

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH : COURT-IV**

**IA-3399/2023 IN IA-2794/2023  
IN C.P.(IB)/893(MB)2021**

Under Section 60(5) of the Insolvency and  
Bankruptcy Code, 2016.

*Application moved by:*

**Torrent Power Ltd.** ...Applicant

Vs.

**Ashish Arjunker Rathi & Anr.**  
....Respondents

And

**IA-3336/2023 IN IA-2794/2023  
IN C.P.(IB)/893(MB)2021**

Under Section 60(5) of the Insolvency and  
Bankruptcy Code, 2016.

*Application moved by:*

**Vantage Point Asset Management Pte. Ltd.**  
...Applicant

Vs.

**Ashish Arjunker Rathi & Anr.**  
....Respondents

*{Both in In C.P.(IB)-893/(MB)/2021}*

*In the matter of*  
**Bank of Baroda**

...Financial Creditor

Vs.

**SKS Power Generation (Chhattisgarh) Ltd.**

...Corporate Debtor

Order Pronounced on : **06.10.2023**

***Coram:***

Mr. Prabhat Kumar

Mr. Kishore Vemulapalli

Hon'ble Member (Technical)

Hon'ble Member (Judicial)

***Appearances:***

For the Applicant(s) :

Mr. Nirav Shah a/w Mr. Zaid Mansuri i/b DSK Legal, Applicant in IA-3336/2023 & Mr. Janak Dwarkadas Ld. Senior Counsel a/w Mr. Aswin Ramaiah, Mr. Shyam Dasgupta i/b Khaitan, Ms. Rishika Harsh and Co., Applicant in IA-3399/2023.

For the CoC :

Mr. Madhav Kanoria a/w Ms. Surbhi Parekh i/b Cyril Amarchand Mangaldas, Adv.

For the Successful Resolution

Applicant :

Mr. Gaurav Joshi Ld. Senior Counsel a/w Mr. Nishant Sogani, Mr. Saurabh Bacchawat, Ms. Shrishti, Adv.

For the RP/Applicant:

Mr. Pradeep Sancheti a/w Mr. Somesh Srivastav and Ms. Apoorva Chandekar, Adv.

**ORDER**

***Per: Prabhat Kumar, Member (Technical)***

1. This is an Application IA-3399/2023 under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'the Code') filed on 03.08.2023 by Torrent Power Limited ("TPL") seeking intervention in the Plan approval Application in the case of SKS Power Generation (Chhattisgarh) Ltd. ('Corporate Debtor') pending before this Bench in IA-2794/2023 in C.P. (IB)/893(MB)2021. The Applicant has arrayed the Resolution Professional (RP) and the Successful Resolution Applicant i.e. Sarda Energy and Minerals Ltd. ("SRA") as the Respondent Nos. 1 & 2. The Applicant has prayed :
  - a) *to pass an order directing the First Respondent to serve a complete copy of the Plan Approval Application, along with all the annexures to the Applicant;*
  - b) *to defer the pronouncement of orders in the Plan Approval Application until the adjudication and disposal of the present Application;*
  - c) *to grant liberty to the Applicant to file its objections in the Plan Approval Application, if any, pursuant to reviewing the Plan Approval Application;*
  - d) *to keep the Plan Approval Application in abeyance until the Applicant has reviewed the Plan Approval Application and filed its objections (if any) in the said Application.*
2. This is an Application IA-3336/2023 under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'the Code') filed on 01.03.2023 by Vantage Point Asset Management Pte Ltd. ("VPAMPL") seeking to intervene Plan approval Application in the case of SKS Power Generation (Chhattisgarh) Ltd. ('Corporate Debtor') pending before this Bench in IA-2794/2023 in C.P. (IB)/893(MB)2021. The Applicant has arrayed the Resolution Professional and the Committee of Creditors (CoC) of the Corporate Debtor as the Respondent Nos. 1 & 2. The Applicant has prayed :
  - a) *This Tribunal be pleased to allow the Applicant to intervene in IA-2794/2023 and be impleaded therein as a party-Respondent;*
  - b) *that this Tribunal be pleased to defer the hearing of IA-2794/2023 till such time as this Application is heard and disposed finally;*

- c) *that this Tribunal be pleased to order and direct the RP to supply a copy of IA-2794/2023 together with the details, particulars and relevant documents with regard to the Resolution Plan approved by the CoC, and allow the Applicant to file its affidavit to oppose the IA-2794/2023;*
- d) *in the alternative to prayer b, that this Tribunal be pleased to permit the Applicant to file Affidavits/pleadings and make submissions at the time of hearing of IA-2794/2023;*
- e) *pending the hearing and final disposal of this Application this Tribunal be pleased to stay the proceedings in IA-2794/2023.*
3. The Respondent-1 had filed an IA-2794/2023 in C.P. (IB)/893(MB)2021 seeking approval of Resolution Plan in the matter of Corporate Debtor after the same was approved by CoC with 100% votes. The CoC comprises of two financial creditors, who are public sector banks each holding 92.1% and 7.9% vote share. This IA was heard and reserved for order by this Bench on 10.07.2023. While the order of this IA was in the stage of discussion, the Applicant in IA-3336/2023 i.e. VPAMPL through its Counsel mentioned that VPAMPL is one of the unsuccessful resolution applicant and has filed an IA on 1.08.2023 which is pending with the registry for numbering and listing thereof. It was submitted by Counsel in mentioning that VPAMPL, being a foreign based fund, has been treated unfairly while deciding on its resolution plan by RP as well as CoC. Since the IA-2794/2023 was reserved and there was no objection during the hearing, this Bench considered it appropriate to have IA-3336/2023 heard before passing a final order in IA-2794/2023. Thereafter, another IA-3399/2023 came to be filed by TPL and both the IAs were heard together on 7.08.2023 and reserved for orders, and the counsel for the Resolution Professional was directed to place on record the correspondences and minutes of meeting which came to be filed on 21.08.2023.
4. The prayers vide Clause-52(A), 52(B), 52(D), and 52(E) in IA-3336/2023 had become infructuous on account of orders in IA-2794/2023 already having been reserved prior to filing of IA-3336/2023. The prayer vide Clause 52(C) to the

