NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.783 of 2023

(Arising out of Order dated 26.05.2023 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Special Bench (Court-II) in CA No.237/ND/2018 in Company Petition No. (IB)-244(ND)/2017)

IN THE MATTER OF:

Navayuga Engineering Company Limited
Registered Office at :
48-9-17, Dwarakanagar
Vishakhapatnam – 530 016

Also At:
M-3, Hauz Khas
Sri Aurobindo Marg,
New Delhi – 110 016 ... Appellant

Vs

1. MR. UMESH GARG
   Resolution Professional of Athena
   Demwe Power Ltd.
   F-33/3, Okhla Industrial Area
   Phase-II, New Delhi – 1100202.
2. Corporation Bank
   Mangladevi Temple Road, Pandeshwar
   Mangaluru, Karnataka – 575001.
3. Indian Bank

   No.66, Rajaji Salai
   Chennai (Madras), Tamil Nadu – 600001
   Also at : ARM Branch Upper Ground Floor
   Word Trade Centre, Babar Road,
   New Delhi – 110001.
4. M/S. Andra Power Private Limited

   Ground Floor, B1/46 Safdarjung Enclave
   New Delhi – 110029
5. M/S Aquagreen Engineering Management Pvt. Ltd.

   2nd Floor, A-Block, Plot No.14 Factory
   Road, Adjoining to Safdarjung Hospital
   New Delhi – 110029

6. Balaji Operation and Maintenance
   Services Private Limited
   2nd Floor, A-Block, Plot No.14, Factory
   Road, Adjoining to Safdarjung Hospital,
   Ring Road, New Delhi 110029

Also at: G-44, Second Floor,
BK Dutt Colony, New Delhi – 110003

7. M/S Lohit Urja Pvt. Ltd.
Front Side, Third Floor, Part of Property
No.E-561, 561-A, G.R. Plaza, Palam,
Sector 7, Dwarka, New Delhi – 110075
Also at: J-38, 2nd Floor, BK Dutt Colony
Near Paryavaran Bhawan, Jorbagh
New Delhi – 110003

8. M/s Zeus Infra Management Pvt. Ltd.
Ho.No.1-3-183/40/122, SBI Colony,
Gandhi Nagar, Hyderabad 500080
Also at: FI. No.601, 6th Floor, 6-3-1291/1/2,
Vasavi Homes, Umanagar, Street No.1,
Kundanbagh, Begumpet, Hyderabad-500016. ... Respondents

Present:

For Appellant: **Mr. Saurav Agarwal, Ms. Medha Sachdev, Ms. Simran Malhotra, Mr. Saurajay Nanda, Advocates.**

Mr. Krishnendu Datta, Sr. Advocate, Tanuj Sud, Mr. Ajay Kumar, Ms. Stuti Vatsa, Mr. Vijayant Goel, Mr. Rajat Sinha, Advocates in I.A. No. 3622 of 2023.

For Respondent: **Mr. NPS Chawla, Mr. Vibhor Kapoor, Mr. Aarsheya Sharda, Advocates for RP and Mr. Umesh Garg, RP.**

Mr. Brijesh Kumar Tamber, Mr. Prateek Kushwaha, Mr. Vinay Singh Bist, Mr. Yashu Rustagi, Mr. Sahas Bhasin, Mr. Aniruddh Mukherjee, Advocates for R-3 to 8.

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal has been filed by the Appellant challenging the order dated 26.05.2023 passed by NCLT, New Delhi Special bench (Court-II) in CA No.237/ND/2018, by which order, CA filed by the Appellant challenging

the decision of Resolution Professional ("**RP**") and Committee of Creditors ("**CoC**") to declare the Appellant as disqualified under Section 29A, has been rejected. The Appellant aggrieved by the order has come up in this Appeal.

2. Brief facts necessary to be noticed for deciding this Appeal are:

(i) Athena Demwe Power Limited, the Corporate Debtor was a company, incorporated for execution of demwe hydro electric project. The Corporate Debtor was incorporated as SPV on 09.07.2007. The Appellant has entered into a Memorandum of Understanding ("**MoU**") dated 15.03.2013 with Corporate Debtor and AIPPPL (Athena Infraprojects Private Limited), under which the Appellant undertook to infuse equity capital of 30% into the Corporate Debtor. The Appellant through its 100% subsidiary Regina Infrastructure Pvt. Ltd. ("**RIPL**") invested an amount of Rs.235.35 Crores through its 100% subsidiary, i.e. RIPL, which held 21.55% equity in the Corporate Debtor.

(ii) The account of the Corporate Debtor was declared NPA on 31.05.2013.

(iii) A Joint Lenders Meeting held on 01.10.2015, where it was decided that the Corporate Debtor required financial assistance. On 23/28.03.2016, a MoU was executed between

Appellant, Corporate Debtor and other entities of Athena Group, where it was decided that the Appellant shall invest equity share in the Corporate Debtor so as to become 51% shareholder. The MoU contained various terms and conditions and clauses pertaining to investment by the Appellant, management of Corporate Debtor, roles and responsibilities of the parties and other terms and conditions. After execution of MoU dated 23/28.03.2016, on 03.06.2016, a Lenders Meeting was held at REC Office to formulate the way forward to implement the project. Several correspondence took place between the Appellant and the Corporate Debtor; Appellant and the REC (the lead lender). The State of Arunachal Pradesh also granted in principle approval of transfer of 51% equity share in the project to the Appellant.

(iv) The Corporate Insolvency Resolution Process ("**CIRP**") commenced against the Corporate Debtor on an Application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "**IBC**") by short term lender, i.e., Indian Bank by order dated 28.09.2017.

(v) The Appellant claims to have transferred its entire shareholding in RIPL Infrastructure Pvt. Ltd. on 22.09.2017 for a consideration of Rs.1 lakh to Mr. Vijaybhaskar and Mr. Vijay Kumar.

(vi) On 11.01.2018, the RP issued pubic announcement inviting Expression of Interest ("**EoI**"). In the CIRP of the Corporate Debtor the Appellant submitted its Resolution Plan on 04.06.2018. Another Resolution Plan was submitted by Sikkim Power Investment Corporation Limited (SPICL). In the CoC Meeting held on 15.06.2018, the CoC opined that the Appellant is not eligible to submit a Resolution Plan under Section 29A of the IBC. On 18.06.2018, the RP sent an email to the Appellant, detailing the reasons for disqualification of the Appellant under Section 29A.

