NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI
(APPELLATE JURISDICTION)

Company Appeal (AT) (CH) (Ins) No. 37/2023
(Filed Under Section 61 of the Insolvency and Bankruptcy Code, 2016)

Arising out of the Impugned Order dated 23/10/2023 in I.A. No. 37/2023 in C.P.(IB) No. 184/7/HDB/2019, passed by the 'Adjudicating Authority', (National Company Law Tribunal, Hyderabad Bench, Hyderabad)

In the matter of :

Consortium of Prudent ARC Ltd.
611, Sixth Floor, D Mall, Plot No. A-1,
Netaji Subhash Palace, Pitampura,
New Delhi West Delhi – 110034 …Appellant

Versus

Mr. Ravi Shankar Devarakonda,
Resolution Professional of
M/s Meenakshi Energy Ltd. and Ors.
D. No. 8-2-248/1/7/9 & 10/6
Third Floor -1B, Uma Chambers,
Punjagurra, Hyderabad – 500082. …Respondent No. 1

Committee of Creditors of Meenakshi Energy Limited
Through its Lead Lender,
State Bank of India,
Having its office at Resolution Group, 21st Florr,
Maker Tower 'E', Cuffer Parade, Mumbai – 400005. …Respondent No. 2

Vendanta Limited
Having its Registered Office at:
1st Floor, L-Wing, Unit – 103, Corporate Avenue,
Atul Projects, Chakole Andhari (East)
Mumbai – 400093, Maharashtra. …Respondent No. 3

Present :

For Appellant	:	Mr. Srinath Sridevan, Sr. Advocate For Ms. Deepika Murali, Advcocate
For Respondent No. 1/ RP	:	Mr. P.H. Arvindh Pandian, Sr. Advocate For Mr. Vinod Kumar & Mr. Srinivasan M.D., Advocates
For Respondent No. 2	:	Mr. P.S. Raman, Sr. Advocate For Ms. Surabhi Khattar, Advocate,
For Respondent No. 3	:	Mr. Gopal Jain, Sr. Advocate For Mr. Adithya Reddy & Mr. Diwakar Maheshwari, Advocates

JUDGMENT

[Per: Shreesha Merla, Member (Technical)]

1. Challenge in this Company Appeal (AT) (CH) (Ins) No. 37/2023, is to the Impugned Order dated 23/01/2023, passed by the National Company Law Tribunal, Hyderabad Bench – II, Hyderabad in IA No. 37/2023 in C.P.(IB) No. 184/7/HDB/2019, whereby the 'Adjudicating Authority' has dismissed the 'Application' filed by the 'Appellant', seeking the following reliefs:

> *a) To restrain the Respondents from proceeding with the Challenge Process.*
>
> *b) Direct the Respondents Nos. 1 & 2 to accept the Resolution Plan of the Appellant as submitted on 28/10/2022.*
>
> *c) Restrain the 1st Respondent from considering any of the Resolution Plans submitted after 20/10/2022.*

2. It is submitted by the Learned Counsel for the Appellant that the 'CIRP' of the Corporate Debtor was initiated on 07/11/2019; Form G was issued on 21/01/2020 and the 1st Respondent / 'Resolution Professional' (RP) had prepared the final list of prospective Resolution Applicants on 23/03/2020; IA No. 582/2020 was filed by the RP seeking extension of the timelines which was granted by the 'Adjudicating Authority'; IA No. 1079/2020 was also filed seeking the 2nd extension of the CIRP period by another 60 days which was allowed by the 'Adjudicating Authority'; that the RP had circulated the request for Resolution Plan dated 29/10/2020 and reissued the Form G on 25/01/2021. It is submitted that the final list of prospective Resolution Applicants was drawn up on 08/02/2021 and that the Appellant herein had submitted its plan to the RP on 06/03/2021 i.e. before the completion of the CIRP period which was 08/03/2021. As per Form G which was reissued; the successful Resolution Plan was to be submitted before the 'Adjudicating Authority' for Approval. While so, on 12/03/2021, the RP requested the Appellant to provide certain additional documents and sought some clarifications which was clarified by the Appellant, vide email dated 25/03/2021. This Tribunal on 24/03/2021 directed the 'Adjudicating Authority' to take up IA 120/2021 and dispose of the same on merits and pass a reasoned Order and dismiss the Appeal as withdrawn.