extent the Applicant seeks permission to file affidavit to oppose IA-2794/2023 has also become infructuous.

5. The prayers in Clause-10(c), and 10(d), in IA-3399/2023 had become infructuous on account of orders in IA-2794/2023 already having been reserved prior to filing of IA-3399/2023.
6. TPL, the Applicant in IA-3399/2023, has alleged that the Plan of the SRA came to be approved in a seemingly irregular and discriminatory manner in which the corporate insolvency resolution process ("CIRP") of the Corporate Debtor was conducted which led to the Resolution Plan submitted by the Second Respondent being approved by the committee of creditors ("COC") of the Corporate Debtor
  - 6.1 TPL, the Applicant in IA-3399/2023, submitted, its resolution plan for the Corporate Debtor on 30 December 2022 in the CIRP of the Corporate Debtor. Subsequently, pursuant to discussions and deliberations with the First Respondent and the CoC in relation to the various legal and commercial aspects of the Resolution Plan, the Applicant submitted its revised resolution plan on 21 March 2023. It is relevant to note that during the course of the discussions/negotiations with the First Respondent/CoC, the Applicant was expressly intimated that the CoC expects the commercial offer made under the Resolution Plans to be paid by way of upfront cash payment. The said commercial expectation was taken into account by the Applicant while submitting its revised resolution plan for the Corporate Debtor.
  - 6.2 Thereafter, on 13 April 2023, the First Respondent addressed an e-mail intimating the Resolution Applicants that a negotiation process is proposed to be carried out by way of a bidding process/mechanism ("Negotiation Process") amongst the Resolution Applicants in terms of Regulation 39(1A) of the CIRP Regulations on 19 April 2023. Vide the said e-mail, the First Respondent also shared a Process Note dated 13 April 2023 ("Process Note") setting out the terms and conditions in relation to

participating in the Negotiation Process. The Process Note required proposed discovery of the *Highest Value as per the Identified Criteria* pursuant to an inter-se bidding process conducted amongst the Resolution Applicants where in each round of the bid, the Resolution Applicants were required to submit the key commercial terms of their Resolution Plans including the amount of upfront cash payment proposed to be paid under the Resolution Plan (which was offered the highest weightage while evaluating the resolution plans as per the correspondences addressed by First Respondent) ("Key Commercial Terms"). The Process Note expressly stated that subsequent to the closure of the Negotiation Process, each Resolution Applicant would be required to submit a draft of its Resolution Plan, incorporating the Key Commercial Terms set out in the last Appendix I submitted by such Resolution Applicant during the Negotiation Process.

- 6.3 The Negotiation Process was completed after 4 (four) rounds. At the end of the Negotiation Process, the First Respondent displayed to the Resolution Applicant with the Highest Value as per Identified Criteria ("H1 Bid"). The H1 Bid proposed a total financial offer of INR 2,005 Crores out of which a substantial amount of approximately INR 400 Crores was proposed to be paid as deferred payment. Per contra, the total financial offer proposed by the Applicant was INR 2,000 Crores (which was a mere INR 5 Crores lower than that offered in the H1 Bid) but the entire amount was proposed to be paid by way of upfront cash payment, in accordance with the commercial expectation of the CoC as communicated to the Resolution Applicants.
- 6.4 Subsequently, vide an e-mail dated 19 April 2023, the First Respondent requested the Resolution Applicants to submit a draft of their further revised resolution plans incorporating the last commercial proposal in the last Appendix I submitted by the Resolution Applicants. Consequently, on 21 April 2023, the Applicant, submitted a draft of its revised Resolution

Plan pursuant to incorporating the Key Commercial Terms proposed by it in terms of Appendix I. in accordance with the provisions of the Process Note.