(vii) On 22.06.2018, the Appellant filed a CA No.237/ND/2018, praying for following reliefs:

"a) Set aside the decision of the Resolution Professional and/ or the Committee of Creditors recorded in the minutes of meeting dated 15th June, 2018 purportedly disqualifying the Applicant.

b) Direct the Resolution Professional and/ or the Committee of Creditors to accept the resolution plan submitted by the Applicant and declare the Applicant as the successful resolution applicant or alternatively, direct the Resolution Professional I Committee of Creditors to provide an equal and fair opportunity to the Applicant to submit a revised resolution plan after being made privy to the details of the revised plan submitted by SPICL;

c) Set aside the decision of the Resolution Professional/ Committee of Creditors accepting the revised resolution plan by SPICL as recorded in the minutes of meeting dated 15th June, 2018;

d) Pending the disposal of the present application, pass an ex-parte ad interim order restraining the Resolution Professional/ Committee of Creditors from entering into any discussion or negotiations with SPICL;

e) Pending the disposal of the present Application, pass orders/ directions injuncting the Resolution Professional/ Committee of Creditors from carrying on with the resolution process any further;

f) Pass orders confirming the ad-interim injunction prayed for above, upon return of motion;

g) Pass such other order/ orders as it may deem fit and proper."

(viii) The RP filed a reply to the A No.237 of 2018, to which a rejoinder was filed by the Appellant. The CoC also filed its reply to the CA filed by the Appellant.

(ix) The Adjudicating Authority by the impugned order dated 26.05.2023 concluded that the Appellant is disqualified under Section 29A. Conclusions of the Adjudicating Authority recorded in paragraph 54 to 58 are as follows:

"54. As per the Judgement of the Hon'ble Apex Court in ArcelorMittal India Pvt. Ltd. v. Satish Kumar Gupta, (2019) 2 SCC 1, the amendment in Section 29(A)(c) i.e., "at the time of

submission of the resolution plan" was clarificatory in nature. Hence, the trigger point of Section 29A is the date when the Resolution Plan was actually submitted by the Resolution Applicant to the CoC. In the instant case, the Resolution plan was submitted by the Applicant/NECL to the CoC on 04.06.2018, when Section 29A of IBC, 2016 was already in force.

55. In the sequel of the discussion and observations in Part VI of this order, we conclude that the Applicant herein/NECL was a 'promoter' exercising its 'control' over the Corporate Debtor/ ADPL in view of the following findings –

> *(i) Clause 4.5 of the MOU dated 23.03.2016 i.e.," ... Till the financial closure of the project is achieved or Definitive Agreements executed, the internal management of the Company would be run on the basis of the provisions of this MOU' remained operational both in effect and practice. Further, even if the MOU was subject to regulatory approvals and approvals by senior lenders, which if not received, the Applicant did not get the MOU terminated in terms of clause 8.9.*
>
> *(ii) By virtue of Clause 3.2 of the said MOU, from the Effective Date i.e., 23.03.2016, the Applicant was vested with the right to nominate the majority of the Directors on the reconstituted Board of ADPL/CD, which depicts that the Applicant/NECL was capable of constituting the composition of the Board.*
>
> *(iii) The Applicant/ NECL was exercising its 'control' over the Corporate Debtor/ ADPL through the exchange of various communications/policy decisions*

exercisable by a person or persons acting individually or in concert, directly or indirectly in terms of the term 'Control' as defined under Section 2(69)(b) of the Companies Act, 2013.

(iv) The entire transaction of the transfer of shares of Regina (RIPL) by the Applicant/NECL was done in cash, the date of receipt of which cannot be proved beyond doubt in the absence of any digital record, especially when both the transferor and transferee of shares are known and connected to each other. Further, while the Applicant/NECL had given a loan of Rs. 328 Crores to Regina (RIPL), the act of transferring its shares including to one of the Directors of Regina at a nominal amount of Rs. 1,00,000/- (One Lakh), that too only 6 days prior to the date of commencement of the CIR Process of the Corporate Debtor/ADPL, raises serious doubts about the fairness of the transaction. In the circumstances, there exists sufficient ground for agreeing with the contention of CoC/RP that the transaction was a sham.

(v) Even otherwise, on lifting the Corporate Veil of Regina (RIPL), we found that the Applicant/Navayuga (NECL) was exercising control over Regina (RIPL) through the "Directors of its Related/Connected Companies" even on the date of submission of the Resolution Plan.

56. We have also noted, in paragraph 53 above, from the documents placed on record that the Corporate Debtor was NPA since 31.05.2013.

57. The Section 29A(c) of IBC, 2016 has three essential conditions that viz, (a) the account of the Corporate Debtor must be NPA, (b) such account must be under the management or control of such persons (Resolution Applicant) or of whom such person is a Promoter, and (c) at least a period of one year has elapsed from the date of such classification till the date of commencement of CIR process of the Corporate Debtor.

58. In the instant case, we have found that all the three ingredients of the Section 29A(c) are met i.e., (a) the account of the Corporate Debtor/ADPL was NPA since 31.05.2013, (b) a period of more than 4 years has lapsed from the date of NPA till the commencement of CIRP of the Corporate Debtor on 28.09.2017, and (c) the Applicant herein/NECL has been found to be a 'promoter' exercising its 'control' over the Corporate Debtor/ADPL through Regina (RIPL)."

(x) This Appeal has been filed by the Appellant challenging the order dated 26.05.2023.

3. We have heard Shri Saurav Agarwal, learned Counsel appearing for the Appellant; Shri NPS Chawla, learned Counsel has appeared for RP; Shri Brijesh Kumar, learned Counsel has appeared for CoC; Shri Krishnendu Datta, learned Senior Counsel has appeared on behalf of THDC India Limited, who has filed IA No. 3622 of 2023, who was permitted to intervene in the Appeal by our order dated 22.09.2023.