3. It is submitted by the Learned Senior Counsel for the Appellant that on 15/04/2021, the Appellant had submitted a revised offer and intimated the same to the RP. on 24/06/2021, aggrieved by the fact that the RP had extended the timelines / deadlines for all prospective Resolution Applicants to submit improvised plan, the Appellant preferred IA No. 244/2021 which was allowed by the 'Adjudicating Authority', directing the RP to consider only the plans given prior to 08/03/2021 in Appeals – Company Appeal (AT) (CH) (Ins) No. 166/2021 and Company Appeal (AT) (CH) (Ins) No. 174/2021, preferred before this Tribunal by the RP, this Tribunal directed the RP to place only the Resolution Plans submitted by the Appellant and Sindhu Trade Links, before the CoC for its consideration and completion. There was email communication between the Appellant and the RP between 10/11/2021 and 17/11/2021regarding the final plan. The Appellant sought time to submit a final complaint Resolution Plan. While so, PTC terminated the PPA with the Corporate Debtor for supply of 200 MW power to BPDB. IA No. 130/2022 was filed challenging the termination Notice issued by PTC since fresh 'Express of Interest' (EOI) was subsequently issued, the said IAs were withdrawn. It is submitted that as the said PPA was an essential assumption for the final projection of the business plan, the Appellant sought to make a fourth Addendum to the plan.

4. It is submitted that RP filed an IA No. 700/2022 seeking extension in the CIRP period and sought permission to re-run the EOI process by wrongly suppressing the fact that there was already an existent viable plan of the Appellant in place. IA No. 700/2022 was allowed extending the period from 15/07/2022 for a period of 60 days till 12/09/2022 and fresh Form G was issued.

On 29/08/2022, the Appellant had submitted the Resolution Plan and there were three prospective Resolution Applicants namely, Jindal Power Limited, Vedanta Limited and the Appellant herein. On 12/09/2022, the RP filed another Application IA No. 920/2022, seeking extension of the Period of 90 days to complete the CIRP Process which was partly allowed by the 'Adjudicating Authority' granting 72 days time. While so, on 27/12/2022, Vedanta Limited revised that plan by way of addendum contrary to Regulation 39(1A) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations).

5. The Learned Counsel drew our attention to Regulation 39(1A) which reads as follows:

> ***"Regulation 39(1A) specifies***
>
> *"the resolution professional may, if envisaged in the request for resolution plan –*
>
> *(a) allow modification of the resolution plan received under sub-regulation (1), but not more than once; or*
>
> *(b) use a challenge mechanism to enable resolution applicants to improve their plans."***"**

6. The Learned Senior Counsel for the Appellant submitted that for improvements in Resolution Plans from a value maximisation perspective, the Resolution Professional can either allow revision / modification of the Resolution Plans ***'not more than once' or can employ a 'Challenge Mechanism'.*** It is contended that the language implied in the aforesaid

Regulation is crystal clear that the RP can only allow ***one avenue*** of improvement in the financial proposal to the Resolution Applicants either by way of modification or by employing a challenge mechanism. The rule contended in the Regulation is couched in a negative language and is therefore mandatory in nature and cannot be deviated from by the RP or by the 2nd Respondent. Allowing more than one modification in a Resolution plan either by way of revision or the challenge mechanism is contrary to what is prescribed in Regulation 39(1A) and the RP ought to have rejected any process which is not in compliance of the provisions of the Code and the CIRP Regulations. The Learned Senior Counsel vehemently argued that if the word ***'or'*** contained in Regulation 39(1A) is read as ***'and'***, then it would allow the Resolution Applicants to revise and modify their plans several times which would be contrary to the plain language and express legislative intent of the Code. It is submitted that the 'Adjudicating Authority' has failed to appreciate that reading of '***or'*** as ***'and'*** is not to be resorted to, originally, unless some other part of the same statute or the clear intention of it that requires it to be done, is specified. The Learned Senior Counsel placed reliance on the Judgment of the Hon'ble Supreme Court of India in the matter of '***Guru Nanak Dev University Vs. Sanjay Kumar Katwal'*** reported in **[(2009) 1 SCC 610]**in which it has been categorically held that *'the word "or" is disjunctive. No doubt, in some exceptional circumstances, the word "or" has been read as conjunctive as meaning "and", where the context warranted it. But the word* *"or" cannot obviously be read as referring to a conditional alternative, when such condition is not specified'.* Further, the Learned Senior Counsel has also contended that the delay in CIRP Process would only add to the cause and lead to further destruction of the value of the Corporate Debtor. A reading of Sections 30 (2) (f) and 30 (3) of the Code and Regulation 39(2) of the CIRP Regulations suggests that only those Resolution Plans which comply with the requirements of the Code and regulations made therein, have to be submitted to the RP and any Resolution Plan submitted in contravention of Regulation 39(1A) would be noncompliant. As regarding the commercial wisdom of CoC, the Learned Senior Counsel placed reliance on the Judgment of Hon'ble Supreme Court of India in ***'M.K. Rajagopalan Vs. Dr. Periasamy Palani Gounder'***, reported in ***[(2023) SCC Online SC 574],*** it was held that *'the principles underlying the decisions of this Court respecting the commercial wisdom of CoC cannot be over-expanded to brush aside a significant shortcoming in the decision making of CoC when it had not duly taken note of the operation of any provision of law for the time being in force'.*

