IN THE NATIONAL COMPANY LAW TRIBUNAL,
COURT II, MUMBAI BENCH

INTERLOCUTORY APPLICATION NO. 702 OF 2024

INTERLOCUTORY APPLICATION NO. 2787 OF 2023

IN

COMPANY PETITION (IB) NO. 2742/MB/2019

Application u/s 60(5) of the Insolvency and Bankruptcy Code, 2016.

In the matter of I.A. No. 2787 of 2023:

Mr. Pravin R. Navandar, Resolution Professional of the VOVL Ltd.

...Applicant

V/s.

1. **BPRL Ventures BV**
2. **Committee of Creditors of VOVL Ltd.**

.... Respondents

In the matter of I.A. No. 702 of 2024:

PRIO S.A. **...Applicant**

V/s.

1. **Mr. Pravin R. Navandar, Resolution Professional of the VOVL Ltd.**
2. **BPRL Ventures BV**
3. **Committee of Creditors of VOVL Ltd.**

.... Respondents

IN THE NATIONAL COMPANY LAW TRIBUNAL, COURT-II,
MUMBAI BENCH

I.A. No. 702 OF 2024
&
I.A. NO. 2787 OF 2023
IN
CP(IB) NO. 2742(MB)/2019

In the matter of

S.Z. Deshmukh & Co. …**Operational Creditor**

v/s.

VOVL Limited & Ors …**Corporate Debtor**

Order pronounced on 26.06. 2024.

Coram:

Shri. Kuldip Kumar Kareer : **Member Judicial.**

Shri. Anil Raj Chellan : **Member Technical.**

Appearances (in I.A. No. 2787/2023)

For the Applicant/RP: Sr. Adv. Gaurav Joshi a/w Pratiksha Agarwal.

For the Respondent: i) Counsel Ms. Anindita Roy Chaudhary a/w Vivek Shetty a/w Nishant Upadhyay a/w K.C. Jacob a/w Saurab Batra a/w Trisha Ray Chaudhari and Adv. Akilesh Menezes appeared for the BPRL Venture BV.

ii) Sr. Adv. Chetan Kapadia a/w Madhav Kanoria, Anush Mathur, Jeta Shree and Vivek Sharma appeared for the CoC.

Appearances (in I.A. No. 702/2024)

For the Applicant : Adv. Nishi B., Mihir D. and Vishal P.

For the Respondent: i) Adv. Vishnu Shriram a/w Srishti Kapoor appeared for the Resolution Professional/Respondent No.01.

ii) Adv. Vivek Shetty a/w Nishant Upadhyay appeared for Respondent No.02.

iii) Adv. Anush Mathkar a/w Surabhi Khattar appeared for Respondent No.03.

ORDER

Per: Kuldip Kumar Kareer, Member Judicial

1. By way of this order, we proposed to decide IA No. 2787/2023 filed by the Applicant/RP seeking approval of the offer received from BPRL Ventures BV (Respondent No. 1) for purchase of interest held by Videocon Oil Ventures Limited (VOVL/Corporate Debtor) in oil and gas assets in Brazil as well as IA No. 702/2024 filed by the Applicant/PRIO S.A raising objections against the relief sought in IA No. 2787/2023 by the RP as common questions of fact and law are involved in both the IAs.

Facts of the case as per the Applicant in I.A. No. 2787/2023:

2. I.A. No. 2787 of 2023 is an application filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "the Code") by the Applicant/RP seeking approval of the offer received from BPRL

Ventures BV i.e. Respondent No.01, for purchase of interest held by Videocon Oil Ventures Limited (VOVL/Corporate Debtor) in oil and gas assets in Brazil and for undertaking all the necessary, ancillary and consequent steps in relation to the Corporate Insolvency Resolution Process (**'CIRP'**) of the Corporate Debtor.

3. It is submitted by the RP that the Corporate Debtor is undergoing corporate insolvency resolution process ("**CIRP**") under the Insolvency and Bankruptcy Code, 2016 ("**IBC**") pursuant to the order dated 8 November 2019 read with the corrigendum order dated 25 November 2019 passed by this Tribunal in the captioned company petition pursuant to an application filed by S. Z. Deshmukh & Co under Section 9 of the IBC ("**Admission Order**"). Vide the Admission Order, this Tribunal appointed Mr. Rakesh R. Rathi (Registration No.: IBBI/IPA-001/IP-P00696/2017-18/11211) as the Interim Resolution Professional ("**IRP**") of the Company. Subsequently, pursuant to the order dated 20 January 2020 passed by this Tribunal in the application being MA 23/2020 in the captioned company petition, the Applicant was appointed as the Resolution Professional (RP) of the Corporate Debtor ("**Appointment Order**").

4. The Corporate Debtor *inter alia* holds through its step-down subsidiary, Videocon Energy Brazil Limited ("**VEBL**"), quotas (shares) in IBV Brasilio Petroleo Limitada, (IBV) which, in turn, holds participating interests ("**PI**") in oil and gas blocks in the Federative Republic of Brazil ("**Brazil**", and such assets are referred to as **"Brazilian Assets").**

5. IBV is a company incorporated under the laws of Brazil. IBV is a joint venture between: (a) Videocon Energy Brazil Limited ("**VEBL**"), a step-down subsidiary of the Corporate Debtor incorporated in British Virgin Islands in which Videocon Hydrocarbon Holdings Limited ("**VHHL**") holds 100% of the equity shareholding; and (b) BPRL Ventures BV ("**BPRL**") group company of Bharat Petroleum Corporation Limited, which is a public sector undertaking in India. BPRL is incorporated in the Netherlands. IBV's PI is primarily held in two oil and gas assets - Campos basin (BM-C-30) ("**VEBL Campos PI**") and Sergipe basin (BM-Seal-11) ("**VEBL Sergipe PI**").

6. The *inter-se* rights and obligations of BPRL and VEBL vis-à-vis IBV is governed in terms of the Quota holders Agreement dated 12 September 2008 as amended from time to time ("**QHA**"). In view of the terms of the QHA, the transfer of quotas of VEBL ("**VEBL Quotas**") or the transfer of VEBL's proportionate share of the PI held by IBV in the Brazilian Assets would trigger the requirement to issue a notice of a period of 30 (thirty) business days to BPRL, to exercise its pre-emptive "Right of First Refusal" ("**ROFR**") to purchase VEBL Quotas on the same terms as offered by the proposed purchasers of VEBL Quotas and/or VEBL's proportionate share of PIs held by IBV in Brazilian Assets. Further, under the terms of the QHA, any transfer of VEBL Quotas in contravention of the BPRL's ROFR under QHA are null and void.

7. In other words, if any resolution plan/ offer is received in the CIRP of the Corporate Debtor which contemplates transfer of VEBL's quotas (including by way of transfer of VEBL's proportionate share of PI in IBV), the Committee of

Creditors ("**CoC**") would first be required to issue a notice giving BPRL the opportunity to exercise ROFR to purchase the VEBL Quotas by matching the offer from the prospective resolution applicants ("**PRA**")/ bidders. Only in the event BPRL does not exercise ROFR, can the CoC proceed to approve the resolution plan/ offer of any other PRA/ bidder.

8. As per the provisions of IBC, the Applicant issued an invitation for expression of interest ("**IEOI**") and Form G dated 13 March 2020 (amended and reissued from time to time as set out hereinbelow) inviting prospective resolution applicants to submit a resolution plan for the Corporate Debtor. Pursuant to the issuance of IEOI and Form-G, several prospective resolution applicants submitted their expressions of interest to submit resolution plans for the Corporate Debtor. Further, in view of the ROFR available to BPRL, the Request for Resolution Plan dated October 10, 2020 ("**RFRP**") issued in the CIRP specifically stipulated that the consideration of any resolution plan would be subject to preemptive contractual rights of counterparties.

9. During the course of the CIRP of the Corporate Debtor, the Applicant received 4 (four) resolution plans/offers which contemplated the transfer of quotas of VEBL held by IBV ("**VEBL Quotas**") and/or transfer of VEBL's proportionate share of PIs held through IBV in the oil and gas assets in Brazil. Offers were received from the following parties:
   a) Eneva SA;
   b) PetroRio SA;
   c) Twin Star Overseas Limited (group company of Vedanta Limited); and

d) RKG Fund I.

Two of the offers, i.e., offers submitted by Eneva SA ("**Eneva**") and PetroRio SA ("**PetroRio**") state that the offer would be subject to waiver of existing pre-emptive right/ ROFR under the existing contractual documents.

10. In view thereof, pursuant to the 37th meeting of the CoC, the members of the CoC ("**Members**") after considering the resolution plans/ offers received, after extensive discussions and deliberations, approved a resolution to authorise, instruct and direct the Applicant *inter-alia* to issue notice to BPRL giving effect to its ROFR under the QHA and giving opportunity to purchase VEBL's quotas in IBV by matching the offers received from Eneva and PetroRio.

11. Consequently, on the basis of the authorization provided by the CoC, the Applicant issued a notice dated 13 April 2023 ("**BPRL ROFR Notice**") to BPRL to give effect to its ROFR on the basis of cumulative offers submitted by : (a) Eneva for the acquisition of VEBL's proportionate share of PI held by IBV in Sergipe basin; and (b) PetroRio for the acquisition of VEBL's proportionate share of PI held by IBV in Campos basin, which are cumulatively offering the highest commercial value to the stakeholders of the Corporate Debtor. In the said BPRL ROFR Notice, the Applicant called upon BPRL to communicate its decision on whether it proposes to exercise its ROFR within a period of 30 (thirty) business days from the date of issuance of BPRL ROFR Notice.

12. In response, BPRL addressed a letter dated 17 May 2023, as amended and restated by the letter dated 18 May 2023, in terms of which it agreed to exercise

its ROFR and acquire the quotas of VEBL in IBV by matching the offer made by Eneva and PetroRio.

13. The Applicant convened the 39th meeting of the CoC on 20 May 2023 wherein the Members of the CoC were apprised of BPRL's offer in the letter dated 18 May 2023 and the terms and conditions set out by BPRL to acquire VEBL Quotas. The Members deliberated on the terms of the offer made by BPRL in the letter dated 18 May 2023. Subsequently, basis discussions in the 39th meeting of the CoC, the Applicant, acting under the instructions of the members of the CoC addressed an e-mail dated 26 May 2023, providing certain comments/clarifications that had been raised by the secured financial creditors of the Corporate Debtor (comprising 99.96% of the CoC by voting share) on the letter dated 18 May 2023. In response, BPRL addressed a revised letter dated 26 May 2023 setting out the revised and final offer in terms of which BPRL offered to acquire VEBL Quotas by matching the offer made by Eneva and PetroRio ("**BPRL Offer**").

14. Subsequently, on 2 June 2023, the Applicant convened the 40th meeting of the CoC, wherein the Members were apprised of the BPRL Offer and the terms and conditions set out by BPRL to acquire VEBL Quotas. The Members deliberated on the terms of the offer made by BPRL in the BPRL Offer. Further, the Members took note that : (a) the substantive assets of the Corporate Debtor are the PIs held in the Brazilian Assets through VEBL; and (b) that there are no other substantive assets left in the Corporate Debtor pursuant to the transfer of

PIs of the Corporate Debtor by way of sale of VEBL Quotas. Accordingly, the following resolutions were, inter alia, put to vote for e-voting:

(a) Consummate the transaction with BPRL for the sale/transfer of the quotas of VEBL in IBV in favour of BPRL as per the terms and conditions set out in the BPRL Offer;

(b) Liquidate residual assets of the Corporate Debtor (save and except its PIs held in Brazilian Assets which stood transferred pursuant to the transfer of VEBL Quotas to BPRL) ("**Residual Assets**") in terms of Section 33 of the IBC; and

(c) Constitute a monitoring committee consisting of SBI, IDBI Bank Limited, EXIM Bank and the applicant to take necessary steps for consummation of the transaction with BPRL following the receipt of approval of this Tribunal.

