NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1619 & 1620 of 2024

(Arising out of Order dated 13.08.2024 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench-IV in I.A. No.2794/2023, I.A. No.3336/2023 in C.P. (IB) No.893/MB/2021)

IN THE MATTER OF:

Vantage Point Asset Management Pte. …Appellant

Versus

Ashish Arjunkumar Rathi & Anr. …Respondents

Present:

For Appellant : Mr. Arvind Nayar, Sr. Advocate with Mr. Soham Mookherjee, Mr. Shahan Ulla, Mr. Varun Kalra, Mr. Akshay, Advocates.

For Respondents : Mr. Gopal Jain, Sr. Advocate with Mr. Madhav Kanoria, Ms. Srideepa Bhattacharyya, Ms. Neha Shivhare, Advocates for Committee of Creditors/R-2

Mr. Harish Salve, Sr. Advocate, Mr. Krishnendu Datta, Sr. Advocate with Mr. Mahesh Agarwal, Mr. Manu Krishnan, Ms. Pooja Mahajan, Mr. Savar Mahajan, Ms. Geetika Sharma, Ms. Shreya Mahalwar, Advocates for SRA/R-3

Mr. Ravi Kadam and Mr. Sunil Fernandes, Sr. Advocates with Mr. Bishwajit Dubey, Mr. Ramakant Rai, Mr. Somesh Srivastava, Mr. Rajshree Chaudhary, Ms. Diksha Dadu, Advocates for R-1.

With

Company Appeal (AT) (Insolvency) No. 1621 & 1622 of 2024

(Arising out of Order dated 13.08.2024 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench-IV in I.A. No.3399/2023 and I.A. No.2794/2023 in C.P. (IB) No.893/MB/2021)

IN THE MATTER OF:

Torrent Power Ltd. …Appellant

Versus

Ashish Arjunkumar Rathi,
RP of SKS Power Generation
(Chhatishgarh) Ltd. & Ors. …Respondents

Present:

For Appellant	**:**	**Dr. Abhishek Manu Singhvi, Mr. Niranjan Reddy, Sr. Advocates with Mr. Vaijayant Paliwal, Mr. Rishabh Jaisani, Ms. Charu Bansal, Mr. Harit Lakhani, Ms. Kirti Gupta, Ms. Priyansha Sharma, Mr. Sahil, Advocates for Torrent.**
For Respondents	**:**	**Mr. Gopal Jain, Sr. Advocate with Mr. Madhav Kanoria, Ms. Srideepa Bhattacharyya, Ms. Neha Shivhare, Ms. Ayushee Singh, Advocates for Committee of Creditors/ R-3.** **Mr. Harish Salve, Sr. Advocate, Mr. Arun Kathpalia, Sr. Advocate with Mr. Mahesh Agarwal, Mr. Manu Krishnan, Ms. Pooja Mahajan, Mr. Savar Mahajan, Ms. Geetika Sharma, Ms. Shreya Mahalwar, Advocates for SRA/R-2.** **Mr. Ravi Kadam and Mr. Sunil Fernandes, Sr. Advocates with Mr. Bishwajit Dubey, Mr. Ramakant Rai, Mr. Somesh Srivastava, Mr. Rajshree Chaudhary, Ms. Diksha Dadu, Mr. Karan Khetan and Mr. Aviral Jain, Advocates for R-1.**

With

Company Appeal (AT) (Insolvency) No. 1696 & 1697 of 2024

(Arising out of Order dated 13.08.2024 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench-IV in IVN P. No.40 of 2024 in IA No.2794 of 2023 in C.P. (IB) No.893/MB/2021)

IN THE MATTER OF:

Jindal Power Ltd. …Appellant

Versus

Ashish Arjunkumar Rathi & Ors. …Respondents

Present:

For Appellant	**:**	**Mr. Krishnan Venugopal, Sr. Advocate with Ms. Gauri Rasgotra, Mr. Angad Sandhu, Ms. Priyashree Sharma, Mr. Shivansh Agarwal, Mr. Gaurav Gujral, Mr. Krishan Agarwal, Mr. Avinash Mathews, Ms. Ekta Gupta, Ms. Neha Maniktala, Advocates.**

For Respondent : Mr. Gopal Jain, Sr. Advocate with Mr. Madhav Kanoria, Ms. Srideepa Bhattacharyya, Ms. Neha Shivhare, Advocates for CoC.

Mr. Arun Kathpalia, Mr. Abhijeet Sinha, Sr. Advocates with Mr. Manu Krishnan, Ms. Pooja Mahajan, Mr. Savar Mahajan, Ms. Geetika Sharma, Ms. Shreya Mahalwar, Advocates for SRA/R-3.

Mr. Ravi Kadam and Mr. Sunil Fernandes, Sr. Advocate with Mr. Bishwajit Dubey, Mr. Somesh Srivastava, Mr. Ramakant Rai, Mr. Rajshree Chaudhary, Ms. Diksha Dadu, Mr. Karan Khetani, Mr. Aviral Jain, Advocates for RP/R-1.

J U D G M E N T

ASHOK BHUSHAN, J.

These Appeal(s) by unsuccessful Resolution Applicants have been filed challenging the same order dated 13.08.2024 passed by National Company Law Tribunal, Mumbai Bench-IV, allowing IA No.2794 of 2023 filed by Resolution Professional ("**RP**") for approval of the Resolution Plan submitted by Sarda Energy and Minerals Ltd. ("**SEML**") (one of the Respondent herein). By the impugned order, IA No.3399 of 2023 filed by Torrent Power Ltd. and IA No.3336 of 2023 filed by Vantage Point Asset Management Pte. Ltd. have been rejected by the Adjudicating Authority. Intervention Petition No.40 of 2024 filed by Jindal Power Ltd. also came to be rejected by the impugned order. All the three unsuccessful Resolution Applicants by these Appeal(s) have challenged the orders of the Adjudicating Authority approving the Resolution Plan of SEML as well as order passed in different IAs filed by the Appellant(s), details of which shall be noted hereinafter.

2. Brief facts of the insolvency resolution process of SKS Power Generation Chhattisgarh Ltd. leading to filing of these Appeal(s) need to be first noticed:

(i) On an Application filed by Bank of Baroda under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "**IBC**") against the Corporate Debtor - SKS Power Generation Chhattisgarh Ltd., insolvency resolution process was initiated vide order dated 29.04.2022 passed by Adjudicating Authority.

(ii) Respondent No.1 – Ashish Arjunkumar Rathi, RP published Form-G inviting Expression of Interest ("**EoI**") from prospective Resolution Applicants. After receipt of EoI, the RP on 12.08.2022 issued RFRP, Information Memorandum and access to Virtual Data Room. Timeline for submission of Resolution Plan was extended upto 30.12.2022. Seven Resolution Applicants, including the Appellant(s) in these Appeal(s) as well as SEML filed their Resolution Plan. Resolution Applicants were called for discussions and negotiations. Revised Resolution Plans were submitted by all the Appellant(s) as well as SEML.

(iii) Committee of Creditors ("**CoC**") decided to hold an inter-se bidding process. A Process Note dated 13.04.2023 was issued for *inter-se* bidding process, informing all the Resolution Applicants that *inter-se* bidding process shall be conducted on 19.04.2023. On 19.04.2023, *inter-se* bidding process was

conducted in four rounds. All Resolution Applicants were asked to submit their revised Resolution Plan by 28.04.2023. All the Resolution Applicants including the Appellant(s) and SEML submitted their Resolution Plans incorporating the financials as per the *inter-se* bidding process dated 19.04.2023 by 28.04.2023.

(iv) The CoC held its meeting on 06.05.2023. The CoC directed the RP to seek clarification from the Resolution Applicants without any change in commercial terms. The RP issued an email dated 08.05.2023 to all the three Appellant(s) as well as SEML asking for certain clarifications with regard to respective Resolution Plans. The email dated 08.05.2023 further directed Resolution Applicants to submit clarification in form of an addendum to Plan. On 10.05.2023, all Resolution Applicants including SEML submitted their clarification by way of addendum to the Plan.

(v) In 31st meeting of the CoC held on 16.05.2023, seven Resolution Plans were put to vote. E-voting was conducted for approval of Resolution Plans from 28.05.2023 to 08.06.2023. By voting result dated 08.06.2023, the Resolution Plan of SEML as amended read with addendum dated 10.05.2023 was approved with 100% vote share.

(vi) On 08.06.2023, the RP issued a Letter of Intent ("**LoI**") to SEML, who was called upon to submit Performance Bank Guarantee ("**PBG**") of INR 150 crores. On 12.06.2023, SEML

unconditionally accepted the LoI and submitted PBG of INR 150 crores in favour of Bank of Baroda.

(vii) On 14.06.2023, Vantage Point Asset Management Pte. Ltd. has sent an email to the RP, offering to increase its financial proposal by INR 50 crores with object to maximise the value of the Corporate Debtor. Another email was sent by Vantage Point Asset Management Pte. Ltd. on 16.06.2023 reiterating the same prayer. The CoC held its 32nd meeting on 17.06.2023 rejecting the offer of Vantage Point Asset Management Pte. Ltd. submitted on 14.06.2023 with 100% vote share.

(viii) On 17.06.2023, RP filed an IA No.2794 of 2023 before the Adjudicating Authority praying for approval of Resolution Plan of SEML as approved by the CoC with 100% vote share. On 20.06.2023, RP informed all Resolution Applicants, including the Appellant(s) before us, about the approval of Resolution Plan by the CoC of SEML. The Earnest Money Deposits received from the Appellant(s) were refunded by the RP and received back by all the Appellant(s).

(ix) The Adjudicating Authority heard IA No.2794 of 2023 on 10.07.2023 and reserved the IA for orders. On Application filed by the RP, period of CIRP was extended from time to time and date of expiry of CIRP was extended upto 24.06.2023, prior to which date, Application for approval of Resolution Plan was filed by the RP.

(x) On 01.08.2023, Vantage Point Asset Management Pte. Ltd. filed an IA No.3336 of 2023 praying for various reliefs. On 03.08.2023, IA No.3399 of 2023 was filed by Torrent Power Ltd. seeking various prayers. On 07.08.2023, IA No.3336 of 2023 and IA No.3399 of 2023 were heard and reserved for orders.

(xi) By an order dated 07.08.2023, the Adjudicating Authority also directed the RP to place on record correspondence with Resolution Applicant and minutes of the meeting. In pursuance of the order dated 07.08.2023, the RP filed an affidavit on 20.08.2023. Torrent Power Ltd. and Vantage Point Asset Management Pte. Ltd. have also filed affidavit in their Applications on 06.09.2023 and 04.09.2023 respectively.

(xii) The Adjudicating Authority vide order dated 06.10.2023 partly allowed IA No.3399 of 2023, IA No.3336 of 2023 was dismissed and in consequence of the above orders, the Resolution Plan pending for approval in IA No.2794 of 2023 was remitted back to the CoC and IA No.2794 of 2023 was disposed of accordingly. The Adjudicating Authority vide order dated 06.10.2023, while remitting the Plan to the CoC for their reconsideration has also directed for consideration of all the Plans found feasible and viable by the Process Advisor in the light of observations made in the order.

(xiii) In pursuance of the direction dated 06.10.2023, the CoC held its 34th meeting on 19.10.2023. The CoC again deliberated on

all the Resolution Plans along with all relevant data and documents which were placed before the CoC and after deliberation, the CoC has reiterated its earlier decision.

(xiv) Three Appeal(s) were filed challenging order dated 06.10.2023 in this Tribunal. SEML filed Company Appeal (AT) (Ins.) No.1395-1397 of 2023; Vantage Point Asset Management Pte. Ltd. also filed a Company Appeal (AT) (Ins.) No.1445 of 2023 and Ashish Arjunkumar Rathi, the RP has also filed Company Appeal (AT) (Ins.) No.1535 of 2023. Jindal Power Ltd. has filed an Intervention Application being IA No.1214 of 2023 in Company Appeal (AT) (Ins.) No.1395-1397 of 2023. All the aforesaid Appeal(s) were heard by this Tribunal and vide judgment and order dated 10.05.2024, all the Appeal(s) were decided by this Tribunal. The operative portion of order of this Tribunal passed on 10.05.2024 is as follows:

> "**89.** In view of the foregoing discussions, we dispose of all these Appeals in following manner:
>
> (i) The impugned order dated 06.10.2023 passed in IA No.2794 of 2023, IA No.3336 of 2023 and IA No.3339 of 2023 is set aside.
>
> (ii) The Plan approval Application, i.e., IA No.2794 of 2023 and other two Applications, i.e. IA No.3336 of 2023 and IA No.3339 of 2023 are revived before the Adjudicating Authority for fresh decision.
>
> (iii) The Plan approval Application is pending from June 2023, we request the Adjudicating Authority to dispose of the Plan approval Application and other two Applications at an

early date, preferably within a period of 60 days from today."