4. Shri Saurav Agarwal, learned Counsel for the Appellant challenging the order passed by the Adjudicating Authority submits that

Adjudicating Authority committed error in holding that the Appellant is ineligible to file a Resolution Plan under Section 29A(c) of the IBC. It is submitted that on the date when Corporate Debtor's account was declared as NPA, i.e., 31.05.2013, the Appellant was neither in management nor was Promoter of the Corporate Debtor. Majority shareholder of the Corporate Debtor at that time was AEPL. The objective of Section 29A, sub-clause (c) is to bar the person/ entity, who had caused/ responsible for NPA. The Appellant being not in management or control at the time when the Corporate Debtor's account was declared as NPA, no disqualification can attach against the Appellant under Section 29A (c). The RIPL, subsidiary of the Appellant had only less than 9% shareholding on the date when Corporate Debtor was declared NPA and it cannot be held that the Appellant has any control over the management of the Corporate Debtor, through its subsidiary RIPL. Reliance of the Adjudicating Authority on the MoU dated 23/28.03.2016 for holding that Appellant came into management and control of the Corporate Debtor is incorrect and unfounded. As per the MoU, the Appellant was to invest equity share in the Corporate Debtor to the extent of 51%, which shareholding required approval of the Lenders and the Government of Arunachal Pradesh. The control and management was to be given to the Appellant subject to Appellant performing its obligation of equity infusion upto 51% in the Corporate Debtor. Process for approval by the Lenders remained pending and equity share of 51% could not be invested by the Appellant, hence, the

Appellant cannot be said to have acquired management and control of the Corporate Debtor. The MoU dated 23/28.03.2016 was a conditional/ contingent contract, which conditions/ contingencies were never satisfied. The learned Counsel for the Appellant has specially relied on Clause 1.9 of MoU dated 23/28.03.2016 to support his submission. The rights contemplated in the MoU were to be given in future in consideration of Appellant's performing its obligation and to pass on the management and control, the investment was a must. The definitive Shareholders' Agreement, as per Clause 1.8 had to be entered into, which was not done. Subsequent emails exchanged between Corporate Debtor, REC and Appellant, do not show any control over the Corporate Debtor of the Appellant. The emails were exchanged for the purposes of sharing information for appraisal process of the project and the Appellant was to submit all information/ documents to REC for timely completion of the process. The Adjudicating Authority erred in relying on the correspondence in the above regard and has erroneously found the control by the Appellant reflected through aforesaid emails. The Appellant has transferred his 100% shareholding in RIPL on 22.09.2017, i.e. before initiation of CIRP on 28.09.2017. The Appellant is not exercising any control or management over the Corporate Debtor through its subsidiary RIPL. The expression 'control' is both *de jure* and *de facto* control. Test of control by the Appellant was not fulfilled in the present case. Neither the Appellant nor RIPL was Promoter of the Corporate Debtor. The Appellant did not cause NPA of the Corporate

Debtor, hence, no ineligibility can be attached to the Appellant. The Adjudicating Authority committed error in concluding that the Appellant is ineligible to submit a Resolution Plan under Section 29A(c).

5. Shri NPS Chawla, learned Counsel appearing for the RP, refuting the submission of the Appellant contends that the Appellant has invested Rs.236.11 Crores and held 21.55% equity shares through its 100% subsidiary RIPL in the Corporate Debtor. The Appellant was in position to invest additional Rs.730 Crores further within the approved limit of Rs.966 Crores, which was already in place in terms of MoU dated 15.03.2013. The MoU dated 23/28.03.2016 has to be read as a whole, which clearly indicate that the Appellant had been given both *de jure* and *de facto* control of the Corporate Debtor. Further, the Appellant was exercising control over the Corporate Debtor through RIPL, which held 21.55% equity shares in the Corporate Debtor. The Appellant claims that by transfer dated 22.09.2017 it has transferred all its shareholding in the RIPL for a consideration of Rs.1 lakh. The Appellant has given loan of Rs.328 Crores to RIPL and the claim of the Appellant that it had transferred 100% of its shareholding in RIPL on 22.09.2017 for a consideration of Rs.1 lakh speaks for itself. The transaction dated 22.09.2017 is back dated transaction, since neither there is any proof of any payment nor any material to prove that transaction took place on 22.09.2017. The MoU dated 23/28.03.2016, clearly indicate that MoU was executed for implementation of the project and the operations of the business of the Corporate Debtor and it was in lieu of investment

already made by the Appellant through its subsidiary and for the investment, which was to be made in future. The Appellant took management and control over the Corporate Debtor even before further infusion of the funds by the Appellant. As per MoU, NEC was to arrange all future fund requirements to meet the Debt Equity Ratio for implementation of the project. Clauses of First and Second MoU dated 23/28.03.2016 when read together, clearly indicate that the Appellant was given control and management of the Corporate Debtor, which disqualify the Appellant under Section 29A(c). All relevant correspondence between the parties and the emails sent by the Appellant, reflects control over all functions of the Corporate Debtor, including policy decision which were placed before the Adjudicating Authority, which have been rightly relied by the Adjudicating Authority for coming to the conclusions that Appellant is in control and management of the Corporate Debtor. The Appellant is a substantial shareholder in the Corporate Debtor through RIPL.

6. The learned Counsel for the CoC, refuting the submissions of the Appellant, submits that the Appellant who is vested with rights exercisable under an arrangement/ agreement is a Promoter. The Appellant is a Promoter by virtue of MoU dated 23/28.03.2016. There is specific clauses in MoU with regard to management of Corporate Debtor. The Adjudicating Authority after considering all relevant materials on the record has rightly come to the conclusion that the Appellant is disqualified under Section 29A(c). The proviso to Section

29A(c) permits a person to pay all the debts and the loan of NPA to become eligible. Persons, who are in management of the Corporate Debtor and do not take steps for paying all the debts of NPA are clearly ineligible to submit a Resolution Plan. The interpretation, which is put by the Appellant of Section 29A(c), if accepted, the larger objective sought to be achieved by the said sub-clause will be defeated.

7. Shri Krishnendu Datta, learned Senior Counsel appearing for THDC India Limited ("**THDC**") has already filed an IA No.2230 of 2022 in the CP (IB) 244/ND/ 2017 and as per the direction of Ministry of Power and suggestion of Government of Arunachal Pradesh, seeking direction to the effect that its Plan be considered by the CoC, given that there is significant delay and change in feasibility and viability factors. The learned Senior Counsel has referred to Report of the Evaluation Committee constituted by Ministry of Power for facilitating takeover of stalled hydro projects, i.e., the project being implemented by the Corporate Debtor. The RP has filed affidavit in IA No.2230 of 2022 stating that it does have any objection against consideration of IA No.2230 of 2022 filed by THDC, if it caters to the interest and well-being of the stakeholders of the Corporate Debtor. It is stated that the State of Arunachal Pradesh has also filed CA No. 1683 of 2019 seeking directions to consider its Resolution Plan. Learned Senior Counsel for the THDC submits that in the facts of present case, the Applicant be permitted to also file its Resolution Plan in the CIRP of the Corporate Debtor.