15. On 23 June 2023, the e-voting has concluded and each of the abovementioned resolutions have received 99.96% approval of the CoC by voting share in exercise of commercial wisdom. In terms of the BPRL Offer, one of the conditions imposed by BPRL for conclusion of the transaction is that the acceptance of BPRL's offer by the CoC (pursuant to the exercise of ROFR) shall be approved by this Tribunal.

16. In view of the above, the Applicant has filed the captioned application seeking approval of this Tribunal to conclude the CIRP of the Corporate Debtor in terms of the BPRL Offer, as approved by the CoC, and to consummate the transaction with BPRL by transferring the VEBL Quotas to BPRL in terms of

the BPRL Offer and for undertaking all necessary, ancillary and consequent steps in relation to the CIRP of the Corporate Debtor.

17. **Reply filed by Respondent No.01 in I.A. No. 2787 of 2023:** The Respondent No.01 is not contesting the application, but is willing to place on record. The reply filed by Respondent No.01 on affidavit is briefly stated below:

i. The Quota Holders Agreement ('QHA') is akin to shareholders agreement in India. QHA is admittedly subsisting between BPRL and VEBL setting out the terms and conditions for operation and management of IBV as a joint venture company. The QHA is governed as per the laws of Brazil. Further, the QHA, in section 6.8 categorically states that any transfer of quotas done in contravention of applicable legal requirements shall be null and void.

ii. BPRL is an entity incorporated in Netherlands and is a foreign step-down subsidiary of Bharat Petroleum Corporation Limited. BPRL India and VIL had incorporated a JV entity in Brazil i.e. IBV Brasil Petroleo Limitada ("IBV"). The present quota-holders of IBV are (i) BPRL and (ii) VEBL. IBV, in turn, holds Participating Interest ('PI') in Sergipe Basin (BM-SEAL-11), Campos Basin (BM-C-30) and BM-POT-16 (presently under relinquishment).

iii. The Oil and Gas Assets in Brazil are regulated through the Joint Operating Agreements executed between IBV and other stakeholders at the concession level. Whenever funds are required, the operators under the JOAs send fund requisition to all the respective parties to the JOA ("Cash Calls"). Pursuant to such demand, the quota-holders i.e. BPRL

and VEBL were required to pay 50% of the cash call obligation each to ensure that there is no default on part of IBV. While BPRL was regularly paying its share of the cash calls, VEBL on the other hand, was defaulting on its obligation to pay its share of Cash Call Obligations since December, 2018. The ultimate source of funds for VEBL was VOVL- which was under financial distress. Therefore, if VOVL could not make payments and no one came to the rescue, IBV would be in default under the JOA resulting in the entire PI being forfeited to a 3rd party.

iv. VOVL had admitted its inability to remit the funds for payment of Cash Calls and requested BPRL to fund the share of VEBL under the QHA. Therefore, the PI of IBV in the O&G assets has been subsisting solely due to the prompt and timely payments of VEBL's share of cash call obligations by BPRL.

v. The CoC has exercised its commercial wisdom and approved the proposed sale to BPRL as the BPRL's offer is equitable and leads to value maximisation.

vi. There is no contravention of Regulation 39(1B) of the CIRP Regulations in the present case. Regulation 39(1B) of the CIRP Regulations stipulates that the CoC shall not consider any "resolution plan" from a person who does not appear in the final list of PRAs. Admittedly, the BPRL offer is not a resolution plan under the IBC for VOVL and therefore, the procedural stipulation under Regulation 39(1B) is not applicable and does not prohibit the CoC from considering and approving the BPRL Offer which has been submitted by BPRL in exercise of the Right of First

Refusal ('ROFR') available under the Quota holders Agreement and approved by the CoC in exercise of its commercial wisdom.

vii. PRIO has participated in the resolution process and submitted its offer being fully aware of and having agreed to and accepted that consideration of its offer would be subject to ROFR available to BPRL.

viii. The pre-existing and pre-emptive rights of BPRL under the Quota holders Agreement cannot be given a go-by and have to be given effect to by the Resolution Professional. It is settled position of law that the factum of the Corporate Debtor undergoing CIRP does not entitle a resolution professional or the corporate debtor to unilaterally amend, modify or disregard the contractual rights of the counterparties of the corporate debtor. Therefore, the Respondent No.01/RP is required to honour the contractual rights of BPRL under the Quota Holders Agreement in the instant case.

18. **Reply of the Respondent No.02/CoC in I.A. No. 2787/2023:**

i. The Respondent No.02 was given a legal advice from a foreign legal counsel that ROFR under the QHA would get triggered in the event of plans/bids submitted by the Resolution Applicants/Bidders, as all such plans/bids included direct or indirect transfer of quotas. Accordingly, in the 37th CoC meeting, it was decided to put forth resolutions for authorizing the RP to issue ROFR notice to BPRL under the QHA, which is a contract in existence prior to the commencement of CIRP of the Corporate Debtor, and if not accepted by BPRL, then to the respective counterparties under the relevant joint operating agreement for Sergipe.

ii. Therefore, it was concluded that owing to the pre-emptive right of first refusal being available to BPRL under the QHA, in the event BPRL exercised the ROFR and agreed to match the terms of the offer made by any of the Resolution Applicants/Bidders from whom resolution plans/offers were received and on the basis of which the CoC decides to issue ROFR, the CoC would be required to consummate the transaction with BPRL and would be precluded from proceeding to approve any of the resolution plans/offer.

iii. Thereafter, pursuant to the authorization from the CoC members, the RP issued a notice to BPRL on April 13, 2023 setting out the terms of the offers submitted by Eneva and PetroRio for acquisition of VEBL's proportionate share of PI held through IBV in the Sergipe and Campos basins respectively. Vide Letter dated May 17 2023, BPRL informed the RP about its willingness to acquire VEBL's quota in IBV and made an offer. After the discussions and deliberations with the CoC, a final offer letter was shared by BPRL on May 26, 2023. The offer acceptance letter states that the consummation of the proposed transaction *inter-alia* requires the approval of CoC and of the Court(s)/Tribunal(s), as may be applicable.

iv. The Applicant further convened 40th CoC meeting on June 02, 2023 to discuss and deliberate on the terms of the offer acceptance letter and to vote on the same. Upon the conclusion of the voting by CoC, the Applicant informed the CoC that by 99.96% voting share, the CoC has approved the offer by BPRL.

v. In light of the above, it is humbly submitted by Respondent No.02 that in view of the existing contractual arrangements which, inter-alia, govern VEBL, the offer acceptance letter of BPRL may be approved.

19. **Facts of the case in I.A. No. 702 of 2024**

i. It is submitted by the Applicant/PRIO that on 8 November 2019, this Tribunal admitted Company Petition No. 2742 of 2019 and commenced corporate insolvency resolution process (**CIRP**) against the Corporate Debtor under the Insolvency and Bankruptcy Code, 2016 (**Code**).

ii. Thereafter, the RP (**Respondent No. 1**) appointed in the CIRP for VOVL issued invitation for expression of interest. Pursuant to the same, on 7 May 2020, PRIO submitted its expression of interest (**EoI**) and on 22 September 2020, the RP issued the Information Memorandum (**IM**) which noted that the RP is seeking offers for the sale of VOVL's participating interest (**PI**) in oil and gas assets situated in Brazil, namely, Wahoo Field in Campos Basin. IBV's PI is 35.71%, out of which VOVL's PI was 17.85%. The remaining PI in the Wahoo Field is held by PRIO (i.e. 64.3%).

iii. Pursuant to the IM and the request for resolution plan dated 10 October 2020 (**RFRP**), PRIO submitted its offer for acquisition of the entire PI of VOVL, in the Wahoo Field on 12 November 2021 for an amount of USD 32.5 million. This was the first offer.

iv. Thereafter, PRIO featured in the final list of prospective resolution applicants (**PRAs**) published under Regulation 36A (12) of the IBBI

(Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (**CIRP Regulations**) by the RP on 16 December 2021 (**Final List**). It is pertinent to note that another government public sector undertaking company (**PSU**), namely ONGC Videsh Limited had also participated in the process and its name was included in the Final List. However, BPRL Ventures BV (**Respondent No. 2 / BPRL**) was admittedly not a part of the Final List and, therefore, it cannot claim that it has special equities in its favour on account of it being a PSU.

v. Subsequently, PRIO submitted two more offers for the PI on the basis of discussions and negotiations with the committee of creditors (**Respondent No. 3/ CoC**). Second Offer dated 31 August 2022 was made by the Applicant to purchase 17.85% of the PI for an amount of USD 20 million. On 2nd September 2022, the second offer was examined by the CoC during its 29th CoC meeting and the same underwent modifications pursuant to negotiations with the CoC. Thereafter, the second offer was examined in the 8th Core CoC Meeting dated 4 October 2022 and the Core CoC made a counter proposal to PRIO, for sale of 15.71% of the PI for an amount of USD 20 million, which was accepted by PRIO, as demonstrated by its email dated 8 October 2022. Third Offer dated 21 November 2022 to purchase 17.85% of the PI for an amount of USD 20 million. Post submission of its third offer, on 10 February 2023, PRIO wrote to the RP providing clarifications to its third offer pursuant to the discussions held with the CoC during the 36th CoC meeting dated 30 January 2023. Thereafter, no response was received by the RP to the aforesaid email and the RP unilaterally and arbitrarily terminated all

communications with PRIO and thereby, arbitrarily ousted PRIO from the CIRP.

vi. Subsequently, the RP filed an application seeking this Tribunal's approval for sale of the PI in favour of BPRL. Pertinently, BPRL's offer is solely premised on a right of first refusal (**ROFR**) exercised by BPRL under a Quota holders' agreement dated 12 September 2008 (**QHA**), which contract is governed by Brazilian law. Aggrieved by the arbitrary ouster of PRIO from the CIRP, I.A. No. 3363 of 2023 came to be filed before this Tribunal, seeking to intervene in the RP's Application. PRIO's IA was dismissed *vide* order dated 9 October 2023.

vii. Thereafter, PRIO filed Company Appeal No. 1650 of 2023 challenging the NCLT's order dated 9 October 2023 before the Hon'ble NCLAT. Upon hearing all the parties, on 24 January 2024, the Hon'ble NCLAT was pleased to dispose of the appeal while directing PRIO to place its objections to the RP's Application before this Tribunal. Further, the Hon'ble NCLAT has directed this Tribunal to hear such objections without being influenced by its order dated 9 October 2023. The relevant paragraphs are reproduced hereinbelow:

"*10. Apart from above, when we look into the facts and sequence of events, the Appellant has submitted offer after receipt of EOI and RFRP for Resolution Plan. The Appellant also revised its offer and had negotiation with CoC and RP, which is a fact established from the record. The RP and CoC interacted with the Appellant in respect of its offer and it appears that on the basis of the offer submitted by the Appellant Right of First Refusal was exercised by Respondent No.2 and consequently offer was received from Respondent No.2, which find favour by the*

CoC. The Appellant, who participated in the process cannot be said to be a person having no locus to object the Application filed by the RP for approval of offer submitted by Respondent No.2.

12. In the facts of the present case and sequence of events, it cannot be said that the Appellant has no locus to file Intervention Application, in an Application, which was filed by the RP for approval of offer of Respondent No.2. The natural consequence of filing of the IA by RP was that offer of the Appellant was not acceptable and CoC approved the offer of Respondent No.2 and consequently, approval was sought from the Adjudicating Authority. The Appellant, who had participated in the process has every right to raise question, which arise from CIRP of the Corporate Debtor. We, thus, are of the view that finding of the Adjudicating Authority that the Appellant has no locus, cannot be sustained.

17. We having permitted the Appellant to file objection / affidavit to IA No.2787 of 2023, we make it clear that observations made in the impugned order on the merits, be not treated as final expression of opinion and the Adjudicating Authority shall consider and decide the issue afresh, after hearing both the parties in accordance with law.

viii. Accordingly, the instant objections IA has been filed by PRIO before this Tribunal.