(xv) On 02.06.2024, an Intervention Petition No.40 of 2024 was filed by Jindal Power Ltd. in IA No.2794 of 2023. IA No.41 of 2024 was also filed by SEML in IA No.3399 of 2023 filed by Torrent Power Ltd.

(xvi) Consequent to the order dated 10.05.2024 passed by this Tribunal, the RP, CoC as well as the SRA have filed their replies to the IA No.3336 of 2023; IA No.3399 of 2023 before the Adjudicating Authority. Adjudicating Authority heard all the IAs and vide judgment dated 13.08.2024, dismissed IA No.3336 of 2023 and 3399 of 2023. Intervention Petition Nos.40 of 2024 was dismissed and Intervention Petition No.41 of 2024 was allowed and disposed of. IA No.2794 of 2023 filed by the RP for approval of Resolution Professional was allowed and Resolution Plan was approved by order dated 13.08.2024. Aggrieved by order dated 13.08.2024, these Appeal(s) have been filed by unsuccessful Resolution Applicants.

3. Before we notice the respective submission of learned Counsel for the parties, we may briefly notice the treatment by Adjudicating Authority of IA No.3336 of 2023, IA No.3399 of 2023, Intervention Petition No.40 of 2024 as well as IA No.2794 of 2023 (Plan approval application). The Adjudicating Authority has made its determination in Part-I, Part-II, Part-III and Part-

IV, as noticed in paragraph 7. Paragraphs 7.1 to 7.4 of the order of Adjudicating Authority are as follows:

> "**7.1. PART-I**
>
> The Applicant in Interlocutory Application bearing I.A. No. 3336 of 2023 to plead its case, and for the RP, CoC and the SRA to file their respective Replies, in due consonance with paras {**87**} r/w. {**89**} of the NCLAT Order. The same has been dealt at Page No. **[20]** of this Order hereto.
>
> **7.2. PART-II**
>
> The Applicant in Interlocutory Application bearing I.A. No. 3399 of 2023 to plead its case, and for the RP, CoC and the SRA to file their respective Replies, in due consonance with paras {**87**} r/w. {**89**} of the NCLAT Order. The same has been dealt at Page No. **[40]** of this Order hereto.
>
> **7.3. PART-III**
>
> To allow the RP, CoC and SRA to submit on the limited aspect of provision/ non-provision of the requisite financial data to the CoC in relation to the CIRP of the Corporate Debtor, to suffice the specific observation in para {56} r/w. {83} of the NCLAT Order. The same has been dealt at Page No. [55] of this Order hereto
>
> **7.4. PART-IV**
>
> To consider the captioned application viz. I.A. No. 2794 of 2023 apropos the Resolution Plan in the matter of the Corporate Debtor herein, in due consonance with paras {**87**} r/w. {**89**} of the NCLAT Order. We have further deemed it fit to additionally consider two Interlocutory Applications (*bearing* ***I.A. Nos. 3286 of 2023*** *and* ***3654 of 2023***) and two Intervention Petitions (bearing ***IVN. P. 40 of 2024*** and ***41 of 2024***), filed during the pendency of the afore-mentioned I.A. Nos. 2794 of 2023, 3336 of 2023 and 3399 of 2023. The captioned application has been dealt at Page No. **[80]** of this Order hereto."

4. Part-I deals with IA No.3336 of 2023. Prayers made in the Application filed by Vantage Point Asset Management Pte. Ltd. has been noticed in paragraph 8, which are as follows:

> "**8.** The instant application bearing I.A. No. 3336 of 2023 has been filed on 01.08.2023, by Vantage Point Asset Management Pte. Limited ("VPAM") against the Resolution Professional viz. Respondent No. 1 herein (Applicant RP in the captioned application) and the Committee of Creditors of Corporate Debtor (CoC) viz. Respondent No. 2 herein. The Applicant in the instant application has sought for the following:
>
> " A) This Tribunal be pleased to allow the Applicant to intervene in Interlocutory Application No. 2794 of 2023 and be impleaded therein as a party-Respondent;
>
> B) That this Tribunal be pleased to defer the hearing of Interlocutory Application No. 2794 of 2023 till such time as this Application is heard and disposed finally;
>
> C) That this Tribunal be pleased to order and direct the RP to supply a copy of Interlocutory Application No. 2794 of 2023 together with the details, particulars and relevant documents with regard to the Resolution Plan approved by the CoC, and allow the Applicant to file its affidavit to oppose the Interlocutory Application No. 2794 of 2023;
>
> D) In the alternative to Prayer B, that this Tribunal be pleased to permit the Applicant to file Affidavits/pleadings and make submissions at the time of hearing of Interlocutory Application No. 2794 of 2023;
>
> E) Pending the hearing and final disposal of this Application, this Hon'ble Tribunal be pleased to stay the proceedings in Interlocutory Application No. 2794 of 2023; "

5. The Adjudicating Authority in paragraph 9 and thereafter proceeded to notice the submissions made by the Applicant, reply given by the RP as

well as the reply given by CoC. Various judgments relied by the parties of the Hon'ble Supreme Court as well as of this Tribunal have also been noticed by the Adjudicating Authority. The submission of the Applicant that Resolution Plan should ensure maximization of value and assets of the Corporate Debtor and the same ought to have been considered, have been dealt in paragraph 14.3 of the judgment. The Adjudicating Authority also in paragraph 14.3 has extracted the paragraph 46 of the Hon'ble Supreme Court judgment in ***Essar Steel India Limited through authorized signatory v. Satish Kumar Gupta***. Paragraph 14.3, is as follows:

> "**14.3.** In the instant application, the principal contention of the Applicant pertains to its resolution plan *supposedly* ensuring maximization of value of assets of the Corporate Debtor, and that the same ought to have been 'considered' for the said reason. We however opine that at the backdrop of the CoC of the Corporate Debtor comprising of two of the largest public sector banks in India viz. Bank of Baroda and State Bank of India; The materials on record clearly demonstrate that the said CoC had *in-fact* deliberated at length upon the feasibility and viability of the Resolution Plan(s) submitted by the respective Resolution Applicant(s), including that of the Applicant in the instant application, and it is not open for this Tribunal to undertake any (quantitative) analysis apropos the same. It was only after such examination that the Resolution Plan(s) (*including that of the Applicant hereto*) were put up for voting during the 31st Meeting of the CoC. Furthermore, the Apex Court in ***Essar Steel India*** (supra) has categorically observed the following:
>
> "46 ... ***There is no doubt whatsoever that the ultimate discretion of what to pay and how much to pay each class or subclass of creditors is with the Committee of Creditors, but, the decision of such Committee must***

reflect the fact that it has taken into account maximising the value of the assets of the corporate debtor and the fact that it has adequately balanced the interests of all stakeholders including operational creditors. This being the case, judicial review of the Adjudicating Authority that the resolution plan as approved by the Committee of Creditors has met the requirements referred to in Section 30(2) would include judicial review that is mentioned in Section 30(2)(e), as the provisions of the Code are Also provisions of law for the time being in force. *Thus, while the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors,* ***the limited judicial review available is to see that the Committee of Creditors has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution process; that it needs to maximise the value of its assets; and that the interests of all stakeholders including operational creditors has been taken care of.*** *If the Adjudicating Authority finds, on a given set of facts, that the aforesaid parameters have not been kept in view, it may send a resolution plan back to the Committee of Creditors to re-submit such plan after satisfying the aforesaid parameters. The reasons given by the Committee of Creditors while approving a resolution plan may thus be looked at by the Adjudicating Authority only from this point of view, and once it is satisfied that the Committee of Creditors has paid attention to these key features, it must then pass the resolution plan, other things being equal."*

{emphasis applied}"

6. The enhanced offer, which was communicated by the Applicant - Vantage Point Asset Management Pte. Ltd. as noticed above, offering INR 50 crores more, was also dealt with in paragraph 14.4, in which paragraph

Adjudicating Authority has noticed the minutes of the CoC dated 17.06.2023. Paragraph 14.4 of the order is as follows:

> 14.4. We further note that the CoC has duly considered the Resolution Plan, which albeit has been belatedly submitted by the Applicant in the instant application, and same is reflected from the minutes of the 32nd Meeting of CoC dated 17.06.2023. During the discussion on the agenda apropos the same, titled **'TO DISCUSS ON THE EMAIL RECEIVED FROM VANTAGE POINT ASSET MANAGEMENT PTE LIMITED ("VPAM")'**, we seek to extract the relevant observations of CoC in relation to the said agenda as hereunder:
>
> > *" The Representative of BoB stated that* ***all the resolution applicants, including VPAM were provided equal and ample opportunity to submit their resolution plans*** *and then the Resolution Plans were placed for voting. After which,* ***the unsolicited offer has been received at a stage where the Resolution Plan of the SRA has already been voted upon.*** *Further, all the Resolution Plans were discussed in the CoC meetings with detailed justifications for each parameter of evaluation.* ***Also, in case of VPAM, the shortcomings were also pointed out by the advisors appointed by the lenders to evaluate the plans. The CoC, considering the interests of all stakeholders, in a fair and transparent manner, deliberated and considered each Resolution Plan holistically before making its decision and had exercised their commercial wisdom. In view of the same, considering that the Resolution Plan of the SRA has been voted with 100% majority, he expressed that there is no justification for accepting therequest of VPAM****, while it is also not legally possible as pointed out by the legal counsels.*

*The views of **SBI** were also sought on this matter, and SBI representative stated that they **concur** with the views of BoB and the Legal Counsels. "*

{emphasis applied}"

7. One of the prayers of the Applicant that he should be given copy of Resolution Plan of Successful Resolution Applicant was also not acceded to. Consequently, the Adjudicating Authority rejected the Application filed by Vantage Point Asset Management Pte. Ltd.

8. In Part-II of the order, the Adjudicating Authority dealt with IA No.3399 of 2023. Prayers in IA No.3399 of 2023 have been extracted in paragraph 15 of the order of the Adjudicating Authority, which are as follows:

"*a. Pass an order directing the First Respondent to serve a complete copy of the Plan Approval Application, along with all the annexures to the Applicant;*

b. Defer the pronouncement of orders in the Plan Approval Application until the adjudication and disposal of the present Application;

c. Grant liberty to the applicant to file its objections in the Plan Approval Application, if any, pursuant to reviewing the Plan Approval Application;

d. Keep the Plan Approval Application in abeyance until the applicant has reviewed the Plan Approval application and filed its objections (if any) in the said application;

e. Pass such other orders as deemed fit in the interests of justice and equity in the facts and circumstances of the matter."

9. The contentions raised by the Applicant – Torrent Power Ltd. have been noticed by the Adjudicating Authority in paragraph 17.1 to 17.4. The reply of the RP has been noticed in paragraph 18.1 to 18.3. SRA's reply

has also been noticed in paragraph 19. The principal contention raised on behalf of the Torrent Power Ltd. has been captured in paragraph 21.2 of the order. The Adjudicating Authority in paragraph 21.2 has also extracted paragraphs 82, 85 and 86 of the order of this Tribunal dated 10.05.2024. Paragraph 21.2 is as follows:

> "**21.2.** The principal contention of the Applicant in the instant application is on the aspect of modification in the key commercial terms of the resolution plan by the SRA (allegedly) in the garb of clarification sought by RP from the Resolution Applicants and the perversity and discrimination emanating from the same. Further, we note that the Hon'ble NCLAT, vide its Order dated 10.05.2024, has already made the following observations in this regard:
>
> > *"**82.** Shri Kapil Sibal, learned Senior Counsel has submitted that in the present case, discrimination was made qua the other Resolution Applicant, since the Appellant Sarda was given an opportunity in guise of seeking clarification to pay Rs.240 crores upfront payment, which was earlier not proposed. **The said submission of discrimination was also pressed before the Adjudicating Authority at the time of hearing of the Application.** The RP and the CoC have pleaded in their replies that under the decision of the CoC, a clarification was asked from four Resolution Applicant by email dated 08.05.2023 to give certain clarification. The email itself contemplated that clarification should be given by way of an Addendum. The Resolution Applicants, who were asked the clarification, had provided the clarification. The CoC during submission has rightly submitted that the said clarification was asked under the directions of the CoC, which is fully permissible as per the provisions of RFRP and Process Note, which empowers the CoC to ask for*

clarification from any Resolution Applicant. It is submitted that clarification was asked from all Resolution Applicants and there cannot be any modification of any financials by clarification and no modification was made to the earlier Resolution Plan. It is relevant to notice that the said argument was considered and did not find favour with the Adjudicating Authority. This clarification was not asked only from the Appellant – Sarda, rather, the said clarification was asked from all other Resolution Applicants. In paragraph 8.2, the Adjudicating Authority has noticed that email dated 08.05.2023 was sent to each Resolution Applicant to clarify and such clarification was sought in accordance with the decision taken in the CoC Meeting. ***We do not find any substance in the submission on behalf of Torrent Power Limited that any discrimination was made with other Resolution Applicants by calling clarification from Appellant – Sarda.***

[...]