7. It is also the case of the Appellant that the 'Adjudicating Authority' has not focused on the matters of procedure, though the 'Bankruptcy Law Reforms Committee' at pages 30 and 31 of their Report, issued in November, 2015, clearly recommended that the Adjudicator will focus on ensuring that all parties adhere to the process of the Code. The Adjudicator ought to be very directly involved in the Resolution Process once it is determined that the date is not viable and that the entity or individual is Bankrupt. The Learned Senior Counsel drew our attention to Regulation 39(1A) as discussed in the report of the Insolvency Law Committee, dated 20/05/2022, which is reproduced as herein for ready reference.

> *"(iv) <u>Curbing submission of unsolicited resolution plans and revisions of resolution plans</u>: It has been observed that there are divergent practices regarding the timeline and manner of submission of resolution plans. Although there are stage-wise timelines provided in the regulations, resolution plans are received by the resolution professional after the stipulated deadlines. In some cases, revisions are made to submitted resolution plans in an attempt to outbid other potential resolution applicants. Such practices lead to divergent practices leading to inconsistencies, delays and lack of procedural sanctity. Therefore, the Committee has recommended that a mechanism for reviewing late submissions of plans and unsolicited revisions to plans should be laid down in the regulations. Pursuant to the recommendations of the Committee in this regard, some amendments have already been carried out in the CIRP Regulations."*

8. It is recommended that *'the Committee agreed that the CIRP Regulations may allow the CoC to opt for a Swiss challenge method for considering plans and revisions to plans submitted after the deadline in the RFRP. Through this challenge method, the CoC may consider any unsolicited plans or revisions based on a decided criteria that is based on the commercial viability of the plan. The decision to allow Swiss challenge method and the details thereof should be recorded in the RFRP. Further the CIRP Regulations* *may require the CoC to specify, in the RFFP, the number of revisions, that are permissible by prospective resolution applicants and the timeline for such revisions. 'Revisions', in this respect, would not be permitted to consider any plans or by which any plans or revisions may be submitted and the CoC not be permitted to consider any plans or revisions after such date. Additionally, the Committee noted that the CoC should provide a reasonable time-period in the RFRP for the submission of resolution plans, in order to provide participants with a fair opportunity to submit their plans before the deadline. This may aid in reducing the number of participants who seek to submit their plans after the deadline in the RFRP.'*

9. It is submitted that the CoC has illegally considered the unsolicited revised offer of Vedanta when it is contrary to Clause 9 of the RFRP which prohibits submission of addendum under any circumstances and that the 'Adjudicating Authority' has erred observing that this Clause 9 of RFRP can be looked at only as a norm incorporated to discipline the process of receiving the Resolution Plan. The contents of RFRP are mandatory in nature and do not consider any Resolution Plan received after timelines. The RP and CoC being statutory Institutions are bound to exercise the power within IBC and cannot exercise powers which are not contemplated under the Code. The Learned Senior Counsel concluded that the addendum was unsolicited as it was viable to Regulation 39(1A) (b) of the CIRP Regulations and that the CIRP was erroneously conducted when the CoC had already decided to vote upon the Resolution Plans submitted on 28/10/2022.