20. **Reply filed by Respondent No.01 in I.A. No. 702/2024:** The Resolution Professional of the Corporate Debtor has filed its reply on record by way of an

Affidavit dated 25th February, 2024. The grounds of objections of the Respondent No.01/RP are briefly covered hereinbelow:

a. There is no contravention of Regulation 39(1B) of the CIRP Regulations in the present case. Regulation 39(1B) of the CIRP Regulations stipulates that the CoC shall not consider any "resolution plan" from a person who does not appear in the final list of PRAs. Admittedly, the BPRL offer is not a resolution plan under the IBC for VOVL and, therefore, the procedural stipulation under Regulation 39(1B) is not applicable and does not prohibit the CoC from considering and approving the BPRL Offer which has been submitted by BPRL in exercise of the Right of First Refusal ('ROFR') available under the Quota holders Agreement and approved by the CoC in exercise of its commercial wisdom.

b. PRIO has participated in the resolution process and submitted its offer being fully aware of and having agreed to and accepted that consideration of its offer would be subject to ROFR available to BPRL.

c. The pre-existing and pre-emptive rights of BPRL under the Quota holders Agreement cannot be given a go-by and have to be given effect to by the Resolution Professional. It is settled position of law that the factum of the Corporate Debtor undergoing CIRP does not entitle a resolution professional or the corporate debtor to unilaterally amend, modify or disregard the contractual rights of the counterparties of the

corporate debtor. Therefore, the Respondent No.01/RP is required to honour the contractual rights of BPRL under the Quota Holders Agreement in the instant case.

21. **Reply of the Respondent No.02 i.e. BPRL Ventures BV in I.A. No. 702/2024:**

i. It is submitted by Respondent No. 2 that the transaction as contemplated and placed before this Bench with the approval of the Respondent No.03/CoC is in accordance with the laws of the land giving effect to pre-existing contractual right of the Respondent No.02 i.e. the answering respondent.

ii. The present applicant i.e. PRIO has no vested right. The Hon'ble NCLAT has neither accorded any 'vested right' on the Applicant, nor has PRIO been accorded the status of PRA. Therefore, the question of rejecting the RP's application does not arise as the Hon'ble NCLAT has only opined on the locus standi of the Applicant and has expressly clarified that it has not expressed any opinion on the merits of the matter.

iii. PRIO's offer even for PI triggers the ROFR under the Quota Holders Agreement. Even though PRIO's offer was for the PI of the Wahoo Field, yet it would have still triggered the ROFR. PRIO is conveniently omitting from its application its own acknowledgment that to consummate its offer, a demerger of IBV would have been required. The demerger would have necessarily entailed a transfer of VEBL's quotas held in IBV and that would have triggered a ROFR. It should also be noted that under the Quota Holders Agreement, the definition of "Transfer" is wide enough

to encapsulate even the sale of PI as used in the context of Clause 6.4. since it means the *"sale of any of the Quotas or any economic interest therein in any manner..."* under Clause 1.1 of the Quota Holders Agreement.

iv. PRIO's contention that the Quota Holders Agreement should be overridden by Section 238 of the Code is misplaced. The residuary jurisdiction of this Tribunal cannot be invoked if the termination of a contract is based on grounds unrelated to the insolvency of Corporate Debtor.

v. BPRL's exercise of its ROFR leads to value maximisation for the lenders of the Corporate Debtor and protects and preserves the value of assets held by IBV and ensures continuity of IBV as going concern. Further, the proposed sale to BPRL is equitable and in consonance with the IM, RFRP and Quota Holders Agreement, and achieves the objective of value maximisation.

22. **Reply of the Respondent No.03 in I.A. No. 702/2024:** The Respondent No.03 i.e. the Committee of Creditors ('CoC') of the Corporate Debtor has objected to the present application of the Applicant by placing its reply on affidavit dated 15th February, 2024. The contentions/objections of the Respondent No.03/CoC are as under:

i. The exercise of a contractual ROFR is in accordance with the Quota Holders Agreement. In fact, the Applicant was well aware of existence of ROFR throughout the process, as the details of the Quota Holders Agreement and the contractual rights of the counter-parties were duly disclosed to all the participants including PRIO and the Applicant had

willingly submitted to the said process. The provisions of the Code read with the rules and regulations laid thereunder, including the CIRP Regulations, nowhere bar the CoC from honouring the contractual obligations of a corporate debtor in exercise of its commercial wisdom.

ii. Offers submitted by PRIO clearly show that the same were contingent upon the exercise of ROFR by BPRL. PRIO was fully aware that implementation of its offer was subject to the ROFR right of BPRL and hence, put a specific condition that VEBL shall seek the consent of BPRL for consummating the transaction. In its third offer, PRIO modified the conditions replacing VEBL with VOVL. The reason why PRIO provided for the condition to seek BPRL's consent was that the only manner in which its offer, if approved, could be consummated was by performing a demerger of IBV and any such demerger would trigger the ROFR of BPRL. Thus, PRIO's offer for the PI would in any event have triggered the ROFR due to the presence of "demerger" related provisions in its offers.

iii. The offer submitted by BPRL was approved as it was a contractual right available to the Respondent No.02 and was binding on VEBL. It was imperative for Respondent No.03 to ensure that the contractual obligations of VEBL are honoured so that there are no challenges to the resolution plan to be approved by the Respondent No.03 in future especially in view of the long drawn CIRP proceedings of Corporate Debtor. Further, it is imperative to note that the BPRL Offer Approval Application has not been filed u/s 30(6) of the Code.

iv. The contention of the Applicant that the Quota Holders Agreement has no applicability to the present case as the Applicant's offer was for purchase of PI and not quotas, is baseless and made without any application of mind. The Applicant is very well aware that the sale of PI would lead to indirect transfer of quotas held by VEBL in IBV, *inter-alia,* by way of demerger of IBV, which again triggers the ROFR under the Quota Holders Agreement.

v. It has been wrongly claimed by the Applicant that CoC has contravened Section 25(2)(h) and Section 29 of the Code and Regulations 36B(1), 36B(6) or 39 of the CIRP Regulations. The main contention of the Applicant appears to be that since BPRL was not a part of the final list of PRAs, its offer could not have been approved. In this regard, it is submitted that BPRL's role came at the stage when after receipt of offers/plans from interested resolution applicants, ROFR right of BPRL was triggered. This is not a case where CoC or RP is seeking to transact with BPRL which has entered the fray as a resolution applicant at a delayed stage.

vi. There is no question of IBC having an over-riding effect u/s 238 over the Quota-Holders Agreement, especially when the terms of QHA are not onerous to the interest of Corporate Debtor or the Financial Creditors. CoC has honoured the contractual rights of counterparties, which is also ultimately aimed at value maximisation of Corporate Debtor. It is duly submitted that IBC does not override or rewrite the existing contractual rights. There is no power in the RP/CoC or even in the SRA to unilaterally modify or terminate existing contracts. A resolution plan may

deal with the pre-existing claims against the Corporate Debtor but cannot modify its contracts or take any action which is contrary to existing contracts.

FINDINGS:-

23. We have heard the Counsels for the Applicant/PRIO and the Respondents.

24. During the course of arguments, the Ld. Sr. counsel for the applicant/PRIO has argued that exercise of ROFR during CIRP is inconsistent with the provisions of the Code as well as the CIRP Regulations. He has further contended that the Code and the CIRP Regulations mandate a specific process to be followed for conducting the CIRP of a corporate debtor. This process, which is envisaged under the Code, read with the CIRP Regulations with respect to a resolution plan, is to ensure value maximisation of the assets of the corporate debtor. However, while ensuring value maximisation, the RP and CoC are duty bound to conduct the process in a fair/ transparent manner and specifically as per the provisions of the Code.

25. According to the Ld. Counsel for the Applicant/PRIO, in the current scenario, instead of following the provisions of the Code and the CIRP Regulations, the RP and the CoC have acted upon a purported contractual ROFR to the detriment of the CIRP. Acting upon and allowing the exercise of such a purported contractual ROFR results in a pre-determined party being handed over the asset(s) of the corporate debtor which is *dehors* the provisions of the Code and the CIRP Regulations), subject to only the

satisfaction of private contractual requirements governing the said ROFR. Under the pretext of maximization of value of assets and commercial wisdom, the RP and the CoC cannot be permitted to take any decision, which is in contravention of the Code and CIRP Regulations. Ld. Counsel for the applicant has further argued that CoC's discretion cannot be exercised in a manner inconsistent with the Code and Regulations thereto. While the CoC can take decisions pertaining to the CIRP of the Corporate Debtor under its commercial wisdom, it is a settled position of law that the commercial wisdom must be in congruence with the statutory requirements of the Code and the CIRP Regulations. In this context, the Ld. Counsel for the applicant has referred to ***Jindal Power Limited v. Dhiren Shantilal Shah, 2024 SCC OnLine NCLAT 46*** *whereby it was* held that while the Code and the CIRP Regulations aim at maximization of value for a corporate debtor, the specific provisions provided therein cannot be given a go by. Further, any plan / offer submitted by an applicant whose name does not feature in the final list of PRAs cannot be entertained as it would delay and derail the CIRP. Therefore, even for value maximization, it is impermissible for the RP and the CoC to travel beyond the contours of the Code. Besides, the Code contemplates resolution of a corporate debtor by parties who participated in the CIRP and not by way of offers from third parties, who did not participate in the CIRP. In this context, according to the Ld. Counsel for PRIO, under Regulation 36B(1), the RFRP could have only been issued to PRAs who featured in the Final List. Further, Regulation 39(IB) prohibits the CoC from considering any such offer/ plan from a person who does not feature in the Final List. Pertinently, the Final List comprised of 14 PRAs including PRIO and did

not include BPRL. Admittedly, BPRL has not submitted a resolution plan for the Corporate Debtor and the purported sale of VOVL's PI by way of the ROFR has been conducted *de hors* the mechanism prescribed by the Code and the CIRP Regulations. Ld. Counsel for PRIO has further submitted that it is settled law that when a statute prescribes the manner of doing a certain act, the prescribed manner must mandatorily be followed. Therefore, sale of an asset or the whole asset pool *de hors* the Code and the CIRP Regulations to honour a so- called "contractual ROFR" is in the teeth of the Code read with the regulations. In support of his contentions, ld. Counsel for the Applicant/PRIO has relied upon ***Union of India v. Mahendra Singh, 2022 SCC OnLine SC 909*** whereby it has been held that it is a well-settled salutary principle that if a statue provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner.

26. Ld. Counsel for PRIO has further argued that undisputedly, BPRL never participated in the CIRP of the Corporate Debtor and consequently did not undergo the statutory rigours imposed by the Code read with the CIRP Regulations. BPRL also played no active role in the CIRP of VOVL and had not submitted any offer/resolution plan pursuant to the RFRP. BPRL was required to participate in the CIRP and submit a resolution plan compliant with the mandatory provisions of the Code as well as the CIRP Regulations. Had BPRL submitted a resolution plan/ offer, it would have undergone the same statutory rigours as the other PRAs, such as submission of EoI including an indemnity, undertaking and an affidavit certifying its eligibility as per the provisions of the Code, including Section 29A. However, there is

nothing to suggest that BPRL has been subject to the same standard of accountability and eligibility as PRIO, whose offer has admittedly been merely used for price discovery. According to the Ld. Counsel for the Applicant/PRIO, If the RP/ CoC are allowed to conduct the CIRP in the manner, as has been sought to be done, then it would lead to scenarios wherein applicants who are otherwise ineligible to submit a resolution plan for a corporate debtor (such as BPRL or promoters of any corporate debtor) will indirectly be allowed to purchase the only viable asset of the corporate debtor *dehors* the provisions of the Code. This blatantly militates against the mandate of the Code.

