and that their participation in the 5/25 scheme is put on hold.[17]

(c) Messrs. Praveen Saxena, Arun Kumar Garg, Rajat Kumar Bagchi and Balaji Iyengar are all NTPC nominee directors.[18]

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[12] Page 101 of the IA

[13] Page 102 of the IA

[14] Page 100, para 5 of the IA

[15] Page 1294 of the IA

[16] Pages 708 & 784 of the IA

[17] Page 727 of the IA

[18] Page 729 of the IA

(d) Canara Bank, one of the lenders of the company (3.99% of outstanding as on 31.03.2019) had classified the company's account as NPA as on 31.03.2018 but with effect from 01.04.2009 citing the reason of incomplete restructuring …. The Canara Bank account as on 31.03.2019 continues to be an NPA in the books of the Bank, and hence shows recoverables of ₹161.24 crore against ₹147.73 crore in respect of initial loan because of difference of penal interest on account of NPA.[19] Therefore, as far as KLL is concerned, the accounts were classified as NPA.

(e) The related party status of NTPC with KLL is also recognised.[20]

3.12. Presently, Mr Mookherjee zeroed in on the financial statements of KLL for the period 2019-20.[21] He drew our attention to the admission in the financial statements that during the previous year, Canara Bank classified KLL's loan as NPA. In current year, SBI and IDBI Bank had also classified KLL loan account as NPA. However, there was no default by the company.[22] It was also mentioned therein that during the year, the company has entered into a Tripartite Agreement with GAIL and its lenders for debt restructuring. So, classification as NPA is recognised even in the financial statements. There were entries reflecting the shareholding[23] and the nomination of directors on the board of KLL.[24]

3.13. Mr Mookherjee elaborated that at the time of submission of the First Plan, NTPC knew that RGPPL and KLL were connected parties whose accounts had been classified as NPA. That being the case, whichever way it is looked at, NTPC stood disqualified.

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[19] Page 801 of the IA, also at page 933 of the IA

[20] Page 1001 of the IA

[21] Page 1020 of the IA

[22] Page 1082 of the IA

[23] Page 1028 of the IA

[24] Page 1032 of the IA

3.14. Mr Mookherjee thereafter submitted that the principal defences taken apropos the First Plan were as follows: -

(a) It is admitted that the accounts in question were NPA as on the due date, but there were no dues. Therefore, section 29A of the Code could not operate so as to disqualify NTPC.

(b) The declaration of NPA was for a period of less than one year from the date of submission of the Resolution Plan. Therefore, disqualification under section 29A of the Code will not be attracted.

3.15. Mr Mookherjee drew attention to the averment by the RP with regard to the section 29A disqualification, wherein it has been admitted that Canara Bank had classified the account of RGPPL as NPA on 30.06.2019 with effect from 01.04.2009, SBI in July 2019 with effect from 30.06.2014 and IDBI Bank on 30.06.2019 with effect from 01.05.2019.[25]

3.16. Mr Mookherjee submitted that the financial statements for the years 2018-19 and 2019-20 show that in both these periods, Canara Bank had classified the account of RGPPL as NPA. So in any event, it was a year prior to the submission of the First Plan, which was 30.12.2019. It will be much longer than that because the classification was from 01.04.2019. As far as SBI was concerned, in the annual accounts, the financial statements show that in 2019-20, the accounts were classified as NPA on 30.06.2014. The condition is that if the account is classified as NPA for more than a year prior to the submission of the Resolution Plan, the disqualification will kick in.

3.17. Mr Mookherjee submitted that in February 2020 itself, Canara Bank, ICICI Bank, IDBI Bank and IFCI had issued letters to RGPPL clearly certifying that there were no overdues as on 31.12.2019.[26] The affidavit filed by NTPC, wherein these letters are referred to,[27] also states the same thing. Mr

[25] Para 23 at page 10 of the RP's reply

[26] Pages 60-63 of the RP's reply

[27] Page 25 of NTPC's reply

Mookherjee placed paras 12.41 to 12.45 of the NTPC's reply,[28] and stated that what is important is how NTPC construed these letters. He placed NTPC's interpretation – *all the lenders of RGPPL had given no dues certificates confirming that there were no overdues for the quarter ending 31.03.2019. Therefore, the answering respondent respectfully submits that with reference to RGPPL there would arise no issue of being in default. In order to place these facts, NTPC had sought for extension of the last date for submission of Resolution Plan.*[29] NTPC does not say that there was no default, it only says that for the period from 01.01.2019 to 31.03.2019, there was no default, Mr Mookherjee submitted.

3.18. Mr Mookherjee then referred to the letter dated 10.02.2020[30] from SBI to RGPPL, wherein it has been certified that RGPPL has paid interest and instalment due as on 31.12.2019 and there are no overdues as on that date, and submitted if there is a restructuring as per RBI's prudential norms, it does not necessarily mean that the account ceases to be NPA. That is what the SBI has done – the account continues to be NPA as on 10.02.2020. In any event, the document came in only after the submission of the Resolution Plan. Similarly, Canara Bank issued a letter dated 11.02.2020,[31] confirming that there are no overdues as on 31.12.2019. It is, however, admitted therein that presently account is classified as NPA as RBI has not allowed the upgradation of account classification. ICICI Bank, IDBI Bank and Industrial Finance Corporation of India (IFCI) do not have this note in their letters.[32]

3.19. Mr Mookherjee submitted that he would make three submissions with regard to disqualification of NTPC under section 29A of the Code:

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[28] Pages 25-26 of NTPC's reply

[29] Page 26 of NTPC's reply

[30] Page 59 of the RP's reply

[31] Page 60 of the RP's reply

[32] Pages 61-63 of the RP's reply

(a) Section 29A(c) of the Code concerns both classification and period. The admitted position is that as on 30.12.2019, the classification of both RGPPL and KLL remained NPA. Therefore, whether the banks have given NDC or not makes no difference.

(b) In spite of the matter being discussed at various meetings of the Joint Lenders Forum (JLF), this classification has not changed and the Regulator itself (RBI) has not permitted the classification to be altered to a standard asset. There is no challenge to this. So mere certification from the banks that the restructured loan is being paid on time, would not result in reclassification.

(c) NTPC itself interprets the letter dated 10.02.2020[33] as only **for** the quarter ending 31.12.2019, not **upto** the quarter.

3.20. Mr Mookherjee placed section 29A(c)[34] of the Code, and submitted that this is concerned with classification of the account. In the present case, the CIRP commenced on 27.03.2019 and the classification by both SBI and Canara Bank preceded that by more than one year. It is this classification which has to be looked at. So the letters[35] certifying no overdues are of no consequence. As far as the first proviso to clause (c) is concerned, the same has not been satisfied. Before the Resolution Plan is submitted, all overdue amounts with interest related to the NPA have to be paid, and paid by such person who submits the resolution plan. So the entire outstanding because of which it became an NPA

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[33] Page 26 of NTPC's reply

[34] Section 29A.– *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) has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter**, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India** issued under the Banking Regulation Act, 1949 or the guidelines of a financial sector regulator issued under any other law for the time being in force, and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor:*

*Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to non-performing asset accounts **before submission of resolution plan**; (emphasis supplied)*

[35] Pages 59-60 of the RP's reply

has to be paid before submission of the Resolution Plan by the RA or by persons acting in concert.

3.21. Mr Mookherjee then referred to the affidavit of the RP[36] wherein he has averred that on 30.03.2020 and 27.03.2020, Canara Bank, SBI and IDBI Bank issued NDCs to KLL, clearly stating that the KLL debt stands satisfied in full and no further amount is payable by the borrower.

3.22. From the above, it is clear that both RGPPL and KLL had no 'overdues.' In this regard, Mr Mookherjee invited us to the letters, which are really a series of NDCs in the case of KLL[37] and RGPPL.[38] He referred to the NDC dated 30.03.2020,[39] and submitted that the sum of ₹548.21 crore was received from the company on 24.03.2020 towards part settlement of dues as on 30.09.2019. This was after the submission of the First Plan. Reading further from the same letter, Mr Mookherjee submitted that the balance dues of ₹217.4 crore have been novated and transferred in favour of GAIL. So there is no payment, and the obligation was simply taken over by someone else.

3.23. Mr Mookherjee found two faults in this approach: Firstly, the transaction took place after submission of the First Resolution Plan on 30.12.2019; and secondly, even if it had been before the submission of the First Plan, this is not payment of the overdue amount on two counts - there is only part settlement, and the balance liability is simply shifted to a third entity. Mr Mookherjee emphasised that section 29A is a see-through provision. In relation to KLL also, identical language is used.[40] These do not help NTPC with the First or the Second Plan.

3.24. In so far as the letter of 08.01.2020[41] (*sic* 2021) with regard to RGPPL is concerned, it states that no further amount is payable under the existing loan

[36] Page 11, clause (iv) of the RP's reply
[37] Pages 1612-1620 of the IA
[38] Pages 1621-1627 of the IA
[39] Page 1612 of the IA
[40] Pages 1612-1620 of the IA
[41] Pages 1621-1627 of the IA

document. The debt was merely novated in favour of NTPC; it was not repaid. So, in so far as the disqualification under section 29A of the Code is concerned, the restructuring is of no assistance, since it only involves a transfer of debt.

3.25. This Adjudicating Authority had passed an order on 02.11.2020, extending the CIRP date to 31.01.2021.[42] An affidavit was filed on 27.11.2020,[43] which was three days before the Second Plan was submitted by NTPC. All payments were made only after Dec 2019, after NTPC submitted the section 29A undertaking. It is in this context that the letters of Mar 2020 issued by the lenders must be seen. The affidavit is completely contrary to the letters of Jan 2020 issued by the lenders as far as RGPPL is concerned. The NPA issue was not at all resolved at that point of time, the Scheme whose non-implementation led to the classification of the account as NPA, was expected to be implemented only by 31.12.2020 subject to approvals from various stakeholders. Further, Mr Mookherjee reiterated that the payments were not actually made by NTPC, or anyone else acting in concert.

3.26. Coming next to the CARE Ratings and the Report dated 19.10.2020,[44] Mr Mookherjee submitted that he was relying on it to get rid of the bogey of all payments having been made. The report categorically states that *RGPPL had not serviced the principal obligations due at the end of September 2020. The Company is in discussion with its lenders for one time settlement (OTS) of its outstanding debt of ₹1461.05 crore. As per minutes of the consortium meeting held on September 17, 2020, the Company has proposed its lenders for OTS for which lead lender has given in principle approval with cut-off date considered as September 01, 2020. Other lenders are still under process of taking requisite approvals. The Company has only paid interest obligations due for the month of Sept 2020, while it has not made the principal payment due on Sept 30, 2020*

[42] Page 1519 of the IA

[43] Page 1521 of the IA

[44] Page 1515 of the IA

as the process for OTS is underway. This document would show that even as on 19.10.2020, payment has not been made. This is hit by the first proviso[45] to section 29A, according to Mr Mookherjee.

3.27. Referring to NTPC's First Plan and the consideration it received from the RP and the CoC, Mr Mookherjee placed the minutes of CoC meeting held on 24.01.2020,[46] drawing particular attention to the noting that *RP has received two resolution plans from NTPC and Adani Power …. RP has reviewed the plans for legal compliance.*[47] Mr Mookherjee strongly submitted that the Process Document and the process, which is mandatory as far as section 29A is concerned, was given a go-by. As per the minutes under the heading, *Presentation of Resolution Plans*, the RP apprised CoC that he has received letters from two different creditors raising certain objections on the eligibility of NTPC. So the issue was indeed flagged for consideration.

3.28. Mr Mookherjee then placed the following paragraph in the Directors Report[48] relating to status of account with lenders:

> *"Your company has been consistent in its debt servicing by paying the interest and principal within due dates as prescribed without any default, subsequent to demerger. However, the account of your company has been declared as NPA due to technical reasons, i.e., incomplete implementation of scheme of restructuring within the allowed date of 31.03.2018 in the books of three Lenders, namely, IDBI Bank, State Bank of India and Canara Bank. The matter is being pursued …."*

Therefore the financial statements of RGPPL show that its account was and continues to remain as NPA, and that NTPC is a related party.

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[45] *Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to non-performing asset accounts before submission of resolution plan.*

[46] Page 1296 of the IA

[47] Page 1298 of the IA

[48] Pages 454-464 of the IA

3.29. Mr Mookherjee thereafter trained his guns on the affidavit filed by NTPC affirmed on 22.10.2019 before the First Plan.[49] He submitted that this was a crucial document, because on the basis of this document and undertaking, NTPC was permitted to file a Resolution Plan. If they are found to be in breach, then the entire process has to fall. Mr Mookherjee also placed the undertaking given by NTPC, wherein it has been undertaken that as and when any of the statements made therein are invalid or misrepresented, the resolution applicant would be ineligible to participate in the CIRP of the corporate debtor.[50] Placing this undertaking in context, Mr Mookherjee submitted that at the time of submission of the Resolution Plan, NTPC knew that RGPPL and KLL were connected parties whose accounts had been classified as NPA.

3.30. Mr Mookherjee then drew attention to the minutes of the CoC meeting of 05.05.2020,[51] where it has been minuted against Agenda Item A-5,[52] that *"the RP updated the CoC on the progress of the CIRP … NTPC is yet to respond on the comments shared by RP team and CoC counsel on the Resolution Plan and other compliance issues, including under section 29A of IBC."* It is further recorded that the RP had updated the CoC about the section 29A compliance, where draft compliance reports had been received from Mazars, the Assurance Services Team. However, at the eleventh CoC meeting of 21.12.2020,[53] there was no discussion on the section 29A compliance.