10. The Learned Senior Counsel placed reliance on the following Judgments in support of his submission.

i. *Jindal Stainless Ltd. Vs. Shailendra Ajmera,* ***[(2023) SCCOnLine NCLAT 44]***

ii. *Vistra ITCL (India) Ltd Vs. Torrent Investments Pvt. Ltd.& Ors.* ***Company Appeal (AT) (Insolvency) No. 132, 133 & 134 of 2023***

iii. *Uttam Singh Duggal & Co. Ltd. v. United Bank of India,* ***[(2000) 7SCC 120]***

iv. *Guru Nanak Dev University v. Sanjay Kumar Katwal,****[(2009) 1 SCC 610]***

v. *M.K. Rajagopalan v. Dr. Periasamy Palani Gounder,* ***[(2023) SCC OnLine SC 574]***

vi. *Kalinga Allied Industries India Limited v. Committee of Creditors,* ***Company Appeal (AT) (Insolvency) No. 689 of 2021***

11. The Learned Senior Counsel appearing for the 'Respondent No. 1'/ 'RP' of the Corporate Debtor Company submitted that the Order dated 25/10/2021, passed by this 'Tribunal' has no bearing in the present 'Appeal' as the NCLAT Order was passed in the factual background that the RP and CoC had accepted the Resolution Plan submitted by 'Respondent No.3', after the expiry of '330 days' period and therefore had directed the 'Resolution Plan' to consider the Resolution Plans submitted prior to the expiry of '330 days' period. The

'Adjudicating Authority', vide Order dated 29/11/2022 in IA No. 1351 & 1375/2022 has extended the CIRP to 23/01/2023 and hence it is evident that the Resolution Plan submitted by R3 ('Jindal') could also be considered. It is submitted that the CoC on 08/07/2022, voted upon the Resolution Plan submitted by the Appellant and after considering the feasibility and viability rejected the same by majority on 94.96%. There was no breach of confidentiality of the offer and the Appellant had not laid any evidence to establish his case.

12. It is submitted that the CoC had taken note of the addendums submitted by Vedanta on 27/12/2022 and has not unilaterally integrated R3's addendum dated 27/12/2022 with the Resolution Plan already submitted. The RP and the CoC in order to give a fair opportunity to all the Resolution Applicants decided in its 43rd Meeting held on 29/12/2022 to run the Challenge Process. The Resolution Applicants were all informed about the Challenge Process in accordance with the Provisions of Clause 1.17 of Part I of the RFRP dated 10/08/2022. While so, Prudent and Jindal sent emails dated 03/01/2023 requesting the RP to reschedule the Challenge Process which was to commence to 03/01/2023. Jindal had requested for an extension of one day, one Prudent had requested for an extension of one week. The RP after getting Approval of the CoC and in order to ensure maximum participation of the Resolution Applicants rescheduled the Challenge Process to 04/01/2023. The Appellant had opportunity to participate in the Challenge Process without prejudice but for reasons best known to it, opted to set out of the Challenge Process. As per Clause 2 of the Challenge Process and the email dated 01/012023, the CoC would consider the last submitted Resolution Plan of the participant who did not take part in the Challenge Process. As the Appellant did not participate in the Challenge Process, the CoC considered the last Resolution Plan submitted on 28/10/2022 and did not approve the same.

13. It is submitted by the Learned Senior Counsel that running the Challenge process, the value of the Corporate Debtor had increased as the value of the bid have also exponentially increased. As R3 had bid a revised amount of Rs. 1440 crores and Jindal bid a revised amount of Rs. 1344 Crores.

14. It is submitted that there is no violation of Regulation 39(1A) of the CIRP Regulations as the restriction incorporated in Regulation 39(1A) does not fetter the modifications being made more than once. The Learned Counsel placed reliance on the Judgment of this 'Tribunal' in the matter of ***'Vistra ITCL (India) Limited Vs. Torrent Investments Private Limited & Ors.'*** reported in ***[(2023) SCC OnLine NCLAT 110]*** in Para Nos. 33, 38, 44, 47, 49 – 53 and 60, it is observed that *'there can be no fetters on the power of committee of creditors to cancel or modify ay negotiation with the resolution applicant including a challenge process, but it is the wisdom of the committee of creditors to take a decision in this regard; in view of Section 30(4) of the Code, which requires the committee of creditors to vote on a plan 'after considering its feasibility and viability' implies that after receipt of the plan,* *subsequent to the challenge mechanism, the committee of creditors is not obliged to put the plan to vote and Regulation 39(1A) of the CIRP Regulations does not prohibit committee of creditors from negotiating with resolution applicants or asking resolution applicants to further increase the plan value; and that even after completion of challenge mechanism under Regulation 39(1A)(b) of the CIRP Regulations, the committee of creditors retains its jurisdiction to negotiate with one or other resolution applicants, or to annul the resolution process and embark on to re-issue RFRP'.*

15. It is submitted that the only Caveator to the aforenoted principle is that the same has to be carried out during the CIRP period, the same was done in the present case and therefore there is no violation of any CIRP Regulations or what was recommended by the 'Bankruptcy Law Reforms Committee' in its Report dated 20/05/2022. It is submitted that the CoC is empowered to determine the feasibility, viability and commercial aspects of the Resolution Plan and ensure that all the stakeholders are treated fairly in the process.