85. The law laid down by the Hon'ble Supreme Court above, clearly indicate that ***distinction has to be maintained while terming a decision as perverse. A minor infraction of procedural or any other similar reasons are not sufficient to term a decision as perverse. We have already noticed the judgment of the Hon'ble Supreme Court in M.K. Rajagopalan (supra), where Hon'ble Supreme Court has observed that commercial wisdom of CoC would come into existence and operation only when all the relevant information is available before it and is duly deliberated upon by all its Members. Thus, in event, all relevant materials are available before the CoC, which is deliberated, no perversity can be imputed in the decision.*** *As noted above, the ground to interfere with the approval of*

Resolution Plan by the CoC by Adjudicating Authority are circumscribed by virtue of Section 31, sub-section (1). Thus, a fault can be found in the decision only when there is serious error in the decision-making process and by which error, the CoC is unable to take its commercial decision.

86. *One more submission, which was pressed by learned Counsel for the Torrent Power Limited was that under the email dated 28.01.2023 all Resolution Applicants were required to give their offer of payment of upfront and it was obligatory for all Resolution Applicants to give only upfront payment, in violation of which, the Appellant having not given entire amount as upfront, his Plan was liable to be not considered.* ***The CoC in its reply has clearly explained that the said email was issued for eliciting the best offer from the Resolution Applicants. However, the email itself provided that it is the CoC, which has ultimate power to take a decision. It is further relevant to notice that much after email dated 28.01.2023, Process Note was issued on 12.04.2024, which Process Note envisaged payment of both upfront and deferred and Resolution Applicants were required to submit their proposal in the format set out in Appendix-1 (Identified Criteria). The Appendix-1, clearly indicated both upfront as well as deferred payment. Thus, in view of the Process Note of Appendix-1, the submission cannot be accepted that all amounts were to be offered upfront.*** *The learned Counsel for the Appellant has also relied on Clause 4.1.8 of RFRP, which clearly provided that the* ***CoC is under no obligation to any of the Resolution Applicant to approve the Resolution Plan****, which has secured the highest value as per the Evaluation Matrix and any Resolution Plan shall be approved solely*

on the basis of CoC's commercial wisdom. To the same effect is Clause-9(c) and 9(d) of the Process Note dated 12.04.2023, where the CoC has reserved its right to evaluate the compliances of Resolution Plans and accept or reject the Resolution Plans. "

{emphasis supplied}"

10. The Adjudicating Authority has further noticed that in pursuance of order dated 07.08.2023 passed by the Bench, RP has sought to place affidavits dated 10.08.2023 and 20.08.2023, which affidavits were taken on record for consideration of the Applications. In paragraph 21.4, the Adjudicating Authority held that the clarification sought by RP, does not constitute any discrimination *qua* the Applicant as clarification was sought from all the Resolution Applicants. The Adjudicating Authority further noticed the relevant clauses of Process Note and RFRP, which empowers the CoC to seek clarification from one/ all Resolution Applicants to give effect to its commercial wisdom. The Adjudicating Authority also returned a finding that clarification sought does not constitute any modification on behalf of the SRA in its Resolution Plan. Paragraph 21.4 of the order of the Adjudicating Authority is as follows:

"**21.4.** Upon a full-bore consideration of Replies filed by CoC, SRA and RP and on the express tenets of the RFRP and Process Note pertaining to the averments raised in this regard, coupled with the Hon'ble NCLAT already having made categorical observations to the same effect in para **{82}** and **{86}** as afore-extracted; We are of the considered view that the clarification sought by the RP *apropos* the SRA (*and all the other Resolution Applicants, including the Applicant in the instant application*) vide E-Mail(s) dated 08.05.2023, thereby does not constitute discrimination *qua* the Applicant as clarification was sought from all the resolution applicant(s). Further, we note

that on a conjoint reading of the terms of Process Note and RFRP, and more specifically so, in light of clauses **9(a)** to **9(e)** of the Process Note, and clauses {**2.16.7**}, {**2.18.5(t)**}, {**2.9.7(d)**}, {**4.1.5**}, {**4.1.8**} and {**4.1.11**} of RFRP, that these clauses essentially empower the CoC to seek clarification(s) from one/ all resolution applicant(s) and give effect to its 'commercial wisdom'. We have duly perused the afore-mentioned clauses and have noted the said E-Mail(s) *dated* 08.05.2023, and have juxtaposed the same with the 'Process' that has been followed. Additionally, we have duly perused the clauses which provide for upfront and deferred payment, as set out in Appendix I of the Process Note *dated* 13.04.2024. We therefore opine that clarification(s) sought does **not** constitute any modification on behalf of the SRA in its resolution plan. We further opine that there has been no dereliction in the 'Process' (*which ought to be read in conjunction with the tenets of RFRP and the Process Note*). Moreover, in light of Hon'ble NCLAT already having given its categorical finding(s) in para {**82**} holding that "..*We do not find any substance in the submission on behalf of Torrent Power Limited that any discrimination was made with other Resolution Applicants by calling clarification from Appellant – Sarda*", we are of the considered view that we need not dwell further on this issue-at-hand.

11. All allegations made by the Applicant - Torrent Power Ltd. regarding perversity and/ or discrimination in the process has also been dealt with. The prayer of the Applicant seeking copy of the Resolution Plan was not acceded to. Consequently, IA No.3399 of 2023 filed by Torrent Power Ltd. was rejected.

12. Part-III of the order dealt with aspect of "incomplete financial data placed before the CoC of the Corporate Debtor in the decision-making process while approving the Resolution Plan", which was the basis of order dated 06.10.2023, earlier passed by the Adjudicating Authority (which now

stands set aside by order dated 10.05.2024 of this Tribunal). The submission of RP, SRA and the CoC were noticed. The aspect of placing of incomplete data by RP and its Process Advisor, as well as treatment of the Bank Guarantees, were dealt in details. The Adjudicating Authority has also noted the relevant judgment of the Hon'ble Supreme Court. The 34th meeting of the CoC dated 19.10.2023 was also noticed and relevant minutes were extracted by the Adjudicating Authority. The Adjudicating Authority held that tenets of bank guarantee(s), margin money infusion, and the treatment of equity, which were essentially a stratum of 'financial debt', have been thoroughly examined by the CoC. The Adjudicating Authority held that it is neither open for the Tribunal to venture into probing about the interpretation of such financial debt, nor can it assume to itself powers of a court of equity in this limited regard. In paragraphs 29, 30 and 31, the Adjudicating Authority made following observations:

> "**29.** To contextualise further, the scope of inquiry endowed to this Adjudicating Authority is apropos the (complete) financial data to be placed before CoC for it to arrive at a considered view in exercise of its commercial wisdom. The tenets of bank guarantee(s), margin money infusion, and the treatment of equity, which are essentially a stratum of 'financial data', have been thoroughly examined by the CoC, in its afore-stated discussion. We re-iterate that it is neither open for this Tribunal to venture into probing about the interpretation of such financial data, nor can it assume to itself powers of a court of equity in this limited regard. We further note that the CoC in its 34th meeting has thoroughly gone into various aspects raised leading up to (*and pursuant to*) the (*now set-aside*) NCLT Order and has affirmed on record that it has

carried out its due diligence while following Due 'Process', as set out by the RFRP read in conjunction with Process Note.

30. Upon having factored-in all the relevant materials cited above, and averments raised by the parties hereto; We are of the considered view that, nothing emerges from the submissions and/or materials forming part of the record herein, to demonstrate any deviation in the 'process' (*as set out in the RFRP read in conjunction with Process Note*) or that relevant 'financial data' was not placed before the CoC for its principal consideration. The afore-extracted minutes of the 34th Meeting of the CoC dated 19.10.2023 clearly affirm that the CoC has re-checked the factual (including the financial) tenets by categorically affirming that "*..all numbers were considered correctly by the CoC and its advisors.*", more specifically so in relation to Clauses (6.3.13), (6.3.14), (6.3.15) and (6.3.16) of the resolution plan of the SRA herein as noted by the CoC, and has further sought to delve into the findings of the (*now set-aside*) NCLT Order and has thereby re-iterated its earlier position in this regard that "*..there seems to be no variance from the earlier factual position decided by the CoC members during the 30th and 31st CoC meetings and the decision arrived at by the CoC members seems to be unaltered.*"

31. Upon conflating and being bound by the nature (*and scope*) of jurisdiction exercisable by this Adjudicating Authority in this regard, more specifically so, in light of the Apex Court's judgement in ***Ngaitlang Dhar v. Panna Pragati Infrastructure Private Limited*** [*CA No. 3665-3666 of 2020*] and ***Vallal RCK v. M/S Siva Industries And Holdings Limited And Others*** [*Civil Appeal Nos. 1811-1812 Of 2022*] as afore-extracted respectively in para nos. **[14.2]** and **[14.6]** of this Order, concomitant to observations of Hon'ble NCLAT in this regard in para {**73**} of its Order dated 10.05.2024 and from a perusal of materials (*including the minutes of 34th CoC Meeting dated 19.10.2023*) relied upon the parties herein; We

are of the shared view that the CoC has adequately dealt with the issue apropos 'incomplete financial data placed before the CoC of the Corporate Debtor in the decision-making process while approving the resolution plan' and has categorically affirmed that it "***..has not found any factual inaccuracies referred to by the Hon'ble NCLT, and it has emerged that all numbers were considered correctly by the CoC and its advisors***.". We are therefore of the principal view that in light of the afore-stated, it is not open for this Adjudicating Authority to undermine the commercial wisdom of CoC by acting as a court of equity, and that the objectives of the Code warrant due primacy to the commercial and/or business decisions taken in this regard. **We are thus not inclined to consider the contention that complete financial data has not been placed before the CoC of the Corporate Debtor in the decision making process, while approving the resolution plan, in consideration hereto**.

13. In Part-IV, the Adjudicating Authority considered the IA 2794 of 2023 filed by the RP for approval of Resolution Plan. In Part-IV, the Adjudicating Authority also delt with Intervention Petition No.40 of 2024, which was filed by Jindal Power Ltd. The Adjudicating Authority noticed that IA filed by Jindal Power Ltd. in Appeal, which was decided by this Tribunal on 10.05.2024 was rejected. Intervention Petition No.40 of 2024 was dismissed by the Adjudicating Authority, after noticing the respective submission of parties. In paragraph 43 of the judgment, following has been held:

> "**43.** Upon perusal of materials which form part of the record hereto, and after having heard the parties at length in the instant intervention petition; We are of the shared view that the issues raised herein, in so far as 'modification in the garb of clarification' by the SRA is concerned and the alleged

material irregularity in the 'process', has been succinctly dealt with in this Order. The Intervenor herein is an unsuccessful resolution applicant, and it is a trite position of law that an unsuccessful resolution applicant does not have a vested right in approval of its resolution plan. The records further indicate that the Intervenor herein has not raised its objection(s) at the relevant stage, and that the commercial wisdom of CoC takes due primacy, more specifically so, at the backdrop of the CoC having re-considered the Intervenor's resolution plan at the backdrop of the financial aspects provided therein, during its 34th Meeting dated 19.10.2023. The Conclusion of the said discussion (*at sub-clauses (a) to (f))* in clause (**4.1.5**) of the minutes of the 34th meeting, are extracted herein to warrant for the same:

"*(f) In view of the review of the terms of the JPL Resolution Plan and after detailed deliberations with the Counsels, the CoC members were of view that the observations of the Hon'ble NCLT appears to be at variance from the terms of the JPL Resolution Plan and further seems to be factually incorrect, as JPL is offering an amount of INR 101.1 Cr, out of which INR 83 Cr is towards financial creditors and the aforementioned paras deal with the scoring of the BGs as well. It was further noted that, the facts and numbers considered by the CoC in the evaluation of the JPL Resolution Plan were accurate and the scoring as per the evaluation matrix is appropriate.* "

14. The Adjudicating Authority from paragraph 45 to 59 has dealt with Application – IA No.2794 of 2023 and after examining different aspect of Resolution Plan has come to the conclusion that Resolution Plan meets the requirement of Section 30(2) of the IBC and Regulations 37, 38, 38(1A) and 39(4) of the Regulations, which need to be approved. The findings of the Tribunal are captured in Paragraph 51 to 59, which are as follows:

"**51.** In the circumstances mentioned hereinabove, the Applicant Resolution Professional has filed this Application seeking approval of this Tribunal on the Resolution Plan, submitted by the Resolution Applicant viz. 'Sarda Energy and Minerals Limited' stating that the plan is in accordance with Section 30(2) of IBC, 2016, and other provisions laid thereunder.