3.31. Mr Mookherjee submitted that at the CoC meeting of 05.03.2021,[54] the CoC's counsel was directed to submit to the Adjudicating Authority that the lenders would like to run a fresh Expression of Interest (EoI) process. The crucial date for determining if there was a disqualification attached to NTPC, would be the

[49] Page 98 of the IA

[50] Page 100, para 5 of the IA

[51] Page 1485 of the IA

[52] Page 1487 of the IA

[53] Minutes at page 28 of the RP's reply

[54] Page 1592 of the IA

time of filing of the resolution plan. The other resolution plans are but part of the same series.

3.32. Mr Mookherjee then referred to the affidavit dated 16.04.2021 relating to the Third Plan.[55] He submitted that nothing really had changed, other than the fact that it is mentioned therein that all dues payable by KLL towards its lenders have been satisfied and that all lenders have issued NDCs, therefore the issue of NPA is resolved.[56] In so far as KLL is concerned, NTPC has executed a Share Purchase Agreement (SPA) with GAIL, whereby GAIL would take over NTPC's shareholding in KLL, facilitating NTPC's exit. GAIL also wrote to the Stock Exchanges, intimating that the equity shareholding in KLL has increased from 40.92% to 69.05%, thus making KLL a subsidiary of GAIL.[57] GAIL's shareholding thereafter increased to 92.15%.[58]

3.33. In the context of RGPPL, the NDC dated 08.01.2020 (*sic* 08.01.2021)[59] issued by Canara Bank would be relevant. Canara Bank states in the letter that all dues stand satisfied in full. Therefore, even at the time of submission of the Second Plan, there was no compliance with section 29A. A similar NDC dated 30.03.2020 has been issued by Canara Bank in the case of KLL.[60]

3.34. At the CoC meeting of 21.04.2021, RP's counsel informed the CoC that the section 29A report by Mazars will be got updated as on the date of submission of the Resolution Plan. So, section 29A was a live issue. On 14.06.2021, a revised plan came in, as recorded in the Supplementary Affidavit.[61] Minutes are of 15.06.2021, which record that a revised plan had been submitted. No

[55] Page 1604 of the IA

[56] Page 1605 of the IA, para 4, sub-para (c)

[57] Page 1310 of the IA

[58] Page 1311 of the IA

[59] Page 1621 of the IA

[60] Page 1620 of the IA

[61] Page 93 of the Supplementary Affidavit

further affidavit relating to section 29A has come in. This revised plan has been treated as modification of the resolution plan.

3.35. Mr Mookherjee placed regulation 36A(7)(c)[62] of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations), and submitted that the RP had failed to do due diligence with regard to the section 29A eligibility in so far as NTPC is concerned, as required by regulation 36A(8)(b) of the CIRP Regulations.[63] Regulation 36B(7)[64] *ibid* stipulates that the RP may, with the approval of the CoC, reissue request for resolution plans, if the resolution plans received in response to an earlier request are not satisfactory, subject to the condition that the request is made to all prospective resolution applicants in the final list.

3.36. Rounding up his submissions, Mr Mookherjee referred to the Process Document dated 01.10.2019,[65] and submitted that for a process to go through under this Document, it necessarily has to be a compliant Resolution Applicant. This means that a section 29A disqualification should not be attracted at the stage when they are asked to submit a Resolution Plan. Going by the financial statements and the letter of 06.12.2020, it is quite clear that when the affidavit of 22.10.2019 was put in, NTPC was clearly disqualified under section 29A. So they could not have been part of the process at all, Mr Mookherjee submitted.

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[62] **36A. Invitation for Expression of Interest.–** (1) to (6) * * *
(7) An Expression of Interest shall be unconditional and shall be accompanied by –
(a) & (b) * * *

(c) an undertaking by the prospective resolution applicant that it does not suffer from any ineligibility under section 29A to the extent applicable;

[63] (8) The resolution professional shall conduct due diligence based on the material on record in order to satisfy that the prospective resolution applicant complies with-
(a) * * *
(b) the applicable provisions of section 29A.

[64] **36B. Request for Resolution Plans.–** (1) to (6) * * * **(**7) The resolution professional may, with the approval of the committee, re-issue request for resolution plans, if the resolution plans received in response to an earlier request are not satisfactory, subject to the condition that the request is made to all prospective resolution applicants in the final list:

[65] Page 11 of the Supplementary Affidavit

3.37. In support of his contentions regarding the need for actual payment of overdue amounts and not mere novation in favour of a holding company or indeed any other third party, Mr Mookherjee relied on the judgment of the Hon'ble Supreme Court in ***ArcelorMittal India Private Ltd v Satish Kumar Gupta,***[66] where the Hon'ble Supreme Court had held that the ineligibility under section 29A(c) can only be removed if the person submitting the Resolution Plan makes payment of the overdue amounts before submission of the Resolution Plan.

3.38. In the present case, on 29.10.2019 when the affidavit was submitted and also when the First Plan was submitted on 30.12.2019, the dues had not been paid off. Therefore, NTPC was ineligible to submit the Resolution Plan and there could have been no discussions with them. If NTPC is ineligible to submit the First Plan, then that should be the end of the matter. Even looking at it as standalones, the Second and Third Plans are also hit. NTPC's subsidiary continued to remain as NPA. RBI's classification has not changed. A one-time settlement does not convert an NPA into a standard asset, Mr Mookherjee asserted.

On feasibility and viability

3.39. Mr Mookherjee submitted that in terms of clauses (a) and (b) of regulation 39(3)[67] of the CIRP Regulations, the CoC had a duty to arrive at a determination of the feasibility and viability of the resolution plans submitted before it. He pointed out that the meeting of the CoC on 15.06.2021[68] records that RBSA has been appointed by the CoC for studying the feasibility and viability of the

[66] (2019) 2 SCC 1 decided on 04.10.2018, at para 57

[67] (3) The committee shall-
(a) evaluate the resolution plans received under sub-regulation (2) as per evaluation matrix;
(b) record its deliberations on the feasibility and viability of each resolution plan; and
(c) vote on all such resolution plans simultaneously.

[68] Page 93 of the Supplementary Affidavit

resolution plans received. Therefore, he alleged that the evaluation has been done by the third party agency and not by the CoC itself, which is bad in law.

B. On the CoC's decision not to entertain the section 12A proposal:

3.40. Mr Mookherjee submitted that on 21.12.2020[69] and 26.12.2020,[70] the Applicant No.1 had attempted to submit a proposal for restructuring of the Corporate Debtor. On 25.01.2021,[71] the Applicant No.1 submitted a detailed financial model along with the operating results upto December 2020, for consideration. Since there was no response, the Applicant No.1 filed IA No.213/KB/2021[72] before this Adjudicating Authority for directions to the CoC to consider its plan.

3.41. On 05.03.2021,[73] the Applicant No.1 requested the RP to place its proposal before the CoC for consideration. Mr Mookherjee drew attention to Agenda Item No.A5 *("To discuss the progress of CIRP")* in the 12th meeting of the CoC held on 05.03.2021.[74] The representatives of Power Finance Corporation (PFC) submitted that the proposal submitted by the promoters does not conform to section 12A of the Code and the same should be noted in the hearing before this Adjudicating Authority on the next date. This view was concurred in by other members of the CoC, who voiced a unanimous view that they do not want to pursue any withdrawal under section 12A or go ahead with the proposal submitted by the promoters.

3.42. On 26.03.2021,[75] the Applicant No.1 again wrote to the RP requesting their proposal to be placed before the CoC, in view of the 12th meeting of the CoC noting that the value of the Resolution Plan submitted by NTPC on 30.11.2020 was substantially lower than the earlier offer submitted on 30.12.2019. At para

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69 Pages 1540-1541 of the IA

70 Pages 1542-1543 of the IA

71 Page 1544 of the IA

72 Pages 1545-1554 of the IA

73 Pages 1589-1590 of the IA

74 Minutes at pages 1592-1595 of the IA @ page 1594

75 Pages 1599-1601 of the IA

4 of the letter, the Applicant No.1 expressed surprise that the minutes of the 12th CoC meeting[74] recorded that the offer does not conform to section 12A of the Code. The Applicant No.1 also requested that discussions be arranged with the CoC for ironing out any deficiencies.[76]

3.43. On 13.04.2021,[77] the Applicant No.1 again wrote to the RP asking for consideration of the 12A proposal. The letter also highlighted that there was a cloud over NTPC's eligibility to submit a Resolution Plan. The threat of liquidation hangs over the corporate debtor, and therefore, the offer submitted by the Applicant No.1 should be placed for consideration before the CoC within the remainder of the CIRP period.[78]

3.44. On 21.04.2021,[79] the Applicant No.1 wrote to the RP to say that they reiterate the terms of their restructuring proposal. It also specifically stated therein that the NTPC's restructuring arrangement to overcome the section 29A disqualification does not fulfil the requirement of section 29A(c).[80] The letter also specifically requested that the resolution plan submitted by NTPC should not be tabled before the CoC or discussed or considered by it.

3.45. Mr Mookherjee referred to the order dated 23.02.2021[81] passed in IA No.75/ KB/2021 by this Adjudicating Authority, wherein it was stated in para 14 that

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[76] Page 1601 of the IA @ para 8

[77] Pages 1602-1603 of the IA

[78] Page 1603 of the IA @ paras 5 & 6

[79] Pages 1650-1654 of the IA

[80] *(c) at the time of submission of the resolution plan has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 or the guidelines of a financial sector regulator issued under any other law for the time being in force, and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor:*

Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to non-performing asset accounts before submission of resolution plan.

[81] Page 1584 of the IA

all possible ways of revival of the corporate debtor must be explored and considered, and that no further extension shall be granted.

3.46. Mr Mookherjee then placed the minutes of the 14th meeting of the CoC held on 21.04.2021,[82] wherein the proposal submitted by the promoters of the corporate debtor was considered. The minutes record that having considered the commercials of the NTPC's offer and the promoter's proposal, it was noted that the offer from NTPC was better. Some CoC members also noted that some other accounts held by the promoters were under examination by various Govt authorities. It is further recorded therein that if the promoter's proposal is a resolution plan under the IBC, then it had potential section 29A issues, and if it was a plan under section 12A of the IBC, then it was not in the prescribed form.

3.47. Addressing each of the three issues highlighted in the meeting, Mr Mookherjee submitted that on the NTPC's commercials being better, the eligibility of NTPC to submit the plan in the first place, is a factor. On the question of examination of some of the promoter's accounts being under scrutiny, no explanation can really be offered unless particulars are given. On the question of section 12A not being strictly complied with, Mr Mookherjee submitted that the Applicants wanted a go-ahead from the CoC first. Only thereafter, could they approach the original petitioning operational creditor to seek consent in the prescribed form.

3.48. In any case, after the meeting, the Applicant No.1 submitted a revised proposal *vide* its letter dated 06.05.2021,[83] re-emphasising its keenness to address the CoC's concerns regarding commercial feasibility of the Offer both with regard to the quantum of upfront payment as well as the time period for repayment of the sustainable debt.[84] The upfront payment was increased to ₹200 crore from the earlier ₹100 crore, and the repayment period for the sustainable debt was reduced from 19 years to 14 years. This was not considered at all, and therefore,

[82] Pages 1655-1658 @ page 1657 of the IA

[83] Pages 1659-1663 of the IA

[84] Page 1661 of the IA @ clause (c)

the CoC's decision to go ahead with NTPC's plan coupled with the fact that the proposal was not considered by the same independent agency which evaluated NTPC's plan, was absolutely arbitrary, Mr Mookherjee alleged.

3.49. Mr Mookherjee submitted that at the 15th CoC meeting held on 15.06.2021,[85] Mr Janmejaya Mahapatra, member of the suspended board and CEO of the corporate debtor, had requested the CoC members to reconsider the revised plan submitted by the promoters and requested the CoC members to delay voting on NTPC's plan until the application filed by the Applicant No.1 came up for hearing on 21.06.2021. But the CoC did not agree, and requested the RP to go ahead with the voting process on NTPC's Plan. Mr Mookherjee contends that the revised proposals submitted on 06.05.2021[83] were never discussed meaningfully by the CoC. The Applicants felt that the minutes did not correctly record the proceedings of the meeting. Therefore, the Applicant No.1 wrote a letter on 17.06.2021[86] to the RP, *inter alia* stating this and requesting some rectification in the minutes to reflect that there was no discussion on the revised proposal submitted by Applicant No.1. There was no response to this. The Applicant also addressed another letter on 19.06.2021[87] that evaluation should be made by the same independent agency.

3.50. Mr Mookherjee summarised the submissions as follows: -

(a) The promoters were always interested in having a section 12A withdrawal. There was no negotiation or discussion on this.

(b) The revised proposal of the promoters, admittedly, had never been considered by the CoC. There was no comparable evaluation which had been undertaken which could justify a conclusion that NTPC's proposal was better than the proposal submitted by the promoters.