8. We have considered the submissions of learned Counsel for the parties and have perused the record.

9. From the submissions of learned Counsel for the parties and materials on record, following issues arise for consideration in this Appeal:

(I) Whether Section 29A, sub-section (c) disqualify only those persons who were in management and control of the Corporate Debtor at the time when Corporate Debtor's account was declared NPA or the persons/ entity, which is in control of the management of the Corporate Debtor at the time of submission of Resolution Plan can also be held ineligible under Section 29A, sub-section (c)?

(II) Whether as per Second MoU dated 23/28.03.2016 entered between the Appellant, Corporate Debtor and Athena Group, the Appellant can be held to be in control and management of the Corporate Debtor with effect from the date of execution of the MoU?

(III) Whether transfer of 100% of shareholding by the Appellant in its subsidiary RIPL on 22.09.2017 was a sham transaction?

(IV) Whether the Adjudicating Authority committed error in holding Appellant, disqualified, to submit the Resolution Plan under Section 29A (c) of the IBC?

Question No. (I)

10. The first question needs to be answered is with regard to the scope and ambit of Section 29A (c). Section 29A was inserted in the Code by Act 8 of 2018 w.e.f. 23.11.2017. The Statement of Object of the Act 8 of 2018, which is relevant to throw light on the purpose of object of enactment is as follows:

> *"The provisions for insolvency resolution and liquidation of a corporate person in the Code did not restrict or bar any person from submitting a resolution plan or participating in the acquisition process of the assets of the company at the time of liquidation. Concerns have been raised that persons who, with their misconduct contributed to defaults of companies or are otherwise undesirable, may misuse this situation due to lack of prohibition or restrictions to participate in the resolution or liquidation process, and gain or regain control of the corporate debtor. This may undermine the processes laid down in the Code as the unscrupulous person would be seen to be rewarded at the expense of the creditors. In addition, in order to check that the undesirable persons who may have submitted their resolution plans in the absence of such a provision, responsibility is also being entrusted on the committee of creditors to give a reasonable period to repay overdue amounts and become eligible."*

11. We in the present case being concerned with 29A(c), which provision along with proviso is as follows:

> *"**29A(c)** at the time of submission of the resolution plan has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949) or the guidelines of a financial sector regulator issued under any other law for the time being in force, and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor:*
>
> *Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to nonperforming asset accounts before submission of resolution plan:*
>
> *Provided further that nothing in this clause shall apply to a resolution applicant where such*
>
> *Explanation I.- For the purposes of this proviso, the expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares or completion of such transactions as may be prescribed], prior to the insolvency commencement date.*

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

12. The submission, which has been advanced by the Appellant is that the expression "*an account of the Corporate Debtor, under the management or control for such person or such person is a promoter, classified as Non-Performing Asset*", disqualifies only those persons or promoters, who cause/ led or were responsible for Corporate Debtor's account to be declared as NPA. The submission is that Corporate Debtor's account was declared NPA on 31.05.2013, on which date, neither the Appellant was Promoter, nor it has management and control of the Corporate Debtor. It is submitted the basis of disqualification of the Appellant is the Second MoU dated 23/28.03.2016, which admittedly is a subsequent event as per the case of the Respondents themselves. Hence, ineligibility under Section 29a(c) shall not attach to the Appellant, who was not in management and control of Corporate Debtor on 31.05.2013, when the account of the Corporate Debtor was declared as NPA. It is further submitted that RIPL, who had

shareholding in the Corporate Debtor as per the MoU dated 15.03.2013, had only less than 9% shareholding. The RIPL being 100% subsidiary of the Appellant, it cannot be held that the Appellant was exercising any management or control over the Corporate Debtor through its subsidiary RIPL. By amendment made in Section 29A by Act 26 of 2018 in Section 29A, sub-section (c), the words "*at the time of submission of resolution plan has an account",* declared that ineligibility has to be seen under Section 29A at the time of submission of Resolution Plan. In the present case, date of submission of Resolution Plan by the Appellant is 04.06.2018. The learned Counsel for the Appellant placed reliance on the judgment of the Hon'ble Supreme Court in ***Arcelormittal India Private Limited vs. Satish Kumar Gupta and Ors. – (2019) 2 SCC 1***. In **Arcelormittal**, the Hon'ble Supreme Court had occasion to examine the validity of Section 29A of the IBC. The Hon'ble Supreme Court has extracted the statement of Hon'ble Minister of Finance and Corporate Affairs, while moving the Insolvency and Bankruptcy Code (Amendment) Bill, 2017 on 29.12.2017. Paragraph 27 of the judgment of Hon'ble Supreme Court notices the statement, which is as follows:

> *"**27.** The Hon'ble Minister of Finance and Minister of Corporate Affairs, Shri Arun Jaitley, while moving the Insolvency and Bankruptcy Code (Amendment) Bill, 2017, stated on 29-12-2017:*
>
> > *"The core and soul of this new Ordinance is really Clause 5, which is Section 29-A of the original Bill. I may just explain that once a company goes into the resolution process, then applications would be*

invited with regard to the potential resolution proposals as far as the company is concerned or the enterprise is concerned. Now a number of ineligibility clauses were not there in the original Act and, therefore, Section 29-A introduces those who are not eligible to apply. For instance there is a clause with regard to an undischarged insolvent who is not eligible to apply; a person who has been disqualified under the Companies Act as a Director cannot apply and a person who is prohibited under the SEBI Act cannot apply. So these are statutory disqualifications. And there is also a disqualification in clause (c) with regard to those who are corporate debtors and who as on the date of the application making a bid do not operationalise the account by paying the interest itself i.e. you cannot say that I have an NPA. I am not making the account operational. The accounts will continue to be NPAs and yet I am going to apply for this. Effectively this clause will mean that those who are in management and on account of whom this insolvent or non-performing asset has arisen will now try and say, I do not discharge any of the outstanding debts in terms of making the accounts operational and yet I would like to apply and set the enterprise back at a discount value, for this is not the object of this particular Act. So Clause 5 has been brought in with that purpose in mind."