52. Upon perusal of the Resolution Plan, it is observed that the Resolution Plan provides for the following:

ii. Payment of CIRP Cost as specified u/s. 30(2)(a) of the Code.

iii. Repayment of Debts of Operational Creditors as specified u/s. 30(2)(b) of the Code.

iv. For management of the affairs of the Corporate Debtor, after the approval of Resolution Plan, as specified u/s. 30(2)(c) of the Code.

v. The implementation and supervision of Resolution Plan by the RP and the CoC as specified u/s. 30(2)(d) of the Code.

53. The Applicant RP has complied with the requirements of the Code in terms of Section 30(2)(a) to 30(2)(f) of IBC, 2016, and Regulations 38(1), 38(1)(a), 38(2)(a), 38(2)(b), 38(2)(c) & 38(3) of CIRP Regulations.

54. The Applicant RP has filed the Compliance Certificate in FORM-H along with the plan, vide Affidavit dated 03.07.2023. Upon perusal, the same is found to be in order. The Resolution Plan has been approved by the members of CoC in the 31st Meeting of CoC, which was held on 08.02.2023, with a voting percentage of 100%.

55. On a further perusal, we note that an application u/s. 66 of IBC, 2016 in relation to fraudulent transaction has been filed via I.A. No. 2580 of 2023, and the same is admittedly pending adjudication. We make it expressly clear that the approval of the Resolution Plan will not ipso-facto amount to abatement

of applications, if any, apropos fraudulent transactions u/s. 66 of the Code and the same may be carried forward independently by the Secured Financial Creditor notwithstanding the same. The same is in due consonance with Item {6.3.5 (c)} of the Resolution Plan in consideration hereto. We have further taken note that the Resolution Plan provides for a Scheme of Amalgamation of the Corporate Debtor herein, with the SRA "*..upon the Corporate Debtor becoming a WOS of the Resolution Applicant.*" We make it clear that the same may be subject to necessary procedure(s), as enshrined under applicable law. 56. The Resolution Applicant has additionally sought certain Reliefs and Concessions per Chapter {11} of the Resolution Plan. We make it expressly clear that no reliefs, concessions and dispensations that fall within the domain of other government department/ authorities are granted hereto, and the same shall be dealt with by the respective competent authorities/fora/offices, Government (State or Central) with regard to the respective reliefs, if any. Be that as it may, the Learned Counsel for the Applicant RP, during the course of hearing on 04.07.2024, has categorically affirmed that the implementation of the Resolution Plan is not conditional or contingent upon grant of any or all of such reliefs, concessions and dispensations by this Tribunal.

57. In the case of ***K Sashidhar*** (*supra*) the Hon'ble Apex Court held that if the CoC had approved the Resolution Plan by requisite percent of voting share, then as per section 30(6) of the Code, it is imperative for the Resolution Professional to submit the same to the Adjudicating Authority (NCLT). On receipt of such a proposal, the Adjudicating Authority is required to satisfy itself that the Resolution Plan as approved by CoC meets the requirements specified in Section 30(2).

58. In ***CoC of Essar Steel*** (*supra*) the Hon'ble Apex Court clearly laid down that the Adjudicating Authority would not have power to modify the Resolution Plan which the CoC in their

commercial wisdom have approved. In para 42 Hon'ble Court observed as under:

> "*Thus, it is clear that the limited judicial review available, which can in no circumstance trespass upon a business decision of the majority of the Committee of Creditors, has to be within the four corners of section 30(2) of the Code, insofar as the Adjudicating Authority is concerned, and section 32 read with section 61(3) of the Code, insofar as the Appellate Tribunal is concerned, the parameters of such review having been clearly laid down in* ***K. Sashidhar*** *(supra).*"

59. In view of the afore-stated discussions and the law thus settled, the instant Resolution Plan meets the requirements of Section 30(2) of the Code and Regulations 37, 38, 38 (1A) and 39 (4) of the Regulations. The Resolution Plan is thus not in contravention with any of the provisions of the Code, and is in accordance with law. The same needs to be approved.

15. The Adjudicating Authority allowed IA No.2794 of 2023 and issued consequential directions. IA No.3336 of 2023, IA No.3399 and Intervention Petition No.40 of 2024 were rejected.

16. As noted above, the Appellant(s) are unsuccessful Resolution Applicants, who have come up in these Appeal(s) challenging the impugned order dated 13.08.2024.

17. We have heard Shri Arvind Nayar, Sr. Advocate appearing for the Appellant- 'Vantage Point Asset Management Pte. Ltd.' (Comp. App. (AT) (Ins.) No. 1619 & 1620 of 2024); Dr. Abhishek Manu Singhvi, Sr. Advocate and Shri Niranjan Reddy, Sr. Advocate have appeared for Appellant- 'Torrent Power Ltd.' (Company Appeal (AT) (Insolvency) No. 1621 & 1622 of

2024); Shri Krishnan Venugopal, Sr. Advocate appearing for the Appellant-'Jindal Power Ltd.' (Comp. App. (AT) (Ins) No. 1696 & 1697 of 2024); Shri Mukul Rohatgi and Shri Gopal Jain, Sr. Advocates appearing for the Committee of Creditors in the above Appeals; Shri Ravi Kadam and Shri Sunil Fernandes, Sr. Advocates with Shri Bishwajit Dubey has appeared for the Resolution Professional in the above Appeals; Shri Harish Salve, Sr. Advocate, Shri Arun Kathpalia, Sr. Advocate and Mr. Krishnendu Datta, Sr. Advocate have appeared for the Successful Resolution Applicant (SRA)-SEML in the above Appeals.

18. Learned Senior Counsel appearing for the Appellants in all the above Appeals has raised two principal submissions in support of the Appeals. The principal submissions raised by the Appellants being common in all the Appeals, we shall notice the said submissions as submissions on behalf of the Appellants. An additional submission has been raised by the Appellants in 'Vantage Point Asset Management Pte. Ltd.' and 'Jindal Power Ltd.' which we shall separately notice.

19. Counsel for the Appellant challenging the impugned decision passed by the Adjudicating Authority dated 13.08.2024 contends that this Tribunal vide order dated 10.05.2024 set aside the earlier order of the Adjudicating Authority dated 06.10.2023 and remanding the matter for fresh consideration which obliged the Adjudicating Authority to consider all contentions raised afresh. Adjudicating Authority committed error in treating the remand as not an open remand rather treated the remand as restricted remand which vitiates the order of the Adjudicating Authority.

The Adjudicating Authority merely placed reliance on remand order dated 10.05.2024 without taking note that remand order was an open unrestricted remand for a fresh decision. Learned Counsel for the Appellant contended that the Resolution Professional and the CoC selectively permitted the SRA (SEML) to modify its commercial offer after conclusion of the Negotiation Process on 19.04.2023. The Resolution Plan which was required to be submitted by all Resolution Applicants consequent to negotiation process dated 19.04.2023 was on the basis of financial offer which was given in the negotiation process on 19.04.2023 by all the Resolution Applicants. No applicant was entitled to modify its commercial offer after the conclusion of the negotiation process. The CoC and the Resolution Professional under the guise of seeking clarifications vide e-mail dated 08.05.2024 permitted the SEML to modify the commercial offer with respect to (i) converting deferred amount of INR 240 Crore to upfront offer (ii) increasing the infusion amount of INR 58 Crore towards bank guarantee margin money whereas in the Resolution Plan, SEML has offered only to infuse INR 103.39 Crore as replacement of margin money. Elaborating the submission on above first ground, it is submitted by the Appellant that SEML in Appendix-I had offered INR 240 Crores plus interest as deferred amount of INR 143.37 Crores and INR 158.27 Crores at the end of 2nd and 3rd year which was offered as a deferred payment. In the Resolution Plan submitted post the Negotiation Process, Sarda offered option to CoC to take the discounted amount of INR 240 Crores as upfront payment. It is submitted that in Appendix-I, there was no option of upfront payment of INR 240 Crores which by way of clarification, SEML gave an option to the

CoC to take the amount of INR 240 Crores as upfront payment. SEML choose to offer deferred amount in Appendix-I of INR 143.37 Crores and INR 158.27 Crores which could not have been allowed to convert into upfront payment permitting the SRA to change its commercial. Once the Negotiation Process concluded on 19.04.2023, the commercial offer given by way of Appendix I stood frozen. Thereafter, no change was permissible. Thus, Sarda has deviated from the Resolution Plan. Resolution Professional itself has confirmed that the Resolution Applicants could not modify their commercial offer by way of clarification permitted the SEML to change its commercial terms. The CoC and the Resolution Professional has permitted the SEML to change its commercial under the garb of seeking clarification. Such similar opportunities were not made to other Resolution Applicants. The SRA has made third highest offer in its plan whereas it was 'Vantage Point Asset Management Pte. Ltd.' who has made the 1st highest offer and 'Torrent Power Ltd.', the 2nd highest offer. In support of second limb of arguments, it is submitted that Sarda has provided treatment of margin amount pertaining to bank guarantees listed in Item Nos.1 to 5 in its Resolution Plan submitted on 28.04.2023 and had offered to infuse INR 103.39 Crores as replacement of margin money. Bank guarantees listed at Item Nos.6 and 7 were not proposed to be continued so that the Resolution Plan did not provide for their treatment. Pursuant to clarification from the Resolution Professional with regard to bank guarantees at Item Nos.6 and 7, Sarda clarified that the margin money pertaining to such bank guarantees would be returned to the CoC as per terms of the RFRP. By way of the clarification email dated 10th May, 2023, Sarda has admitted that

originally it had neither proposed to continue BGs at item nos. 6 and 7 nor proposed to infuse any amount towards the margin money for such BGs. Thus, clearly in relation to BGs at item nos. 6 and 7 (aggregating to INR 76.61 crores), Sarda did not offer any contribution toward the BGs at item nos. 6 and 7. Sarda has originally offered only replacement of INR 103.39 Crores by way of clarification. It is stated that the bank guarantees listed at Item Nos.6 and 7 will be secured by 100% margin money which was clear deviation from its Resolution Plan. Post deviation, there was increase of Sarda's contribution towards BGs from INR 103.39 crores to INR 180.49 crores for which Sarda has been assigned separate marks for both these criteria. Thus, the preferential treatment has been meted out to Sarda by the RP/CoC enabling it to leapfrog over the other RAs. A similar opportunity was not provided to Torrent. Thus, the facts of the present case clearly demonstrate the two deviations by Sarda, viz. conversion of deferred amount of INR 240 crores to upfront and increase of infusion towards BGs by INR 76 crores approx. The case squarely falls within the ambit of Section 61(3) of the Insolvency and Bankruptcy Code, 2016 which permits this Tribunal to interfere, since there is material irregularity in the process.

20. Counsel appearing for the Appellant- 'Vantage Point Asset Management Pte. Ltd.' has additional submission that 'Vantage Point Asset Management Pte. Ltd.' has sent an e-mail dated 14.06.2023 to the Resolution Professional that 'Vantage Point Asset Management Pte. Ltd.' is ready to increase its offer by INR 50 Crores and further the 'Vantage Point Asset Management Pte. Ltd.' had given the highest offer in the plan, its

Resolution Plan deserves to be approved. It is contended that the object of CIRP is to maximise the value of the assets of the Corporate Debtor. Non-approval of the plan of 'Vantage Point Asset Management Pte. Ltd.' is ex-facie, arbitrary and perverse. It has been set-out "highest value" as the determinative parameter in the Process Note and Challenge Process. There has been a material irregularity in the process which is a valid ground for interfering with the Resolution Plan.

21. Counsel appearing for Jindal Power Limited has raised an additional issue in support of these Appeals that Jindal Power has offered 10% equity upside with a buyback value of INR 27 Crores. The said amount has not been taken into account in the financial proposal for voting. It is submitted that upon the conclusion of the bidding process on 19.04.2023, SEML's offer amounted to INR 1995 Crores whereas it is submitted that JPL's offer following the conclusion of bidding on the same date, stood at INR 2003 Crores and in event, 10% equity upside is added, the said amount will become INR 2130.10 Crores. It is submitted that in the facts of the present case, the Tribunal may permit the Resolution Applicant to submit fresh revised plan. It is submitted that the Adjudicating Authority erroneously rejected application IA No.40 of 2024. JPL after becoming aware of the rejection of the plan in the resolution process has issued letter dated 09.01.2024 requesting the Resolution Professional and the CoC to conduct another round of auction.