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85 Minutes at pages 93-98 of the Supplementary Affidavit, @ page 96

86 Page 99 of the Supplementary Affidavit

87 Pages 102-103 of the Supplementary Affidavit

(c) Relevant consideration which was pointed out in the Applicant No.1's letter of 06.05.2021[83] had not been weighed in at all.

3.51. Mr Mookherjee submitted that the CoC has not shown any willingness to negotiate or have the proposal evaluated by the same independent agency – RBSA. He alleged that the CoC's decision not to entertain the section 12A proposal for withdrawal of the CIRP initiated against the corporate debtor was not based on any material considerations. Therefore, the CoC's decision cannot be said to be unimpeachable.

3.52. Mr Mookherjee relied on the following authorities in support of his contentions regarding material consideration:

(a) Judgment of the Hon'ble Supreme Court in ***Swiss Ribbons Private Limited & another v Union of India & others,***[88] wherein the Hon'ble Court held that if the CoC arbitrarily rejects a just settlement or withdrawal claim, NCLT and thereafter NCLAT can always set aside such decision under section 60 of the Code (para 83).

(b) Judgment of the Hon'ble NCLAT in ***Hammond Power Solutions Pvt Ltd v Sanjit Kr Nayak & others,***[89] wherein the Appellate Tribunal held that there are no reasons given by the CoC to demonstrate that it has taken care of the interests of all stakeholders (paras 14 & 15). Mr Mookherjee submitted that this judgment shows how commercial wisdom is to be looked at.

3.53. In these circumstances, Mr Mookherjee submitted that on both counts – section 29A ineligibility of NTPC, and non-consideration of section 12A proposal submitted by the promoters – the decision of the CoC ought to be struck down.

4. Submissions of Mr Joy Saha, Ld Sr Counsel appearing for the CoC

4.1. Mr Joy Saha, Ld Senior Counsel appearing for the CoC, submitted that the application is essentially for disqualification of the successful Resolution Applicant - NTPC - on the ground that it had two subsidiaries who had NPA

[88] (2019) 4 SCC 17:2019 SCC OnLine SC 73 decided on 25.01.2019 *(references are to the print edition)*

[89] 2020 SCC OnLine NCLAT 199 decided on 14.02.2020

accounts. The second ground was that the proposal submitted by the Applicant No.1 under section 12A of the Code was not appropriately heard or dealt with.

On the section 12A proposal

4.2. Mr Joy Saha drew attention Agenda item A7 of the 14th meeting of the CoC – 21.04.2021,[90] wherein members of the suspended board were also present. The minutes record as follows: *"the proposal submitted by the promoters was discussed pursuant to NCLT directions, and after due consideration, the CoC members from PFC, SBI, Axis Bank, PNB and REC stated that they do not consider the plan submitted by promoters to be commercially viable as the upfront payment is only ₹100 crore. ... in any event, CoC considered the commercial aspects of the proposal and have found it unacceptable. CoC members also informed RP that lenders have not received any formal request from promoters under section 12A for withdrawal of application and moreover, lenders are not keen on withdrawal from the CIRP in case the plan is offered by the promoters to the lenders to consider under section 12A. Based on these points, the CoC unanimously decided not to pursue the restructuring plan further."*

4.3. Mr Joy Saha submitted that essentially there are two points – first, the promoters said that theirs was a superior plan. That contention has to be answered only by reference to the fact that plan has been duly considered by the CoC. The CoC really does not have to justify the reasons, unless it has been shown to the Adjudicating Authority that the consideration has been completely arbitrary or whimsical. The scope of judicial review by the Adjudicating Authority is extremely limited. The commercial wisdom must be respected, as per by the Hon'ble Supreme Court in ***K. Sashidhar v Indian Overseas Bank & others***,[91] where it was held that the commercial wisdom of CoC has been given paramount status without any judicial intervention, for ensuring completion of

[90] Page 91 of the Supplementary Affidavit

[91] (2019) 12 SCC 150 decided on 05.02.2019

the stated processes within the timelines prescribed by the IBC;[92] that there was no need for the dissenting financial creditors to record reasons for disapproving or rejecting a resolution plan;[93] and the opinion so expressed by voting is non-justiciable.[94]

4.4. Mr Joy Saha further relied on the judgment of the Hon'ble Supreme Court in ***Committee of Creditors of Essar Steel India Limited v Satish Kumar Gupta & others***,[95] wherein it was held that it is the commercial wisdom of the CoC which is to determine, through negotiation with the prospective resolution applicant, as to how and in what manner the corporate resolution process is to take place.[96] After a resolution plan is approved by the requisite majority of the CoC, it must pass muster of the Adjudicating Authority under section 31(1) of the Code. The Adjudicating Authority's jurisdiction is circumscribed by section 30(2) of the Code.[97] The limited judicial review available to the Adjudicating Authority is to see that the CoC has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution process; that it needs to maximise the value of its assets; and that the interests of all stakeholders including operational creditors has been taken care of.[98]

4.5. Mr Joy Saha stated that the Applicants are under a misconception that a section 12A proposal is equivalent to a Resolution Plan, and they could pitch it point by point against the Resolution Plan submitted by NTPC. A section 12A proposal does not really require the CoC to vet the proposal in the same manner

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92 *Ibid* at para 52

93 *Ibid* at para 64

94 *Ibid* at para 68

95 *2019* SCC OnLine SC 1478 decided on 15.11.2019

96 *Ibid* at para 64

97 *Ibid* at para 65

98 *Ibid* at para 73

as a Resolution Plan. On that ground also, the present Application is without merit, he submitted.

On the eligibility of NTPC

4.6. Addressing the court on the question of eligibility of NTPC, Mr Joy Saha submitted that the First Plan was submitted on 30.12.2019. The first revision to this Plan came on 30.11.2020. Thereafter, the final revision was on 14.06.2021, and this was the Plan that was voted upon and approved by the CoC with 100% majority on 26.06.2021 and 27.06.2021.

4.7. So far as the dues of the two subsidiaries are concerned, the NDC in respect of KLL came on different dates.[99] The last of these came before 30.03.2020. So far as RGPPL is concerned, the NDC again came on different dates.[100] The last of these have come in January 2020. So, as on the date of the final Resolution Plan being submitted in June 2021, all the clearances had already come in.

4.8. Mr Joy Saha placed section 29A(c)[101] of the Code and submitted that the question that the Adjudicating Authority has to consider is whether the cut-off date will be the First Plan or the subsequent Plans. He urged us to consider this both in letter and in spirit. Ultimately, the section will have to be read in a manner so as to serve the object of the statute. The question which begs

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[99] Pages 57-65 of the CoC's reply

[100] Pages 80-86 of the CoC's reply

[101] Section 29A.– *A person shall not be eligible to submit a resolution person, if such person, or any other person acting jointly or in concert with such person –*

(a) * * *

(b) * * *

(c) has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 or the guidelines of a financial sector regulator issued under any other law for the time being in force, and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor:

Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to non-performing asset accounts before submission of resolution plan.

consideration is this: if the shackles are removed before the voting, will the Plan fall by the wayside because of a technical objection, Mr Joy Saha submitted.

4.9. Questioning the *locus standi* of the Applicants, Mr Joy Saha submitted that the role of the promoters in the CIRP of a corporate debtor is extremely limited. There are defined boundaries within which they have to operate. These cannot be stretched so as to jettison or provide grounds for rejection of a resolution plan which is otherwise compliant. One would have understood if the NDCs in respect of RGPPL and KLL were not there. That is not the case here, he submitted.

4.10. Mr Joy Saha then stated that the nature of the objection is completely technical. There is no mandatory clause in this proviso, such as '*only if.'* Constant revision of resolution plans was not originally envisaged in the Code. Regulations 36A and 36B of the CIRP Regulations came later on. The scheme of entire Code and the Regulations should be interpreted in favour of resolution, and not towards defeating it.

4.11. It is the specific case of the Applicant No.1 that its revised proposals communicated *vide* letter dated 06.05.2021[83] was not properly considered by the CoC, but only perfunctorily. The minutes reflect proper consideration.

5. Submissions of Mr Ramji Srinivasan, Ld Sr Counsel for NTPC, the successful Resolution Applicant

5.1. Mr Ramji Srinivasan opened his arguments with a quote from the judgment in ***Kanta Goel v BP Pathak & others,***[102] where the Hon'ble Supreme Court, speaking through VR Krishna Iyer, J., observed as follows:

"The legislative project and purpose turn not on niceties of little verbalism but on the actualities of rugged realism and so, the construction of section 14-A(1) must be illumined by the goal, though guided by the word."

[102] (1977) 2 SCC 814 decided on 01.04.1977

5.2. Mr Ramji Srinivasan submitted that in interpreting the provisions of section 29A, the court must keep in mind the goal that Parliament has put before us. It is the goal that should guide us, and not just the words. He urged the court to give life to the black – which is the letter of the law – on white paper. He also quoted the judgment in ***Manish Kumar v Union of India & others***,[103] that a law cannot operate in a vacuum, and that solutions to vexed problems made manifest through experience, would indeed require a good deal of experimentation, as long as it passes muster in law (para 249). While the courts are there to interpret the provisions and find solutions, these cannot be found in *"verbalism, but in rugged realism,"* as held by the Hon'ble Supreme Court in ***Kanta Goel (supra)*** (para 5.1 above), he submitted.

5.3. Coming to the specifics of the present application, Mr Ramji Srinivasan submitted that this was moved by a promoter. The application calls into question the actions of the CoC which, by a 100% vote, has approved the Resolution Plan submitted by India's largest power company – NTPC. NTPC has offered about 1800 crore rupees to resolve the insolvency of the corporate debtor, which is otherwise headed into the depths of liquidation. He emphasised that liquidation must be the last resort, and every effort must be made to bring back into the economic stream – and bring back with energy – the corporate debtor. This would always be preferable to running the company to ground on the basis of the promoter's application.

5.4. Mr Ramji Srinivasan submitted that the entire case of the Applicants rests on two paragraphs. One is with regard to the section 12A proposal, which is not within the province of the successful resolution applicant. Having said that, even on merits, the section 12A proposal has no comparison to what NTPC has offered. There is no forthcoming visibility as far as the financial strength of the Applicants is concerned. The CoC, having its ear to the ground, felt that there is both feasibility and viability if NTPC were to take over the corporate debtor.

[103] (2021) 5 SCC 1 decided on 19.01.2021

The other objection was that NTPC was clearly ineligible as per section 29A of the Code on 30.12.2019, when the First Plan was submitted, and so, even if NDCs were issued, that is of no avail. The further case is that even after clearing the dues, the accounts were still classified as NPA. NTPC, therefore, ought not to have been permitted to submit the Second and Third Plan.

Submissions apropos the 'ineligibility' of NTPC to submit its resolution plan

5.5. Plunging headlong into the 'ineligibility' issue, Mr Ramji Srinivasan said that the proposition that disqualification must be tested at the time of submission of the First Plan alone, is really a far-fetched one. The law only lays down, *"at the time of submission of the Resolution Plan."* It does not envisage whether it is the first one or the last. He submitted that each Plan, if it contains a modification, is a separate plan. Even as a matter of fact, each of the Plans submitted by NTPC were materially different.

5.6. The only test is this: so long as the Plans are submitted within the time permitted by the CoC, and at the time of consideration for approval, they are in accordance with the law, there is no restriction on the number of Plans that a prospective Resolution Applicant can submit. The gate-pass theory regarding the eligibility to be tested only at the time of submission of the Resolution Plan for the first time alone, and that if the resolution applicants fails the test for the first time, he cannot be permitted to submit any other plan, is completely impermissible. Relying on the decision of the Hon'ble Supreme Court in ***Arcelor Mittal India Pvt Ltd v Satish Kumar Gupta & others,***[104] Mr Ramji Srinivasan submitted that the RP has no jurisdiction to be a gatekeeper; he is only a facilitator. The RP can only give a *prima facie* view. The final decision has to be that of the CoC (para 80 of the judgment). Section 25(2)(i) of the Code enjoins the RP to submit all resolution plans at the meetings of the CoC, whether compliant or not. The

[104] (2019) 2 SCC 1 decided on 04.10.2018.

final decision was that of the CoC, and not that of the RP, Mr Ramji Srinivasan submitted.

5.7. Mr Ramji Srinivasan then placed the relevant statutory provisions. Section 5(25)[105] of the Code defines a Resolution Applicant. Section 5(26)[106] defines what a Resolution Plan is. A resolution plan can also be read as "resolution plans" in the plural. He drew support for this proposition from section 13(2)[107] of the General Clauses Act, 1897, regarding gender and number. In any case, Mr Ramji Srinivasan submitted, section 25(2)(h)[108] of the Code prescribes the duties of the RP, which include inviting prospective resolution applicants who fulfil such criteria as may be laid down by him with the approval of the CoC, to submit a resolution plan or plans. Section 30(2) of the Code requires the RP to examine each Resolution Plan received by him. Elaborating on this, Mr Ramji Srinivasan submitted that every time a Resolution Plan is received by the RP, he has to examine each such Plan to see that it does not contravene any provisions of the law. Section 30(3) of the Code then requires the RP to present to the CoC for its approval such Resolution Plans which confirm (*sic* conform to) the conditions referred to in sub-section (2). At this stage, it is qualified – the RP should present only such plans that conform to section 30(2) **for approval**.