27. The Ld. Counsel for PRIO has further contended that it is not that any pre-existing contract would be altered, but merely that such pre-existing contractual rights cannot be enforced during CIRP. Given that the purported ROFR falls foul of the Code read with the CIRP Regulations, the same cannot be given effect to in the manner sought in the present case. Further, since the Code is a self-contained one and the processes mandated in the CIRP Regulations are mandatory, PRIO could not have been sidelined on account of BPRL's purported ROFR since the same runs counter to the Code as well as the CIRP Regulations.

28. According to the Ld. Counsel for PRIO, the RP and the CoC are bound by the Code and the CIRP Regulations and any departure from the Code by seeking enforcement of the purported ROFR during CIRP is prohibited in view of the overriding effect of Section 238 of the Code. If a contract or its enforcement during the CIRP is inconsistent with the provisions of the Code,

such contract would be overridden by Section 238. In support of his contentions, the Ld. Counsel for the Applicant has relied upon ***Gujarat Urja Vikas Nigam Limited v. Amit Gupta, (2021) 7 SCC 209*** whereby it was held that IBC would override another laws including an instrument having effect by virtue of any such law and the NCLT's jurisdiction could be invoked because the termination PPA was sought solely on the ground that the Corporate Debtor has become subject to become Insolvency Resolution under the IBC.

29. Ld. Counsel for the Applicant/PRIO has further argued that a foreign contract, the enforcement of which is in contravention of the provisions of an Indian statute cannot be enforced by a court in India. Given that the Code has a specific process for resolution process/sale of assets, there can be no question of enforceability of ROFR being in consistent with the Code and the CIRP Regulations. In support of his contentions, Ld. Counsel for the Applicant/PRIO has relied upon ***Taprogge Gesellchafafit MBH v. IAEC India, 1987 SCC OnLine Bom 345*** whereby it has been held that it is a general principle of the conflict of laws that the courts of a country will not apply any foreign rule if and in so far as its application would lead to results contrary to the fundamental principles of public policy of the lex fori. It was further held that in this very case that a contract made in a foreign country cannot be enforced in India if it contravene the provisions of Indian statute or fundamental principles of jurisdiction.

30. Ld. Counsel for PRIO has further argued that even otherwise the contractual ROFR and exercise thereof affects the level playing field which is central to

the fair and transparent resolution process envisaged under the Code and has a chilling effect on the CIRP. The Code read with the CIRP Regulations seeks to maintain a level playing field amongst the PRAs while balancing the interests of all stakeholders in the CIRP. Any deviation from the CIRP Regulations, meant to favour one party to the detriment of other PRAs would render the intent of the Code redundant. In the current scenario, the contractual ROFR and its exercise during the CIRP allows a non-participating third party to steal a march over legitimate participants who have been subject to the rigours contemplated under the Code and CIRP Regulations. This is directly in contravention to the object of the Code and the CIRP Regulations as it defeats the objective of maintaining a level playing field for all bidders and allows a third party to enforce its private arrangements. The very existence of a contractual ROFR in a CIRP hits at the core of value maximization due to the inherent advantage the ROFR holder has. The ROFR holder can use the CIRP as a price discovery tool to match the highest offer without undergoing the same scrutiny or competitive pressures. This leads to the CIRP becoming skewed in favour of the ROFR holder while undermining the level playing field intended by the Code. Therefore, any exercise of ROFR during the CIRP to the impairment of other PRA's cannot be permitted. In this regard, the Ld. Counsel for the Applicant/PRIO has relied upon ***Amritvani Exim Private Limited v. Ajanta Offset and Packaging Limited, IA 1528/ND/2022 in CP No. IB – 1526/ND/2019 (NCLT Delhi)*** whereby it was held that if the successful Resolution Applicant never underwent the rigors of compliance before the CoC by submitting the Expression of Interest with the other prospective

Resolution Applicants and the resolution plan submitted after expiry of 330 days of CIRP in the guise of maximization of realization cannot be held to be valid and the illegal exercise of power by the Resolution Professional in conducting CIRP cannot be treated as an exercise of power for maximization of value under commercial wisdom. Ld. Counsel for the Applicant/PRIO has further relied upon ***In re Mr. Grocer, Inc., 77 B.R. 349 (1987) (United States Bankruptcy Court)*** whereby it was held that rights of first refusal granted to a landlord in a lease provision are not enforceable by virtue of provisions of S. 365 (f) (1) of the Bankruptcy Code against a trusty or debtor in possession seeking to assume and assign a lease.

31. Ld. Counsel for PRIO has further argued that regardless of whether PRIO's offer mentioned the purported ROFR, there can be no estoppel against the law, i.e., the provisions of the Code and regulations thereunder. The provisions of the Code and CIRP Regulations make it amply clear that no such exercise of a ROFR is permitted during a CIRP. Further, by merely referring to the ROFR in its offer, PRIO did not forgo its rights to contest any part of the process which is in violation of the Code or the CIRP Regulations. In this regard, the Ld. Counsel for PRIO has relied upon ***Tata Chemicals Limited v. Commissioner of Customs, (2015) 11 SCC 628*** @ whereby it was held that participating in a process shall not estop a person from objecting to the process merely because no objection was raised during such participation since there cannot be any estoppel against the provisions of law. The Hon'ble Supreme Court further held that when a statute prescribes the manner in which a certain act is to be carried out and the prescribed manner is not

followed, such acts shall have no existence in the eyes of law. On this very point, the Ld. Counsel has further relied upon ***Krishna Rai v. Banaras Hindu University, (2022) 8 SCC 713*** whereby it was held that principle of estoppel cannot override the law. It was further held that manual duly approved by the executive counsel will prevail over any such principle of estoppel or acquiescence.

32. Ld. Counsel for PRIO has further contended that PRIO as a PRA submitted its offer pursuant to the RFRP and underwent the rigors under the Code and the CIRP Regulations. During this process, including during the negotiations with the RP and the CoC, it was never disclosed that offers being submitted by PRIO, and the other PRAs were mere price discovery tools to give effect to a purported ROFR clause. The RFRP as the name suggests, is the principal and fundamental document which determines the nuances in which the CIRP of a corporate debtor would be conducted. Accordingly, the RFRP ought to *inter alia*, include the methodology in which the bids are to be invited, the manner of opening a bid, potential challenge processes between the prospective resolution applicants, Regulation 39(1A)(b) of the CIRP Regulations mandates that the RP may, if envisaged under the RFRP, use a challenge mechanism to enable resolution applicants to improve their plans. However, in the current scenario, the RFRP did not include any information on exercise of a ROFR or a challenge process. Further, even assuming that ROFR is similar to Swiss Challenge mechanism and aids in value maximization, the same ought to have been included in the RFRP. In this context, reliance has been placed on ***Ravi Development v. Shree Krishna***

Pratishtan and Ors. (2009) 7 SCC 462 whereby it has been observed that even for a Swiss Challenge process to be adopted or for any bidder to exercise its pre-emptive right, such process has to be included in the bid documents and all parties have to participate in the process. Ld. Counsel for the PRIO has further referred to the Insolvency Law Committee Report dated 20 May 2022, which also recognizes that a Swiss challenge may be permitted during a CIRP, however it is only if the same is included in the RFRP. The relevant portion is reproduced as follows:

> *"2.45. 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****."*

33. Therefore, according to the Ld. Counsel for PRIO in the absence of any such specific stipulation in the RFRP, the RP and the CoC could not have issued the ROFR notice to BPRL, after using PRIO's offer as a price discovery tool. This goes against the very basis of the CIRP being conducted in a fair and transparent manner. Even assuming that the ROFR was applicable during a CIRP, it is a settled position of law that a holder of a right of pre-emption ought to participate in the sale process from the word go and cannot be permitted to exercise its right by stealing a march at the end of the process. In this regard, he has submitted that even if the pre-existing ROFR could be allowed to be exercised, it could only be if BPRL had participated in the CIRP

of VOVL and had undergone the same rigors as the rest of the PRAs. In this regard, reliance has been placed on ***Tej Singh v. Gobind Singh, 1880 SCC OnLine All 123*** whereby it was held by the High Court of Allahabad that in order to give effect to the right of pre-emption of shareholder, it is necessary for such a shareholder also to participate and make a bid in a manner similar to the stranger who has placed a bid. Therefore, BPRL cannot steal a march over stakeholders such as PRIO who have participated in the CIRP for over 2 years, by merely matching the price submitted by PRIO.

34. Therefore, in view of the aforesaid, it is submitted by the Ld. Counsel for PRIO that the exercise of the ROFR is entirely *de hors* the mandatory provisions of the Code and the CIRP Regulations and cannot be permitted and, therefore, the sale in favour of BPRL cannot be approved at all.

35. On the other hand, the Ld. Counsel for the RP has argued that application filed by PRIO is nothing but an attempt to challenge the decision taken by the CoC in exercise of its commercial decision to approve the offer of BPRL over PRIO's offer by packaging it as a challenge to the process followed for resolution. According to the Ld. Counsel for the RP, PRIO's submission cannot be accepted for the following reasons:-

(a) BRPL has submitted its offer pursuant to exercise of a pre-existing and pre-emptive right of first refusal ("**ROFR**") and, therefore, there was no requirement on the part of BPRL to submit an expression of interest to form part of the final list of prospective resolution applicants;

(b) PRIO has itself consciously recognized BPRL's overriding ROFR and in fact expressly stipulated as precondition to acceptance of its own offer that the Corporate Debtor/ RP must obtain waiver of ROFR from BPRL; and

(c) Admittedly, PRIO is itself not a resolution applicant and has not submitted a resolution plan.

36. According to the Ld. Counsel for the RP, BPRL, being a joint venture partner of the Corporate Debtor's overseas step-down subsidiary – Videocon Energy Brasil Limited ("**VEBL**") enjoyed a ROFR to ensure that any offer to sell the interest held by VEBL in the oil and gas assets in Brazil must first be offered to BPRL since the very inception of the joint venture. This is an admitted fact. It was made categorically clear in the information memorandum as well as the request for resolution plan that the consideration of any offer for VEBL's the oil and gas assets in Brazil would be subject to BPRL's ROFR. Despite the CoC and RP running a process for sale of the Corporate Debtor as a going concern for nearly 4 years, no viable resolution plans were received. However, pursuant to receipt of offers from PRIO and one Eneva S.A for the interest in the Sergipe oil field, the CoC in exercise of its commercial wisdom directed the RP to issue a notice to BPRL so that the transaction could be consummated either with BPRL if the ROFR is exercised or with PRIO and Eneva S.A. in the event BPRL foregoes its ROFR. Pursuant to BPRL exercising its ROFR by submitting the BPRL Offer, the CoC, in its commercial wisdom, approved the BPRL Offer which it considered to be more viable and feasible.

37. Ld. Counsel for the RP has further argued that PRIO having participated in the CIRP being fully aware of BPRL's pre-emptive ROFR and having subjected its own offer to the waiver of the ROFR by BPRL, PRIO's challenge to the CoC's commercial decision cannot be permitted, particularly when the regulations and provisions of the IBC, which PRIO alleges has been contravened, are not at all applicable to the present CIRP

38. Ld. Counsel for the RP has contended that acceptance and approval of BPRL's Offer by CoC is in exercise of commercial wisdom cannot be questioned. He has further pointed out that BPRL exercised its ROFR vide letter dated 26.05.2023 and submitted its offer to acquire the VEBL Quotas by matching the offer made by PRIO and the other bidders and at the 40th CoC meeting on 02.06.2023, a resolution to approve the BPRL Offer and to consummate the transaction with BPRL for the sale/transfer of the VEBL Quotas to BPRL in terms thereof was deliberated and the same was approved by 99.96% voting share by the CoC in exercise of its commercial wisdom. According to the ld. Counsel for RP that the CoC, in its commercial wisdom, deemed it beneficial to approve an offer for the quotas of IBV as proposed by BPRL, against the proportionate share of PIs in IBV as proposed by PRIO and the bidder for the Sergipe basin. This is because the offer of PRIO, which is for the proportionate PIs in IBV, provided for demerger of IBV which would have been subject to regulatory compliances. Against this, the offer of BPRL is for the quotas/ shares of IBV held by VEBL which is more viable, does not involve a merger and would not be subject to regulatory compliances.