22. Counsel for the CoC submits that the clarifications had been sought by the Resolution Professional from all the Resolution Applicants pursuant

to a decision by the CoC in its meeting held on 06.05.2023. Such act of seeking clarification was pursuant to the rights of the CoC categorically set out in the RFRP. Counsel for the CoC has referred to Clauses 2.6.2(d), 2.6.2(g), 2.9.4, 2.9.7, 2.16.7, 2.18.5(t) and 4.1.5 of the RFRP. It is further submitted that the RFRP as well as the Process Note clearly set out that the CoC can vote on any Resolution Plan in its commercial wisdom. Under Clauses 9(a) to 9(e) of the Process Note, the RP/CoC reserve the right to evaluate the compliance of each plan and accept or reject the Resolution Plan. The CoC is under No Obligation to any of the RAs or any other person to approve a Resolution Plan which has the highest value as per the Identified Criteria. Referring to Clause 4.1.8 of the RFRP, it is contended that the CoC is under no obligation to any of the Resolution Applicants or any other person to approve a Resolution Plan which has scored the highest as per the Evaluation Criteria and any Resolution Plan shall be approved solely on the basis of the CoC's commercial wisdom. It is submitted that the CoC approves a Resolution Plan in its commercial wisdom by taking into account a host of factors and the overall feasibility and viability of the Resolution Plan. The Resolution Plan of SEML was approved by 100% majority of the CoC. CoC consist of Bank of Baroda having 92.77% voting share and the State Bank of India having 7.23% voting share. Members of the CoC being leading banks of the country are well aware of all financial and are fully competent to evaluate the Resolution Plan and come to a business decision. Thus, the arguments of the Appellants that by guise of clarifications SEML was allowed to change its financial is without any basis. The e-mail dated 08.05.2023 sent by the Resolution Professional

raising certain queries and in the reply to the said e-mail on 10.05.2023, SEML itself indicated that there was no modification in the financial proposal submitted by the SRA. Sarda had offered INR 1854.64 Cr. to the secured financial creditors comprising of (a) upfront component of INR 1553 Crores and deferred component of INR 301.64 Crores. The NPV of deferred portion of SEML's offer was INR 240 Crores. Sarda's NPV was INR 1805 Crores which is an admitted fact reflected form Appendix-I. Sarda's Resolution Plan submitted on 28.04.2023 after bidding process, NPV of Sarda did not change. The process was conducted by the CoC in fair and transparent manner. All Resolution Applicants got a level playing field and participated without demur till conclusion of the process. It was subsequent to the approval of the plan by the CoC and after the Appellants took back their EMDs, as an afterthought, 'Vantage Point Asset Management Pte. Ltd.' and 'Torrent Power Ltd.' filed applications before the Adjudicating Authority raising certain objections.

23. The arguments of option of INR 240 Crores given by the SEML as upfront payment, changes the financial offer is incorrect. The deferred payment which was offered of INR 143.37 Crores at the end of 2nd year and INR 158.27 Crores at the end of 3rd year, applying 10% discounting, the said amount comes to INR 240 Crores, hence, NPV of INR 240 Crores was added in the upfront component which is clear from Appendix-I. The language of certain clauses of the Resolution Plan being not clear and there being some doubts, clarification was asked from SEML.

24. Coming to the bank guarantees infusion, it is submitted that Sarda was always offering INR 180.49 Crores under the plan in relation to bank guarantees. Clarification was sought on the modality and there was no change in the commercial offer. All Resolution Applicants provided different treatment with respect to margin money. Even before the clarification was sought, SEML had proposed that margin money of INR 180.4 Crores will be returned to the Corporate Debtor and shall be utilised for payment to the secured financial creditor. It is submitted that in the 34th CoC meeting held on 18th-19th October, 2023, the CoC had examined all the Resolution Plans and the aspect as to whether before the CoC all necessary financial data and materials were placed before it and it reiterated its decision in 34th CoC meeting that all financial data was placed before the CoC and CoC reiterated its decision approving the plan of the SEML.

25. Counsel for the Resolution Professional refuting the submissions of the Counsel for the Appellants contends that the Resolution Professional in pursuance of the decision of the CoC held in its meeting dated 06.05.2023 has issued e-mail dated 08.05.2023 to all the Resolution Applicants asking different clarifications with respect to their Resolution Plans. The e-mail clearly contemplates that necessary clarification asked to the queries raised by e-mail be submitted by way of an addendum to the Resolution Plan. Clauses of RFRP specifically empower the CoC/ RP to ask for any clarification from the Resolution Applicants. The clarification from the Resolution Applicants was necessary for completing assessment of feasibility and viability as well as commercial acceptability of each of the

Resolution Plan and was for the purpose to bring clarity in the assessment. There was no discrimination practiced against any of the Resolution Applicants since clarification was asked from all Resolution Applicants. All Resolution Applicants also submitted their reply to the query on 10.05.2023. The query, which was asked from the SRA, in no manner permitted the SRA to change its commercial offer which was finalised in Negotiation Process completed in four rounds on 19.04.2023. The reply which was given by the SRA, were only clarification on the query which was asked from the SRA and the clarifications given by the SRA in no manner modified its commercial offer given in the Resolution Plan. No modification of financial proposal was permitted to the SRA nor actually SRA by reply to the queries modified its financial proposal. No irregularity has been committed by the Resolution Professional in conduct of the CIRP process. The query was made to all Resolution Applicants as per the decision of the CoC taken in the CoC meeting held on 06.05.2023. There is no substance in the submission of the Counsel for the Appellants that any irregularity was committed by the Resolution Professional in the CIRP process. The CIRP process was conducted as per the provisions of the IBC Regulations, 2016, RFRP and the Process Note. All the Appellants after approval of the plan have taken back their EMD.

26. Counsel for the SRA refuting the submissions of the Appellants submits that the arguments raised by the Appellant that SRA by way of clarification sent by e-mail dated 10.05.2023 has modified its financial offer is wholly incorrect. Appellants from time to time changed their stand at

different stages of the present proceeding. It is submitted that the SRA in the bidding process held on 19.04.2023 offered both upfront payment and deferred payment which was permissible as per the RFRP and the Process Note. SRA along with Affidavit filed in Company Appeal (AT) (Insolvency) No. 1621 & 1622 of 2024 has brought on the record last Appendix submitted by SEML to Resolution Professional during negotiation process on 19.04.2023. Copy of e-mail dated 10.05.2023 sent by the SEML to the clarification mail dated 08.05.2023 has also been brought on record. Learned Counsel referring to Appendix-I which was submitted on 19.04.2023 contends that Appendix-1 itself clearly mentions that the upfront payment was offered by SEML of INR 1553 Crores and INR 143.37 Crores at the end of 2nd year and INR 158.27 Crores at the end of 3rd year as deferred payment. It is submitted that on the basis of deferred payment offer given by the Resolution Applicant, there is automatic generation of data providing from net present value of the offer. Net present value of the deferred payment given by the Appellant was reflected as INR 120 Crores at the end of 2nd year and INR 120 Crores at the end of 3rd year and the net present value of the SRA remain unchanged in its Resolution Plan submitted on 28.04.2023. When the net present value of the SRA remains the same, it is not open for the Appellant to contend that the SRA has changed its financial. The clarification given on 10.05.2023 by the SRA is clarification on the queries asked by the Resolution Professional which also in no manner changed the commercial offer given by the SRA. In the Resolution Plan submitted on 28.04.2024, SRA has clearly mentioned that the discounted amount of INR 240 Crores can be given upfront also at the

option of the CoC which amount of INR 240 Crores was net present value of the deferred payment offered by the SRA. It is submitted that the said option was already included in the offer given by the Appellant, when the Resolution Plan was submitted by SRA on 28.04.2023 itself contain the offer to pay upfront of INR 240 Crores on option of the CoC, the foundation of the submission of the Appellant that in the guise of clarification, Appellant has changed its commercial is baseless. Learned Counsel for the SRA stated that SRA has already paid Rs.1900 crores consequent to the approval of the Plan.

27. Coming to margin money of INR 180.05 Crores, the SRA in its plan has already provided that it shall replace all bank guarantees that are secured by the margin money of INR 180.05 Crores. With regard to treatment of the bank guarantees in Item Nos.6 and 7 totalling to INR 76.66 Crores, there being some doubt, certain modalities clarification were asked from the SRA, which clarification in no manner can be treated as any deviation from the Resolution Plan. The submission of the Appellant that there is deviation by the SRA by its reply dated 10.05.2023 is baseless and unfounded. The Resolution Plan submitted by the SRA along with the Addendum dated 10.05.2023 has been considered and approved by the CoC, it is not open to the Unsuccessful Resolution Applicant to question the commercial wisdom of the CoC in approving the Resolution Plan.

28. Dr. Abhishek Manu Singhvi, Learned Senior Counsel appearing for 'Torrent Power Ltd.' has contended that the remand made by this Tribunal by its order dated 10.05.2024 was open remand for fresh decision.

Adjudicating Authority was obliged to consider all issues raised and Adjudicating Authority has not adverted to all submissions advanced by the Appellant and certain arguments were rejected relying on the earlier order of this Tribunal dated 10.05.2024.

29. These Appeals have been filed challenging the order of the Adjudicating Authority dated 13.08.2024. We proceed to examine all contentions advanced by the Appellants on merits to find out as to whether there are any grounds made in these Appeals to interfere with the order of the Adjudicating Authority approving the Resolution Plan which had approval of the CoC with 100% vote shares. Appellants have raised their submissions relying on Section 61(3)(ii) of the IBC. Provisions of Section 61(3)(ii) provides as follows:-

> *"**61. Appeals and Appellate Authority.**- (3) An appeal against an order approving a resolution plan under section 31 may be filed on the following grounds, namely:—*
>
> *xxx xxx xxx*
>
> *(ii) there has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period"*

30. We thus, proceed to examine the contentions raised by parties in the light of the above ground which has been pressed by the Appellants in these Appeals. Before proceeding further, we need to notice certain relevant clauses of the RFRP and the Process Note which are basis for entire CIRP process of the Corporate Debtor. It shall be sufficient to notice the

pleadings in Company Appeal (AT) (Insolvency) No. 1621 & 1622 of 2024 (Torrent's Appeal) for deciding all these Appeals.

31. The RFRP dated 12.08.2022 has been filed as Annexure A2 of the Appeal ('Torrent Power Ltd.'). Clause 2.6.2 (d) empowers the CoC to deliberate, discuss and/or negotiate with any one or more Resolution Applicants in any manner deemed fit by the CoC. Clause 2.6.2 (d) is as follows:-

> *"d) The Compliant Resolution Plans presented by the Resolution Professional to the CoC shall be considered, evaluated, assessed and approved by the CoC as per the sole discretion of the CoC The CoC has the right to satisfy itself about the credentials and antecedents of the Resolution Applicant(s) and the viability and feasibility of the Resolution Plan(s). The CoC may at its option, prior to or post evaluation, deliberate discuss and/or negotiate with any one or more Resolution Applicants in any manner deemed fit by the CoC. The Prospective Resolution Applicants acknowledge and agree that such right of deliberation, discussion and/ or negotiation in terms of this RFRP is necessary for the maximisation of the value of the Company. For the avoidance of doubt, it is clarified that neither the Resolution Professional nor the CoC shall have any obligation to undertake or continue the Resolution Plan Process with the Resolution Applicant having the best technical capabilities or highest best financial plan. Notwithstanding anything contained hereinabove, the CoC reserves the right to engage in discussions with any Resolution Applicant(s)."*

32. The above clause of the RFRP makes it clear that the powers of the CoC to deliberate, discuss and/or negotiate with any one or more Resolution Applicants in any manner deemed fit by the CoC is unfettered. Clause 2.6.2 (g) provides that on the basis of clarifications and negotiations with the Resolution Applicants, such Resolution Applicants may be required to submit a revised resolution plan. Clause 2.6.2 (g) is as follows:-

> *"(g) Basis clarifications and negotiations with the Resolution Applicants, such Resolution Applicants may be required to submit a revised Resolution Plan or make any modifications/amendments to the Resolution Plan in writing. Such submissions made at the instructions/request of the CoC shall not be considered as submission of a Resolution Plan made after the Resolution Plan Submission Date."*

33. Clause 2.9.4 begins with non-obstante clause reserving the absolute right of the CoC. Clause 2.9.4 is as follows:-

> *"2.9.4. Notwithstanding anything contained in this RFRP, the CoC reserves the absolute right to*
>
> *(a) consider, accept or vote or any Resolution Plan, with or without modification,*
>
> *(b) reject any Resolution Plan without assigning any reason;*
>
> *(c) negotiate with all or any Resolution Applicant with a view of maximizing the Corporate Debtor's value,*
>
> *(d) decide any method or process for negotiations with the Resolution Applicant(s) regarding the Resolution Plans received prior to voting in accordance with*

Applicable Law, which may include, but shall not be limited to, a price discovery process, outbidding process, swiss challenge process, etc. and each Resolution Applicant shall be hound by the terms governing such a process, which shall be decided by the CoC in its commercial wisdom.