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[105] 5(25): ***"Resolution Applicant"*** means a person who, individually or jointly with any other person, submits a resolution plan …

[106] 5(26): ***"Resolution Plan"*** means a plan proposed by resolution applicant for insolvency resolution of the corporate debtor as a going concern in accordance with Part II.

[107] **13(2)-Gender and number:–** In all Central Acts and Regulations, unless there is anything repugnant in the subject or context,

(1) ***

(2) words in the singular shall include the plural, and *vice versa.*

[108] 25(2)(h): invite prospective resolution applicants, who fulfil such criteria as may be laid down by him with the approval of committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board, to submit a resolution plan or plans.

5.8. Taking a cue from the provisions of Chapter-IIIA of the Code dealing with Pre-Packaged Insolvency Resolution Process, Mr Ramji Srinivasan drew our attention to sub-sections (1) to (3) of section 54K[109] of the Code and submitted that the resolution plans and the base resolution plan submitted under this section shall conform to the requirements of sub-sections (1) & (2) of section 30. Further, the provisions of sub-sections (1), (2) and (5) shall also apply *mutatis mutandis* to the proceedings under that Chapter. The sequitur was that wherever a qualification was required, it has been provided for by the legislature.

5.9. Concentrating on regulation 36A(7)(e)[110] of the CIRP Regulations, Mr Ramji Srinivasan submitted that if a resolution applicant becomes ineligible during the CIRP, it is required to intimate the RP forthwith. He wondered why the reverse could not happen then – if the resolution applicant was ineligible to begin with, and became eligible later on, should it not be considered by the CoC and RP? He submitted that the final test to be applied is as on the date of consideration by the CoC.

5.10. There is a further reference in regulation 36B[111] of the CIRP Regulations to "request for resolution plans." Sub Regulation (3) thereof provides prospective

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[109] **54K. Consideration and approval of resolution plan.** –

(1) The corporate debtor shall submit the base resolution plan, referred to in clause (c) of sub-section (4) of section 54A, to the resolution professional within two days of the pre-packaged insolvency commencement date, and the resolution professional shall present it to the committee of creditors.

(2) The committee of creditors may provide the corporate debtor an opportunity to revise the base resolution plan prior to its approval under sub-section (4) or invitation of prospective resolution applicants under sub-section (5), as the case may be.

(3) The resolution plans and the base resolution plan, submitted under this section shall conform to the requirements referred to in sub-sections (1) and (2) of section 30, and the provisions of sub-sections (1), (2) and (5) of section 30 shall, *mutatis mutandis* apply to the proceedings under this Chapter.

[110] (7) An expression of interest shall be unconditional and be accompanied by– (a) to (d) * * *; (e) an undertaking by the prospective resolution applicant that it shall intimate the resolution professional forthwith if it becomes ineligible at any time during the corporate insolvency resolution process.

[111] **36B. Request for resolution plans.–**

resolution applicants a minimum of thirty days to submit the resolution plan(s) *(emphasis added).* He submitted that the use of the word ***"plan(s)"*** is a deliberate one, and envisages submission of more than one plan, or plans multiple times.

5.11. Therefore, Mr Ramji Srinivasan submitted, the Code itself, and the regulations framed thereunder, both recognise that a Resolution Applicant can submit more than one Resolution Plan. There is no need even to take recourse to the General Clauses Act, 1897, for the proposition that a resolution applicant can submit more than one Plan. An artificial distinction is sought to be drawn between different resolutions plans. There is no difference in law if a second plan is submitted, irrespective of whatever nomenclature it is called by – revised plan, second plan, etc. At the time when the plan is to be placed for voting, the language of the section and the Act is materially different, inasmuch as the Plan that is presented for voting has to be compliant. If a resolution applicant is non-compliant and the RP or the CoC asks that the plan be made compliant, that is not impermissible.

On the contention that OTS or payment by a third party will not cure the disqualification

5.12. Mr Ramji Srinivasan then proceeded to answer Mr Mookherjee's contentions that the OTS in no way cures the ineligibility of NTPC under section 29A, and that cure can only be by way of payment of all overdue amounts. He submitted that at the core, the argument was that if one was disqualified on day one at the

(1) The resolution professional shall issue the information memorandum, evaluation matrix and a request for resolution plans, within five days of the date of issue of the provisional list under sub-regulation (10) of regulation 36A to -

(a) every prospective resolution applicant in the provisional list; and

(b) every prospective resolution applicant who has contested the decision of the resolution professional against its non-inclusion in the provisional list.

(2) The request for resolution plans shall detail each step in the process, and the manner and purposes of interaction between the resolution professional and the prospective resolution applicant, along with corresponding timelines.

(3) The request for resolution plans shall allow prospective resolution applicants a minimum of thirty days to submit the resolution plan(s).

time of submission of the First Plan, then one was ineligible till the entire amount was paid by the same person. The further submission was that even if NTPC had paid, the Second and Third Plan cannot be submitted since the eligibility of NTPC was to be tested only at the time of submission of the First Plan, and not at the time of submission of every subsequent Plan. Mr Ramji Srinivasan contended that this argument cannot be sustained in law.

5.13. Mr Ramji Srinivasan proceeded to give a brief background as to how NTPC came to be responsible for the NPA of its subsidiary, RGPPL.

5.14. Leading us through the list of dates, Mr Ramji Srinivasan submitted that when Enron fell afoul of the Dabhol Power Project, the Govt of India stepped in. On 03.12.2004, the Ministry of Petroleum & Natural Gas (MoPNG) wanted to set up RGPPL for restructuring the debt of DPC, which eventually happened on 08.07.2005. DPC was taken over by RGPPL. The Govt of India and the Govt of Maharashtra urged both GAIL and NTPC to infuse ₹500 crore each to resuscitate the stalled Dabhol Power Project. RGPPL (the present name of DPC), fell into the lap of NTPC. The demerger scheme envisaged for Dabhol ran into some problems. Cumulative Redeemable Preference Shares (CRPS) were required to be issued. The sustainable portion of RGPPL's debt had to be serviced.

5.15. Mr Ramji Srinivasan urged that two things are important, which were the fulcrum of his arguments, and placed them in the context of Mr Mookherjee's arguments that NTPC had done this restructuring exercise with RGPPL and KLL only to defeat the provisions of section 29A. That is not correct in view of the background given in para 5.14 above. If NTPC is allowed to take over Jhabua, then it will only strengthen the economy. NTPC was not trying to avoid the provisions of section 29A. On the contrary, it was trying to pay off the financial creditor so that it would not have a taint when it attempted to place a Resolution Plan for the corporate debtor. These things don't happen overnight.

NTPC was working overtime to meet the deadline set by the Adjudicating Authority.

5.16. The Preamble of the Code indicates the objective that the Code seeks to achieve, which is *inter alia* to facilitate insolvency resolution in a time-bound manner so as to maximise the value of assets. The Applicant wants to read a prohibition that is not otherwise there in the law. Every argument on behalf of the Applicant defeats the Preamble. Mr Ramji Srinivasan, therefore, urged us to read the words, *"at the time of submission of the resolution plan"* occurring in section 29A(c)[112] of the Code, as *"at the time of submission of the relevant resolution plan."*

5.17. Moving on to the arguments made with respect to classification of accounts as NPA on 21.05.2018,[113] and one year had not lapsed from the date of such classification till the date of commencement of CIRP (27.03.2019), Mr Ramji Srinivasan submitted that what is important is the date of such classification. He pointed out that that Canara Bank was under an impression that it was obligated to classify the accounts as NPA under RBI's circular DBR No.BP.BC. 101/21.04.048/2017-18 dated 12.02.2018, commonly known as the ***Dharani Circular.*** The positive action happened only on 21.05.2018,[113] though the classification period related back to 2009. If that is the correct factual position, NTPC was eligible to submit its resolution plan because of the conjunctive ***"and"*** used in section 29A(c)[114] and not merely because it was in control of

[112] 29A(c): At the time of submission of the resolution plan has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 or the guidelines of a financial sector regulator issued under any other law for the time being in force, and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor.

[113] Page 727 of the IA, also at page 73 of the Convenience Compilation filed by NTPC.

[114] 29A.– *A person shall not be eligible to submit a resolution person, if such person, or any other person acting jointly or in concert with such person –*

(a) * * *

(b) * * *

RGPPL. Therefore, section 29A(c) was not attracted because the second essential ingredient of ***"at least one year lapsing from the date of such classification"*** had not occurred. The date of classification is very important, he submitted.

5.18. Elaborating on the issue, Mr Ramji Srinivasan submitted that in respect of Dabhol, the debt was divided into two parts – sustainable and unsustainable. The sustainable portion was being serviced and there was no default. For the unsustainable portion, CRPS was required to be issued after approval by the NCLT. By the time it came about, the Dharani Circular intervened, which was eventually struck down by the Hon'ble Supreme Court *vide* its judgment dated 02.04.2019 in ***Dharani Sugars and Chemicals Limited v Union of India & Others.***[115] Canara Bank misapplied the Dharani Circular (para 5.17 above) and classified RGPPL as a defaulter on 21.05.2019, but with effect from 2009. IDBI Bank and SBI also classified RGPPL on 30.06.2019 and July 2019 respectively, but this is after the commencement of CIRP on 27.03.2019.

5.19. Section 29A(c) stipulates ***"at least one year should have lapsed from the date of such classification."*** The **date** of classification was 21.05.2018.[116] Therefore, one year had not lapsed. Canara Bank's auditors took advantage of the Dharani Circular of 12.02.2018 (para 5.17 above), citing incomplete implementation of the Scheme of CRPS (para 5.14 above), not because of non-payment. No intimation was given prior to such classification to NTPC, before

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*(c) has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 or the guidelines of a financial sector regulator issued under any other law for the time being in force, **and** at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor (emphasis added):*

Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to non-performing asset accounts before submission of resolution plan.

[115] (2019) 5 SCC 480 : 2019 SCC OnLine SC 460, decided on 02.04.2019.

[116] Page 727 of the IA, also at page 73 of the Convenience Compilation filed by NTPC.

21.05.2018. If this is the date of classification, then how it could go back to 31.03.2018 was not clear. Either way, the conjunctive "*and*" is not satisfied. In any case, on 02.04.2019, the Dharani Circular (para 5.17 above) was quashed by the Hon'ble Supreme Court, and it also held that all actions taken under the said circular was quashed and rendered *non est* in law.

5.20. Mr Ramji Srinivasan therefore urged us to consider that this is not a case of default arising out of non-payment. The intention behind section 29A was to prevent undesirable persons from coming in, and also to keep delinquent promoters from getting back the company at a discount. Nobody can say that NTPC is undesirable. It was not the delinquent promoter who drove the corporate ground to the ground. When NTPC has actually revived DPC, how is the actual default of DPC, which was committed by its previous promoters, attributable to NTPC, Mr Ramji Srinivasan wondered. The same Canara Bank which called out RGPPL as a defaulter, has declared that there are no overdues on 08.01.2020[117] in so far as RGPPL and on 30.03.2020[118] in the case of KLL are concerned. Even Canara Bank's letter does not attribute any fault to NTPC. Therefore, NTPC is not in default of any payment to any bank, including Canara Bank. That is the purpose and object of the first proviso to section 29A- *provided that the person shall be eligible to submit a Resolution Plan if such person makes payment of all overdue amounts with interest thereon and charges relating to NPA accounts before submission of resolution plan.* Even by the Applicant's own admission, there is nothing overdue at the time of final consideration of the Resolution Plan, Mr Ramji Srinivasan submitted.

5.21. Responding to Mr Mookherjee's submissions with regard to section 29A being a see-through provision as held by the Hon'ble Supreme Court in ***Arcelor Mittal (supra)*** (para 3.37 above), Mr Ramji Srinivasan submitted that in the case of NTPC, it was not applicable at all. NTPC and GAIL actually paid off the dues.

[117] Page 1577 of the IA

[118] Page 1312 of the IA

NTPC was in no way responsible for the NPA. All the minutes of the Joint Lenders Forum (JLF) at its meetings (Joint Lenders Meeting or JLM) state that NTPC has been paying and serving the debt without default. The classification as NPA was only on account of non-implementation of the Scheme (para 5.14 above). There was never any default on the part of NTPC in clearing dues. The amounts were made available in the Trust & Retention Account (TRA).

5.22. A thirteen-page compilation (13-pager) has been placed on record, which *inter alia* contain the minutes of the meetings. These are recorded in the JLM minutes of 28.06.2019 and 28.12.2017. RGPPL's financial statement for the year 2017-18 also records that the company (RGPPL) has serviced the sustainable loan of ₹1900 crore with effect from the appointed date of 01.01.2016 as per the restructuring scheme.[119]

5.23. As far as the second requirement that if the account is NPA, and one year has elapsed, one can still go and participate if one has cleared the overdues with interest, is concerned, NTPC was still not ineligible, since there are no overdues now. The provision does not require that the entire dues have to be cleared, only the overdues need to be.

5.24. The Applicant had argued that while the certificate was valid as on 31.12.2019, there could still have been compliance issues as on 30.12.2019, *i.e.*, a day before. Mr Ramji Srinivasan submitted that this is all in the realm of conjecture. Apart from the JLM minutes, the Applicants have filed RGPPL's financial statements for 2018-19,[120] wherein it has been shown that all payments were being duly made and there was no default at any point of time. Therefore, the attempt at creating confusion between 30.12.2019 and 31.12.2019 cannot be appreciated.