- 6.5 On 28 April 2023, the Applicant submitted its final Resolution Plan to the First Respondent in accordance with the instructions of the First Respondent and the provisions of the Process Note. Subsequently, on 8 May 2023, the First Respondent addressed an e-mail to the Applicant requesting the Applicant to kindly provide necessary clarifications in relation to certain queries of the First Respondent/CoC regarding the resolution plans submitted by them to enable a comprehensive evaluation of the Resolution Plan by way of an addendum to the Further Revised Resolution Plan. It is relevant to note that vide the said e-mail, the PRAs were only allowed to give certain clarifications to the specific queries raised by the First Respondent/CoC in relation to the contents of their resolution plans.
- 6.6 The Applicant submitted the clarifications sought by the First Respondent by way of an addendum dated 10 May 2023. The Applicant is given to understand that the Resolution Plans read with the addendums were put up for voting before the CoC in the 31 meeting of the CoC dated 16 May 2023.
- 6.7 On 20 June 2023, the First Respondent addressed a letter to the Resolution Applicants inter-alia intimating the Applicant of the approval of the resolution plan submitted by the Second Respondent under Section 30(4) of the IBC. The Applicant is given to understand that the First Respondent has filed an application being IA 2794/2023 before this Tribunal under Section 30(6) read with Section 31 of the IBC, praying for the approval of the Resolution Plan submitted by the Second Respondent in terms of Section 31(1) of the IBC ("Plan Approval Application"). The said application was listed for hearing on 5 July 2023 and subsequently on 10 July 2023 at which date it was heard and reserved for orders.

- 6.8 Subsequently, the Applicant came across a newspaper report dated 5 May 2023 (which appears to have escaped the Applicant's notice at the relevant time) titled "Vantage Point is the highest bidder for SKS Power's bankruptcy" (Newspaper Report"). The Newspaper Report which was published shortly after the submission of Final Resolution Plans appeared to indicate that the commercial offer made by Vantage Point Asset Management ("Vantage"), a Singapore based entity was highest commercial offer during the course of the Negotiation Process. The Newspaper Report also mentioned that the Applicant made the second highest competitive offer for the Corporate Debtor which was less than the offer of Vantage by a mere INR 7 Crores, followed by Jindal Power Limited and the Second Respondent.
- 6.9 It is at that time that the Applicant recollected what had transpired in the course of the Negotiation Process. While neither the identity of the H1 Bidder nor the Key Commercial Terms offered by the other Resolution Applicants was disclosed to the other Resolution Applicants, considering that: (a) the value of the Key Commercial Terms offered by Vantage was higher than that of the Applicant by only INR 5 Crores; and (b) as per the Newspaper Report, Vantage and the Applicant emerged as the 2 (two) highest bidders in terms of the aggregate commercial offer made in terms of the Final Resolution Plan submitted by the Resolution Applicants on 28 April 2023 ("Aggregate Commercial Offer") whereby the Aggregate Commercial Offer of Vantage was only INR 7 Crores higher than that of the Applicant, it appears that the Vantage was the H1 Bidder during the course of the Negotiation Process and that the Applicant was the second highest bidder during the course of the Negotiation Process. Furthermore, considering that: (a) the Applicant submitted the second highest bid during the course of the Negotiation Process; (b) the bid offered by the Applicant consisted entirely of upfront cash payment; and (c) the upfront cash payment proposed by the Applicant was substantially higher than the H1

Bidder, it is evident that during the course of the negotiation process, the Applicant submitted the highest upfront cash payment to the creditors of the Corporate Debtor.

- 6.10 Furthermore, as per the Newspaper Report which is dated as on 5 May 2023 i.e. shortly after the date of submission of signed revised resolution plans on 28 April 2023, it appears that even in terms of the Aggregate Commercial Offers provided by the Resolution Applicants in their respective Final Resolution Plans submitted on 28 April 2023, Vantage and the Applicant had made the highest commercial offers while the Second Respondent made at best the third highest Aggregate Offer.
- 6.11 In view of these facts, Applicant, which proposed the highest upfront payment of INR 2,000 Crores (which was even significantly higher than the amount of approximately INR 1,500 Crores offered in H1 Bid), in line with the CoC's requirements which stated that "entire amount proposed to be paid under the resolution plan be paid upfront without any deferred payment component", should have been declared the successful resolution applicant.
- 6.12 It is submitted that during the Negotiation Process, the Applicant was not aware of and is still not aware of the value of the commercial offer of the Second Respondent, as also whether the same is higher than or more beneficial to the stakeholders of the Corporate Debtor. Further, the Applicant is also not aware as to how, when during the Negotiation Process, there was no other commercial offer by any other Resolution Applicant (which would include Second Respondent) which provided a higher upfront payment, the Second Respondent ultimately came to be declared the successful resolution applicant especially considering that: (a) the Negotiation Process was the last opportunity given to the Resolution Applicants to revise their Key Financial Terms (including upfront cash payment to the creditors) in the form and manner set out in the Process Note and that no Resolution Applicant could revise their Key Financial

Terms as set out in the last Appendix I submitted by them after the conclusion of the Negotiation Process which ended on 19 April 2023.

- 6.13 In view of the foregoing facts, it is respectfully submitted that approval of the Resolution Plan submitted by a Resolution Applicant who was at best the third highest bidder over and above the Resolution Plan submitted by Vantage and the Applicant appears to be extremely irregular. It is respectfully submitted that it is inexplicable that the CoC approved the resolution plan submitted by a Resolution Applicant, which appears to be: (a) at best third highest pursuant to the submission of Final Resolution Plans on 28 April 2023, both in terms of Key Commercial Offer and the Aggregate Offer provided by it; and (b) had lower qualitative and quantitative credentials than Vantage and the Applicant.
- 6.14 In fact, upon making enquiries and checking NCLT website, it has come to light, the entire process of filing the Plan Approval Application appears to have been conducted in undue haste whereby the entire process from approval of the Resolution Plan of the Second Respondent to CoC till the filing and moving of the Plan Approval Application was conducted in just about 2 (two) weeks.
- 6.15 It is submitted that the aforesaid facts call for a thorough examination of the manner in which the process of selecting the Second Respondent as the successful resolution applicant needs to be considered by this Hon'ble Tribunal. Hence this Application.
7. The Applicant, in IA-3336/2023, submitted that, after requests from RP to revise the Resolution Plan, VPAMPL submitted its revised Resolution Plan on April 28, 2023, which was in accordance with bids in the inter-se bidding mechanism, and its bid was the highest financial bid. Thereafter, clarifications to RP were duly provided by VPAMPL as and when requested by RP with regard to the already submitted revised Resolution Plan. It thereafter appears that the revised Resolution Plans were considered by the COC, and a revised Resolution Plan submitted by another PRA (not being VPAMPL) was approved