39. The ld. Counsel for the RP has argued that the contention of PRIO that the Exercise of ROFR is inconsistent with the provisions of the IBC and the CIRP Regulations is wholly erroneous as the offer by BPRL is not a resolution plan but a transaction for transfer of VEBL Quotas to BPRL pursuant to exercise of ROFR by BPRL, which has been approved by the CoC in its commercial wisdom. It is for this reason that the offer submitted by PRIO, specifically states that the implementation of the offer for purchase of VEBL's proportionate PI in the Campos Basin/ Wahoo Field) would require a demerger of IBV, thereby triggering ROFR available to BPRL. The fact that the ROFR would be triggered in the event of a demerger is also admitted by Prio to be the correct position under Brazilian Law as set out at paragraph 24 of the Affidavit of Mr. Rafael Baptista Balleroni, which has been sought to be relied upon by Prio. According to the Ld. Counsel for the RP, in the peculiar facts and circumstances of the CIRP of the Corporate Debtor, the issuance of the ROFR notice to BPRL and approval of the BPRL Offer by the CoC in exercise of their commercial wisdom is the most viable option for resolution of the insolvency and outstanding dues of and maximisation of value for the stakeholders of the Corporate Debtor.

40. Ld. Counsel for the RP has further argued that PRIO's reliance on Section 238 of the IBC is wholly misplaced. The overriding effect under Section 238 is only applicable when there is inconsistency with the provisions of an instrument in question with the provisions of the IBC. Equally, reliance of the judgment of the Hon'ble Supreme Court in ***Gujarat Urja Vikas Nigam Limited vs. Amit Gupta (2021) 7 SCC 209*** is also misplaced. According to Ld. Counsel

for RP, in *Gujarat Urja*, the Hon'ble Supreme Court invoked Section 238 of the IBC since the contract in question contained an *ipso facto* termination clause on account of which the party was seeking to terminate the sole power purchase agreement with the corporate debtor. The Hon'ble Supreme Court observed that if this clause was permitted to be exercised, the sole contract, which ensured the business, would stand terminated thereby vitiating the going concern status of the corporate debtor. For this reason, the contract was held to be inconsistent with the provisions of the IBC and, therefore, read down.

a. According to the ld. Counsel for the RP, PRIO's reliance on the decisions in ***Reliance Capital Limited v. IDBI Trusteeship Services Limited, 2023 SCC OnLine NCLT 177*** is also misplaced since in the present case, there is no inconsistency whatsoever between the provisions of the QHA or the ROFR available to BPRL and the provisions of the IBC. Accordingly, there is no overriding effect on BPRL's ROFR on account of Section 238 of the IBC. Similarly, reliance on the decision in ***Taprogge Gesellchafafit MBH v. IAEC India, 1987 SCC OnLine Bom 345*** relied on by PRIO is also misplaced since in the present case, the provisions of the QHA and BPRL's ROFR have no conflict whatsoever with the public policy of India. Further, as stated above, PRIO has also on its own accorded accepted BPRL's ROFR and in fact made the acceptance of its own offer by the CoC subject to waiver of ROFR by BPRL.

(a) Ld. Counsel for the RP has further contended that in the present case, there is no inconsistency between the QHA and the IBC. On the contrary, it

is a settled position of law that the resolution process under the IBC cannot and ought not to give a carte-blanche go-by to pre-existing contractual rights of third parties and must be given effect to. Reliance is placed by the Counsel for the RP on ***Jaypee Kensington Boulevard Apartments Welfare Asso. v/s NBCC (India) Ltd. [(2022) 1 SCC 401]*** whereby it has been held that even if in the scheme of IBC, resolution plan could modify the terms of a contract, any tinkering with the contract could not have been carried out without the approval and consent of the Authority concerned, especially when the contract is entered into with a statutory Authority. Ld. Counsel for the RP has further relied upon ***Municipal Corporation of Greater Mumbai v/s Abhilash Lal and Others [(2020) 13 SCC 234]*** whereby it has been held that Section 232 cannot be read as overriding MCGM's right to control and regulate how his properties are to be dealt with. It was further held that Section 238 could be of importance when the properties and assets are of a debtor and not when a third party like MCGM is involved.

41. Ld. Counsel for the RP has further relied upon ***In re Golden Jubilee Hotels Private Limited [IA 73/2018 in CP(IB) No. 248/7/HDB/2017]*** where it was held that prior to the commencement of CIRP when there was an agreement between the Corporate Debtor and the Applicant herein, the clause in the agreement must be adhered to by both the Applicant and Resolution Professional representing the Corporate Debtor and further the Resolution Professional cannot unilaterally modify the contracts. Ld. Counsel for the RP has further relied upon ***DBM Geotechnics and Constructions Pvt. Ltd. v/s Dighi Port Ltd. 2019 SCC online NCLT 8142*** whereby it was held that the Resolution

plan cannot seek to terminate the agreement that have created legal rights in third parties without adhering to due process of law by which these agreemnts could have been terminated in case there was no CIRP. Such termination of legally biding agreements would violate the law under which such contracts are governed and thus in violation of Section 30 (2) (e) of the Code. Ld. Counsel for the RP has further relied upon ***EARC v Bharti Defence and Infrastructure Ltd. [MA 170/2018 in CP 292/I&B/NCLT/MAH/2017]*** whereby it was held that a resolution plan which seeks termination/extinguishment of all the contracts with the employees/ workmen/consultants cannot be approved as it contravenes the law and is prejudicial and unjust to the existing employees/workmen/consultants.

42. It has also been pointed out by the Ld. Counsel for the RP that PRIO was admittedly aware from the very beginning of BRPL's preexisting and pre-emptive ROFR and as per the terms of its own offer called upon the RP of VOVL to obtain waiver of the ROFR from BPRL as a precondition to the acceptance of its own offer. Likewise, the terms of the process, including that the consideration of any resolution plan/offer would be subject to the ROFR of BPRL was made clear from the very beginning. This being the case, PRIO as a party who participated in the tender process cannot now seek to challenge the terms of the process.

43. Ld. Counsel for the RP has further argued that it is widely accepted that ROFR clauses aid in maximisation of value and find place in all forms of public auction/ tender processes including in the form a Swiss Challenge

mechanism. In support of his contentions he has relied upon ***Ravi Development v Shree Krishna Pratishthan and Ors. (2009) 7 SCC 462*** *whereby it was held as under*

"54. The Swiss Challenge method is transparent inasmuch as all the parties were well aware of the "right of first refusal" accorded to the "originator of proposal". As per the method which was known to all the parties the originator of the proposal must in consideration of his vision and his initiative be given to the benefit of matching the highest bid submitted. As pointed out earlier, the said method is beneficial to the Government inasmuch as the Government does not lose any revenue as it is still getting the highest possible value.

55. Further, in view of financial crunch and availability of undeveloped lands, the national and State housing policies provide for encouragement of private participation. The State Government is also well within its rights to try out on pilot basis a methodology recognised internationally as well as in India.

56. In those circumstances, the High Court is not justified in striking out the Swiss Challenge method without allowing the State Government to exercise its executive discretion on a pilot basis. It is not possible to reject the claim of the State of Maharashtra and MHADA, in view of shortage of land, increasing cost in housing sector, the Central and State Governments recommended strongly for public-private joint ventures and in the said category Swiss Challenge method is the acceptable democratic method as compared to other options."

44. According to Ld. Counsel for the RP, the contention raised by PRIO that the contractual ROFR and exercise thereof affects the level playing field which is

central to the fair and transparent resolution process envisaged under the Code is also not correct. In this regard, he has pointed out that it is not PRIO's case that the ROFR has allegedly disrupted the level playing field and that giving effect to it would dissuade the bidders.

45. According to Ld. Counsel for the RP, the argument that the ROFR has the effect of dissuading parties from participating in the CIRP is to be rejected since in this very CIRP, despite being aware of the overriding nature of the ROFR and the RFRP categorically stating that the consideration of any resolution plan would be subject to BPRL's ROFR, four resolution plans/ offers were received. However, other than PRIO, none of the other parties who submitted a resolution plan/ offer have objected to BPRL's ROFR.

a. The Ld. Counsel for the RP has further contended that the argument that the ROFR acts against there being a level playing field is equally fallacious. The ROFR in the peculiar facts of the matter is a pre-existing and overriding right of BPRL to match the price offered by any other party for purchase of VEBL's proportionate share of PI or the VEBL quotas. However, similar to the case of resolution plans, as to whether or not BPRL would exercise its ROFR would depend on the commercial offer made by a party.

b. The Ld. Counsel for the RP has further argued that being fully aware of the ROFR available to BPRL and its implications, PRIO submitted an offer for a commercial value that it believed would dissuade BPRL from exercising its ROFR. However, BPRL in its own commercial assessment believed that the

offer price made by PRIO is a fit case for exercise of ROFR. There is no question of BPRL's ROFR having any impact on the level playing field between parties.

c. Ld. Counsel for the RP has further argued that the contentions of PRIO that sale of individual assets under Regulation 37 of the IBC can only be done if the procedure prescribed under Regulation 36B (6A) (which requires reissuance of RFRP) is followed is not applicable in the present case. In this regard, Ld. Counsel for the RP has placed reliance on Regulation 37 (m) of the CIPR Regulation in support of the proposition that even under a resolution plan, the IBC recognizes the principle that value may only lie in some assets and there may be a requirement to deal with the remaining assets of a corporate debtor (in which a bidder may not be interested) differently. In view of the above contentions, the Ld. Counsel for the RP has prayed that the present IA 702/2024 filed by PRIO be rejected and IA 2787/2023 seeking approval of sale in favour of BPRL may be allowed.

46. Ld. Counsel for BPRL has argued that the QHA, which is akin to a Shareholders Agreement in India, was executed on 12.09.2008 and is admittedly subsisting between BPRL and VEBL setting out the terms and conditions for operation and management of IBV as a JV Company. The QHA is governed as per the laws of Brazil. Further, the QHA, in Section 6.8 categorically states that any transfer of quotas done in contravention of applicable legal requirements shall be null and void.

47. Ld. Counsel for BPRL has pointed out that VOVL, the Corporate Debtor in the ongoing CIRP, holds majority shareholding in Videocon Hydrocarbon Holdings Limited ("**VHHL**"), a Cayman Island entity. VHHL, in turn holds 100% shareholding of Videocon Energy Brazil Limited ("**VEBL**"), a British Virgin Island entity. BPRL is an entity incorporated in Netherlands and is a foreign step-down subsidiary of Bharat Petroleum Corporation Limited. BPRL India and VIL had incorporated a JV entity in Brazil *i.e.* IBV Brasil Petroleo Limitada ("**IBV**"). The present quotaholders of IBV are (i) BPRL and (ii) VEBL. IBV, in turn, holds Participating Interests ("**PI**") in Sergipe Basin (**BM-SEAL-11**), Campos Basin (**BM-C-30**) and BM-POT-16 (presently under relinquishment).

48. Ld. Counsel for BPRL has further argued that Cash-call obligations of VEBL are in default in respect of O&G Assets. The Oil and Gas Assets ("O&G Assets") in Brazil are regulated through the Joint Operating Agreements ("JOA") executed between IBV and other stakeholders at the concession level. The JOAs essentially capture the respective rights and obligations of the parties to the JOA with regard to operations including the joint exploration, appraisal, development, production and disposition of hydrocarbons from the concerned O&G Assets/blocks. Towards the aforesaid, whenever funds are required, the operators under the JOAs, send fund requisition to all the respective parties to the JOA ("**Cash Calls**"). Upon the receipt of the Cash Calls, the parties are required to remit their respective share of such Cash Calls so that the joint exploration, appraisal, development, production, etc. of the concerned O&G Asset/blocks continues ("**Cash Call Obligation**").