(e) annul the Resolution Plan Process and reject all Resolution Plans and call for submission of new Resolution Plans from any Person;

(f) select or approve any proposal or Resolution Plan, as it may deem fit;

(g) call upon the Resolution Applicant to negotiate terms of the Resolution Plan and/or make modifications of the Resolution Plan and/or submit a revised Resolution Plan,

(h) allow one or more Resolution Applicants to jointly submit a Resolution Plan;

(i) call for submission of revised Resolution Plans from the Resolution Applicants who have already submitted Resolutions Plans at any stage of the process; or

(j) re-issue invitation for submission of Eol or re-issue request for resolution plans from Resolution Applicants (including any new Resolution Applicants).”

34. Clause 2.9.7 reserves the right of the CoC to consult with any Resolution Applicant(s) in order to receive clarifications or further information. Clause 2.9.7 is as follows:-

“2.9.7. The Resolution Professional and the CoC reserve the right to:

(a) consider offers from other Resolution Applicants, in case for some reason they are unable to approve or continue with the shortlisted Resolution Applicants (even if such applicant is the Successful Resolution Applicant);

(b) consult with any Resolution Applicant(s) in order to receive clarifications or further information;

(c) retain any information and/or evidence submitted to the CoC, Resolution Professional or CoC advisors by, on behalf of, and/or in relation to any Resolution Applicant, and

(d) require the Resolution Applicant to provide any additional documents or information in relation to its Resolution Plan

35. Right of CoC to request for additional information/ documents and/or seek clarifications from Resolution Applicant(s) is also reiterated in Clause 2.16.7 which is as follows:-

"2.16.7. Save as provided in this RFRP, no change or supplemental information to the Resolution Plan shall be accepted after the Resolution Plan Submission Date. The Resolution Professional, or CoC may, at their sole discretion, request for additional information/ documents and/or seek clarifications from Resolution Applicant(s), even after the Resolution Plan Submission Date. Delay in submission of additional information and/or documents sought by the Resolution Professional, or RP Professional Advisor (on behalf of the Resolution Professional) or the CoC shall make the Resolution Plan liable for rejection and the same may be treated as non-responsive."

36. Clause 2.18.5 contains heading 'acknowledgments and representations' which provides that by accessing/ obtaining RFRP and upon obtaining access to the Data Room and Information Memorandum, the Resolution Applicant is deemed to have made the following warranties,

undertakings, acknowledgments and representations. Clause 2.18.5 (t) is as follows:-

> *"(t) The Resolution Applicant hereby acknowledges that the Resolution Professional and/or the CoC may, at their sole discretion, at any time before the approval of the Resolution Plan submitted by the Successful Resolution Applicant(s), to their satisfaction, stipulate any additional conditions to be satisfied/ met by the Resolution Applicant and/or seek additional comforts/documents/ information from the Resolution Applicant."*

37. The above sub-clause (t) is wide in scope which empowers the Resolution Professional and/or the CoC to ask for any additional conditions to be satisfied/ met by the Resolution Applicant and/or seek additional comforts/documents/ information from the Resolution Applicant. When we look into the above clauses of the RFRP, the conclusion is inescapable that the queries which have been asked from the SRA and other Resolution Applicants was well within power and jurisdiction of the CoC and no exception can be taken to the queries and the nature of queries raised by the CoC from the SRA as is sought to be advanced by the Appellant. Clause 4 of the RFRP deals with 'Resolution Plan Evaluation and Approval'. Clause 4.1.8 clearly provides that the CoC is under no obligation to any of the Resolution Applicants or any other person to approve a Resolution Plan which has scored the highest as per the Evaluation Criteria and any Resolution Plan shall be approved solely on the basis of the CoC's commercial wisdom. Clause 4.1.8 is as follows:-

"4.1.8. Subject to such final Resolution Plan of the Resolution Applicant being a Compliant Resolution Plan, the CoC may vote on one or more of the Resolution Plan to approve and/or reject such Resolution Plans. It is made abundantly clear that the CoC is under no obligation to any of the Resolution Applicants or any other person to approve a Resolution Plan which has scored the highest as per the Evaluation Criteria and any Resolution Plan shall be approved solely on the basis of the CoC's commercial wisdom."

38. We also need to notice the Process Note issued on 13.04.2023 for conducting Negotiation Process on 19.04.2023. On the basis of Negotiation Process, Resolution Plans were required to be filed by all Resolution Applicants. Clause 9 of the Process Note set out details of Negotiation Process. Clause 9(v) details 'modalities for negotiation meetings'. Sub-clause (vii) provides that the financial proposal received in the negotiation process under the Identified Criteria shall be strictly as per the format prescribed in Appendix-I. Sub-clause (xi) provides that only the financial proposal which is offering the highest value as per the Identified Criteria at the end of each round will be disclosed. Clauses 9(v), (vii) and (xi) are as follows:-

"(v) Modalities for Negotiation Meetings

(vii) During the Negotiation Meetings, the participating Resolution Applicants shall be provided an opportunity to submit their revised and increased financial proposal in respect of identified Criteria (as

defined hereinafter). Any financial proposal received in the Negotiation Process under the Identified Criteria shall be strictly as per the format prescribed in Appendix I. The said Appendix 1 shall be duly submitted by the authorised representative of the Resolution Applicant.

(xi) To ensure confidentiality, the details of the resolution plans of Resolution Applicants will not be disclosed. Only the financial proposal which is offering the Highest Value as per the Identified Criteria at the end of each round will be disclosed "Highest Value as per the Identified Criteria shall be the financial proposal with highest NIV as per the Identified Criteria for that particular round

Note 1: It is clarified that the RP will display the following on the screen pertaining to the Resolution Applicant who has offered highest NPV as per the Identified Criteria at the end of each round:

I. *Upfront amount to Financial Creditors (i.e. the amount which will be paid within 45 days from the NCLT Approval Date as per the RFRP),*
II. *Amount offered to other creditors,*
III. *NPV as per the Identified Criteria*

Note 2: Each Resolution Applicant is required to specify the amount that is allocated by such Resolution Applicant towards the payment of the insolvency resolution process costs ("CIRP Cost") If no amount is allocated by any Resolution Applicant towards the payments of the CIRP Cost then an amount of INR 190 Crores will be deducted from the Upfront Cash Recovery being offered by such

Resolution Applicant for the purpose of ascertaining the upfront payments to the financial creditor INR If a Resolution Applicant allocates an amount towards payment of the CIRP Cost which is lower than INR 190 Crores, then the gap between INR 190 Crores and such allocated amount shall be deducted from the Upfront Cash Recovery being offered by such Resolution Applicant for the purpose of ascertaining the upfront payment to the financial creditors"

39. Annexure to Process Note contains "the Tentative Schedule for the Negotiation Process". Step 6 of the Schedule on which reliance has been placed by the Appellant provides as follows:-

Step 6	*Post the Closure of the Negotiation Process, each Resolution Applicant will be required to submit a draft of its Resolution Plan, incorporating the last Appendix i submitted by such Resolution Applicant (either in the last round or in the previous round, as the case may be) during the Negotiation Process alongwith any clarification that may have been sought by the RP or the CoC and their respective advisors within a period of 48 hours from the Closure of the Negotiation Process. Upon verification of the said draft by the RP, the Cot and/or their respective advisors, each Resolution Applicant shall submit the signed resolution plan to the RP on such date as may be communicated by the RP (pursuant to approval of the CoC).* *(ii) All Resolution Applicants must note that the proofs for the source of funds shall be required to be submitted within 48 hours from the Closure of the Negotiation Process, unless otherwise extended by the CoC in its discretion.*

	(iii) All revised signed resolution plans along with the addendums, if any, which are in compliance with the provisions of the Code and the CIRP Regulations shall be put to vote simultaneously, in accordance with Regulation 39(3) of the CIRP Regulations.

40. As noted above, after completion of the Negotiation Process on 19.04.2023 in four rounds, the Resolution Plans were submitted on 28.04.2023 by all the Resolution Applicants reflecting the offer given by the Resolution Applicants in Negotiation Process dated 19.04.2023.

41. After having noticed the relevant Clauses of RFRP and the Process Note, now we revert to respective submissions of the parties. As noted above, both Vantage and Torrent have filed the Applications before the Adjudicating Authority much after RP communicated the approval of Resolution Plan to unsuccessful Resolution Applicants. The Applications were filed by both Vantage and Torrent relying on newspaper report, which informed that financial offers given by Vantage was highest and Torrent was second highest and Sarda was third highest. As per the Appellants' submission commercial offer of Torrent, Vantage and Sarda as on 19.04.2023 were as follows:

	Upfront	**Deferred**	**Operational Creditors**	**Total**
Vantage *[disclosed to all bidders since H1 bid]*	1408.08	400	6.96	1815.04
Torrent	1790.00	-	20	1810.00
Sarda	**1553** *[Appendix 1 –*	**240**	12 *[2.73 crores +*	1805.00

	Pg 4 of Sarda Affidavit]		*9.27 crores – Pg 195. Vol I)*	

42. We have already noticed relevant Clauses of RFRP, which clearly provided the fact that a Resolution Applicant who has given the highest offer cannot claim that his Resolution Plan is to be approved. It is the commercial wisdom of CoC to approve a Plan. The approval of the Plan has to be as per the CoC's commercial wisdom.

43. The Process Note dated 13.04.2023 provided for submitting the financial proposal in Appendix-1, which Appendix-1 was part of the Process Note. Clause 9(e), contains a declaration on behalf of the Resolution Applicant, which is as follows:

> **"9. Notes to the Resolution Applicants:**
>
> (e) By participating in the Negotiator Process, each Resolution Applicant shall be deemed to have unconditionally accepted all the terms and conditions of the Negotiation Process and that it has clearly understood the effect and implication of the Process Note including it rationale, reasonableness and fairness of the terms and proposed timeline and steps thereto."

44. From the above Clause of Appendix 9(e), as well as the relevant Clauses of RFRP and Process Note as extracted above, it is clear that mere fact that Vantage has given offer, which was highest (INR 1815.04 crores) and Torrent second highest (INR 1810 crores) and Sarda, third highest (INR 1805 crores) could not be the reason, which obliged the CoC to approve the Resolution Plan of Vantage and Torrent, as CoC in its commercial wisdom

by taking into consideration other relevant factors was entitled to take its business decision.

45. Two principal submissions pressed by learned Senior Counsel for the Appellant(s) in the present Appeal(s), alleging deviation by SRA from its Resolution Plan needs to be dealt upon. The submission of the Appellant as noticed above is that in guise of clarification asked by the RP vide email dated 08.05.2023 to the SRA, the SRA was given an opportunity to modify its commercial offer, which opportunity was not given to other Resolution Applicants, which process reflect the material irregularity by RP, warranting interference by this Tribunal in approval of Resolution Plan. We while hearing the Appeal(s) on 21.08.2024, granted liberty to the RP to bring on record the email dated 08.05.2023, which was sent to the SRA. The learned Counsel for the RP has also made a statement that he shall keep all other relevant records ready for perusal of the court, if so required. On 21.08.2024, this Tribunal passed following order:

> "**21.08.2024:** Ld. Counsel for the Resolution Professional seeks liberty to bring on record the email dated 08.05.2023 which was sent to SRA.
>
> Ld. Counsel for the Resolution Professional further submits that he shall keep all other relevant records ready for perusal the court if so required.
>
> Let affidavit be filed by Friday i.e; 23.08.2024.
>
> List these appeals on **30.08.2024**."