by the COC. However, in the meanwhile, with the recent economic developments in the power sector, VPAMPL was of the view that to maximize the value of the assets of the Corporate Debtor and to protect and balance the interests of all stakeholders and creditors of the Corporate Debtor (including operational creditors, unsecured creditors and statutory creditors (and not just the members of the COC), VPAMPL would like to further increase its offer in its revised Resolution Plan by paying more money to other creditors who still stand to lose a large sum of money. The total amount by which VPAMPL was increasing its offer by is INR 50 Crore and VPAMPL was willing to make the additional payment, that is, INR 30 Crore to Operational Creditors other than workmen and employees, INR 10 Crore to Government/Statutory Creditors and INR 10 crore to Agritrade Power Ventures Private Limited. Accordingly, emails dated June 14, 2023 were addressed by VPAMPL to the RP. A formal further revised Resolution Plan incorporating the aforementioned increased offer was emailed to the RP on June 16, 2023.

7.1 To VPAMPL's surprise, by an email dated June 20, 2023, the RP stated that the COC has approved a Resolution Plan and declared a Successful Resolution Applicant("SRA") (other than VPAMPL). The RP further stated that the resolution plan process has been successfully conducted and concluded in accordance with the provisions of the RFRP. the IBC, and regulations framed thereunder and VPAMPL 's "belated and unsolicited offers" were placed before the COC at their meeting held on June 17, 2023. Purportedly taking into account and considering all the facts and circumstances, the COC was of the view that the revised unsolicited resolution plan submitted by VPAMPL cannot be considered at this stage, especially since the COC has already approved a Resolution Plan purportedly taking into account the objects of the IBC and its purported compliance with applicable laws. Thereafter RP has filed the RP's Application under Section 30(6) and 31(1) of the IBC seeking approval of the Resolution Plan submitted by the SRA.

Aggrieved by the actions of the COC and the RP, VPAMPL is constrained to file this Application. Hence, this Application to intervene the Interlocutory Application No. 2794 of 2023 filed by the RP.

8. We heard the counsel and perused the material on record.

- 8.1 We find that the applicant in IA-3399/2023 and IA-3336/2023 are unsuccessful resolution applicants and their resolution plan was not approved by CoC, which approved the plan filed by M/s Sharda Energy and Minerals Limited "SEML").
- 8.2 This bench finds that the applicant in IA-3399/2023 i.e. TPL is alleging partiality on the part of resolution professional in allowing another opportunity to "SEML" in the garb of clarification. We find that the Resolution Professional has sent a mail on 08.05.2023 to each of resolution applicant to clarify and such clarification was sought in accordance with the decision taken inn CoC meeting.
- 8.3 The scope of power u/s 31 of the Code was elaborated in the case ***K. Sashidhar Vs. Indian Overseas Bank & Ors. [2019] ibclaw.in 08 SC; Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta and Ors.: (2020) 8 SCC 531; Jaypee Kensington Boulevard Apartments Welfare Association & Ors. Vs. NBCC (India) Ltd. & Ors. (2021) ibclaw.in 63 SC;*** and recently in ***Paschimanchal Vidyut Vitran Nigam Ltd. Vs. Raman Ispat Pvt. Ltd. & Ors. (2023) ibclaw.in 81 SC.*** It has consistently been held that (i) the ultimate discretion of what to pay and how much to pay each class or sub-class of creditors is with the Committee of Creditors, but, the decision of such Committee must reflect the fact that it has taken into account maximizing the value of the assets of the corporate debtor and the fact that it has adequately balanced the interests of all stakeholders including operational creditors; (ii) while the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors, the limited

judicial review available is to see that the Committee of Creditors 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 maximize the value of its assets; and that the interests of all stakeholders including operational creditors has been taken care of; (iii) The reasons given by the Committee of Creditors while approving a resolution plan may thus be looked at by the Adjudicating Authority only from this point of view; (iv) The assessment about maximization of the value of assets, in the scheme of the Code, would always be subjective in nature and the question, as to whether a particular resolution plan and its propositions are leading to maximization of value of assets or not, would be the matter of enquiry and assessment of the Committee of Creditors alone; (v) The generalized submissions and objections made in relation to this aspect of value maximization do not, by themselves, make out a case of interference in the decision taken by the Committee of Creditors in its commercial wisdom; (vi) the Parliament did not empower the Adjudicating Authority “with the jurisdiction or authority to analyze or evaluate the commercial decision of the CoC much less to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors; (vii) the matters or grounds be it under Section 30(2) or under Section 61(3) of the I&B Code are regarding testing the validity of the “approved” resolution plan by the CoC; and not for approving the resolution plan which has been disapproved or deemed to have been rejected by the CoC in exercise of its business decision.