(emphasis supplied)"

13. The observations made by the Hon'ble Supreme Court in ***Arcelormittal*** in paragraph 60, makes it clear that, those who were at a reasonably proximate point of time before the submission of Resolution Plan were in control of the affairs of the Corporate Debtor and they have arranged the affairs, as to avoid paying off the debts of the non-performing asset, such persons must also be held to be ineligible to submit a Resolution Plan. Paragraph 60 of the judgment is as follows:

> *"**60.** It is important for the competent authority to see that persons, who are otherwise ineligible and hit by clause (c), do not wriggle out of the proviso to clause (c) by other means, so as to avoid the consequences of the proviso. For this purpose, despite the fact that the relevant time for the ineligibility under clause (c) to attach is the time of submission of the resolution plan, antecedent facts reasonably proximate to this point of time can always be seen, to determine whether the persons referred to in Section 29-A are, in substance, seeking to avoid the consequences of the proviso to clause (c) before submitting a resolution plan. If it is shown, on facts, that, at a reasonably proximate point of time before the submission of the resolution plan, the affairs of the persons referred to in Section 29-A are so arranged, as to avoid paying off the debts of the non-performing asset concerned, such persons must be held to be ineligible to submit a resolution plan, or otherwise both the purpose of the first proviso to clause (c) of Section 29-A, as well as the larger objective sought to be achieved by the said clause in public interest, will be defeated."*

14. In event the interpretation as put by the learned Counsel for the Appellant is accepted that only those persons, who were in management and control of the Corporate Debtor at the time when the Corporate Debtor was declared as non-performing asset are disqualified under Section 29A (c), the provision will operate in a very narrow field, which is not in accord with the object and purpose of the amendment. A Corporate Debtor, whose account has been declared as non-performing asset, event at previous point of time, those who are managing the affairs of the Corporate Debtor and arranged the affairs, who did not take any steps to clear the non-performing asset and regularize the account, also are in the net of Section 29A, under their management and control the Corporate Debtor could not come out from NPA, but still if they are held to be eligible to submit a Resolution Plan, the same shall not be as per the Scheme of the IBC. The Hon'ble Supreme Court in paragraph 60 as extracted above has used the expression "*the affairs of the persons referred to in Section 29A are so arranged, as to avoid paying off the debt of the non-performing asset concerned, such persons must be held to be ineligible to submit a resolution plan,"*. Thus, persons in the management and control of the affairs of the Corporate Debtor, who led the Corporate Debtor to slip into NPA and persons, who are in the management and control of the affairs of the Corporate Debtor in the close proximate of time, before the submission of Resolution Plan, who failed to pay the debt of the Corporate Debtor, are also ineligible. We,

thus, are satisfied that narrow interpretation of Section 29A (c) put by learned Counsel for the Appellant, cannot be accepted. Thus, the submission of the Appellant that since the Appellant was not in control and management of the Corporate Debtor admittedly on 31.05.2013, when the Corporate Debtor's account declared as NPA, he cannot be held to be ineligible under Section 29A, cannot be accepted. The relevant date for examining the ineligibility is the date of submission of Resolution Plan. We, thus, answer Question No.(I) in following manner:

(i) Section 29A, sub-section (c) does, not only disqualify, those who were in management and control of the Corporate Debtor at the time when its account was declared NPA, but also disqualifies those, who were in management and control of the Corporate Debtor and in close proximity of time, before submission of Resolution Plan, who failed to clear the debts of the Corporate Debtor.

Question Nos. (II), (III) and (IV)

15. Question Nos. (II), (III) and (IV) being inter related, are being considered together.

16. The submission of learned Counsel for the parties veer round the second MoU dated 23/28.03.2016. The submission of learned Counsel for the Appellant is that the MoU dated 23/28.03.2016, did not transfer the management and control of the Corporate Debtor to the Appellant, rather, management and control were to be transferred after the Appellant fulfills

its obligation of equity investment of 51%. Learned Counsel for the Appellant has specifically relied on Clause 1.9 of the MoU and submits that the said clause clearly contemplates that management and control were to be given to the Appellant in future, after 51% equity is invested by the Appellant. It is submitted that 51% equity investment by the Appellant was subject to the approval by the Lenders, which approval having not come and the Appellant having not invested 51% equity, there is no question of management and control vested with the Appellant. It is submitted that the Adjudicating Authority committed error in coming to the conclusion that under MoU dated 23/28.03.2016, the management and control was transferred to the Appellant. Learned Counsel for the Appellant further submits that various correspondence between the Appellant and the Corporate Debtor, Appellant and RECs the lead Lender have been relied by the Adjudicating Authority to come to the conclusion that the Appellant acted in pursuance of MoU dated 23/28.03.2016 and is having management and control of the Corporate Debtor, is also fallacious, since the very basis of said findings that control and management have been transferred by MoU dated 23/28.03.2016 is incorrect.

17. On the other hand, learned Counsel for RP as well as CoC have contended that MoU dated 23/28.03.2016 handed over the management and control to the Appellant and the handing over of the management and control was on effective date, which was the date of signing of the MoU and was not dependent on 51% equity investment by the Appellant. The learned Counsel for the RP has referred to various correspondences and letters

written by the Appellant subsequent to 23/28.03.2016. It is submitted that learned Counsel for the Appellant is selectively reading the clauses of MoU and if the MoU is read as a whole the intendment of the parties will be clear that management and control was handed over w.e.f. effective date. It is submitted that in the Corporate Debtor, the Appellant has already invested Rs.236 Crores through its wholly owned subsidiary RIPL and the action of the Appellant transferring 100% shareholding in RIPL, six days before the initiation of CIRP was a sham transaction, just to get rid of its shareholding in the RIPL, which transaction has rightly been held as sham by the Adjudicating Authority relying on all relevant materials on record.

18. We have noticed that the Appellant has invested Rs.236 Crores in the Corporate Debtor in pursuance of MoU dated 15.03.2013, through its wholly owned subsidiary RIPL. The Appellant through its wholly owned subsidiary have 21.55% equity share in the Corporate Debtor. The investment of Rs.236 Crores in the Corporate Debtor by the Appellant is an admitted fact, which is captured in MoU dated 23/28.03.2016. Paragraphs 1.4 and 1.5 of the MoU states as follows:

> *"1.4. ADPL,-AIPL and NECL have entered into a Memorandum of Understanding in respect of the equity investment by NEC in ADPL, dated March 15, 2023 which was amended on December 06, 2013 (with effect from January 01, 2014), December 24, 2014 (with effect from January 01, 2015) (collectively the "Old MOA"' which. would include amendments from time to time).*

1.5. In terms of the Old MOA, NEC had agreed to (a) make an investment of INR 290,00,00,000 (Rupees Two Hundred and Ninety Crores) in ADPL against allotment of equity shares corresponding to 9% (nine percent) of the equity share capital of ADPL; and (b) make an investment of INR 676,00,00,000 (Rupees Six Hundred and Seventy Six Crores) in AEVPL, a shareholder of ADPL, corresponding to 21% (twenty one percent) of the equity share. capital of ADPL. Out of committed amount of INR 290,00,00,000 (Rupees Two Hundred and Ninety Crores) NEC has already invested INR 236,11,00,000 (Rupees Two Hundred and Thirty Six Crores and Eleven Lacs) in ADPL and ADPL has issued and allotted corresponding shares to NEC. The closing date under the Old MCA, as amended, was December, 31, 2015."