16. The Learned Senior Counsel appearing for the 'Respondent No. 2'/ the CoC also placed reliance on the principle laid down by this bench in ***'Vistra ITCL vs. Torrent Investments Private Limited and Ors.'*** reported in ***[(2023) SCC OnLine NCLAT 110],*** in support of his submission that Regulation 30(1A) of the CIRP Regulations placed no fetter on the power of the CoC to allow modifications of the Resolution Plan and / or use a Challenge mechanism. It is submitted that the decision to undertake the Challenge

Process among all the Resolution Applicants was taken by the CoC by a majority of 99.18% and the CoC in it is commercial wisdom asked for modification in the Resolution Plan. It is submitted that the Appellant had wrongly relied on the ***'Jindal Stainless Ltd. Vs. Shailendra Ajmera'*** case reported in ***[(2023) SCC OnLine NCLAT 44],*** as in that matter one of the Resolution Applicants was admitted to revise the Resolution Plan, but the CoC in their Commercial wisdom decided not to consider any plan after the Resolution Process. In the present case, RFRP provides vast powers to the CoC. Clause 1.17 of the RFRP empowers the CoC to initiate the terms of the Resolution Plans that the Resolution Applicants including but not limited to determining the mechanism of such negotiation and also request the Resolution Applicants to resubmit their revised proposals on basis of their discussions and negotiation. RFRP was not issued post facto to empower the CoC to run the Challenge Process. RFRP was well in place and CoC had acted in accordance with the same. The RFRP was issued on 10/08/2022 and the decision to undertake the Challenge Process was taken up by the CoC on 29/12/2022. The Challenge Process was decided only for value maximisation, keeping in view, the best interest of all the Stakeholders.

17. It is submitted by the Learned Senior Counsel that the Appellant had deliberately concealed the email dated 03/01/2023, whereby Vizag Minerals which holds only 20% majority control of the Consortium, requested for withdrawal of the Challenge Process. The Appellant was also given an opportunity to make suitable modifications vide email dated 21/12/2022. A prospective Resolution Applicant has no vested interest and no role envisaged under the Code to dictate how the CIRP should be running. It is submitted that Regulation 39(1A) is directory and not mandatory as regarding the Order of this Bench on 25/10/2021. The Learned Senior Counsel submitted that the observations of this Tribunal in Order dated 25/10/2021 was only regarding plans being considered after the expiry of CIRP, which is not the present case. The Learned Senior Counsel placed reliance on the Judgments of the Hon'ble Apex Court in the matter of ***'J.Jayalalitha Vs. Union of India & Anr.'*** reported in **[(1999) 5 SCC 138]**in which it is held as under:

> *9. ....The dictionary meaning of the word 'or' is "a particle used to connect words, phrases, or classes representing alternatives". The word 'or', which is a conjunction, is normally used for the purpose of joining alternatives and also to join rephrasing of the same thing but at times to mean 'and' also. Alternatives need not always be mutually exclusive. Moreover, the word 'or' does notstand in isolation and, therefore, it will not be proper to ascribe to it the meaning which is not consistent with the context of Section 3. It is a matter of common knowledge that the word 'or' is at times used to join terms when either one or the other or both are indicated..."*

18. It is submitted by the Learned Senior Counsel that is word ***'or'*** occurring in Regulation 39 (1A) cannot be given its literal interpretation to mean ***'one of the two'*** as the same would not be in line with the value maximization objective of the code.

19. The Learned Senior Counsel Mr. Gopal Jain appearing for R3 ('Vedanta Limited') submitted that Regulation 39(1A) of the CIRP Regulation, does not limit the powers of CoC to take measures in the interest of value maximisation and placed reliance on the Judgment of this Tribunal in the matter of ***'Vistra ITCL (India) Ltd. Vs. Torrent Investments Pvt. Ltd & Ors'*** (Supra) and drew our attention to Company Appeal (AT) (Ins) No. 132, 133 & 134 of 2023 in support of his submission that the decision to conduct the swiss challenge was approved by the CoC by a majority of 99.18% during the 43rd Meeting held on 29/12/2012; that the Appellant has maliciously sought to mislead this Hon'ble Appellate Tribunal by arguing that the minutes of the 43rd Meeting of the CoC were not shared with the Appellant despite the communication issued by the Appellant to the Resolution Professional in April 2023; that the Appellant's request is belated and was raised much after the Impugned Order was passed on 23/01/223; that the Appellant's request is belated and was raised much after the Impugned Order was passed on 23/01/2023.