- 8.4 We also find that the Hon’ble NCLAT, in case of in *Darshak Enterprise Pvt. Ltd. Vs. Chhaparia Industries Pvt. Ltd.* passed in CA (AT)(Ins) No. 327/2020, held that “*in absence of any discrimination or perverse decision it is not open to the Adjudicating Authority or Appellate Tribunal to modify the*

*plan.”; and, it, in the case of **PNC Infratech Ltd. Vs. Deepak Maini (2022) ibclaw.in 612 NCLAT**, further held that “there is no such mechanism under the Code that gives the right to the Unsuccessful Resolution Applicant to challenge the score granted as per the evaluation matrix prepared by the CoC and the Resolution Professional as per the provisions of CIRP Regulations”.*

8.5 In view of the above judicial proposition, we find that the present application can be examined only on the issue of discrimination or perversity.

8.6 We Find that the Inter-se Bidding was conducted and concluded on 19.04.2023 after Round 4. The minutes of 27<sup>th</sup> Meeting of CoC held on 19.04.2023 records under Agenda Item No. 1 that,

*“the financial bids were evaluated, and RAs were requested to be present when the highest value received as per Identified Criteria defined in the Process Note at the end of each round was displayed.*

8.7 We notice the table in the Minutes states the Highest Upfront amount to Financial Creditors, amount offered to Other Creditors and Net Present Value (“NPV”) of the four rounds. As per this table, the highest upfront amount to financial creditors is Rs.1408.04 Crores, amount offered to other creditors is Rs.6.96 Crores and total NPV (*as per Identified Criteria defined in the Process Note*) is Rs.1815.00 Crores at the end of round 4. It is noted that this amount of Rs. 1805 crores comprised of (i) Upfront amount to financial creditors and Other Creditors; and (ii) NPV of deferred amount offered to other Creditors. As revealed from the minutes RFRP provided in the clear terms that, the margin money against the continuing Bank Guarantee(s) shall be infused separately, and amount termed as Exclusive Margin Money towards BGs given by SBI which was to given back to them, shall not form part of the Resolution Money and shall have to be dealt with as

over and above such resolution money. It is further stated in the minutes dated 19.04.2023 that

*“The RP apprised the participants that as per clause 9 (v) (xiii) of the Process Note issued to the RAs if the highest NPV as per the identified criteria remains unchanged for three consecutive rounds, the inter-se bidding process stands concluded. The CoC and their legal counsels concurred with the view.”*

8.8 We further find from the minutes of the Meeting of CoC, held on 29.04.2023, that the revised draft of the Resolution Plan, in terms of the Process Note, was sought and received from the RAs on 21.04.2023 and the signed revised Resolution Plans were first sought by 26.04.2023 and then the timelines were extended to 11.59 PM IST of 28.04.2023, upon a few requests received from the RAs. The RP apprised the CoC that five RAs who had participated in the inter-se bidding process, held on 19.04.2023, have submitted their signed revised Resolution Plan by 28.04.2023, in password protected form over emails and as sealed bids physically, as was stipulated. The RP also apprised the members that Vantage Point Asset Management Pte Limited had the sealed bid (physical copy of the Resolution plan) submitted at the office of the RP Counsel – Trilegal, which has been procured and is presently with the RP. It further recorded in the minutes that

*“The sealed bids were opened before the RAs, after receipt of confirmation that the bid being opened was the one submitted and the condition of the sealed bid is intact, i.e. the seal has not been tampered and the soft copy of the Resolution Plans were opened after the receipt of passwords in the meeting from the Ras. The RAs were invited to present a brief on the contours of the Resolution Plan. Preliminary financial parameters of*

*each plan were noted by the CoC members, and the RAs were informed that in case of any clarifications, RP/RP's Advisor would reach out.*

.....  
*The RP concluded the agenda item by stating that the opened signed revised Resolution Plans shall be shared with the CoC and the legal counsels and advisors for their evaluation. He also requested the legal counsels to examine if the physical copies received are in line and identical to the soft copies, for which scanned copies of the physical signed revised Resolution Plans shall be shares by the RP. The same was taken note of by all present.”*

- 8.9 We further find from the minutes of the Meeting of CoC, held on 06.05.2023, that treatment of BGs and the underlying margin money in the Resolution Plans was discussed. We understand that total outstanding live BGs required to be replaced as on Bidding Date amounted to Rs. 103.89 Crores. In this case, one of the financial creditor i.e. SBI had issued Bank Guarantees ("BGs"), secured by 100% cash margin. It was submitted by SBI at the meeting that these Bank Guarantees do not form part of the claim and there are a number of judgements and as per which, as long as the liability of BG issuing bank remains, no one can lay it's claim against the margin money. It is also recorded that -

*“It was also pointed out that there is a category of margin money to the extent of approx. Rs 18.43 crores, mentioned as Exclusive Margin money in the RFRP, which belongs to erstwhile lenders of SKS Power and in case of extinguishment of the BG liability against the issuing bank, the same should flow back to the erstwhile lenders. The above-mentioned understanding has been clearly captured in the RFRP and the same stand has been discussed in various CoC meetings and also in the negotiation meetings held with the Resolution Applicants. The*