49. According to the Ld. Counsel for BPRL, since IBV was a party to the JOAs, Cash Calls were raised by the respective operators on IBV from time to time. Consequent to such demand for Cash Calls, IBV would in turn raise a demand/seek contribution from its quota-holders *i.e.* BPRL and VEBL respectively. Pursuant to such demand, the quota-holders *i.e.* BPRL and VEBL were required to pay 50% of the Cash Call Obligation each to ensure that there is no default on part of IBV.

50. Ld. Counsel for BPRL has further contended that under the JOA, if any default is continued for 5 business days from the date of the Operator Default Notice, the defaulting party shall not be entitled to call or attend operating committee or subcommittee meetings or to vote on any matter coming before the operating committee or any subcommittee during the period when such default continues and has not been remedied (including the payment of accrued interest). Further, non-curing of default during the prescribed cure period from the date of the Operator Default Notice, results in a right to non-defaulting parties to issue notice to defaulting party to transfer all its rights, title and beneficial interest in the concession to non-defaulting party. While BPRL has been regularly paying its share of the cash calls, VEBL, on the other hand, was defaulting on its obligation to pay its share of Cash Call Obligation since December 2018. The ultimate source of funds for VEBL was VOVL – which was under financial distress. Therefore, if VOVL could not make payments and no one came to the rescue, IBV would be in default under the JOA resulting in the entire PI being forfeited to a third party.

51. Ld. Counsel for BPRL has further submitted that between December 2018 to December 2023, it is BPRL (and not VEBL) who has paid VEBL's share of the Cash Call Obligation to IBV in order to protect the concerned O&G Assets, as mentioned above. Towards the same, BPRL has remitted a cumulative amount of approx. USD 129 million (equivalent to approx. INR 1072 crores as per current exchange rate) till 31.12.2023 to IBV towards its share of paid-up capital/advance against capital in IBV. Upon receipt of such capital/advance, IBV paid the cash calls for the O&G Assets during the said period. This was on account of VEBL's failure to pay its share of Cash Call Obligation. BPRL has been exercising its right under clause 7.4 of the QHA which allows the non-defaulting party to cure the defaulting party's default. Admittedly, Lenders of VOVL had also requested BPCL and BPRL India to continue taking necessary steps to preserve the O&G Assets of IBV. VOVL had also admitted to its inability to remit the funds for payment of Cash Calls and requested BPRL to fund the share of VEBL under the QHA Therefore, the PI of IBV in the O&G Assets has been subsisting solely due to the prompt and timely payments of VEBL's share of Cash Call Obligations by BPRL. If BPRL had not cured VEBL's default, the entire investments of IBV of approx. USD 1.8 billion (equivalent to approx. INR 15,000 crores as per current exchange rate) would be lost and the security interest created in favour of Indian public-sector banks, who had lent to VOVL, would have been rendered otiose.

52. Ld. Counsel for BPRL has further pointed out that each time that BPRL fulfilled/cured VEBL's inability to make payments towards Cash Call Obligation raised on IBV by the JOA operator, BPRL would get corresponding quotas/shares in IBV. Therefore, while in 2008, when the QHA was executed between BPRL and VEBL, each of the said parties held 50% shareholding in IBV, at present, on

account of BPRL fulfilling Cash Call Obligations raised by IBV on VEBL, BPRL holds 63.24% while VEBL holds 36.76% as recorded in the 55th amendment to IBV's AoA reflecting payments made till March, 2023, which is undisputed. It is to be noted that BPRL's financial commitment towards IBV till 31.12.2023 is approx. USD 1.041 billion.

53. Ld. Counsel for BPRL has further argued that The Committee of Creditors has exercised its commercial wisdom and approved the proposed sale to BPRL and the commercial wisdom of the COC is not justiciable. Ld. Counsel for BPRL has further argued that after 4 years and 15 extensions to the last date of submission of resolution plans, the RP received offers (and not resolution plans) from Eneva S.A. and PRIO; and resolution plans from Twin Star and RKG Fund. The Committee of Creditors ("**CoC**") discussed the offers and resolution plans received by RP in detail. From the offers received, BPRL understands that -

    (i) Eneva S.A. offered to acquire VEBL's proportionate share of the PI held through IBV in Sergipe Basin; and

    (ii) PetroRio offered to acquire VEBL's proportionate share of PI held by IBV in Campos Basin. In light of the offers, which were for the acquisition of the O&G Assets involving the transfer of VEBL's quota in IBV or VEBL's share of IBV's PI through a demerger process of IBV or transfer/disposal in any other manner, the pre-emptive right/ROFR of BPRL was triggered.

54. According to the Ld. Counsel for BPRL in view of the ROFR available to the BPRL as per the terms of the QHA, the CoC approved, authorised and instructed the RP to issue a notice dated 13.04.2023 to BPRL. This was also in line with the

RFRP issued in the CIRP of the Corporate Debtor which categorically states that any resolution plan for the Corporate Debtor would be subject to the waiver of pre-emptive right by contractual counterparties such as BPRL. The CoC, in exercise of its commercial wisdom has approved the BPRL Offer and consummation of the transaction with BPRL.

55. According to Ld. Counsel, BPRL's Offer is equitable and leads to value maximization. BPRL communicated its decision to exercise the ROFR under the QHA on 17.05.2023 and made an offer to acquire VEBL's quotas in IBV on the same terms made in the offer of Eneva and PetroRio. Pursuant to negotiations with the secured lenders of VOVL, BPRL issued a letter dated 26.05.2023 setting out the revised terms for the acquisition of VEBL quotas. BPRL's Offer is to acquire the totality of VEBL's quotas in IBV free and clear of all encumbrances. Further, BPRL is matching the aggregate price from Eneva and PRIO *i.e.* USD 270 million subject to adjustment for any reduction in VEBL's quotas on account of BPRL curing VEBL's default. BPRL's Offer is crucial because it achieves a two-fold purpose. Firstly, BPRL, which is held by a public sector undertaking, has requisite expertise and experience for managing oil and gas operations and will take over a prospective asset and will simultaneously ensure going concern status of IBV. Secondly, BPRL carries forward its commitment towards IBV as it has done in the past by paying approx. USD 1.041 billion (equivalent to approx. INR 8645 crores as per current exchange rate). The BPRL Offer also maximizes value for all stakeholders whilst allowing the contracting parties to exercise their rights under the binding agreement *i.e.* the QHA.

56. We have thoughtfully considered the contentions raised by the ld. Counsel for the parties and have carefully gone through the record as well as the case laws cited by them in support of their respective contentions.

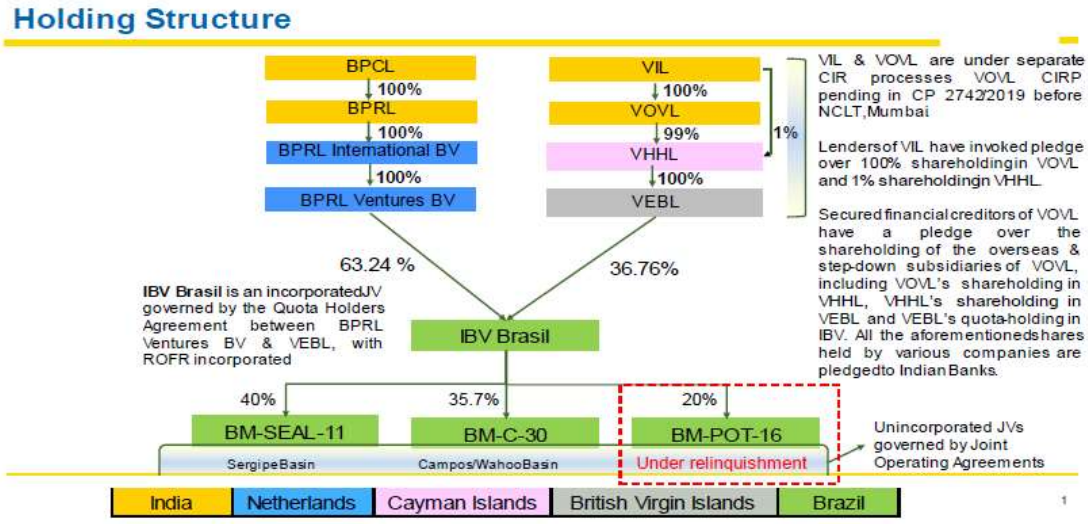
57. The present Application (IA No. 702/2024) has been filed by PRIO pursuant to the Hon'ble NCLAT's order dated 24.01.2024 in Company Appeal (AT)(Ins) No. 1650 of 2023 filed by PRIO challenging this Tribunal's order dated 09.10.2023 passed in IA No. 3363/2023.By the said order dated 09.10.2023, PRIO's objections against the consideration of BPRL's offer exercising its ROFR were rejected. However, the Hon'ble NCLAT set aside the said order holding that PRIO has locus to file objections and further the objections raised by PRIO be decided without being influenced by its order dated 24.01.2024.

58. By way of IA No. 702/2024**,** the Applicant/PRIO is seeking the following reliefs –

i. to declare the exercise and implementation of the right of first refusal ("**ROFR**") by Respondent No. 2 – BPRL Ventures BV ("**BPRL**") under the Quota Holders Agreement dated 12.09.2008 ("**QHA**") as invalid and impermissible under the IBC;
ii. to set aside the actions by the RP and CoC at the 37th CoC meeting in respect of approval granted for issuance of ROFR notice to Bharat Petroresources Limited ("**BPRL**");
iii. as a consequential relief, reject IA 2787/2023 filed by Respondent No. 1.

At the same time, IA No. 2787/2023 has been filed by the RP under Section 60(5) of IB Code, 2016 read with Rule 11 of NCLT Rules, 2016 seeking approval of the acceptance of ROFR exercised by BPRL for acquisition of quotas under QHA 12.09.2008.

59. In this context, it would be worthwhile to mention that VOVL Ltd., the Corporate Debtor, is a wholly owned subsidiary of Videocon Industries Limited ("**VIL**") engaged in the business of investing in and holding offshore oil and gas assets through its subsidiaries and step-down subsidiaries. Videocon Hydrocarbon Holdings Limited ("**VHHL**") is a company incorporated under the laws of Cayman Islands in which the Corporate Debtor holds 99% of the equity shareholding and remaining 1% of equity shareholding is held by VIL. A 100% subsidiary of VHHL, viz. VEBL, incorporated in British Virgin Islands is a joint venture ("**JV**") partner of BPRL in a company known as IBV Brasil Petroleo Ltda ("**IBV**"), a company incorporated under the laws of Brazil. This company, IBV holds participating interest ("**PI**") in offshore oil and gas assets in the Campos Basin and Sergipe located in Brazil(together "**Brazilian Assets**"). The holding structure of VOVL and its subsidiaries is as follows:



60. It is further pertinent to note that on 12.09.2008, BPRL and VIL entered into QHA setting out the terms of their inter-se rights and obligations as quota-holders in IBV. Subsequently, the interest of VIL in IBV devolved on VEBL. The entire quota-holding/ shareholding of VEBL in IBV is pledged to the secured lenders of VOVL, who comprise 99.96% of the CoC of VOVL. As per Clause 6.4 of the QHA, in case any proposal is received to transfer or otherwise in any manner dispose of the quotas of VEBL in IBV ("**VEBL Quotas**") (including by way of demerger of IBV), the pledgees of the quota-holding of VEBL in IBV are required to be given notice of 30 business days (approx. 45 calendar days) to BPRL to permit BPRL to exercise its ROFR to match the offer and purchase the VEBL Quotas.