19. We may also notice that under the MoU that within expression NEC its associates, affiliated and subsidiaries are used. While describing the parties at Claue-4, following have been stated in the MoU Dated 23/28.03.2016 :

"4. Navayuga Engineering Company Limited, incorporated in India under the Companies Act, 1956 with corporate identity number [U45203API 986PLC006925], whose registered office is at Plot No. 379, Road No. 10, Jubilee Hills, Hyderabad – 50003 (hereafter referred to as "NEC" which expression, unless repugnant. to the context or

meaning thereof shall be deemed to include its associates, affiliates, subsidiaries, successors and permitted assigns);"

20. We need to look into various clauses of MoU dated 23/28.03.2016 to decipher the real effect and consequence of MoU between the parties. The key to answer the question as to whether MoU dated 23/28.03.2016 gave management and control to the Appellant, need to be find out from the clauses of the MoU. We shall, thus, notice relevant clauses of MoU. Clause 1.8 of the MoU provides as follows:

"1.8. The Parties have arrived at revised business understanding with respect to investment in ADPL and implementation of the Project. Accordingly, in supersession of the Old Moa, the Parties have agreed that NECL shall be holding 51% (fifty one percent) equity share capital of ADPL at the time of COD and are entering into this binding MOU, to record the principal terms of their renewed understanding in relation to operations of the business of ADPL and implementation of the Project. Subsequently, this MoU would be converted into a shareholders' agreement and/or any such other agreements ("Definitive Agreements"), which would govern their respective rights and obligations as joint venture partners and shareholders of ADPL and the manner in which the rights and obligations of Parties shall be discharged."

21. A perusal of the above clause indicates that two principal agreements between the parties have been recorded i.e. - (i) parties have agreed that

NECL shall be holding 51% equity share capital of ADPL; and (ii) are entering into its binding MOU, to record the principal terms of their renewed understanding in relation to operations of the business of ADPL and implementation of the Project. Thus, the agreement clearly was on the both parts, i.e. investment of equity upto 51% and in relation to operation of business of ADPL.

22. Now, we come to clause 1.9, on which much reliance has been placed by learned Counsel for the Appellant, which is as follows:

> *"**1.9.** The requisite up front equity as per the financing plan approved by the senior lenders has already been infused by ADPL in the Project and accordingly, in consideration of NEC performing its obligations under this MOU, and until such time NEC holds 51% (fifty one percent) of the equity share capital of ADPL, to give effect of the revised business understanding as per 1.8, Parties have agreed that NEC shall be given management control/ affirmative rights in accordance with this MoU."*

23. learned Counsel for the Appellant submits that Clause 1.9 clearly meant that management and control was to be given after the Appellant performing its obligations, i.e. infusing equity of 51%. The Clause 1.9 as extracted above clearly records that **"until such time NEC holds 51% of the equity share capital of ADPL, to give effect of the revised business understanding as per 1.8, Parties have agreed that NEC shall be given management control/affirmative rights in accordance with this MoU**". The above clause clearly indicates that the giving of management and

control of rights was until such time NEC holds 51% equity share. Thus, giving of management and control was not dependent on 51% equity share by the Appellant. The use of the expression "***until such time NEC holds 51%***" clearly indicates that the said status has to be prior to completion of 51% investment. We have already noted that investment of Rs.236 Crores by the Appellant through RIPL was already there. The Clause 1.9 cannot be read as contended by the Appellant.

24. The above interpretation finds support from clause, i.e., Clause-3, 'Management of ADPL', where various sub-clauses under Clause-3 clearly indicate the intention of the parties. Clause 3 and its various sub-clauses of MoU dated 23/28.03.2016 are as follows:

> *"**3. Management of ADPL***
>
> *3.1. From the Effective Date till the execution of the Definitive Agreements or till the term of this MOU, whichever is earlier, the relationship between the Parties would be governed in terms of this MOU>*
>
> *3.2 From the Effective Date, NEC shall have right to nominate its directors on the board of directors of ADPL ("Board") and NEC nominated directors shall form the majority of reconstituted Board.*
>
> *3.3 From the Effective Date, all matters listed in Annexure 'A' of the MOU shall require the affirmative vote of the NEC nominee directors in the board meeting(s) of ADPL and shall require the affirmative vote of the NEC representatives in the shareholder's meeting(s) of ADPL as the case may be to be passed successfully.*

3.4 From the Effective Date, NEC shall have the right to appoint or replace the Key Managerial Personnel like Managing Director and Chief Financial Officer of ADPL.

3.5 Subject to the provisions of the Companies Act, 2013, from the Effective Date, the presence of at least 2 (two) Directors nominated by NEC shall be mandatory for form requisite quorum for all board meeting(s).

3.5 All the general meetings of the shareholder of ADPL and the Board of ADPL shall be governed by the provisions of this MOU. From the Effective Date, the presence of at least 1 (one) NEC representative shall be mandatory to form the requisite quorum for any meeting of shareholders of ADPL.

3.6 The director(s) nominated by NEC shall be covered in D&O policy obtained by ADPL to the extent permitted."

25. When we read various sub-clauses of Clause-3, it is clear that the Appellant was given full management and control. Clause 3.1 clearly provide that ***"from Effective Date till the execution of the Definitive Agreements or till the terms of this MOU, whichever is earlier, the relationship between the parties would be governed in terms of this MOU***". The Effective Date has been defined in the Agreement as date on which the Agreement is executed by all the parties. The Effective Date is defined in Clause 8.8, which is to the following effect:

"8.8. <u>Effective Date:</u> This MOU shall be effective from the date on which its execution by all the Parties is complete, and the date on which the last party executed this MOU shal1 be considered to its effective date."

26. The Agreement indicates that on 23/28.03.2016, all parties have executed the Agreement. Thus, Effective Date is 23/28.03.2016. The term of the MoU is referred in Clause 8.9, which was either on any date as mutually agreed upon or upon signing of the Definitive Agreement, whichever is earlier. The Definitive Agreement has not been executed and there is no material to indicate that parties agreed for termination of MoU at any point of time. Thus, from the Effective Date, the management was entrusted to the Appellant. Clause 4.5, further indicates that the internal management of the Company was to run on the basis of provisions of the MoU. Clause 4.5 is as follows:

"4.5 To the extent required, the Patties shall make amendments to the articles of association of ADPL to reflect the provisions of the Definitive Agreements. Till the financial closure of the Project is achieved or Definitive Agreements executed, the internal management of the Company would be run on the basis of the provisions of the MOU."