*representative of SBI further added that, if any plan does not give the treatment to the Bank Guarantee margin money as per the above understanding and in line with RFRP stipulations, then the plans should be considered as violation of RFRP. If CoC approves any such plans, it may lead to litigations and delay in resolution.*

*Regarding Exclusive margin money, RP was of the view that for evaluation purpose as per the evaluation matrix, it cannot be treated as recovery for the Financial Creditors, as the same belongs to erstwhile lenders and not to the present lenders / CD. The same was discussed and agreed to and taken note of by all present.*

*Mr. Kunal Doshi stated that the distribution of the Resolution Plan value among the Secured Financial Creditors needs to be decided. Mr. Madhav Kanoria from Cyril Amarchand Mangaldas ("CAM") stated that, from the perspective of the evaluation criteria, the payment to Upfront Financial Creditors does not distinguish between the Secured and Unsecured Financial Creditors. He added that the distribution of the value would be decided by the CoC members since the amounts offered by the RAs towards upfront Financial Creditors do not exceed INR 2,121.97 crores i.e. the total amount of financial claims admitted. He added that there is no restriction on banks applying interest during the moratorium period and if the Resolution Plan is compliant with Section 30 (2) of the Insolvency and Bankruptcy code, 2016 and Regulation 38 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("CIRP Regulations"), CoC may approve any Resolution Plan in its commercial wisdom. Mr. Kunal Doshi highlighted that the Supreme Court ("SC") has passed an order in the case of Appu Hotels, which touches upon the distribution of the Resolution Plan value, and this may be examined by the legal counsels. This was noted by the Counsels".*

- 8.10 Further, the meeting held on 06.05.2023, it was also decided that “*certain clarifications on the resolutions plan received, will be requested from the RAs on*

*Monday, 08.05.2023, and that the RAs would be requested to send the clarifications by Tuesday, 09.05.2023. It was also agreed that if the clarifications are not received within the time line, the assessment would be done basis the available information, as decided by the CoC members. The clarifications would be sought as an addendum to the Resolution Plan”.*

- 8.11 It is further found that pursuant to this decision, the Resolution Professional sent mail to each of participating RAs on 08.05.2023 seeking clarifications by 09.05.2023, 11.59 PM IST. This clarification pertained to issue of shares, treatment of avoidance transactions proceeds. It is gathered from the records that the RAs filed necessary clarifications by this stipulated time. SEML was also required to clarify, amongst others, whether it *will pay “discounted amount of INR 240 Cr. to the CoC, in case CoC wishes to obtain the deferred portion of INR 240 Cr. upfront. Fully, please clarify whether resolution application is offering a value lower than INR 240 Cr. (i.e. INR 240 Cr. discounted to a lower value), if the option to obtain the value upfront is exercised.* Apart from this, all the Resolution Applicants were asked to clarify on the treatment of Guarantees.
- 8.12 This Bench has asked the RP to place on record these communications, and the same were placed vide affidavit dated 21.08.2023. On perusal of these communications, it is notice that the RP has not enclosed ‘*responses to the clarifications*’ as sent by SEML vide its email dated 10.05.2023, and as only appended the copy of addendum and the email. However, the typed version of the clarification was provided later on by the Counsel of the RP.
- 8.13 We also find that the SEML, TPL, VPAMPL and JPL were also asked to clarify about the treatment of Bank Guarantees in their proposal. On the reading of such clarifications, it emerges that
- a. SEML clarified that –“*the Margin Money of INR 180.49 Crores provided against the BGs will be returned by the relevant issuing bank to the Corporate Debtor on the Transfer Date (upon replacement of Margin Money in accordance with Clause 6.315 of the Plan) and utilized for making payment to the Secured Financial Creditors or in the manner as decided by the CoC*”. It is further stated that “*In*

*order to maintain the going concern status of the Corporate Debtor and secure the continuity of the BGs, the Resolution Applicant shall provide 100% margin money for the relevant issuing banks towards the BGs listed at Item No. 1 Item No 5 of Annexure 3 Relevant BGs") on the Transfer Date for such purpose, the Resolution Applicant shall infuse INR 103.83 Crores ("Margin Money Replacement Amount in the Escrow Account (as a part of Initial Infusion Amount) which shall be utilised to provide such margins towards the Relevant BG". It also clarified by SEML that "except for the Margin Money provided to the issuing banks, to other liability shall befall on or accrue to the Corporate Debtor or the Resolution Applicant towards the issuing banks or the beneficiaries in respect of invocation of the BG. ....Notwithstanding anything to contrary, the benefit relating to the Exclusive Margin Money (as defined in the RFRP) shall be provided to the State Bank of India in accordance with the term of the RFRP.*

- b. TPL clarified that further, clause 11.2.3. already clarifies that "*The residual 75% of the existing margin money in relation to such specified bank guarantees i.e. an amount of INR 49.75 Crores shall form part of the cash balance and shall be unconditionally passed on to secured assenting financial creditors on payment date in the manner set out in clause 7.1.2(2) of part B of this Resolution Plan*". It is further clarified that "*As mentioned in the preamble to clause 11.3.2 the MPPP Margin Money is unconditionally passed on to secured assenting financial creditors on the payment date. Accordingly, Resolution Applicant has proposed to renew replace the bank Guarantee, if required and pay the MPPP Margin Money to AFCs on payment Date. However, we clarify that the Resolution Applicant shall unconditionally pay to the financial creditors the amount equivalent to the underlying margin money for such MPPP Bank Guarantees are not renewed for replaced as provided in clause 11.3.2(b)(ii) of Part B of the Resolution Plan*". It is also confirmed that "*the replacement of bank guarantees would be undertaken in such a manner that the issuing bank's exposure is not left unsecured for any moment. The same has been clarified as claim 11.6 of Part B of the Resolution Plan. Refer to Clause 7 of the addendum*".