20. It is submitted that the decision of CoC to conduct the Challenge Process is supported by Clause 1.17, 1.18 and 7.2 of the Request for Resolution Plan ("RFRP"); Clause 1.17 of RFRP empowers the CoC to "negotiate" (if required) terms of the Resolution Plan(s) with the Qualified Applicant(s) and other Applicants. Pursuant to this, the Committee of Creditors shall be required to vote on the Resolution Plan(s) presented to it; Further the said clause specifically empowers the CoC to 'undertake simultaneous negotiations with various Qualified Applicants and/or adopt any other process of negotiation as they may deem appropriate, for maximization of value to the stakeholders in a time bound manner (including, without limitation, open auction, swiss challenge etc.)' and therefore, the submission of the Appellant that CoC did not have the power to conduct the Challenge mechanism is not only contrary to objects of Insolvency and Bankruptcy Code, 2016 ("IBC") and the CIRP Regulations but is also contrary to the express provisions contained in the RFRP.

21. It is submitted that the Appellant has sought to mislead this Hon'ble Appellate Tribunal by arguing that the decision to conduct challenge process was taken during the time when CoC was voting upon the resolution plans and, therefore, such process is bad in law. In this regard, it is submitted that CoC is well within its powers under the RFRP and IBC to conduct swiss challenge mechanism even at a stage when the resolution plans are placed for voting and that it is evident from the 44th Meeting of the CoC held on 04/01/2023, the relevant portion of which is extracted at page 12-14 of the Reply filed by the Resolution Professional, that the voting window commenced on 06/01/2023 i.e. post the challenge process conducted on 04/01/2023 and such voting window remained open upto 16/01/2023. After closing of the voting lines, the CoC has approved the Resolution Plan of Respondent No. 3 by majority of 94.96%.

22. It is submitted that the Appellant has no right to Challenge the process adjudicated by CoC when it was voluntarily abstained from the Challenge

Process and that the Appellant had no vested right to have its plan approved and therefore, the Learned Senior Counsel sought for dismissal of the Appeal.

<u>Appraisal:</u>

23. It is the main case of the Appellant that the Regulation 39(1A) of the CIRP Regulations was inserted in the Regulation with an objective to curtail submission of unsolicited Resolution Plans and number of revisions which delay the process. It is strenuously contended that the swiss challenge method was referred to ***'as one of objections which can be objected by the CoC'.*** For better understanding of the case, the said Regulation is reproduced as hereunder:

> *"the resolution professional may, if envisaged in the request for resolution plan - (a) allow modification of the resolution plan received under sub-regulation (1), but not more than once; or (b) use a challenge mechanism to enable resolution applicants to improve their plans."*

24. It is the case of the Appellant that this Regulation is mandatory in nature and that the RP ought not to have permitted the modification in the Resolution Plan more than once either by way of revision or by way of challenge mechanism and was duty bound to reject any process which is not complaint with the express provisions of the CIRP Regulations. If the word ***'or'*** contained in Regulation 39 (1A) is read as ***'and',*** it would allow the Resolution Applicants to revise their plans several times which is not the scope and intent of the Code.

25. At this juncture, it is apt to place reliance on Paragraph 20, 21, 30 & 31 of the discussion paper of Insolvency and 'Bankruptcy Board of India', dated 27/08/2021 which deals with the number of revisions that could be allowed to our Resolution Applications while submitting the Resolution Plan.

> *"**20**. Regulation 36B of the CIRP Regulations contain provision regarding request for resolution plans. It provides for a minimum of 30 days for prospective resolution applicants to submit the plans and allows for revision/ modification of the request for resolution plan (RFRP) subject to the 30- day timeline but there is no cap on the number of revisions that may be allowed in a resolution plan. These have the effect of delaying resolution. There are also cases where the resolution applicants revise the resolution plans multiple times, with or without the consent of the CoC, leading to delays in completing the process.*
>
> ***21**. The CoC, at many times keeps on entertaining these plans for value maximization. It, however, creates uncertainty about the process and rather places an incentive on the PRAs to offer lesser at the initial stages. If sufficient competition is not achieved in the process, such practice may even lead to less than optimum value for the corporate debtor. Invariably, the delay in the process adds to the costs leads to further destruction of the value of the CD.*
>
> ***Proposed Amendment***
>
> ***30.** Considering the issues in RFRP and to provide for option for Swiss challenge to the CoC, it is proposed to amend the regulations to provide for:*
>
> > *(i) The RP and CoC to place the RFRP with due consideration of the market conditions.*

(ii) The CoC shall decide on allowing for revision of the RFRP, number of such revisions and timelines for the same on ex-ante basis. The number of revisions shall not exceed 2.