27. Clause-5 provides for 'Conditions and Approvals', which provided that the investment contemplated by NEC shall be subject to receipt of all regulatory approvals. Clause-5, is as follows:

"5. CONDITIONS ANO APPROVALS

The investment contemplated by NEC pursuant to this MOU shall be subject to receipt of all regulatory approvals and approvals from the senior lenders, as may be necessary."

28. The aforesaid clause was thus, only with regard to investment. Under Clause-8.5 the MOU was binding on all the parties. Clause 8.5 is as follows:

"8.5. <u>Binding:</u> this MOU is binding in nature."

29. It is well settled that a document is to be read as a whole to find out its intention and purpose. The MoU became effective from the date of execution as per the clauses as quoted above. Annexure to the MoU clearly contemplated the matters, which required Affirmative votes or approvals of the NEC. Annexure of the MoU is as follows:

"ANNEXURE

Matters requiring an Affirmative votes/ approvals of NEC nominee Directors and their representatives in Board Meeting(s) and Shareholders meeting(s)

1. *Reconstitution of the existing Project Management Committee ("PMC") and change in its delegated roles, responsibilities and authorities.*
2. *Review of all existing delegation of authorities, contracts, arrangements, management personnel, employees and any other aspect related to execution of the Project and any additions and modifications therein.*
3. *Appointment of re-appointment of Chief Financial Officer of ADPL ("CFO").*

4. In absence of CFO, delegation of financial powers typically exercised by a CFO to any other person."

30. It is, thus, clear that MoU cannot be read to mean that management and control was to be given to the Appellant only after investment of 51% of equity shares by the Appellant. The investment and running of the Company, are two different aspects, which were captured by the MoU and management and control of the Corporate Debtor was given to the Appellant, which is clear from various clauses as noted above. Thus, we hold that as per second MoU, the Appellant has to be held to be in control of the management of the Corporate Debtor from the date of execution of the MoU, i.e., 23/28.03.2016.

31. The Adjudicating Authority in the order has elaborately considered the materials and correspondence, which were brought by the parties and has come to the conclusion that correspondence between the parties and letters written by the Appellant, itself indicate that the Appellant acted as entity in control and management of the Corporate Debtor. We in this context, only refer to few of the materials, which were already on the record. We may refer to the letter dated 18.05.2016, which was written to the Appellant by the President of the Corporate Debtor. In the end of the letter, following request was made to the Appellant by the President of the Corporate Debtor:

"In view of the above, we hereby request you to please provide the final report of the due diligence exercise done by SBI Caps on behalf of NEC for further submission to Indian Bank and also consider the request for equity

infusion towards part payment of Short term Loan dues. The matter with regard to the Lenders Meet is being discussed with REC, Lead Lender."

32. The MoU dated 23/28.03.2016, clearly provided that the Appellant was to provide financial support as it deem necessary for implementation of the Project. Paragraph 4.3 of the MoU is referred to in this context, which is as follows:

"4.3 NEC shall provide the following support to ADPL:

(a) NEC shall make such additional investment, as it deems necessary towards maintaining debt-equity ration specified by the lenders of ADPL;

(b) NEC shall provide such other financial support as it may deem necessary for implementation of the Project."

33. It was due to this reason the President of Corporate Debtor wrote to the Appellant to clear the dues of the Indian Bank to make equity infusion towards part payment of short-term loan dues of the Indian Bank. It is to be noted that it is the Indian Bank, who filed the Application under Section 7, which led to CIRP of the Corporate Debtor. Thus, the Appellant had every opportunity and right to clear the debt of short-term loan, which led to insolvency and the Appellant, who was in management and control of the Corporate Debtor, cannot be heard in saying that it has no opportunity to clear the debt in the proximate time of commencement of CIRP.

34. The Adjudicating Authority after considering all relevant materials has come to the conclusion in paragraph 55 to 58, which we have already quoted in paragraph 2(ix) of this judgment.

35. On the question as to whether the transaction entered on 22.09.2017, under which the Appellant came to have transferred the 100% shareholding to the RIPL, the Adjudicating Authority has considered the issue in detail and recorded that the said transfer was made after the filing of Section 7 Application by the Financial Creditor and was six days before the order was passed initiating the CIRP. The transaction was carried on in cash consideration of Rs.1 lakh, which is despite the fact that the Appellant had given loan of Rs.328 Crores to RIPL. In paragraph 33 of the order, the Adjudicating Authority has made the following observation:

> *"**33.** It is further contended by the RP and CoC that the transfer of shares by the Applicant/NECL in Regina (RIPL), that too, just 06 days prior to initiation of CIRP was a sham transaction. In support of their contention, the RP and CoC have stated that the said Transaction was carried out in cash with consideration of Rs. 1,00,000 /- (one lakh) only despite the fact that the Applicant/NECL had given a loan of Rs. 328 Crores to Regina (RIPL). Further, half of the shareholding was transferred to one Mr. K. Vijayabhaskar, who was an official of the Applicant/NECL. The RP has relied upon the certificate of CA to substantiate its submission that the shares were sold for a cash amount of Rs.1,00,000 /- only to Mr. K. Vijayabhaskar and Mr. C. Vijay Kumar. The said Certificate is reproduced overleaf for immediate reference:*
>
> *"TO WHOM SO EVER IT MAY CONCERN*

This is to certify that Navayuga Engineering Company Limited, having is Reg. Office at 48-9-17, Dwarkanagar, Viskhapatnam, Andhra Pradesh, had sold its investment of 10,000 Equity Shares held in Regina Infrastructure Private Limited for a consideration of Rs.1,00,000/- (Rupees One Lakh only) and received the cash on 22.09.2017/- towards sale consideration. The details of the parties to whom the said shares have been sold are given under:

Sl. No	*Name of the Transferor*	*Certificate No.*	*Distinctive No.*	*Name of the Transferee*	*No of Shares Transferred*
1.	*Navayuga Engineering Company Limited*	*001*	*0001-5000*	*K. Vijaybhaskar*	*5,000*
2.	*Navayuga Engineering Company Limited*	*003*	*5001-9999*	*C. Vijay Kumar*	*4,000*
3.	*Chinta Madhav (Nominee of NECL)*	*004*	*10000-10000*	*C. Vijay Kumar*	*1"*

This certificate is issued based on the relevant ledger copies and documents produced for our verification and also based on the information and explanations given to us."