[119] Pages 61-63 of the Convenience Compilation filed by NTPC

[120] Page 387 of the IA

5.25. The last date of submission of resolution plan was extended to 30.12.2019. Canara Bank confirmed on 19.09.2019[121] that there are no overdues. This has not been dealt with by the Applicants at all. In the light of the letter dated 19.09.2019,[121] NTPC submitted its section 29A affidavit on 22.10.2019 that it was now compliant. On 06.12.2019, before the last date for submission of the Resolution Plans, which was 30.12.2019, NTPC clarified the status and told the RP that it has received NDC. NTPC also submitted that it has requested the GoI to take up, at its level, the issue of classification of account to standard with RBI.

5.26. There are a series of NDCs between 06.02.2020 and 11.02.2020 from the other bankers also.[122] Canara Bank also wanted IDBI bank, as lead banker, to take up the matter of classification of RGPPL's accounts with RBI. On 18.10.2019,[123] OTS proposals were already in the pipeline.

5.27. On 23.03.2020, KLL entered into an OTS. All security trustees released their charges as on 06.04.2020. The arrangements were all novated and transferred to GAIL's books. So, NTPC actually went way beyond section 29A(c); it extinguished the loan in its entirety as far as RGPPL (by NTPC) and KLL (by GAIL).

5.28. Mazars, which was engaged by RP, submitted a draft report on 14.04.2020, certifying NTPC's compliance with the requirements of section 29A. On 05.05.2020, the 8th CoC meeting was held, wherein the issue of section 29A compliance by NTPC was discussed. CoC felt that there was no disqualification since all lenders had given the NDC. On 18.09.2020, Mazar also submitted its final report, certifying that NTPC is section 29A complaint.[124]

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[121] Page 84 of the Convenience Compilation filed by NTPC

[122] Page 77 onwards of the Convenience Compilation filed by NTPC

[123] Page 57 of the Convenience Compilation filed by NTPC

[124] Page 1490 of the IA

5.29. On 05.11.2020, Adani Power Limited, the competitor which had filed its resolution plan, withdrew. On 30.11.2020, NTPC submitted the Second Plan with a fresh affidavit under section 29A. By this time, NTPC was fully compliant since OTS was completed in respect of KLL, and there were no overdues in respect of RGPPL.

5.30. Between 30.11.2020 and 16.04.2021, NTPC paid off the entire dues of RGPPL in full and final settlement on 30.12.2020. A letter dated 01.01.2021 was issued in respect of RGPPL,[125] wherein it has been stated that balance dues have been novated and transferred in favour of the resolution sponsor (NTPC). Accordingly, all of the dues stand satisfied in full and no further amount is payable by the borrower under the existing loan documents.

5.31. On 16.04.2021, NTPC submitted its Third Plan. By this time, there are no dues in respect of any lender. There is no question now, since NTPC has cleared the entire loan book. So what could be a better action by a Resolution Applicant than this comprehensive demonstration of its financial ability, Mr Ramji Srinivasan mused. On 14.06.2021, only revisions were made to the Third Plan on the basis of negotiations. So, a new section 29A compliance affidavit was not required. On 14.06.2021,[126] Mazar reported again that NTPC is complaint under section 29A(c).

5.32. Mr Ramji Srinivasan continued, two things emerge from this: (1) that a person who is otherwise disqualified by virtue of section 29A(c) can become eligible by paying the overdue amounts; and (2) that a person who had submitted a Plan earlier, and was disqualified, can cure his defect and submit another resolution plan. The RP has to place it before the CoC for consideration.

5.33. To top it all, this was not NTPC's default at all, and, therefore, section 29A(c) should not apply. It was a case where NTPC was forced to take over RGPPL

[125] Page 85 of the CoC's reply

[126] Page 102-137 of the CoC's reply

and KLL as a result of the GoI's decision taken at the highest levels to revive DPC. In support of this proposition, Mr Ramji Srinivasan relied on the decision of the Hon'ble NCLAT dated 24.08.2020 in ***Park Energy Pvt Ltd v Syndicate Bank & another,***[127] wherein the order of admission passed by the Adjudicating Authority initiating CIRP against the appellant therein was challenged. The order of the Adjudicating Authority was set aside on the ground that there was no fault on the part of the corporate debtor. Mr Ramji Srinivasan submitted that the same principles should apply in the case of section 29A also.

5.34. Mr Ramji Srinivasan further submitted that at the CoC meeting held 05.03.2021,[128] the CoC was dissatisfied with the Second Plan since there was a substantial drop in the values. Therefore, CoC directed the RP to issue fresh EoI. Regulation 36(7) confers power on the CoC to invite a fresh plan. On 24.03.2021, the CoC was informed that the available time period may not be available for running a fresh EoI and resolution process. Therefore, the CoC scrapped the idea of issuing fresh EoI, but decided to consider the current plans (Agenda A5). In the meantime, NTPC also requested for a meeting with the CoC members to put forward and discuss their resolution plan. The CoC decided to consider the NTPC's plan and invited NTPC for the next meeting. This is perfectly within the realm of the CoC, and in line with the judgment of the Hon'ble Supreme Court in ***Kalpraj Dharamshi & another v Kotak Investment Advisors Limited & another***.[129] These two meetings are extremely

[127] 2020 SCC OnLine NCLAT 637 decided on 24.08.2020

[128] Page 1592 of the IA

[129] (2021) 10 SCC 401 : 2021 SCC OnLine SC 204 decided on 10.03.2021. In para 160 @ page 475 thereof, the Hon'ble Court observed as follows:

"160. This Court held, that what is left to the majority decision of CoC is the "feasibility and viability" of a resolution plan, which is required to take into account all aspects of the plan, including the manner of distribution of funds among the various classes of creditors. It has further been held, that CoC is entitled to suggest a modification to the prospective resolution applicant, so that carrying on the business of the corporate debtor does not become impossible, which suggestion may, in turn, be accepted by the resolution applicant with a consequent modification as to distribution of funds, etc. It has been held, that what is important is, the commercial wisdom of the majority of creditors, which is to determine, through negotiation with the prospective resolution applicant, as to how and in what manner the corporate resolution process is to take place."

important, since the CoC exercised its commercial wisdom to invite NTPC to present its plan.

5.35. Between the Second and Third Plans, the CoC was unhappy with the presented plan, and invited NTPC to present a fresh plan. NTPC submitted its Third Plan on 16.04.2021 with a fresh section 29A affidavit. As on that date, NTPC had paid off the entire RGPPL OTS also on 31.12.2020. The Applicants have contended that the letter says that part payment has been made by RGPPL, and that the balance payment will be made by NTPC, the parent company. That is not correct, since there is full and final payment. Therefore, on the date of 16.04.2021, there was no disqualification. This removes the last vestiges of doubt, if there was any at all. The Mazar report of 14.06.2021 also certifies that NTPC is section 29A compliant.

5.36. On 15.06.2021, RP presented the plan under section 30(3) for consideration and approval of the CoC, along with a certificate that NTPC's plan is compliant. The minutes of the 15th CoC meeting of 15.06.2021.[130] The minutes record that *"the RP further informed the CoC members that NTPC submitted its final resolution plan on 14.06.2021 for consideration by CoC members. The Resolution Plan was shared by the RP with all the CoC members vide email dated 14.06.2021. The RP also mentioned that the resolution plan had been reviewed by him and found to be compliant with the requirements of the IBC. RBSA had been appointed by the CoC for the feasibility and viability of the Resolution Plan submitted by NTPC and they were invited to the CoC meeting to present their findings. RBSA had carried out the valuation on both qualitative and quantitative parameters as per the evaluation matrix and opined that NTPC would not face any difficulty …."* The CoC approved the NTPC's plan on 26.06.2021.[131] The RP thereafter filed the resolution plan for approval

[130] Page 141 of the CoC's reply

[131] Page 144 of the CoC's reply

of this Adjudicating Authority *vide* IA No.586/KB/2021. IDBI bank's email dated 13.07.2021[132] captures all of the arguments in one communication.

5.37. Mr Ramji Srinivasan submitted that there remains one other thing: the removal of NPA on CIBIL etc. PFC wrote to RGPPL on 04.10.2021 that it had *vide* its letter dated 05.01.2021 informed no dues status to RGPPL. It had also, *vide* its emails dated 05.04.2021, 07.09.2021, 09.09.2021 and 10.09.2021 requested TransUnion for modification of CIBIL status of RGPPL. This indicates that way before NTPC submitted its Third Plan, PFC had written to CIBIL to correct the records.

On the section 12A proposal submitted by the Applicants

5.38. On this point, Mr Ramji Srinivasan started off by saying that there should be no comparison between a Resolution Plan and a section 12A proposal. However, he was presenting a chart comparing the Applicant No.1 (Avantha Holdings Limited)'s initial and final restructuring proposal, and NTPC's final resolution plan, just to satisfy the court's conscience. The salient features are tabulated below:

Table 1: Comparison of Avantha's s.12A proposal & NTPC's Resolution Plan:

Head	**Avantha's section 12A proposal**	**NTPC's Resolution Plan**
Upfront payment	₹200 crore	₹905 crore
Deferred payment consideration	₹1700 crore over 14% with interest @ 8%	Equity shares worth ₹325 crore, and Non-Convertible Debentures (NCDs) of ₹600 crore with coupon rate of 8.5% over 12 years.

[132] Page 104 of the Convenience Compilation.

Head	**Avantha's section 12A proposal**	**NTPC's Resolution Plan**
Settlement of liabilities	As per cash flows	₹20 crore against the total claim of ₹684.50 crore.
Additional Capex	Nil	₹198 crore.

On deficiency in affidavit

5.39. Mr Ramji Srinivasan submitted that merely because there was only one signature at the bottom of the page, it does not make NTPC any less qualified to submit the Resolution Plan. These are all straws in the wind now, he submitted.

5.40. The term 'affidavit' is defined under section 3(3)[133] of the General Clauses Act, 1897. It is an inclusive definition, not an exhaustive one. Section 7[134] of the Oaths Act, 1969, says that proceedings and evidence are not invalidated by omission of oath or affirmation or irregularity in the administration of oath or affirmation.

5.41. In support of his contentions that defect in affidavit is not fatal, Mr Ramji Srinivasan quoted the following judgments:

(1) ***State of Rajasthan v Darshan Singh***:[135] In this judgment, the Hon'ble Supreme Court quoted its own judgment in *Rameshwar v State of Rajasthan* (AIR 1952 SC 54) and held that in view of the provisions of section 7 (para 5.40 above) of the Oaths Act, 1969, the omission of administration of oath or affirmation does not invalidate any evidence (para 24).

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[133] 3(3): "affidavit" shall include affirmation and declaration in the case of persons by law allowed to affirm or declare instead of swearing.

[134] **7. Proceedings and evidence not invalidated by omission of oath or irregularity.—**No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the administration of any oath or affirmation or in the form in which it is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth.

[135] (2012) 5 SCC 789 decided on 21.05.2012

(2) ***Murarka Radhey Shyam Ram Kumar & others v Roop Singh Rathore:***[136] In this matter, the objection was that the affidavit was neither in the prescribed form nor was it properly sworn as required by the rules in the Conduct of Election Rules, 1961 (para 12). The Hon'ble Supreme Court agreed with the view of the Election Tribunal, which was also affirmed by the Hon'ble High Court, that the defect in the verification due to inexperience of the Oaths Commissioner is not such a fatal defect as to require the dismissal of the election petition (para 13).

(3) ***N Kamalam (dead) & another v Ayyasamy & another:***[137] This was placed for the proposition that place of signature does not matter. *(Our observation: this judgment does not apply to the fact-situation obtaining in our case.)*

(4) ***Associated Journals Ltd v Mysore Paper Mills Ltd:***[138] The issue under challenge in this case directly related to affidavit and verification and the challenge was that it was not in compliance with rules 18 and 21 of the Companies (Court) Rules, 1959, governing verification of contents of the winding-up petition (para 9). It was also contended that the defect in verification on account of non-compliance with rule 21 of the Companies (Court) Rules, 1959 was fatal to the winding up petition (para 10). The Hon'ble Supreme Court held that while the rules relating to the affidavit and verification cannot be ordinarily brushed aside, what is required to be seen is whether the petition substantially complies with the requirements, and secondly even when there is some breach or omission, whether it can be fatal to the petition (para 22).

Summation of arguments

5.42. Mr Ramji Srinivasan summed up his arguments thus:

(1) There is no bar for a resolution applicant to submit multiple plans, or indeed submit plans multiple times under the various provisions of the Code and the regulations framed thereunder. In any case, singular includes the plural,

[136] (1964) 3 SCR 573 : AIR 1964 SC 1545 decided on 07.05.1963

[137] (2001) 7 SCC 503 : 2001 SCC OnLine SC 905 decided on 03.08.2001

[138] (2006) 6 SCC 197 : 2006 SCC OnLine SC 696 decided on 11.07.2006

and the provisions of section 13(2) of the General Clauses Act, 1897 (para 5.7 above) will also apply.

(2) The idea behind section 29A is that persons responsible for running the company to the ground should not be allowed entry through the backdoor. NTPC was not ineligible as it was acting in compliance of government directions when it acquired RGPPL.

(3) Section 29A(c) should be attracted only if the NPA classification is one year from CIRP commencement. It cannot have a theoretical construct from the date on which it retrospectively applies.