(iii) CoC shall decide the timelines within which it will allow for negotiation and changes to the submitted resolution plans

(iv) CoC and RP shall not entertain unsolicited revision to resolution plans.

(v) The CoC shall decide whether it considers appropriate to opt for a swiss challenge method and if the same is decided by the CoC, then it should be provided in RFRP on ex-ante basis.

(vi) The CoC to decide basis for evaluation, timelimit within which the challenge process shall be concluded and the minimum threshold for improvement over the resolution plan on ex-ante basis.

Economic Analysis

31. The proposed amendment would help by allowing additional options to the CoC for resolution of a firm while under CIRP. The cap on number of extensions in RFRP would ensure that the sacrosanct timelines envisaged under the Code is practicable. Further, such an amendment would help instilling faith amongst stakeholders in the corporate insolvency resolution process and prevent potential misuse in absence of any specifications. This would also ensure that the CIRP remains timebound and value obtained is a competitive one and the maximum achievable given the market condition."

(Emphasis Supplied)

26. The insertion of Regulation 39(1A) was especially that a objection to maximise the value of the assets and to reduce any delay in timelines by several resubmissions or addendums which the Resolution Applicants seek to submit.

27. The NCLAT, Principal Bench, New Delhi, in Company Appeal (AT) (Ins) No. 132, 133 & 134 of 2023 in the matter of ***'Vistra ITCL (India) Ltd. Vs. Torrent Private Ltd. and Ors.'*** (Supra) addressed to the question whether Regulation 39(1A) contains an implied prohibition on the jurisdiction of the CoC to enter into any further negotiation with the Resolution Applicant or to further ask the Resolution Applicant to increase its Resolution plan value. This Tribunal in Para Nos. 36 and 37 of the aforenoted observed as follows:

> *"36. We have noted in the foregoing paragraphs, the relevant clauses of RFRP on the strength of which, the learned Counsel for the Appellant submits that the right of CoC to negotiate with Resolution Applicants, even if Challenge Mechanism is intact and Regulation 39(1A) does not contain any fetter on the right of the CoC to proceed further after Challenge Mechanism. Clause 3.17.17 for ready reference is extracted below:*
>
> > *"3.17.17 The Resolution Plan(s) that are in compliance with the provisions of the !BC shall be considered by the Coe in accordance with Regulations 39(3), 39(3A) and 39(3B) of the CIRP Regulations. The Administrator and the CoC {along with any person authorised by the CoC in this regard) reserve the right to negotiate with the Resolution Applicant(s) and/or the Resolution Bidder(s) prior to such plan(s)*

being put to vote for approval by the CoC in order to achieve a successful resolution of RCAP with the objective of maximising the value of the Corporate Debtor for all stakeholders."

37. The above clause will indicate that after a Resolution Plans are received in accordance with Regulation 39(1A), the right of the CoC to negotiate with Resolution Applicants, after receipt of the Plan and/ or before the Plan is put to vote, is clearly reserved. Clause 4.2.4 again reserves the right of CoC to annul the Resolution Plan process and call for submission of new Resolution Plan from any person/ Resolution Applicantto make modification to the Plan and to submit a revised Resolution Plan or revised Resolution Bid or Combined Resolution Plan. Clause 4.2.4 (c), (e), (h) and (i) clearly envisage such consequence. The submission of the Respondent that after completion of Challenge Mechanism under Regulation 39(1A), the power of CoC is circumscribed and Coc is only obliged to vote on the Plans received consequent to Challenge Mechanism is clearly unsustainable, in view of the above explicit clauses of RFRP. Clause 4.2.9, further makes it clear that CoC is not obliged to continue the Submission Process with the Resolution Applicant, even if the best technical capabilities or highest financial plan received, the CoC reserves the right to engage in discussion with any Resolution Applicant. Clause 4.2.9, sub-clause (a), clearly indicate the said conclusion."