36. The shareholding was transferred to only two persons, i.e., Mr. K. Vijaybhaskar and C. Vijay Kumar, who were all Directors and Officials of NEC and C. Vijay Kumar was also related. The Adjudicating Authority after considering all materials including the Balance Sheets/ Financial Statements etc. of RIPL has come to the finding that transaction dated

22.09.2017 was a sham transaction. All relevant materials were considered by the Adjudicating Authority and in paragraph 50 has held the following:

> *"**50.** Thus, we have examined the transaction of shares in Regina (RIPL) from both angles. Not only, we did not find any reason to differ with the contention of RP/CoC that the transaction was a sham, but also even for the sake of argument, while assuming the transaction to be genuine, we found that the Applicant/NECL was exercising control over Regina (RIPL) through the Directors of its Related/ Connected Companies. Hence, we find no merit in the contention raised by the Applicant/NECL that after the sale of its shareholding, it was not in a position to control Regina (RIPL) hence, it cannot ADPL/Corporate Debtor."*

37. We fully concur with the view of the Adjudicating Authority that transaction of shares to RIPL on 22.09.2017 was a sham transaction with the object to claim that Appellant has nothing to do with RIPL.

38. The learned Counsel for the Appellant has relied on the judgment of ***Arcelormittal*** to contend that the control and management of the Appellant, which is referred to, has to be a positive control, i.e., entity should be in driving seat. The Hon'ble Supreme Court in ***Arcelormittal*** case has examined the 'control' in paragraphs 50, 51 and 52, which are as follows:

> *"**50.** The expression "control" is therefore defined in two parts. The first part refers to de jure control, which includes the right to appoint a majority of the Directors of a company. The second part refers to de facto control. So*

long as a person or persons acting in concert, directly or indirectly, can positively influence, in any manner, management or policy decisions, they could be said to be "in control". A management decision is a decision to be taken as to how the corporate body is to be run in its day-to-day affairs. A policy decision would be a decision that would be beyond running day-to-day affairs i.e. long-term decisions. So long as management or policy decisions can be, or are in fact, taken by virtue of shareholding, management rights, shareholders agreements, voting agreements or otherwise, control can be said to exist.

51. *Thus, the expression "control", in Section 29-A(c), denotes only positive control, which means that the mere power to block special resolutions of a company cannot amount to control. "Control" here, as contrasted with "management", means de facto control of actual management or policy decisions that can be or are in fact taken. A judgment of the Securities Appellate Tribunal in Subhkam Ventures (I) (P) Ltd. v. SEBI [Subhkam Ventures (I) (P) Ltd. v. SEBI, 2010 SCC OnLine SAT 35] , made the following observations qua "control" under the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1997, wherein "control" is defined in Regulation 2(1)(e) in similar terms as in Section 2(27) of the Companies Act, 2013. The Securities Appellate Tribunal held : (SCC OnLine SAT para 6)*

> *"6. … The term control has been defined in Regulation 2(1)(c) of the Takeover Code to "include the right to appoint majority of the Directors or to control the management or policy decisions exercisable by a person or persons acting*

individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner". This definition is an inclusive one and not exhaustive and it has two distinct and separate features : (i) the right to appoint majority of Directors or, (ii) the ability to control the management or policy decisions by various means referred to in the definition. This control of management or policy decisions could be by virtue of shareholding or management rights or shareholders agreement or voting agreements or in any other manner. This definition appears to be similar to the one as given in Black's Law Dictionary (Eighth Edn.) at p. 353 where this term has been defined as under:

'Control—The direct or indirect power to direct the management and policies of a person or entity, whether through ownership of voting securities, by contract, or otherwise; the power or authority to manage, direct, or oversee.'

Control, according to the definition, is a proactive and not a reactive power. It is a power by which an acquirer can command the target company to do what he wants it to do. Control really means creating or controlling a situation by taking the initiative. Power by which an acquirer can only prevent a company from doing what the latter wants to do is by itself not control. In that event, the acquirer is only reacting rather than taking the initiative. It is a positive power and not a negative power. In a board managed company, it is the

board of Directors that is in control. If an acquirer were to have power to appoint majority of Directors, it is obvious that he would be in control of the company but that is not the only way to be in control. If an acquirer were to control the management or policy decisions of a company, he would be in control. This could happen by virtue of his shareholding or management rights or by reason of shareholders agreements or voting agreements or in any other manner. The test really is whether the acquirer is in the driving seat. To extend the metaphor further, the question would be whether he controls the steering, accelerator, the gears and the brakes. If the answer to these questions is in the affirmative, then alone would he be in control of the company. In other words, the question to be asked in each case would be whether the acquirer is the driving force behind the company and whether he is the one providing motion to the organization. If yes, he is in control but not otherwise. In short control means effective control."

52. *We think that these observations are apposite, and apply to the expression "control" in Section 29-A(c)."*

39. From the facts that we have noted above, it is clear that the Appellant was very much in control of the Corporate Debtor as per the MoU dated 23/28.03.2016.

40. The Appellant may be right in his submission that he was not Promoter of the Corporate Debtor since beginning and by MoU dated

15.03.2013, only shareholding was taken through RIPL. However, even if the Appellant was not the Promoter of the Corporate Debtor since inception, after the execution of the MoU dated 23/28.03.2016, the Appellant was given control and management of the Corporate Debtor. The reason for handing over the management and control to the Appellant was proposed investment of 51% equity share and to implement the Project. Rs.236 Crores having already been invested by the Appellant, the control and management was given, so that the Corporate Debtor may run the Project. There was object in giving the control and management, which is clearly reflected from clauses of the Agreement as noticed above.

41. We, thus, are of the view that the Adjudicating Authority did not commit any error in holding the Appellant disqualified under Section 29A, sub-section (c) of the IBC. The order of the Adjudicating Authority rejecting the Application of the Appellant has been passed after considering all relevant materials and submissions of the parties. We do not find any error in the order passed by the Adjudicating Authority warranting interference by us in this Appeal.

Interlocutory Application No.3622 of 2023

42. The above IA has been filed by THDC India Limited, we have noticed the details of IA in paragraph 7 of the judgment. The Applicant THDC has already filed an IA No.2230 of 2022 before the Adjudicating Authority, which is said to be pending. The Adjudicating Authority may consider and

pass appropriate order in IA No.2230 of 2022. The IA No.3622 of 2023 is disposed of accordingly.

43. In result, the Appeal is dismissed. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Mr. Barun Mitra]
Member (Technical)

NEW DELHI

16th February, 2024

Ashwani