(4) Ineligibility under section 29A attaches at the time of submission of Resolution Plan. The ineligibility is removed if payment is made of **all overdue amounts with interest**, and **not all of the dues.**

(5) The Dharani Circular dated 12.02.2018 (para 5.17 above) was declared *ultra vires* and all actions under the circular were quashed and rendered *non est* in law. Therefore Canara Bank's classification on 21.05.2018 was bad in law.

(6) Commercial wisdom of CoC is non-justiciable, and cannot be interfered with except as provided under sections 30 & 31 of IBC.

(7) The positive intent of the Code is value maximisation. Liquidation should be the last resort, and a corporate debtor capable of revival under a resolution plan whose feasibility and viability has been tested and found to be acceptable by the CoC, should not be allowed to be defeated on mere technicalities.

(8) Deficiency in the section 29A affidavit submitted on behalf of NTPC, where the signature of the authorised signatory is found only at one place verifying the affidavit, without signatures below the solemn affirmation clause, is not fatal to the case. Substantial compliance with requirements is present in the affidavit itself.

5.43. Lastly, Mr Ramji Srinivasan submitted that NTPC is one of the most profitable PSUs, with GoI holding over 51% shareholding. He urged that the Adjudicating Authority's decision be illumined by the goal that the statute has set before it.

This requires the Adjudicating Authority to dismiss the objection and put the plan on the fast route for approval, Mr Ramji Srinivasan concluded.

6. Submissions of Mr Ratnanko Banerji, Ld Sr Counsel appearing for the RP

6.1. Opening his arguments, Mr Ratnanko Banerji, Ld Sr Counsel appearing for the RP, submitted that the first section 29A affidavit was filed on 22.10.2020. The RP has gone by the last section 29A affidavit affirmed on 16.04.2021, which was the date on which the Resolution Plan was submitted for the last time by NTPC.

6.2. On 24.01.2020,[139] the seventh meeting of the CoC took place, at which the members discussed the progress of the evaluation on section 29A compliance evaluation of the RAs.[140] The RP apprised the CoC that he has received two different letters from two creditors raising certain objections on the eligibility of NTPC.

6.3. Mr Ratnanko Banerji submitted that he completely adopts the arguments of Mr Ramji Srinivasan in regard to both the issues – the section 29A compliance by NTPC, and the CoC's decision not to approve the section 12A proposal of the Applicants, and does not wish to repeat them for the sake of brevity. He submitted that the CoC's decision not to approve the section 12A proposal cannot be gone into since it is within the CoC's commercial wisdom.

7. Submissions of Mr SN Mookherjee, Ld AG for the Applicants, in reply:

On section 29A exceptions

7.1. Mr SN Mookherjee, Ld AG appearing for the Applicants, referred to the two cases relied on by Mr Ramji Srinivasan – ***Kanta Goel (supra)*** and ***Manish Kumar (supra)*** (para 5.2 above) and submitted that it does not really matter who the concerned entity is, who the resolution applicant is, when interpreting section 29A. What is important is that section 29A makes no exception in its

[139] Minutes at page 1296 of the IA

[140] Page 1298 of the IA

applicability to resolution applicants who are government entities or have taken over entities who have a huge debt to service at the instance of the government. It is not material at all as to how the debt came to be the obligation of the subsidiaries or entities to which NTPC is related. The very fact that there is no such provision negatives the submissions of Mr Ramji Srinivasan.

7.2. Section 29A in fact has exceptions, Mr Mookherjee submitted. When it has expressly provided for exceptions, there is no question of another exception being added to section 29A by a creative interpretation. He referred to Explanation I and Explanation II below the proviso to section 29A(c). Explanation I[141] carved out an exception in respect of financial entities regulated by a financial sector regulator. Explanation II[142] made an exception in the case of a resolution applicant who has taken over a corporate debtor under a resolution plan passed by this Adjudicating Authority. Similar exceptions can be found in clauses (d), (e), (g) and (h) of section 29A. Thus, where the Code intended to provide exceptions, it did so. The provisions of section 29A can only admit of such exceptions as are expressly provided; no other exception can be read into it, Mr Mookherjee asserted.

On NTPC's plans being materially different, and hence technically a new plan

7.3. Mr Mookherjee argued that there was only one plan which was submitted in Dec 2019, which was modified, remodified and there was a fourth modification. There was no other invitation, and the CoC minutes show that whatever was submitted was due to negotiations. It was a continuous process. Of course, a

[141] *Explanation I.*– For the purposes of this proviso, the expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares or completion of such transactions as may be p33rescribed, prior to the insolvency commencement date.

[142] *Explanation II.*— For the purposes of this clause, where a resolution applicant has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset and such account was acquired pursuant to a prior resolution plan approved under this Code, then, the provisions of this clause shall not apply to such resolution applicant for a period of three years from the date of approval of such resolution plan by the Adjudicating Authority under this Code.

modification is permitted as long as the propounder of the plan does not change. Earlier, under sections 391-394 of the Companies Act, 1956, there was provision for modification of schemes. A question arose as to what is meant by modification. It was held by the Hon'ble Supreme Court *vide* its judgment in ***SK Gupta & Anr v K.P. Jain & Anr***,[143] that anything workable can be worked out, even by changing the propounder. In the case of section 29A, no such substitution is permissible, because eligibility is judged on the basis of section 29A.

7.4. Second, even if these were separate plans, the same could not have been entertained because the CoC did not come out with another invitation. Once disqualified, a new plan could not have been submitted because NTPC was never a ***qualified*** resolution applicant. So, either way, the plans which were submitted do not qualify at all.

7.5. Dealing with the case of ***Kanta Goel (supra)*** (para 5.1 above) cited by Mr Ramji Srinivasan, Mr Mookherjee submitted that where the words are clear, they must be given effect to. There is no quarrel with this proposition. So this case has no application at all. Mr Mookherjee reiterated that whatever is to be excepted is provided for. If a resolution applicant falls foul of section 29A, the mere fact of such resolution applicant being NTPC, or having inherited the NPAs because of the Dabhol acquisition, cannot be an excuse.

7.6. Mr Mookherjee then dealt with ***Manish Kumar (supra)*** (para 5.2 above) cited by Mr Ramji Srinivasan. It again has to be seen in the context of amendments to IBC. This was a homebuyers amendment which came to be challenged before the Hon'ble Supreme Court. There is a class element which was introduced into section 7 of the Code.

[143] (1979) 3 SCC 54 decided on 30.01.1979.

On the argument that at a resolution applicant can have more than one plan

7.7. Mr Mookherjee contended that keeping in mind the provisions of section 13(2) of the General Clauses Act, 1897 (para 5.7 above) the sections relied on do not permit the plural being read in place of the singular (paras 5.7 and 5.8 above). Section 5(25)[144] uses the term, "*means*." Therefore it is exhaustive. When there is a resolution applicant, it can mean only a single person, otherwise, the words, *"individually or jointly*" cannot have any meaning. Similarly, section 5(26)[145] defines a resolution plan. Both these clauses talk about a single resolution plan by a resolution applicant either individually or jointly. This is clear when one looks at section 25(2)(h)[146] of the Code. The reason why this clause speaks of "*plans*" is because it invites multiple prospective resolution applicants.

On the interpretation of the General Clauses Act, 1897

7.8. Placing section 13(2) of the General Clauses Act, 1897 (para 5.7 above), Mr Mookherjee pointed out that the same will apply *"unless there is anything repugnant in the subject or context."* Since both sections 5(25)[144] and 5(26)[145] use the term '*means*,' it cannot be read as resolution plans by one resolution applicant.

Literal rule of interpretation

7.9. Mr Mookherjee cited the judgment of the Hon'ble Supreme Court in ***Raghunath Rai Bareja & Another v Punjab National Bank & Others,***[147] in support of the proposition that a very high standard has to be canvassed, and successfully so, in order to do away with the literal rule of interpretation. In para 40 of this

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[144] "Resolution Applicant" means a person who, individually or jointly with any other person, submits a resolution plan to the RP pursuant to the invitation made under clause (8) of section 25.

[145] "Resolution plan" means a plan proposed by resolution applicant for insolvency resolution of the corporate debtor as a going concern.

[146] For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely:

(h) invite prospective resolution applicants, who fulfil such criteria as may be laid down by him with the approval of committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board, to submit a resolution plan or plans.

[147] (2007) 2 SCC 230 decided on 06.12.2006.

judgment, the Hon'ble Supreme Court has re-emphasised that the other literal rule is to be applied first, and that the other rules of interpretation, such as the mischief rule or purposive interpretation, can only be resorted to when the plain words of a statute are ambiguous or lead to no intelligible results. It further cautions that where the legislative intent is clear from the language, the Court should give effect to it, and not amend the law in the garb of interpretation.

7.10. After noticing the views of Justice Felix Frankfurter, Associate judge of the US Supreme Court,[148] and of Lord Cranworth in ***Grundy v Pinniger,***[149] the Hon'ble Supreme Court laid down that once we depart from the literal rule, then any number of interpretations can be put to a statutory provision, each judge having a free play to put his own interpretation as he likes. … Hence departure from the literal rule should only be done in very rare cases, and ordinarily there should be judicial restraint in this connection (para 43).

7.11. There is no ambiguity about section 29A(c) of the Code. The legislative intent has been explained, the literal rule has been applied in ***Arcelor Mittal*** *(supra).*[104] The section is very clear. And when the argument is advanced that NTPC should not be disqualified under section 29A, one has to look at section 29A and see whether they fall within it or not. If they do fall, then irrespective of its status, NTPC should be disqualified, Mr Mookherjee submitted.

On the argument that a period of one year has not lapsed since the classification of accounts of RGPPL and KLL

7.12. On Mr Ramji Srinivasan's argument was that CIRP commenced on 27.03.2019, and more than one year of NPA had not lapsed as on that date and therefore there was no disqualification, Mr Mookherjee submitted that Canara Bank was not the only bank - SBI and IDBI Bank Ltd had also declared them as NPA from 30.06.2014 and 01.05.2015. This is reflected in the standalone accounts of RGPPL for 2018-19 and 2019-20. So they were all along NPA as far back as

[148] ***Of Law & Men: Papers and Addresses of Felix Frankfurter.***

[149] (1852) 21 LJ Ch 405 : 42 ER 647

2014, which is more than one year of CIRP. None of the financial statements which were drawn attention to, was dealt with by the Ld Sr Counsel for NTPC, Mr Mookherjee submitted.

7.13. The annual accounts of RGPPL and KLL are binding on those companies, having been approved at shareholder meetings. Therefore, they are also binding on NTPC, because the statements made therein are not only made to the shareholders, but also on the public at large. NTPC never objected to the qualifications made with regard to the NPA being declared from 2014. They were shareholders at the relevant point of time, and were in control. The submissions in this regard were not disputed.

7.14. On the one year cut-off, there cannot be any dispute at all, Mr Mookherjee submitted.

7.15. Third, it was submitted by NTPC's senior counsel that when all overdues have been paid, the proviso to section 29A(c) would not be attracted. Mr Mookherjee countered this by submitting that the overdue in the Scheme was not paid, this remained as a debt in the books. Therefore it continued to be NPA as per RBI guidelines. It had to be cleared by 31.03.2018 by issuing CRPS. This sentence is there in the financial statements as well. Demerger did not happen on time. There were dues which were required to be paid in any event. They were cleared on 30.09.2019, and yet the accounts remained NPA for other technical reasons due to the fact that CRPS had not been issued by the cut-off date. Till that got resolved, there remained a debt in the books. If those CRPS were not being issued, then the payment had to be made, and they were not made.

7.16. It is not as if the classification as NPA was not as per RBI's guidelines. In fact, when the SBI and IDBI Bank Ltd classified the accounts as NPA with effect from 2014 and 2015, they did it as per directions of the RBI. It is all there in the standalone financial statements. So there were outstandings, the debt had not been cleared on the date of submission of the First Plan, or when the Second Plan was submitted.

On the OTS

7.17. On the OTS, Mr Mookherjee drew our attention to the proviso to section 29A(c),[150] and submitted that payment had to be made by **such person**, meaning thereby the person who has submitted the resolution plan, not anybody else. This point has not been answered at all, he emphasised. The OTS did not amount to compliance with the proviso to section 29A(c), which required payment, and by that person who was submitting a resolution plan.

7.18. On each occasion that NTPC submitted the plans, they were disqualified under section 29A. The reason is for not discharging the unsustainable debt which carried on until Nov 2020.

On misapplication of the Dharani Circular

7.19. Mr Mookherjee submitted that the Dharani circular dealt with section 35AA of the Banking Regulation Act, 1949, as to whether such a circular could be issued as an omnibus circular, or should have been issued to a particular bank. There was no challenge to the classification norms in that circular. What is interesting is that after the Hon'ble Supreme Court judgment dated 02.04.2019 setting aside the Dharani Circular, there was a circular issued on 07.06.2019 issued by RBI. Even more significantly, after 07.06.2019, SBI and IDBI classified the accounts of RGPPL as NPA in July 2019 and 30.06.2019 with effect from 30.06.2004 and 01.05.2005. Similarly, for KLL, it happened on 01.08.2019 and 11.09.2019, but relatable to 30.06.2004 (SBI) and 01.05.2005 (IDBI). The fact of the matter is that the debt was not cleared. So the classification took place after the Dharani Circular had been set aside and the new circular has come into effect. It is an overdue amount.