28. In this Judgment of NCLAT, Principal Bench is also referred to Jindal Stainless Ltd. which is relied upon by the Learned Senior Counsel for the Appellant. In ***'Jindal Stainless Limited Vs. Mrs. Shailendra Ajmera, Resolution Professional of Mittal Corp Ltd. & Ors.'*** reported in ***Company Appeal (AT) (Ins) No. 1058 of 2022*** in Paragraph No. 20, the question of the power of the CoC to cancel or modify any negotiation with the Resolution Applicant ***'including the Challenge Process'*** has been decided. It is relevant to reproduce the said paragraph as hereunder:

> *"**20.** There can be no fetter on the power of the CoC to cancel or modify any negotiation with the Resolution Applicant including a Challenge Process but it is the wisdom of the CoC to take a decision in that regard. CoC, in the facts of the present case, did not take any decision to disregard the Challenge Process completed in 13th CoC meeting held on 15.07.2022 and it decided to vote on the plan which voting process has begun."*

29. It is significant to mention that the decision to co-run the challenge process was taken by the CoC to maximise the value of the Corporate Debtor and the record shows that the Respondent No. 3 submitted revised bid of Rs. 1440 Crores, an increase from the initial bid of Rs. 650 Cores submitted on 28/10/2022 and similarly Jindal Power submitted a revised bid of Rs. 1344 Crores which is an increased from initial bid of Rs. 1269 Crores submitted on 28/10/2022. It is evident that there is a significant increase in the amounts submitted by the Resolution Applicants. We find force in the submission of the Learned Counsel for the CoC that it was only after the running of the Challenge Process that the CoC was offered with a Resolution Plan where the NPV was more than the Liquidation value. It is pertinent to mention that Respondent No. 3 had issued addendum dated 27/12/2022 but the CoC in its commercial wisdom had decided to allow all Resolution Applicants to submit revised plans through the Challenge Process when the Appellant had an opportunity to participate in the Challenge Process without prejudice and when there was an extension also granted, the Appellant had chosen to stay out of the Challenge Process. It is also relevant to note that Clause 2 of the Challenge Process as well as the email dated 01/01/2023 clearly mentions that for those who do not participate in the Challenge Process, '*the CoC will consider their last submitted Resolution Plan'*. It is not in dispute that the Appellant did not participate in the Challenge Process, but the CoC had considered the last Resolution Plan submitted by the Appellant on 28/10/2022. Clause 1.17 of the RFRP vest in the CoC, the right to negotiate the terms of the Resolution Plan with the Resolution Applicants after receipt of the plan on or before the plan is put to vote. Clause 7.2 vest in the CoC, the power to annul the Resolution Plan process and reject all Resolution plans if considered unsatisfactory and seek fresh submission of Resolution Plans. Keeping in view the aforenoted facts, this Tribunal is of the earnest view that the ratio of NCLAT in the matter of ***'Vistra ITCL (India) Ltd. Vs. Torrent Investments Private Limited and Ors.'***(Supra) is squarely applicable to the facts of this case, specifically, the conclusion arrived at in Para 60 of the Judgment which reads as follows:

> *"60. In view of the foregoing discussions, we, thus conclude that even after completion of Challenge Mechanism under Regulation 39(1A)(b), the CoC retain its jurisdiction to negotiate with one or other Resolution Applicants, or to annul the Resolution Process and embark on to re-issue RFRP. Regulation 39(1A) cannot be read as a*

fetter on the powers of the CoC to discuss and deliberate and take further steps of negotiations with the Resolution Applicants, which resolutions are received after completion of Challenge Mechanism."

30. In the instant Case, keeping in view the facts of the matter that the decision to conduct the Swiss challenge was approved by the CoC by majority of 99.18% during the 43rd Meeting held on 29/12/2022 that the decision of CoC to conduct the Challenge Process is supported by Causes 1.17, 1.18 and 7.2 of the RFRP that the voting window commenced on 06/01/2023 vest the Challenge Process conducted on 04/01/2023 and such voting window remained open upto 16/01/2023 and only after closing the voting lines, the CoC has approved the Resolution Plan of Respondent No. 3 by majority of 94.96%, does not find any violation of Regulation 39 (1A) of the CIRP Regulations or any other provisions of the Code.

31. For all the aforegoing reasons, we do not see any substantial reasons to interfere in the well considered Order of the Adjudicating Authority. Hence this Company Appeal (AT) (CH) (Ins) No. 37 of 2023 fails and is accordingly 'dismissed'. No Order as to Costs. Connected Pending Interlocutory Applications, if any, are 'closed'.

[Justice M. Venugopal]
Member (Judicial)

[Shreesha Merla]
Member (Technical)

SPR/NG