- c. JPL clarified that the *“the liability of the existing issuing banks will be fully protected through the continuation of the existing cash margin available for such bank guarantees and, in case of invocation of the bank guarantees prior to such replacement, the existing cash margin can be utilized by the issuing bank for adjusting against the invoked amounts”*.
- d. VPAMPL clarified that *“we shall be replacing the bank guarantees, the amount of INR 50 Crore payable to secured financial creditors for the release of margin money of the bank guarantees shall be payable within 45 days as upfront cash. Independent of the timeline of replacement of the bank guarantee, the RA will make the payment of such amount within 45 days. To avoid an confusion, the Creditors shall have no right to any of the margin money after INR 50 crore is paid. Upon any Bank guarantee being replaced/released, all the liquid/illiquid security if any used for the Bank Guarantee shall belong to RA. Additionally, the exclusive margin money of INR 18.4 crore shall also be payable to the respective lender”*.

8.13.1 From the aforesaid clarifications, we find that all the four RAs had protected the cash margin money pertaining to live bank guarantee amounting to Rs.103.83 Crores and have also committed the refund of amount of exclusive margin money of INR 18.4 crore to erstwhile lenders in terms of RFRP. However, it is gathered from the minutes and various clarifications that the total margin money deposited against outstanding bank guarantee amounts to Rs.180.31 Crores, meaning thereby the cash margin of Rs. 58.08 Crores (based on these numbers) shall stand released. The clarification of JPL is silent on this; VPAMPL has committed Rs.50 Crores, as payment to secured creditors in addition to resolution money, out of this released margin; SEML is contemplating this amount as credit to Corporate Debtor's account to be utilized towards payment of resolution money; and TPL is committing 75% of released margin but not exceeding to 49.75 Crores as payment to secured assenting Financial Creditors. However, the Process Advisor has taken 180.31 as static figure while determining NPV of the payout to financial creditors by each of RAs. We find that TPL and VPAMPL has committed

49.75 crores and Rs.50 Crores additionally out of released cash margin over and above Rs.122.23 Crores, while the effect of proposal made by SEML and JPL translates into Rs.122.23 Crore only. To this extent, we find the Process Advisor placed the incorrect numbers before the CoC for consideration of the plan and voting thereon. Hence, we are of the considered view, that this omission led to consider SEML as RA offering highest upfront cash to Financial Creditors whereas if, this anomaly would not have occurred, TPL could have emerged as RA offering highest upfront cash to Financial Creditors, amongst RAs whose plan were found feasible and viable by the Process Advisor. Accordingly, we are of the considered view that the decision making process was carried out on the basis of incorrect financial data and had propensity to lead to incorrect decision.

- 8.14 We further find from the minutes of the Meeting of CoC, held on 12.05.2023, that a presentation of summary of the proposed payment by RAs to be paid to various stakeholders was made by BDO the process advisor. On perusal of the noting in the minutes, it is noticed that the plan submitted by JPL (Jindal Power Limited), SEML and TPL were found to be feasible and viable after a valuation thereof on the basis of financial ratios of peer companies, and were recommended for consideration of the CoC. It is further noted that the plan of VPAMPL was found wanting on the viability and feasibility aspect on the ground of their financial projections being too aggressive and, insufficiency documentation to demonstrate their ability to infuse the committed fund and their ability to turn around.
- 8.15 We further notice that the minutes of the Meeting of CoC, held on 12.05.2023, records that *“it was pointed out on a plane reading of the resolution plan of SEML, they were proposing to pay INR 1954.89 Cr. from the total resolution amount on the transfer date but according to the terms of the resolution plan, from the total resolution amount, the amount payable to secured financial creditors on the transfer date was INR 1876.33 Cr. No amount was proposed to be paid to unsecured financial creditors”*. From the perusal of the records, we could only infer, in the absence of any

clarification on this aspect, that this difference of Rs. 78.56 Crores pertains to the difference between the amount of cash margin against all the bank guarantees amounting to Rs.180.31 and the amount of cash margin require for replacing existing bank guarantees of Rs.103.83. This further validates our conclusion at para.8.13 above that the amount of the cash margin of Rs. 58.08 Crores (based on these numbers) releasing on replacement of guarantees was not accruing to the Financial Creditors.