7.20. Mr Mookherjee placed the contents of IDBI's email dated 13.07.2021 in this regard, which noted that the delay in conversion of unsustainable debt into CRPS was viewed by RBI as non-compliance of regulatory directions that the

[150] Provided that the person shall be eligible to submit a resolution plan **if such person** makes payment of all overdue amounts with interest thereon and charges relating to non-performing asset accounts before submission of resolution plan.

LTBP cum Demerger Scheme would be fully implemented by March 31, 2018. RBI had, therefore, *vide* its letter dated 06.08.2019, directed IDBI and SBI to downgrade accounts with effect from 01.05.2015. That is why the NPA classification stood. Therefore, it cannot be called a technical issue; that would only be an explanation.

7.21. Referring to the minutes of the JLM of 28.12.2017[151] and 14.09.2018,[152] Mr Mookherjee submitted that the fact of the matter is that the debts were not serviced on time. Unsustainable debt remains a debt till it is wiped out. That did not happen on the due dates. This is the important one, which has not been dealt with at all, coupled with the standalone financial statements.

8. The issues

8.1. We have been called upon to answer the primary question of eligibility of NTPC. In doing so, we will also have to determine certain other sub-issues, such as whether the plans submitted by NTPC are fresh plans or mere revisions of the First Plan, and if they are fresh plans, and the crucial date for determining the eligibility of a Resolution Applicant. Since these are all interconnected, we shall deal with them as one composite issue.

8.2. The second major issue that we have been called upon to adjudicate is the consideration accorded by the CoC to the section 12A proposal.

9. The historical context- a brief foray

9.1. In determining the eligibility of NTPC, it is necessary once again to place facts in historical perspective without getting bogged down in too much detail: NTPC was visited with the sins of DPC, the forerunner of both RGPPL and KLL, when it was tasked by the GoI, through its Empowered Group of Ministers (EGoM) in consultation with the GoM, to take over DPC after Enron's exit from the Dabhol Power Project. DPC transformed into RGPPL, with NTPC and GAIL

[151] Page 16 of the JLM compilation

[152] Page 38 of the JLM compilation

picking up about 25% stake each in the equity of RGPPL. RGPPL owned a power generation facility and a re-gasified LNG facility.

9.2. In course of time, a demerger took place, whereby RGPPL's LNG terminal was hived off into KLL with the Appointed Date as 01.01.2016, as per the order dated 28.02.2018 of the Hon'ble NCLAT. The Effective Date of the demerger was 26.03.2018. On 17.03.2017, GoI issued directions for equity swapping between RGPPL and KLL. On 20.09.2017, the Hon'ble NCLAT directed the financial creditors to refrain from declaring RGPPL as NPA on account of non-approval of demerger scheme pending before it.

9.3. These facts were placed by Mr Ramji Srinivasan, Ld Senior Counsel appearing for NTPC, the Successful Resolution Applicant, during the course of hearings. They are also available in the public domain.

10. The legislative framework

10.1. Section 29A of the Code was introduced by the Insolvency & Bankruptcy Code (Amendment) Ordinance 2017, with effect from 23.11.2017.[153] The Statement of Objects and Reasons mentioned in the Ordinance, states that the Ordinance was being promulgated *"to prohibit certain persons from submitting a Resolution Plan who, on account of their antecedents, may adversely impact the credibility of the processes under the Code."*

10.2. The Ordinance was later on replaced by the Insolvency & Bankruptcy Code (Amendment) Act, 2018. The Statement of Objects and Reasons accompanying the Bill,[154] explained the purpose of the provision in para 2 thereof, which is extracted below:

"2. The provisions for insolvency resolution and liquidation of a corporate person in the Code did not restrict or bar any person from submitting a

[153] https://prsindia.org/files/bills_acts/bills_parliament/2017/Insolvency%20and%20Bankruptcy%20Code%20(Amendment)%20Ordinance,%202017.pdf @ unnumbered para 3 on page 1. Last accessed 03 Feb 2022.

[154] http://164.100.47.4/BillsTexts/LSBillTexts/asintroduced/280_2017_LS_Eng.pdf @ page 5 is the Statement of Objects and Reasons accompanying the Bill. Last accessed 03 Feb 2022.

resolution plan or participating in the acquisition process of the assets of a company at the time of liquidation. Concerns have been raised that persons who, with their misconduct contributed to defaults of companies or are otherwise undesirable, may misuse this situation due to lack of prohibition or restrictions to participate in the resolution or liquidation process, and gain or regain control of the corporate debtor. This may undermine the processes laid down in the Code as the unscrupulous person would be seen to be rewarded at the expense of creditors. In addition, in order to check that the undesirable persons who may have submitted their resolution plans in the absence of such a provision, responsibility is also being entrusted on the committee of creditors to give a reasonable period to repay overdue amounts and become eligible."

10.3. Section 29A of the Code specifies ten broad categories of persons who shall not be eligible to be a resolution applicant. Of these, the battlelines of this legal conflict are drawn around section 29A, clause (c) read with its first proviso, and clause (j) read its Explanation I. Therefore, it is necessary to extract the relevant portions of the Code, with the relevant provisions highlighted in bold, for better appreciation of the nuances involved.

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) is an undischarged insolvent;

(b) is a wilful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949;

(c) ***at the time of submission of the resolution plan has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 or the guidelines of a financial sector regulator issued under any other law for the time being in force, and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor:***

Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to non-performing asset accounts before submission of resolution plan;

Provided further that nothing in this clause shall apply to a resolution applicant where such applicant is a financial entity and is not a related party to the corporate debtor.

Explanation I: For the purposes of this proviso, the expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares or completion of such transactions as may be prescribed, prior to the insolvency commencement date.

Explanation II: For the purposes of this clause, where a resolution applicant has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset and such account was acquired pursuant to a prior resolution plan approved under this Code, then, the provisions of this clause shall not apply to such resolution applicant for a period of three years from the date of approval of such resolution plan by the Adjudicating Authority under this Code;

(d) has been convicted for any offence punishable with imprisonment –

(i) for two years or more under any Act specified under the Twelfth Schedule; or
(ii) for seven years or more under any law for the time being in force:

Provided that this clause shall not apply to a person after the expiry of a period of two years from the date of his release from imprisonment:

Provided further that this clause shall not apply in relation to a connected person referred to in clause (iii) of Explanation I;

(e) is disqualified to act as a director under the Companies Act, 2013;

Provided that this clause shall not apply in relation to a connected person referred to in clause (iii) of Explanation I;

(f) is prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets;

(g) has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the Adjudicating Authority under this Code;

Provided that this clause shall not apply if a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place prior to the acquisition of the corporate debtor by the resolution applicant pursuant to a resolution plan approved under

this Code or pursuant to a scheme or plan approved by a financial sector regulator or a court, and such resolution applicant has not otherwise contributed to the preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction;

(h) has executed a guarantee in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code and such guarantee has been invoked by the creditor and remains unpaid in full or part;

(i) is subject to any disability, corresponding to clauses (a) to (h), under any law in a jurisdiction outside India; or

(j) ***has a connected person not eligible under clauses (a) to (i).***

Explanation I.— For the purposes of this clause, the expression "connected person" means-

(i) any person who is the promoter or in the management or control of the resolution applicant; or

(ii) any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan; or

(iii)the holding company, subsidiary company, associate company or related party of a person referred to in clauses (i) and (ii):

Provided that nothing in clause (iii) of Explanation I shall apply to a resolution applicant where such applicant is a financial entity and is not a related party of the corporate debtor:

Provided further that the expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares or completion of such transactions as may be prescribed, prior to the insolvency commencement date;

Explanation II—For the purposes of this section, "financial entity" shall mean the following entities which meet such criteria or conditions as the Central Government may, in consultation with the financial sector regulator, notify in this behalf, namely:-

(a) a scheduled bank;

(b) any entity regulated by a foreign central bank or a securities market regulator or other financial sector regulator of a jurisdiction outside India which jurisdiction is compliant with the Financial Action Task

Force Standards and is a signatory to the International Organisation of Securities Commissions Multilateral Memorandum of Understanding;

(c) any investment vehicle, registered foreign institutional investor, registered foreign portfolio investor or a foreign venture capital investor, where the terms shall have the meaning assigned to them in regulation 2 of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 made under the Foreign Exchange Management Act, 1999 (42 of 1999);

(d) an asset reconstruction company register with the Reserve Bank of India under section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(e) an Alternate Investment Fund registered with Securities and Exchange Board of India;

(f) such categories of persons as may be notified by the Central Government.

10.4. The net for resolution plans is required to be cast long and wide. At the same time, we need to keep in mind the legislative intent that suffuses section 29A: errant promoters are required to be kept at bay until the taint of NPAs, for which they were directly or indirectly responsible, are cleared. Such persons must not be allowed to a find a way through the backdoor. It behoves the court to interpret the provision in a manner that will further this intent.

11. The relevant judgments

11.1. Denning, L.J., in one of his earliest cases, the celebrated case of ***Seaford Court Estates Ltd v Asher***,[155] deals with the approach to be taken by a court when a statute comes up for consideration. He held that *"it was not within human powers to foresee the manifold sets of facts which may arise, and even if it were, it is not possible to provide for them in terms free from ambiguity."*[156] The English language, he observed, is not an instrument of mathematical precision. Therefore, he said,

"When a defect appears, a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament and then he must supplement the written word so as to give "force

[155] (1949) 2 KB 481 decided on 01.06.1949

[156] *Ibid*, page 499

and life" to the intention of the legislature. ... A judge should ask himself the question: If the makers of the Act had themselves come across this ruck in the texture of it, how would they have straightened it out? He must then do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the creases."[157]

11.2. In ***Arun Kumar Jagatramka v Jindal Steel & Power Ltd,***[158] the Hon'ble Supreme Court, speaking through D.Y. Chandrachud, J., stated that the salutary objectives of the IBC can be achieved if the integrity of the resolution process is placed at the forefront. The primary focus is resolution of insolvencies and liquidation is a matter of last resort. The next few lines are worth their weight in gold – *"These objectives can be achieved only through a purposive interpretation, which requires courts, while infusing meaning and content to its provisions, to ensure that the problems which beset the earlier regime do not enter through the backdoor through disingenuous stratagems."*[159]

11.3. Earlier, *in* ***ArcelorMittal (supra),***[160] the Hon'ble Supreme Court stated a purposive interpretation of section 29A, depending both on the text and the context in which the provision was enacted, must inform the interpretation of the same.[161] The Hon'ble Court, while holding section 29A to be a see-through provision, also held that *"a wooden literal, interpretation would obviously not permit a tearing of the corporate veil when it comes to the "person" whose ineligibility is to be gone into. However, a purposeful and contextual interpretation, such as is the felt necessity of interpretation of such a provision as section 29A, alone governs."*[162]

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[157] *Ibid*, page 499

[158] (2021) 7 SCC 474 : 2021 SCC OnLine SC 220, decided on 15.03.2021

[159] *Ibid* at para 41, page 507

[160] (2019) 2 SCC 1 decided on 04.10.2018

[161] *Ibid* at para 30.

[162] *Ibid* at para 32, page 47.

11.4. In ***Reserve Bank of India v Peerless General Finance & Investment Company Limited***,[163] the Hon'ble Supreme Court laid down that interpretation must depend both on the text and on the context. In the words of the Hon'ble Court, *"if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual (para 33)"* The Hon'ble Supreme Court, speaking through O. Chinnappa Reddy, J., held that a statute is best interpreted when we know why it was enacted. It exhorts that we must look at the Act as a whole and discover what each section, clause, phrase or word is meant and designed to say, as to fit into the scheme of the entire Act. It further cautions that no part of a statute and no word of a statute can be construed in isolation.

11.5. This approach was approved by the Hon'ble Supreme Court in ***Bank of Baroda & another v MBL Infrastructures Limited & others.***[164] It counselled that while interpreting statutes, adequate thought will have to be given to the nature of the statute and the provisions contained thereunder. The focus should be on avoiding any interpretation which might cause an injury or destroy the intent behind the legislation.[165] It went on to hold that, *"ineligibility has to be seen from the point of view of the resolution process. It can never be said that there can be ineligibility qua one creditor as against others. Rather, the ineligibility is to the participation in the resolution process of the corporate debtor. Exclusion is meant to facilitate a fair and transparent process."*[166]

11.6. The message is loud and clear. In dealing with a provision such as section 29A, it is not the literal interpretation that is preferred, but rather a purposive interpretation, whereby the provisions can be looked at in the context of the

[163] (1987) 1 SCC 424 decided on 22.01.1987

[164] 2022 SCC OnLine SC 48 decided on 18.01.2022, at para 40

[165] *Ibid*, at para 34

[166] *Ibid*, at para 53

entire statute, which should be preferred. This is especially and expressly held to be so in the case of interpretation of section 29A.

12. Analysis

NTPC's "disqualification"

12.1. Once it is clear that it is the purposive interpretation which is the ideal means of interpreting section 29A, it is necessary once again to have a sneak peek into the mind of the legislature when this provision was engrafted into the law. We look back at the Statement of Objects and Reasons *(see para 10.2 above),* and we notice that the *raison d'être* of the provision is this: concerns were expressed that persons who, **with their misconduct, contributed to defaults of companies** or are otherwise undesirable, may misuse the situation to gain or regain control of the corporate debtor *(emphasis supplied).* If this is the thought process that permeated the enactment, then it could never have been the intention to disqualify a Resolution Applicant, such as NTPC in this case, the good Samaritan which rescued a company at the express behest of the Govt of India and the Govt of Maharashtra, in the public interest.