61. It is also noteworthy that the overriding nature of the ROFR available to BPRL, being a crucial right enshrined in the very formation of the JV by which the Brazilian Assets came to be held, was duly disclosed to all PRAs in the

CIRP vide the information memorandum ("**IM**") and request for resolution plan ("**RFRP**") issued in the CIRP of VOVL. The relevant clauses of the IM and RFRP read as follows:

Information Memorandum

"Note: …The indirect acquisition of participating interest in the Offshore Assets pursuant to the acquisition of VOVL under the terms of a resolution plan is subject to the rights of: (a) contractual counterparties of IBV (under the terms of the Brazil JOA) and BPRL (the contractual counterparty of VEBL under QHA); (b) contractual counterparties of VINI under the Indonesia JOA; and (c) the applicable local laws."

RFRP

Clause 6.1.1(f)	*"The shares of the Corporate Debtor and the transfer of Control of the Corporate Debtor and the vesting of any legal or beneficial interest, right or title over any of the assets, direct or indirect, of the Corporate Debtor shall be issued, vested, transferred pursuant to the Approved Resolution Plan, to the Successful Resolution Applicant on an "as is where is", "as is what is" basis. The Resolution Applicants acknowledge that the acquisition of shares or assets of the Corporate Debtor, pursuant to implementation of the Approved Resolution Plan, shall be subject to security arrangements satisfactory to the CoC, rights of relevant contractual counterparties and Applicable Law."*
Clause 7.9.7(iii)	*"…the Resolution Plan submitted by each Resolution Applicants shall be subject to compliance of the approvals, consents or any other requirements, if any, under Applicable Laws and the documents. agreements, contracts or deeds set out in the Data Room; and*

62. It cannot be not in dispute and is even admitted even by PRIO that it was always made clear to all the PRAs through the IM, RFRP and Data Room (where a copy of the QHA was provided) that the consideration of any

resolution plan or offer for acquisition of PIs or interest of VEBL in the Brazilian Assets through CIRP of VOVL would be subject to the pre-existing ROFR available to BPRL.

63. After all efforts taken by the RP and CoC between November 2019 to September 2022, the following resolution plans/ offers were received:

(a) Eneva S.A. – Offer for VEBL's share of PI in Sergipe basin;
(b) PRIO – Offer for VEBL's share in Campos basin (Wahoo field);
(c) Twinstar Technologies Limited – Resolution plan for VOVL by monetising VEBL's share of PI in the Brazilian Assets; and
(d) RKG Fund - Resolution plan for VOVL by monetising VEBL's share of PI in the Brazilian Assets,

64. The offer from PRIO in respect of the VEBL's share of PI in the Campos Basin was revised from time to time. PRIO initially submitted an offer for USD 32.5 mn for the acquisition of VEBL's proportionate share of PI held IBV in the Campos Basin, which was subsequently revised to USD 20 mn. *It is pertinent to note that PRIO specifically submitted only an offer for the Campos Basin and not a resolution plan and did not comply with the provisions of the IBC and CIRP Regulations.* The fact that the ROFR was triggered by PRIO's offer is not in dispute and in fact admitted by PRIO itself. Considering BPRL's pre-emptive ROFR, PRIO's own offer states that it was subject to BPRL's ROFR and stipulates that "*VOVL shall individually seek consent of BPRL Ventures BV ("Bharat") and its non-exercise of right of first refusal provided in the quotaholders' agreement between VEBL and Bharat*

regarding the Assets, or any other consents imposed to this transaction by any corporate or governance documents".

65. The RP/ CoC also received an offer for acquisition of VEBL's proportionate share of PI in IBV in the Sergipe Basin from another bidder – Eneva S.A.In view of the offers/ proposals received for acquisition of VEBL's proportionate share of PI in IBV, at the 37th CoC meeting held on 21.02.2023, the CoC, in order to give effect to BPRL's pre-emptive ROFR to ensure that the consideration of any offer is viable and feasible, in its commercial wisdom resolved to authorize the RP to issue a ROFR notice to BPRL on the basis of offers received from PRIO and Eneva S.A. for the Sergipe basin. Accordingly, the RP issued notice dated 13.04.2023 to BPRL ("BPRL ROFR Notice") to give effect to its ROFR in terms of the QHA. BPRL exercised its ROFR vide letter dated 26.05.2023 and submitted its offer to acquire the VEBL Quotas by matching the offer made by the Appellant and the other bidder.

66. It is the case of the respondents that at its 40th CoC held meeting on 02.06.2023, a resolution to approve the BPRL Offer and to consummate the transaction with BPRL for the sale/transfer of the VEBL Quotas to BPRL in terms thereof was deliberated and the same was approved by 99.96% voting share by the CoC in exercise of its commercial wisdom. It is pertinent to note that the CoC, in its commercial wisdom, deemed it beneficial to approve the offer for the quotas of IBV proposed by BPRL as against the offer proposed by PRIO and other the bidder. What weighed with the CoC while accepting the offer of BPRL is that the offer of PRIO, which is for the proportionate PIs in IBV, provided for

demerger of IBV which would be subject to regulatory compliances. Against this, the offer of BPRL is for the quotas/ shares of IBV held by VEBL which is more viable, does not involve any formalities of merger and would also not be subject to regulatory compliances.

67. Now the question arises as to whether or not a contractual ROFR can be given effect to during the CIRP under the provisions of the IBC read with the CIRP Regulations? It is PRIO's case that the IM and RFRP contemplated the sale of "*VOVL's PI*" and not the quota holding of VEBL in IBV. Therefore, PRIO alleges that BPRL's offer for purchase of the VEBL Quotas by exercise of ROFR cannot be permitted. Further, PRIO relies on Regulation 36A (2) (h), Regulation 36B (1) and Regulation 39 of the CIRP Regulations to contend that since BPRL was not in the final list of PRAs, its offer pursuant to exercise of ROFR cannot be considered at all. However, in our considered view, from the IM and RFRP, it is abundantly clear that the PI in the Brazilian Assets is held by IBV wherein VEBL is a quota holder. Further, it is clarified that VEBL is a step-down subsidiary of VOVL and that VOVL derives significant value from the PI held by IBV by virtue of its step-down subsidiary VEBL being a quota holder in IBV and considering that the business of VOVL was to make investments in offshore oil and gas assets, there were no resolution plans sought for sale of VOVL's PI in the Brazilian Assets as per the IM and RFRP. What the IM and RFRP disclose is the fact that VOVL draws a significant portion of its interest from the interest held by VEBL in the Brazilian Assets and does not seek to put on offer VEBL's proportionate share of PI in the Brazilian Assets as opposed to VEBL's quotas in IBV. In so far as BPRL's

ROFR, as triggered by the offers submitted by PRIO and Eneva S.A. is concerned, it makes no difference whether the respective offers were for purchase of VEBL's share of PI in IBV or VEBL's quotas in IBV. The BPRL Offer's and consummation of the transaction in terms thereof was approved by 99.97% majority voting share of the CoC and is now sought to be consummated with the approval of this Authority. In our considered view, the BPRL's Offer is not a resolution plan in strict terms of its definition given in Section 5 (26) of the Code nor is it akin to an attempt to sell the assets of the Corporate Debtor but is merely a transaction for transfer of the VEBL Quotas to BPRL pursuant to the exercise of ROFR by BPRL. Pursuant to exercise of ROFR by BPRL, the CoC has approved the BPRL Offer's in exercise of its commercial wisdom and seeks to consummate the transaction with BPRL for transfer of VEBL quotas to BPRL and liquidation of the residual assets of VOVL.

68. So far as the reliance by PRIO on the provisions of Sections 25(2)(h) and 29 of the IBC and on Regulations 36(8), 36B (1), 36B (6) and 39 of the CIRP Regulations is concerned, the same seems to be completely misplaced as they apply in the event of the approval of a resolution plan. Regulation 36A(8) of the CIRP Regulations mandates a resolution professional to conduct due diligence based on the material on record to satisfy itself that a "resolution applicant" submitting a "resolution plan" for a corporate debtor complies with the requirements set out in Section 25(2)(h) of the IBC and the provisions of Section 29A of the IBC. Similarly, reliance on Regulation 36A (6A) of the CIRP Regulations is misplaced as the RFRP was not shared with BPRL. It is no one's case that BPRL is a resolution applicant. In fact, even PRIO on their

own volition stated in its offer that they are not to be considered a resolution applicant. Regulation 39 of the CIRP Regulations is not applicable since the offer of BPRL is not a resolution plan and Regulation 39 restricts the CoC from considering a resolution plan from a prospective resolution applicant who does not appear in the final list of PRAs. However, there is no restriction on the powers of the CoC from considering a proposal for sale of all or ought of the asset of the Corporate Debtor which, in its commercial wisdom, would provide a more feasible and viable resolution of a corporate debtor, as has been done in the present case.

69. Furthermore, there was no occasion or requirement for BPRL to have submitted an expression of interest to submit a resolution plan and find place in the final list of PRAs since it submitted its offer pursuant only to exercise of ROFR under the QHA which was known to all PRAs who cannot now claim to have been taken by surprise nor can they be allowed to commit a volte-face from the admitted position. Having played the game, knowing fully well its rules and regulations, PRIO cannot be now heard harping that the entire process is dehors the provisions of the IB Code and CIRP Regulations. In this regard, the Ld. Counsel for the RP has rightly relied upon ***Vijendra Kumar Verma vs Public Service Commission, Uttarakhand and Others (2011) 1 SCC 150*** whereby it was held that if all the candidates knew the requirements of the selection process and were also fully aware that they must possess basic knowledge of computer operation and knowing the said criteria, the appellant also appeared in the interview, faced the questions from the expert of computer application and has taken a chance and opportunity therein without

any protest at any stage and now cannot turn back to state that the aforesaid procedure adopted was wrong and without jurisdiction.

70. In this very context, a further reliance has been rightly placed on ***Indotech Group vs. UOI & Ors 2009 (109) DRJ 143 (DB)*** whereby it was held that the Court does not sit in appeal over the merit of terms and conditions of the tender, which determination ought to be left to the experts in the field. Further in the present case, the Petitioner did not challenge the impugned condition in Court at the time of the tendering process which commenced in February 2008 and instead participated in the same. It was only when the Petitioner was not selected in the bid process that the Petitioner belatedly challenged the tender conditions as well as the awarding of the same in the month of September 2008.

71. In this context, it is further pertinent to point out that PRIO, as per its own offer, had stated that it shall not be deemed as an applicant of a resolution plan and refers to itself as a "*solely a potential buyers of the Assets to be sold*". In view of the fact that PRIO itself has also not submitted a resolution plan, the grievance raised that there is non-compliance of the regulations is wholly untenable. It cannot be disputed that the insolvency process under the IBC does not give a *carte blanche* to override pre-existing third-party contractual rights under the garb of Section 238 of the IBC. The RP is bound to comply with the obligations under any contract entered into by the Corporate Debtor. Section 17(2)(e) of the IBC stipulates that a resolution professional is required to ensure that a corporate debtor is in compliance with provisions of

applicable laws. Had the RP/ CoC proceeded to consider any resolution plan without taking into consideration the ROFR available to BPRL, the very feasibility and viability of such resolution plan would have come into question. Therefore, PRIO's entire case that the acceptance of the BPRL Offer is contrary to the CIRP Regulations is nothing but an argument of convenience since PRIO itself did not submit a resolution plan, and the BPRL Offer has been accepted pursuant to exercise of ROFR and not as a resolution plan.

72. With regard to the contention raised by the Ld. Counsel for PRIO that the ROFR of BPRL cannot be given effect to as the same is inconsistent with the provisions of the IBC and further that on account of Section 238 of the IBC, the ROFR available to BPRL under Section 238 of the IBC would stand overridden, it is pertinent to reiterate that the offer by BPRL is not a resolution plan nor an attempt to sell the assets of the Corporate Debtor, but rather is a transaction for transfer of VEBL Quotas to BPRL pursuant to exercise of ROFR by BPRL, which has been approved by the CoC in its commercial wisdom. A bare reading of Clause 6.4 of the QHA would demonstrate that the ROFR would get triggered by any offer to sell, assign, transfer or otherwise dispose of all or any of its quotas to any person other than its Affiliates in the joint venture. This would include a demerger of IBV which would in turn lead to disposal of the quotas of VEBL. Admittedly, the QHA is governed by the Brazilian law under which, as per legal advice received by the RP, the ROFR of BPRL would be triggered if there is disposal of Quotas of VEBL in any manner. Since Prio's offer is for purchase of VEBL's proportionate share of PI of IBV in the Campos Basin/ Wahoo Field, a demerger/ spin-off of such

PI would have been necessarily required to implement such a transaction. Likewise, the offer of Eneva S.A. triggered BRPL's ROFR in respect of the Sergipe basin.