46. In pursuance of the order of this Tribunal dated 21.08.2024, the RP has filed an affidavit bringing on record the email dated 08.05.2024 sent

to the SRA. The email sent to other Resolution Applicants were also brought on record. An affidavit on behalf of SRA has also been filed in Company Appeal (AT) (Ins.) No.1621-1622 of 2024, bringing on record the Appendix-1, which was submitted by Sarda in Negotiation Process on 19.04.2023 as well as the reply dated 10.05.2023 sent by SRA to the email received from the RP. As noted above, two principal grounds of attack to the approval of Resolution Plan are with regard to replacement of Bank Guarantee and upfront payment of INR 240 crores, which was earlier given as deferred payment by the SRA. We may proceed to consider the submissions of the parties in seriatim of queries raised in the email dated 08.05.2023. We need to first notice the email dated 08.05.2023, which was sent to the RP to the SRA. It is useful to extract the entire email sent by RP to Resolution Applicant, which email is as follows:

> "Dear Resolution Applicant,
>
> This is with reference to the Resolution Plan submitted by you on April 28, 2023 ("Resolution Plan") in the corporate insolvency resolution process of SKS Power Generation (Chhattisgarh) Limited. While the Resolution Plan is being reviewed and evaluated by the Resolution Professional ("RP") and the Committee of Creditors ("CoC") alongwith their respective advisors, we request you to kindly provide necessary clarifications to the points attached in this email, to enable a comprehensive evaluation of the Resolution Plan.
>
> **Clarifications sought**
>
> *1. We note that under clause 6.3.14 of the Resolution Plan, the Resolution Applicant has provided that the margin money of INR 180.05 crore provided against bank guarantees will be returned by the relevant issuing bank to the Corporate Debtor on the Transfer Dale and utilised for payment to the Secured Financial Creditors or in the*

manner decided by the CoC. Further, as per clause 6.3.15 of the Resolution Plan, the Resolution Applicant has undertaken to infuse INR 103.39 crore as part of Initial Infusion Amount for utilising towards providing 100% margin money for the Relevant BGs (as defined in the Resolution Plan). The Margin Money Replacement Amount (as defined in the Resolution Plan) is proposed to be utilised for replacement / renewal / securing of the Relevant BGs. It is further clarified in the Resolution Plan that in the event any Relevant BG is encashed and paid out to the beneficiary by the relevant issuing bank, then Margin Money Replacement Amount corresponding to such encashment shall be utilised for making payment to the Secured Financial Creditors or to creditors as decided by the CoC, on- the Transfer Date.

In this regard please clarify the following:

(i) Will the Resolution Applicant replace all the BGs that are secured by the margin money of INR 180.05 crore since such amount of INR 180.05 Crores is sought to be returned to the Corporate Debtor on the Transfer Date and utilised for making payment to the Secured Financial Creditors or to creditors as decided by the CoC under clause 6.3.14 of the Resolution Plan?

(ii) In case the Resolution Applicant will not replace all the BGs as above that are currently secured by margin money of INR 180 05 crore, then what will be the treatment of the bank guarantees at Item Nos. 6 and 7 of Annexure 3 which are currently secured by margin money of INR 76.66 crore? The treatment of the aforesaid BGs is not clear from the Resolution Plan. Further, please clarify the treatment of the underlying margin money, if it is not released by the relevant issuing banks.

(iii) If the Relevant BGs are invoked prior to the Transfer Date and the existing margin money securing such Relevant BGs is utilised to adjust against the invoked amount, will the Resolution Applicant still pay the difference between INR 103.39 Crores and such utilised margin money on the Transfer

Date to make payments as envisaged under the Resolution Plan?

(iv) Please clarify the treatment of the Exclusive Marin Money (as defined in the RFRP) proposed under the Resolution Plan which is required to be provided as per clause 3.4(x)(A) & (C) of the RFRP?

(v) Whether the release of the margin money is being sought before arranging for infusion of the fresh margin money for the Relevant BGs? Please clarify that the replacement of the bank guarantees will be undertaken in a manner which does not leave the issuing bank's exposure unsecured for any moment prior to, on or after the Transfer Date for the following categories of BG:

i. BGs of INR 103.39 Crores- defined as Relevant BGs

ii. BGs of INR 76.61 Crores (with specific mention of exclusive margin)

(vi) There seems to be an error in calculation of Annexure 3 viz aggregate of PGCIL/SECL/Rajasthan PPA is INR.103.83 Cr. Please clarify.

2. Are "Litigation Recovery" and "Litigation Benefits" intended to be used inter-changeably? If not please clarify the usage in the last sentence of Clause 6 3.4(a).

3. Clause 6 3.4(b) provides that the Litigation Recovery received by the Corporate Debtor after the Insolvency Commencement Date shall not be construed as part of the Surplus Cash. Further, the Litigation Recovery is proposed to be paid after the Transfer Date as per Clause 6.3.4(d) Accordingly, please clarify whether the Litigation Recovery is also included within Clause 6.5 12.

4. Clause 6.3.5 (j) of the Resolution Plan stipulates that the treatment in relation to Avoidance Benefits shall come into effect only when the RA is provided with a copy of the pleadings filed by the RP in relation to the Avoidance Transaction Litigations and that RA has reserved the right (in consultation with the CoC), to retain the

Avoidance Benefits for the benefit of the Corporate Debtor (and not for Secured Financial Creditors) if in its reasonable opinion the Avoidance Benefits are necessary for operations of the Corporate Debtor. This is inconsistent with Clause 6 3 5(a). In this regard, as also informed earlier, the pleadings in relation to Avoidance Transaction litigation were already made available in the Data Room to all the resolution applicant [VDR Ref. No. 12_ CIRP/Avoidance Application and 13_ Additional Data/ Additional Data _ 27 April 2023/ Avoidance Application], *Accordingly, please clarify the treatment of Avoidance Benefits.*

5. We note that Clause 2.2.7 deals with furnishing of a report by the Interim Accounting Agency (tAC). Responsibilities of IAC are yet to be defined. The CoC cannot vote on the terms/obligations of the IAC. Monitoring committee may take up this responsibility. Please clarify that furnishing of the report by IAC is not a prerequisite to distribution of plan amounts and determination of CIRP costs.

6. Clause 6.3.2.(b), states that Resolution Applicant will pay a "discounted amount of INR 240 Cr" to the CoC, in case CoC wishes to obtain the deferred portion of INR 240 Cr upfront. Please clarify whether Resolution Applicant is offering a value lower than INR 240 Cr (i.e. INR 240 Cr discounted to a lower value), if the option to obtain the value upfront is exercised.

7. We note that Clause 6.4.8 states that Monitoring Committee (MC) will pay costs incurred during the monitoring period as and when they fall due during the monitoring period. Please clarify that this is subject to Clause 6.2.7.

8. In Clause 6.4.9, all dues relating to employees are sought to be extinguished. Gratuity of continuing employees which may fall due after takeover, but relate to prior period, cannot be extinguished. Please clarify that gratuity and other similar obligations that fall after the Insolvency commencement date shall not be extinguished.

9. We note that Clause 7.3.2 stipulates that the RP shall inform of expiring licenses to the Resolution Applicant on transfer date.

Please-clarify that such responsibility will be that of the Monitoring Committee, of which the Resolution Applicant will be a part.

10. In Clause 9.2.6, please clarify that the Monitoring Committee will be bound to take actions on a reasonable efforts basis, as provided in Clause 9.2.1

11. Clause 12.3 states that if any court sets aside or unilaterally modifies the plan resulting into an increased financial outlay, the amounts paid till then shall be returned to the Resolution Applicant. Please clarify that, if the adjudicating authority orders a payment over and above the plan value and the RA was present and was heard during the proceedings (i.e. not unilaterally), the clause cannot operate

We request you to kindly provide the necessary clarification to the aforesaid queries by way of an addendum to the Resolution Plan at the earliest but no later than **11:59 p.m. IST of the 9th day of May 2023** by way of an email to irp.skspower@qmail.com, to enable the CoC and the RP to evaluate the Resolution Plan and complete the CIRP within the timelines prescribed under the Insolvency and Bankruptcy Code, 2016 (Code). Please note that the clarifications must be provided by way of an addendum to the Resolution Plan submitted by you on April 28, 2023. The addendum may contain necessary consequential changes (if any) pursuant to the points raised on your Resolution Plan.

The aforesaid clarifications are necessary and important for the complete assessment of the feasibility and viability as well as commercial acceptability of each of the resolution plans and to bring about clarity and uniformity in the assessment to the resolution plans in order to arrive at a considered decision in acceptance with the provisions of the Code and the regulations thereunder.

This communication has been issued without prejudice to the rights of the CoC and the Resolution Professional to undertake all actions permissible under law and the RFRP to achieve the objectives of the Code."

47. In paragraph-1 of the email, clarification was asked from the Sarda with regard to margin money of INR 180.05 crores. Paragraph-1 asked Clarifications (i) to (vi) as extracted above. The above email has referred to paragraph 6.3.14 of the Resolution Plan. We may also need to notice paragraph 6.3.14 of the Resolution Plan to understand the nature of query and the reply given by Sarda. The RP in pursuance of the liberty, which was granted by this Tribunal by order dated 21.08.2024 has handed over the copy of the Resolution Plan to the Court for reference of relevant Clauses as referred to with regard to which queries were raised by the RP. The relevant Clauses of Resolution Plan dealing with replacement of Bank Guarantee are 6.3.14 and 6.3.15. Clauses 6.3.13 to 6.3.16 are under the heading "Bank Guarantee" issued by various Banks as listed in Annexure 3. Clause 6.3.13 to 6.3.15 of Resolution Plan are as follows:

> "**Bank Guarantees:**
>
> 6.3.13. The Resolution Applicant understands that there are bank guarantees issued by various banks as listed in Annexure 3 (such bank guarantees, the "BGs"). All BGS are secured against 100% Margin Money.
>
> 6.3.14. The Margin Money of INR 180.05 Crores provided against the BGs will be returned by the relevant issuing bank to the Corporate Debtor on the Transfer Date and utilized for making payment to the Secured Financial Creditors or in the manner decided by the CoC. It is clarified that in the event any BG is returned prior to the Transfer Date, the Margin Money provided against such BGs shall be returned by the relevant issuing bank to the account of the Corporate Debtor prior to the Transfer Date for purposes of payment to the Secured Financial Creditors or to creditors as decided by the CoC, on the Transfer Date

6.3.15. In order to maintain the going concern status of the Corporate Debtor and secure the continuity of the BGs, the Resolution Applicant shall provide 100% margin money to the relevant issuing banks towards the BGs listed at Item No. 1 Item No. 5 of Annexure 3 ("Relevant BGs") on the Transfer Date. For such purpose, the Resolution Applicant shall infuse INR 103.39 Crores ("Margin Money Replacement Amount") in the Escrow Account (as a part of Initial Infusion Amount) which shall be utilised to provide such margins towards the Relevant BGs. It is clarified that the Margin Money Replacement Amount shall be utilised for replacement/renewal/securing of the Relevant BGs. It is further clarified that in the event any Relevant BG is encashed and paid out to the beneficiary by the relevant issuing bank, the Margin Money Replacement Amount corresponding to such encashment shall be utilised for making payment to the Secured Financial Creditors or to creditors as decided by the CoC. on the Transfer Date."

48. Paragraph 6.3.13 refers to Annexure-3, which contains the detail of Bank Guarantees from Serial Nos. 1 to 7. Annexure 3 is as follows:

"**ANNEXURE 3 : BANK GUARANTEES (as on 28 FEBRUARY 2023)**

S. No.	**Name of the Beneficiary**	**Amounts** *(in Crores)*	**Remarks**
1.	Power Grid Corporation of India Limited	37.50	A claim has been filed by PGCIL for this amount which has been duly admitted by the RP.
2.	South Eastern Coal fields Limited	36.33	This was provided under the Cost Supply Agreement.
3.	Ajmer Vidyut Vitran Nigam Limited (Rajasthan PPA)	8.14	Issued to Rajasthan Discom
4.	Jaipur Vidyut Vitran Nigam Limited (Rajasthan PPA)	12.08	Issued to Rajasthan Discom
5.	Jaipur Vidyut Vitran Nigam Limited (Rajasthan PPA)	9.78	Issued to Rajasthan Discom
6.	Excise Department	69.77	

7.	Customs	6.89	
	TOTAL	**180.05**	

49. We may now notice the reply to the queries as given by the Sarda to the RP. Sarda in its email dated 10.05.2023 after referring to paragraph 1 of the email dated 08.05.2023 gave its response as follows:

> "**Response:**
> In our Resolution Plan, it is proposed that the entire Margin Money will be utilised for payment to Secured Financial Creditors. In our Resolution Plan, we had proposed continuation of certain Bank Guarantees listed in Annexure 3 (except BGs listed in point 6 and 7) to ensure going concern status of the Corporate Debtor and had accordingly provided for replacement of the Margin Money with respect to such BGs. In respect of BGs listed in point 6 and 7 of Annexure 3 since the underlying liabilities of the Corporate Debtor towards the beneficiaries (for which Remaining BGs have been given) would be extinguished under the Resolution Plan, such BGs will not be continued. We clarify that the corresponding Margin Money (of INR 76.61 crs.) is therefore also sought to be returned to the Corporate Debtor for further payment to the Secured Financial Creditors as per the Resolution Plan.
> However, to provide assurance to the issuing banks, we clarify that all BGs listed in Annexure 3 will be secured by 100% Margin Money at all times. Therefore, pending the cancellation, expiry, release of BGs listed in point 6 and 7 of Annexure 3, we will be providing replacement Margin Money to the issuing banks on the Transfer Date.
>
> If any of the BGs listed in point 6 and 7 of Annexure 3 are invoked prior to the Transfer Date then the equivalent Margin Money of such invoked BGs shall be paid by the Resolution Applicant which shall be utilised to make payment to the Secured Financial Creditors or in the manner as decided by the CoC, on the Transfer Date.