12.2. To read section 29A purposively, as the Hon'ble Supreme Court has repeated exhorted us to do, can only mean that the legislative intent is not to disqualify those promoters who came in late, and with the express intention to rescue a company from its previous promoters. In other words, all promoters should not be tarred with the same brush, and the taint should attach only to those promoters who were responsible for the NPA in the first place. Any other interpretation would mean throwing out the baby with the bathwater.

12.3. Nobody has alleged that NTPC was responsible for the NPAs of RGPPL or KLL. To the contrary, NTPC and GAIL stepped in at the instance of the GoI at the highest levels to rescue DPC which tottered on the brink of collapse, taking down with it several crores of rupees. In essence, NTPC emerged as the knight in shining armour to rescue the defunct DPC which transformed into RGPPL. In doing so, NTPC and GAIL were both saddled with the NPAs of RGPPL.

12.4. NTPC's entry cannot, by any stretch of imagination, be considered as adversely impacting the credibility of the processes under the Code, the very mischief that the Ordinance of 2017 *(since replaced by the Amendment Act of 2018)* sought to remedy. Indeed, it is not anyone's case that NTPC, by its own conduct or of any of those in management, contributed to the default of RGPPL. NTPC is also not "otherwise undesirable," nor would its entry into the mix undermine the processes laid down in the Code. Therefore, the application of the literal rule of interpretation would lead to absurd results in the present context, and we would need to take recourse to the purposive rule of interpretation, just as the Hon'ble Apex Court has urged us to do in ***Jindal Steel (supra), ArcelorMittal (supra), Peerless General (supra) and MBL Infrastructures (supra).***

12.5. Trying to match the textual with the contextual, and reading the terminology used in section 29A(c) proviso in the context of the Code as a whole and having illumined ourselves with its real intent, we hold that NTPC is **not** an ineligible resolution applicant.

12.6. The ***Asher (supra), Peerless General (supra), MBL Infrastructures (supra)*** judgments were not quoted before us from any side. To be fair, the ***MBL Infrastructures (supra)*** judgment came only on 18.01.2022 and could not have been quoted when the arguments ended on 14.12.2021.

12.7. Having gotten the issue of whether NTPC was eligible at all out of the way, we now concentrate on the crucial date for determining the eligibility of a Resolution Applicant.

12.8. The long and short of Mr Mookherjee's submission is that if a resolution applicant is not eligible at the time of submission of the First Plan, then the ineligibility attaches throughout, unless fresh EoIs are invited.

12.9. For reasons that we shall state presently, we are unable to persuade ourselves to agree with this contention.

12.10. This was a matter where multiple resolution plans were submitted by NTPC. The First Plan was submitted on 30.12.2019, with the first revision to this Plan on 30.11.2020. The final revision was on 14.06.2021. It was this Plan that was finally put to vote and approved by the CoC with 100% majority on 26.6.2021.

12.11. Broadly, Mr Mookherjee's argument was that the Second, Third and Fourth Plans were really only a continuation of the process, and therefore, if the resolution applicant was ineligible while submitting the First Plan, then such resolution applicant stood automatically disqualified from submitting the subsequent plans.

12.12. Mr Ramji Srinivasan's counter to this was that a resolution applicant could submit any number of plans. The First, Second, Third and Fourth Plans submitted by NTPC in the present case were materially different, and cannot be categorised as mere revisions. Therefore, the eligibility was required to be tested with reference to each Plan.

12.13. The intention of giving wide publicity is to enable invitation of maximum bids for the corporate debtor. One of the two major objectives of the Code is to achieve resolution of the corporate debtor. Regulation 39(1)(a)[167] of the CIRP Regulations expressly permits a prospective resolution applicant in the final list to submit "resolution plan" or "plans" in accordance with the Code and the Regulations, to the Resolution Professional electronically within the time given in the Request for Resolution Plans (RFRP document).

12.14. On this touchstone, it does not really matter if a single resolution applicant submits plans any number of times, and also whether it is really a revision or a fresh plan. It does not make any material difference at all. We are not even

[167] **39. Approval of resolution plan.–** (1) A prospective resolution applicant in the final list may submit resolution plan or plans prepared in accordance with the Code and these regulations to the resolution professional electronically within the time given in the request for resolution plans under regulation 36B along with - (a) an affidavit stating that it is eligible under section 29A to submit resolution plans;

required to take recourse to the General Clauses Act, 1897, to read "resolution plan" as "resolution plans."

12.15. We notice that the classification of RGPPL's account as NPA took place first under the Dharani Circular of 12.02.2018. We also notice that the action of classification of the account as NPA took place only on 21.05.2018 (See para 5.17 above). The Dharani Circular and all actions taken under it, came to be struck down by the Hon'ble Supreme Court *vide* its judgment dated 02.04.2019 in ***Dharani Chemicals (supra)***.[168]

12.16. In any case, by the time the CoC sat down and approved the Resolution Plan, NTPC was free of the taint of NPAs.

12.17. We are clear in our mind that we have to look into the purpose behind enactment of section 29A and not read it too literally. The intention could never have been to disqualify a resolution applicant permanently if there is an initial disqualification. If there is a resolution applicant whose disqualification can be cured prior to the final consideration of the resolution plan or plans, then such persons must be encouraged and permitted to do so. This can only result in betterment of value for the corporate debtor, and never to its detriment.

12.18. Therefore, the eligibility of the resolution applicant will have to be tested at a meaningful stage, *i.e.*, when the plan is ripe for consideration by the CoC. That is the only way we can infuse life and meaning to section 29A. On the other hand, there is nothing to be gained by rejecting the NTPC plan just because it had a connected account which was classified as NPA on a technical ground when it submitted its First Plan, and that too when it was in no way responsible for the same. The process envisaged for a resolution plan is a process of selection and not of rejection.

[168] (2019) 5 SCC 480 : 2019 SCC OnLine SC 460, decided on 02.04.2019.

12.19. Further, as Mr Ramji Srinivasan argued, if a resolution applicant is required to intimate the RP forthwith if it became ineligible at any time during the CIRP, there is no reason why it cannot apply in the reverse: a resolution applicant who was ineligible to begin with, and became eligible later on, should also be considered. We are convinced by Mr Ramji Srinivasan's argument that the words, *"at the time of submission of the resolution plan,"* should really be read as, *"at the time of submission of the **relevant** resolution plan." (see para 5.16 above).*

12.20. We, therefore, hold that the crucial date of eligibility should be the date on which all plans are finally considered by the CoC before it is put to vote in terms of regulation 39 of the CIRP Regulations. Therefore, the gate-pass theory advanced during the course of oral arguments, which adopts a mechanical check-box approach, is rejected.

12.21. While we appreciate Mr Mookherjee's submission that while relying on the definitions in the General Clauses Act, 1897, we often forget the wordings, *"unless there is anything repugnant in the subject or context,"* in the present context, we have to say that reading the proviso in the manner that Mr Mookherjee has invited us to do, would indeed be repugnant to the context.

On the CoC's decision not to entertain the section 12A proposal:

12.22. Mr Mookherjee had submitted that the section 12A proposal had been placed for consideration before the CoC at its 12th meeting held on 05.03.2021 (see para 3.41 above). At that meeting, the CoC members had concurred in the view of the representatives of PFC that the proposal submitted by the promoters did not conform to section 12A of the Code. The CoC's unanimous view was that they did not want to pursue any withdrawal under section 12A or go ahead with the proposal submitted by the promoters.

12.23. The section 12A proposal was finally discussed at the 14th CoC meeting held on 21.04.2021. The CoC's deliberations indicate that after evaluating the commercials of NTPC's offer and the promoter's proposal, the offer from

NTPC was considered better (see para 3.46 above). Having understood this, the promoters then came up with a fresh offer on 06.05.2021,[169] increasing the upfront payment to ₹200 crore from the earlier ₹100 crore, and reducing the repayment period from 19 years to 14 years (see para 3.48 above). In spite of insistence by the suspended management at the 15th CoC meeting held on 15.06.2021, the proposal was not discussed meaningfully (see para 3.49 above).

12.24. The gist of the allegations are that –

(a) The CoC did not consider the proposals purposeful manner;

(b) The proposals were not handed up for evaluation by the same external agency - RBSA - which evaluated NTPC's plan;

(c) The parameters enunciated by the Hon'ble NCLAT in its judgment in ***Hammond Power Solutions (supra),***[170] have not been factored in by the CoC in making the decision not to consider the promoters' proposal.

12.25. To this, Mr Joy Saha, Ld Senior Counsel appearing for the CoC, submitted that the applicants are labouring under a misconception that a section 12A proposal and a Resolution Plan should be pitched point by point against each other. Mr Joy Saha submitted that the scope of judicial review is circumscribed by judgments of the Hon'ble Supreme Court in a long line of judgments starting from ***K. Sashidhar (supra)*** onwards. The commercial wisdom of the CoC extends to determination as how and in what manner the CIRP is to take place, as per the ***Essar Steel (supra)*** judgment (see para 4.4 above).

12.26. Taking the argument several notches higher, Mr Ramji Srinivasan, Ld Senior Counsel appearing for the Successful Resolution Applicant, presented the two proposals, if one may call them that for convenience, in a comparative table. This is captured in para 5.38 above. This table factors in the revised proposals submitted by the Applicants, which they allege were given perfunctory

[169] Page 1661 of the IA @ clause (c)

[170] 2020 SCC OnLine NCLAT 199 decided on 14.02.2020

treatment by the CoC. The details given in the table have been subjected to any serious challenge before us. In any case, the commercial wisdom of the CoC is paramount, and we do not wish to make any incursions into this.

12.27. Though we are not quite equipped to enter into a comparison of the two proposals, nor are we even supposed to do, it is clear even from the table that point by point, the NTPC's Resolution Plan fares much better. A voyage of discovery into the relative merits is completely unnecessary.

12.28. Therefore, the challenge to the NTPC's Resolution Plan on this score needs to be repelled as a non-starter.

On deficiency in affidavit

12.29. We are satisfied that the deficiency in the section 29A affidavit filed by NTPC was really only an inadvertent error, where there is only one signature at the bottom of the page instead of two. Nevertheless, it is not fatal. In any case, this was not a challenge pressed by the applicants, but only an observation made by the court. The omission does not invalidate the section 29A affidavit, so we will let that be.

13. Summary of findings

13.1. Applying purposive interpretation of section 29A as held by the Hon'ble Supreme Court in a direct line of judgments involving interpretation of the Insolvency & Bankruptcy Code, 2016, we hold that NTPC was **not** disqualified in terms of the first proviso to clause (c) and Explanation I to clause (j) of section 29A of the Code. The disqualification will apply in the case of errant promoters and cannot be applied to promoters such as NTPC who came in to rescue DPC at the instance of the Govt of India and of the Govt of Maharashtra.

13.2. The section 12A proposal submitted by the promoters has been considered as not good enough by the CoC, and we should not enter into the "occupied field," as it were, of commercial wisdom of the CoC.

13.3. The deficiency in the affidavit is of a minor nature, and cannot invalidate the affidavit itself.

13.4. **In arriving at these conclusions, we have relied wholly on the verbatim notes taken down during the course of oral arguments in court. For this very reason, we have not factored in the written submissions of the parties. We have also gone through the convenience compilation submitted by NTPC and the various charts submitted, besides the pleadings. The documents submitted to court have also been shared between the various parties. We are not so sure about the written submissions, though.**

14. Orders

14.1. All the three prayers – (a) for declaring that NTPC is not compliant with section 29A of the Code and therefore incapable of participation in the CIRP of the corporate debtor; (b) for setting aside the CoC's decision rejecting the section 12A proposal submitted by the Applicants; and (c) for a direction to the CoC to consider the proposals submitted by the Applicant No.1 under section 12A – shall stand rejected.

14.2. Consequently, IA (IB) No.537/KB/2021 in CP (IB) No.634/KB/2017 shall stand dismissed as devoid of merit.

14.3. The Registry is directed to communicate a copy of this order immediately to the Counsel on record for the various parties by email.

14.4. Certified copy of the order be issued if applied for, upon compliance with all the requisite formalities.

14.5. Before parting with the matter, we owe a round of appreciation to Mr SN Mookherjee, Ld AG appearing for the applicants, Mr Ramji Srinivasan, Ld Sr Counsel appearing for the Successful Resolution Applicant, Mr Joy Saha, Ld Sr Counsel appearing for the CoC, and Mr Ratnanko Banerji, Ld Sr Counsel appearing for the RP. Their magnificent assistance in and mastery of the matter, combined with the tireless efforts put in by their respective teams, have been of

invaluable assistance to us in arriving at the conclusions that we have indicated. The arguments, at various points, ranged from the poetic to the sublime, and we have only enriched ourselves in the process. This judgment would have much poorer, but for their outstanding assistance. Our thanks to each one of them.

Rajasekhar V K
Digitally signed by Rajasekhar V K
Date: 2022.03.08 14:12:12 +05'30'

Harish Chander Suri
Member (Technical)

Rajasekhar V.K.
Member (Judicial)

08.03.2022