- 8.16 We further notice that the minutes of the Meeting of CoC, held on 16.05.2023, that the COC members decided to re-adjust upfront recovery to secured financial creditors after providing the equivalent amount to 'creditors other than financial creditors', as has been offered to them by VPAMPL, so as to ensure a fair and equitable treatment qua these creditors. Accordingly, the CoC decided, *keeping in mind the interest of all stakeholders, in this one-off case, it was decided that an amount equivalent to the highest amount offered to creditors other than financial creditors (on NPV terms) out of all the Resolution Plans, shall be distributed to 'creditors other than financial creditors'. It was also noted that the Resolution Plan submitted by VPAM has proposed an amount of INR 200 crores to be paid to operational creditors in the fourth year from the approval of Resolution Plan by the Hon'ble NCLT. As per provisions of the Code and the regulations framed thereunder, the operational creditors are to paid in priority to payment to any other stakeholder. After detailed deliberations in the CoC, the net present value of the total amount proposed by VPAM to be paid to operational creditors was calculated in accordance with the provisions of the RFRP as INR 144.97 Crore. Accordingly, it was noted that in the present case, the highest value offered to 'creditors other than financial creditors' is INR 144.97 Crore, offered by VPAM. Considering the proposed payments under various Resolutions Plans and in order to be fair and equitable to all stakeholders, additional amounts, over and above what has already been proposed under each of such Resolution Plans for such class of creditors, was decided to be allocated to creditors other than financial creditors, so that an amount of INR 144.97 is uniformly allocated to such class in each one of the Resolution Plans. Accordingly, BDO was requested to present*

*the evaluation on the Quantitative Parameters, in both scenarios i.e. considering the manner of distribution proposed by the Resolution Applicants as well as the manner of distribution as decided by the COC.*

8.17 It is noticed that after this re-adjustment the BDO submitted the final score and proposals each RAs under both scenarios i.e. (i) score based on the original financial proposal, (ii) score based on the redistributed financial as per CoC. On perusal of these scores, we notice that BDO has not assigned any financial value to the 10% equity upside offered by RAs in two cases to financial creditors, free of costs, was not included in the absolute financial numbers for the purpose of determination of their scores. We find that the following scores were placed before CoC for their voting :

Name of RAs/Score	VPAMPL	JPL	TPL	SEML
Score as per original proposal	63.46	69.76	67.29	67.16
Score as per redistributed financial	65.00	73.51	71.13	71.22

8.17.1 We are of the considered view that after taking into account the amounts, which got omitted by the Process Advisor, the above scores would also undergo change. Accordingly, any decision based on incorrect data is bound to be perverse and not fair, notwithstanding, that the COC may have decided exactly what they decided, even if updated financial numbers would have been placed before them.

8.18 The RP has provided the explanation as to how the highest bid amount stated in the minutes dated 19.04.2023, which was undisputedly the bid amount offered by VPAMPL, is an agreement with final upfront cash recorded in the minutes of the meeting dated 16.05.2023. We find that such highest bid amount

is a sum total of upfront payment to financial creditors, upfront to other creditors and NPV of deferred payment to the creditors.

- 8.19 This Bench could not find the rationale for not including the fair market value of upside equity in the financial proposals placed before CoC before the voting, and why the value of upside equity website was not considered as a part of upfront amount while the valuation criteria considered the equity upside offered to the financial creditor within 6 months as upfront cash.
- 8.20 We find that the BDO has considered amount paid towards replacement of BGs as money being offered to Secured Financial Creditors, which is not in conformity with the minutes of meeting dated 06.05.2023, which recorded the deliberations taken place at that meeting as “*The representative of SBI mentioned that all the Bank Guarantees are secured by 100% cash margin. Bank Guarantees do not form part of the claim since the guarantees are not considered exposure on the company because of 100% cash margin available to secure the BGs. While submitting the claim to RP, SBI has duly mentioned this fact in the claim form. In addition, there are a number of judgements and as per which, as long as the liability of BG issuing bank remains, no one can lay it’s claim against the margin money*”. We feel that the amount offered towards replacement of the BG cannot form part of the upfront amount offered to the financial creditor and considered as such in the analysis. Nonetheless, we find that the total Bank Guarantees, required to be replaced to keep the Corporate Debtor is Rs. 103.83 crores, and the margin money against remaining Bank Guarantees is free cash available to the Corporate Debtor, except margin money against Bank Guarantees to the lenders of the associate company of the Corporate Debtor which was to go to such lenders in terms of RFRP.
9. This Bench takes note of legal proposition that the Adjudicating Authority cannot interfere with the commercial wisdom of CoC, however, this bench feels that the decision taken by CoC on the basis of incomplete financial data placed before it for such decision making process by the legal advisor, process advisor and RP, makes such decision making process perverse and amenable to interference by this bench. Though, this bench cannot allow the prayer for

supply of resolution plan of SEML and an opportunity to file objection to these two applicants in IA-2794/2023, this bench consider it appropriate to remit the Resolution Plan of SEML, which is pending for final orders in IA-2794/2023, to the committee of creditors for their re-consideration of all the plans, found feasible and viable by the Process Advisor, in the light of the above observations.

10. With the above directions, the IA-3399/2023 is partly **allowed** and IA-3336/2023 is **dismissed**. In consequence of these orders, the Resolution Plan pending for approval in IA-2794/2023 is **remitted back to CoC** and IA-2794/2023 is **disposed of** accordingly.

**Sd/-**  
**PRABHAT KUMAR**  
**MEMBER (TECHNICAL)**

**Sd/-**  
**KISHORE VEMULAPALLI**  
**MEMBER (JUDICIAL)**

06.10.2023/-