73. It is for this reason that the offer submitted by PRIO, specifically states that the implementation of the offer for purchase of VEBL's proportionate PI in the Campos Basin/ Wahoo Field) would require a demerger of IBV, thereby triggering ROFR available to BPRL. The fact that the ROFR would be triggered in the event of a demerger is also admitted by Prio to be the correct position under Brazilian Law as set out at paragraph 24 of the Affidavit of Mr. Rafael Baptista Balleroni, which is sought to be relied upon by Prio. In the peculiar facts and circumstances of the CIRP of the Corporate Debtor highlighted above, in our considered view, the issuance of the ROFR notice to BPRL and approval of the BPRL Offer by the CoC in exercise of their commercial wisdom is the most viable option for resolution of the insolvency and outstanding dues of and maximisation of value for the stakeholders of the Corporate Debtor.

74. PRIO's reliance on Section 238 of the IBC also seems to be wholly misplaced and misconceived. It has been rightly pointed out by the Ld. Counsel for the RP that the overriding effect under Section 238 is only applicable when there is inconsistency with the provisions of an instrument in question with the provisions of the IBC. Similarly, reliance on the judgment of the Hon'ble Supreme Court in ***Gujarat Urja Vikas Nigam Limited vs. Amit Gupta (2021) 7 SCC 209*** is equally misplaced. In *Gujarat Urja*, the Hon'ble Supreme Court invoked Section 238 of the IBC since the contract in question contained an

ipso facto termination clause on account of which the party was seeking to terminate the sole power purchase agreement with the corporate debtor. In that context, the Hon'ble Supreme Court observed that if this clause were permitted to be exercised, the sole contract, which ensured the business, would stand terminated thereby vitiating the going concern status of the corporate debtor. For this reason, the contract was held to be inconsistent with the provisions of the IBC whereas it is not so in the instant case.

75. We have also considered the PRIO's reliance on ***Reliance Capital Limited v. IDBI Trusteeship Services Limited, 2023 SCC OnLine NCLT 177*** but have found to be misplaced since in the present case, there is no inconsistency whatsoever between the provisions of the QHA or the ROFR available to BPRL and the provisions of the IBC. Accordingly, there is no overriding effect on BPRL's ROFR on account of Section 238 of the IBC. Similarly, reliance on the decision in ***Taprogge Gesellchafafit MBH v. IAEC India, 1987 SCC OnLine Bom 345*** by the Ld. Counsel for PRIO is also misplaced since in the present case, the provisions of the QHA and BPRL's ROFR have no conflict whatsoever with the public policy of India. Moreover, PRIO has also on its own accord accepted BPRL's ROFR and made the acceptance of its own offer by the CoC subject to waiver/exercise of ROFR by BPRL.

76. In this context, it needs to be observed that the Applicant/PRIO having played the game conversant with the rules of the game from the very beginning cannot be now heard harping that it was not provided with a level playing field or that the rules and regulations of the game were not appropriate or illegal. In

the light of law laid in ***Vijendra Kumar Verma vs Public Service Commission, Uttarakhand and Others (2011) 1 SCC 150*** (Supra). In this regard, a further reference can also be made to the law laid down in ***State Bank of India vs. Airports Authority of India 2002 SCC OnLine Del 69*** whereby also it was held that the Petitioner having knowingly participated in the process of bidding and after become unsuccessful is precluded even on an equitable consideration from making a challenge to the notice inviting tender. A party cannot be permitted to approbate and reprobate.

77. The argument raised on behalf the PRIO that the ROFR acts against there being a level playing field is equally fallacious. The ROFR in the peculiar facts of the matter is a pre-existing and the overriding right of BPRL to match the price offered by any other party for purchase of VEBL's proportionate share of PI or the VEBL quotas. Being fully aware of the ROFR available to BPRL and its implications, PRIO submitted an offer for a commercial value that it believed would dissuade BPRL from exercising its ROFR. However, BPRL in its own commercial assessment believed that it was a fit case for exercise of ROFR. There is no question of BPRL's ROFR having any impact on the level playing field between parties. As stated above, PRIO was aware of all the terms and conditions of the offer from the very beginning and was not taken by surprise at any point of time. Therefore, the law laid down in ***Amritvani Exim Private Limited v. Ajanta Offset and Packaging Limited, IA 1528/ND/2022 in CP No. IB – 1526/ND/2019 (NCLT Delhi)*** relied on by PRIO is not applicable to the present case as PRIO has participated in the process being fully aware of the ROFR available to BPRL and after subjecting the

acceptance of its own offer to the waiver of ROFR by BPRL, it now stands precluded from raising any objection that terms of the offer did not give a level playing field to the bidders.

78. PRIO has placed strong reliance on the decision of the United States of America's Bankruptcy Court in ***In re Grocer, Inc. 77 B.R. 349 (1987),*** which is also wholly misplaced. In the context of that case, it is relevant to mention that Section 365 (f) (1) and (f) (2) of the Bankruptcy Code (US) specifically states that a contractual right that prohibits in any manner and affects the right to transfer a contract of lease is not be given effect to. However, there is no equivalent provision under the IBC. On the contrary, it is a settled position that under the IBC, rights of parties under pre-existing contracts must be given effect to. It is for this reason that the afore-cited judgment relied on by PRIO cannot be applied to the facts and circumstances of this case.

79. It has been vehemently argued on behalf of PRIO that while sale of assets is permitted under the IBC, such a sale could only be done by way of a resolution plan and not by any other method. In support of this contention, PRIO places reliance on Regulation 37 and 36B (6A) of the CIRP Regulations. Even this contention raised on behalf of PRIO seems to be not tenable considering that in the present case, the VEBL Quotas are not assets of VOVL, the Corporate Debtor in question. However, in view of the ROFR being triggered, the exercise of ROFR by BPRL and the pledge held by the members of the CoC of the Corporate Debtor on the VEBL Quotas, which are security for the loans availed by VOVL, the RP has filed IA 2787/2023 under Section 60(5) of the IBC seeking approval of this Tribunal to give effect to the commercial wisdom

of the COC and for value maximization. In our considered view, Section 60(5)(c) of the IBC confers the NCLT with residuary jurisdiction to decide all questions of law or fact arising out of or in relation to insolvency resolution or liquidation under IBC as has been held in ***Committee of Creditors of Essar Steel India Limited*** **v.** ***Satish Kumar Gupta and Ors*** **(2020) 8 SCC 531** whereby it has been held that Section 60(5) (c) is in the nature of a residuary jurisdiction vested in NCLT so that NCLT may decide all question or law or fact arising out of or in relation to insolvency resolution or liquation under the Code. Similarly, in ***Gujarat Urja Vikas Nigam Limited v. Amit Gupta, (2021) 7 SCC 209*** it has been held that Section 60 (5) (c) of IBC vests NCLT with vide power since it can entertain and dispose of any question of fact of law arising out or in relation to the insolvency resolution process.

80. Section 5(26) of the IBC read with Regulation 37 of the CIRP Regulations provides an "*indicative list of measures"* which may be necessary for insolvency resolution for corporate debtor for maximisation of value of the assets of the corporate debtor. Therefore, the structure and the manner adopted for insolvency resolution of a corporate debtor depends on the peculiar facts and circumstances of each case and there cannot be a "straitjacket" formula which can be adopted in each and every insolvency resolution. In this regard, it has been rightly pointed out by the Ld. Counsel for the RP in the insolvency resolution processes of real estate companies such as ***Housing Development and Infrastructure Limited (Company Appeal (AT)(Ins) NO. 896 of 2021]*** *and* ***Nucleus Premium Properties Private Limited (, IA(IBC)/131/KOB/2022 & IA(IBC)/132/KOB/2022 in CP(IB)/01/KOB/2021),*** the Adjudicating

Authority/this Tribunal allowed "project wise insolvency" of each real estate project as opposed to consolidated CIRP of the entire corporate debtor. Similarly, in the insolvency proceedings of Videocon Industries Limited and 13 group companies, the NCLT has evolved the concept of "group insolvency" wherein the option of submitting a composite resolution plan for 13 companies of the same group was innovated. Similarly, in the insolvency resolution of ***Flat Buyers Associations Vs. Umang Realtech Private Limited, 2020 Scc Online NCLAT, 1199,*** this Tribunal allowed "reverse CIRP" whereby it was directed that the promoter of the real estate company to disburse amounts from outside as lender (not as Promoter) to ensure that the project is completed with the time frame given by it. Therefore, there is always a scope for innovation and experimentation so long as such innovations are necessary and conducive for achieving the object of maximisation of value which is the ultimate goal of the IB Code. Therefore, in our considered view, under the provisions of IBC and the Regulations, resolution of a Corporate Debtor is not strictly confined or constricted to the Code and Regulations. As highlighted above, there may be some cases, like the instant one, where the objects of value maximisation could not have been possible in ordinary course of procedure laid down in the Code and Regulations. Keeping in view the peculiarity of fact and circumstances of the case, the CoC, in its commercial wisdom, has rightly adopted a course which not only preserves the valuable contractual rights of the parties and at the same time afforded a level playing field to the participants. PRIO having made a valid and optimum offer for the purchase of PI, knowing fully well its offer could be nullified by BPRL by matching the same, PRIO cannot now raise a grievance that BPRL had no

such right of ROFR. Besides, as highlighted above, in several case, NCLAT /NCLT has evolved new methods keeping in view the special challenges/circumstances of the said cases deviating from the procedure laid down in the Code which have been upheld even by higher courts.

81. In view of the foregoing discussions, we are of the considered view that the approval ought to be granted to the offer made by the BPRL for purchase of quota held by VEBL in IBV in terms of BPRL offer letter dated 26.05.2023 and the consummation of transaction with BPRL for purchase of aforesaid quota held by which was approved by the CoC in its 40th meeting and a monitoring committee be constituted consisting of SBI, IDBI Limited, Exim Bank Limited to take necessary steps for consummation of transaction with BPRL. As discussed in the foregoing part of this order, the objections raised by PRIO against the proposed transaction with BPRL are also devoid of any merit and, therefore, deserve to be rejected.

82. Resultantly, we pass the following order:-

i. **IA No. 702/2024** filed by PRIO raising objections against the transaction in question is hereby **dismissed**.

ii. **IA No. 2787/2023** filed by the RP is **allowed** granting approval to the consummation of transaction with BPRL for purchase of quota held by VEBL in IBV in terms of BPRLs offers letter dated 26.05.2023, as provided by the CoC in its 40th meeting and a monitoring committee is also permitted to be constituted consisting

of SBI, IDBI Limited and Exim Bank to take necessary steps for consummation of transaction. We further, permit and approve the distribution of proceeds release for consummation of transaction with BPRL in terms of CoC resolution passed in 40th meeting held on 02.05.2023 while the Residual Assets of the Corporate Debtor shall be liquidated under section 31 (a) of IB Code, 2016 and for that purpose Mr. Pravin R. Navandar is appointed as Liquidator of the Corporate Debtor to undertake the liquidation proceedings in accordance with relevant provisions as IBC as well Liquidation Regulations.

iii. The parties are, however, left to bear their own costs.

Sd/-
ANIL RAJ CHELLAN
(MEMBER TECHNICAL)

Sd/-
KULDIP KUMAR KAREER
(MEMBER JUDICIAL)