> In case any of the BGs listed in point 6 and 7 of Annexure 3 are live or uninvoked as on the Transfer Date, the Resolution Applicant shall provide replacement margin money to the issuing banks on the Transfer Date which shall be utilised for replacement/ renewal/securing of the Remaining BGs and the relevant Margin Money shall be returned by the issuing banks to Corporate Debtor which Margin Money shall be utilised for the purposes of payment to the Secured Financial Creditors or in the manner as decided by the CoC, on the Transfer Date.
>
> Notwithstanding anything to contrary, the benefit relating to the Exclusive Margin Money (as defined in the RFRP) shall be provided to the State Bank of India in accordance with the terms of the RFRP.
>
> The aforesaid clarification and rectification of calculation errors are provided in the Addendum to the Resolution Plan.

50. We now need to test the challenge raised by the Appellant(s) on the queries dated 08.05.2023 and reply dated 10.05.2023 that by way of reply, Sarda was allowed to modify its financial proposal and Sarda, who initially provided for giving margin money of INR 103 crores has now by its reply has changed its offer from INR 103.83 crores to INR 180.49 crores. We need to first revert to the Clause 6.3.14 of the Resolution Plan submitted by Sarda. From the first sentence of Clause 6.3.14, which provides for margin money of INR 180.05 crores, it is stated that BGs will be returned by the relevant issuing bank to the Corporate Debtor on the transfer date and utilized for making payment to the secured Financial Creditors or in the manner decided by the CoC. Reading the aforesaid paragraph of Resolution Plan with the query dated 08.05.2023, where paragraph 1 of the query in email of the RP stated that "*We note that under clause 6.3.14 of the Resolution Plan, the Resolution Applicant has provided that the margin*

money of INR 180.05 crore provided against bank guarantees will be returned by the relevant issuing bank to the Corporate Debtor on the Transfer Dale and utilised for payment to the Secured Financial Creditors or in the manner decided by the CoC", the query by the email itself noticed that Resolution Applicant has provided for margin money of INR 180.05 crores. Further, Clause 6.3.15 was noticed and in the above reference six queries were raised as extracted above. The Sarda in its reply dated 10.05.2023 has clarified that margin money will be used for payment to secured Financial Creditors. It was clarified that in the Resolution Plan continuation of certain Bank Guarantees listed in Annexure 3 (except BGs listed in point 6 and 7), which was proposed for replacement of the margin money with respect to such BGs., the Sarda mentioned that "*in respect of BGs listed in point 6 and 7 of Annexure 3, since the underlying liabilities of the Corporate Debtor towards the beneficiaries would be extinguished under the Resolution Plan, such BGs will not be continued*". The response by email dated 10.05.2023 is extracted above in paragraph 49. Further, it was clarified that corresponding margin money of INR 76.71 crores, is therefore, also sought to be returned to the Corporate Debtor for further payment to the secured Financial Creditor as per the Resolution Plan. Thus, clarification issued by Sarda clearly reiterated its commitment of replacement of total Bank Guarantees amounting to INR 180.05 crores, which amount was to be returned to the Financial Creditor, which was to be utilized for payment to secured Financial Creditors. In the email, which was sent by the RP on 08.05.2023, it was clearly mentioned that "*the aforesaid clarifications are necessary and important for the complete*

assessment of the feasibility and viability as well as commercial acceptability of each of the Resolution Plan and to bring about clarity and uniformity in the assessment to the resolution plans in order to arrive at a considered decisions, in accordance with the provisions of the Code and regulations thereunder". Thus, email made it abundantly clear that the said clarification are necessary for complete assessment of the feasibility and viability as well as commercial acceptability of each of the Plan. From the relevant Clauses of Resolution Plan as extracted above, the clarification sought by email dated 08.05.2023 and the reply sent by Sarda on 10.05.2023, it is clear that Sarda has not modified its commitment with regard to replacement of BGs as was reflected in the Resolution Plan and clarification, which was basically asked with regard to BGs at Item No.6 and 7, were replied and answered reiterating the commitment of Resolution Applicant that corresponding margin money of INR 76.61 crores with respect to BGs in respect of Item Nos.6 and 7 shall also be returned to the Corporate Debtor for further payment to secured Financial Creditors as per the Resolution Plan. We, thus do not find any substance in submission of learned Counsel for the Appellant(s) that Resolution Plan of Sarda only had provided for return of the BGs of INR 103.39 crores and by clarification, the Sarda has changed its offer of entire BG to INR 180.05 crores. The Resolution Plan cannot be read to mean that Resolution Applicant has only provided for replacement of BG of INR 103 crores. Query with regard to Clause 6.3.15 was answered by Sarda clarifying the doubt, which was raised by the RP. It is also relevant to notice that the RP on 08.05.2023 has also sent the queries to other Resolution Applicants, asking them to

clarify certain aspect of their respective Resolution Plan. The RP has also brought on the record dated 08.05.2023, which was sent to Torrent as well as Vantage. The email, which was sent to Torrent on 08.05.2023 has also been brought on record by the RP in its affidavit filed on 30.08.2024. The clarification sought from the Torrent was also with regard to margin money and Bank Guarantees are as follows:

> "**Clarifications sought:**
>
> 1. We note that as per clause 11.2.2 of Part B of the Resolution Plan, the bank/financial institution which has issued the Specified Bank Guarantees shall have the benefit of the margin money provided in relation to such bank guarantees. In this regard; please clarify whether the Resolution Applicant will pay the amount equivalent to the undertying margin money for such Specified Bank Guarantees in the event such bank guarantees are invoked and the margin money is adjusted by the relevant bank/financial institution as provided in clause 11.2.3 of Part B of the Resolution Plan or will the Resolution Applicant pay towards the margin money which is remaining on the Payment Date in' relation to the Specified Bank Guarantees.
>
> 2. We note that as per clause 11.3.2 (b)(ii) of Part B of the Resolution Plan, the MPPP Bank Guarantees which are not invoked and extinguished on or before the Payment Date shall be renewed or replaced by the Resolution Applicant/Corporate Debtor as per the terms mutually agreeable between the Resolution Applicant and the bank/financial institution which has issued the MPPP Bank Guarantee. Further, it is provided that the existing underlying margin money in respect of such MPPP Bank Guarantees will be released to the financial creditors in the event of such renewal or replacement. In this regard, please clarify whether the Resolution Applicant will pay to the financial creditors the amount equivalent to the underlying margin money for such MPPP Bank Guarantees without any condition including in the event such MPPP Bank

Guarantees are not renewed or replaced as provided in clause 11.3.2(b)(ii) of Part B of the Resolution Plan.

3. Please clarify that the replacement of the bank guarantees will be undertaken in a manner which does not leave the issuing bank's exposure unsecured for any moment prior to or on or after the Payment Date under any circumstances."

51. The above email to the Torrent also indicate that margin money, clarification was also sought from the Torrent and similar clarification was also sought from the Sarda with regard to Bank Guarantees. We do not find any substance in submission that by way of clarification, only Sarda was shown any favour or given an opportunity to change its Resolution Plan.

52. We can also not be unmindful of the fact that CoC consists of lead Bankers of the country, Bank of Baroda and State Bank of India, who are assisted by financial experts and advisors and are well aware of the contents of the financials of the Resolution Plan of all the Resolution Applicants and are well aware of the financial implications of the Plan. As noted above, the CoC and RP are fully empowered to ask for any clarification from any or all Resolution Applicants as per the RFRP and RP has issued the email dated 08.05.2023 under the direction and decision of the CoC. Hence, it cannot be said that any irregularity was committed by RP in issuing the queries to the Resolution Applicants. We, thus, are not persuaded to accept the submission that above is an irregularity within the meaning of Section 61, sub-section (3) (ii), making any ground for interference.

53. Now, we come to the second limb of attack by the Appellant(s) on the approval of Resolution Plan, which is that by clarification dated 08.05.2023, the CoC and RP has given an opportunity to Sarda to modify its commercial offer to permit it to give deferred payment of INR 240 crores as upfront payment, which has given undue benefit to the Sarda in evaluation of its Plan. It is submitted that had Sarda not been allowed to change its commercials in guise of reply to the clarification, there was no occasion to add INR 240 crores upfront payment by Sarda and by permitting Sarda to change its deferred payment of INR 240 crores into INR 240 crores upfront, the entire commercials were allowed to be changed, which is impermissible as per the Process Note. It is submitted that all Resolution Applicants were required to submit their Resolution Plan in accordance with the financial proposal, which was finalized on 19.04.2023 in the bidding process. It is submitted that by clarification issued on 10.05.2023, Sarda has deviated from its commercial offer, which was frozen and concluded on 19.04.2023. For appreciating the above submission, we need to revert to the email dated 08.05.2023, sent by the RP to the Sarda and relevant clarification sought with regard to above aspect. Paragraph 6 of the email dealt with amount of INR 240 crores. Paragraph 6 of the email dated 08.05.2023 by which clarification was asked was to the following effect:

> *"6. Clause 6.3.2.(b), states that Resolution Applicant will pay a "discounted amount of INR 240 Cr" to the CoC, in case CoC wishes to obtain the deferred portion of INR 240 Cr upfront. Please clarify whether Resolution Applicant is offering a value lower than INR 240*

Cr (i.e. INR 240 Cr discounted to a lower value), if the option to obtain the value upfront is exercised."

54. Clause 6.3.2(b) has been referred in query No.6. We need to first notice the Clause 6.3.2 of the Resolution Plan. Clause 6.3.2 (b), contains proposal for Financial Creditor. Clause 6.3.2(b) of the Plan provides as follows:

> "6.3.2 (b) Secured Financial Creditors shall be issued NCDs by the Corporate Debtor for an amount equal to Deferred Amount (INR 240 Crores). The NCDs will be unsecured and issued in 2 different series of INR 120 Crore, being Series A & B. The NCDs will carry a coupon (Interest on Deferred Amount) and shall be redeemed as per the terms set out in Annexure 5. In the event CoC does not propose to subscribe to the NCDs on the Transfer Date, the Resolution Applicant shall pay a discounted amount of INR 240 Crore to the Secured Financial Creditors on the Transfer Date, in lieu of the Deferred Amount ("Deferred Amount Compensation"), The CoC shall inform the Resolution Applicant regarding its decision to subscribe to the NCDs or opt for discounted payment in lieu of the Deferred Amount to the Resolution Applicant in the Lol to be issued to the Resolution Applicant upon approval of its Resolution Plan. It is clarified that in case the CoC decides to take the Deferred Amount Compensation, no NCDs shall be issued and no Interest on the Deferred Amount shall be payable to the Secured Financial Creditors:"

55. The reply given by Sarda on 10.05.2023 to the above email, has been filed by the Sarda along with its affidavit. The reply of Sarda with regard to query No.6, is as follows:

> **"6.** Clause 6.3.2.(b), states that Resolution Applicant will pay a "discounted amount of INR 240 Cr to the CoC, in case CoC wishes to obtain the deferred portion of INR 240 Cr upfront.

> Please clarify whether Resolution Applicant is offering a value lower than INR 240 Cr (i.e. INR 240 Cr discounted to a lower value), if the option to obtain the value upfront is exercised.
>
> **Response:** No. The value of INR 240 crores is the discounted value of deferred payment (which includes principal amount of NCDs i.e. INR 240 Crore plus interest on such NCDs). If CoC exercises the option to obtain the value upfront, then the RA will pay INR 240 Crores upfront i.e. the principal amount of NCDs."

56. For appreciating the query and its response, we need to look into Appendix-1, which has also been brought on the record by Sarda along with its affidavit. Appendix 1, which contains the figure of upfront payment and deferred payment, indicate that upfront payment proposed was INR 1553 crores and deferred component consisted an amount of INR 301.64 crores. An amount of INR 143.37 crores was proposed to be paid at the end of 2nd year and INR 158.27 crores at the end of 3rd year. Total deferred payment offered by Sarda was thus, INR 301.64 crores. Exhibit-A, which is automatically generated on the basis of Appendix-1, indicate that upfront value of deferred payment was INR 120 crores by end of 2nd year and INR 120 crores by the end of 3rd year. Thus, net present value of payment of INR 301.64 crores (deferred) was reflected as INR 240 crores, which was the net present value of the financial offers reflected in the Exhibit-A. The net present value of INR 240 crores of the deferred payment was added in the net present value as well as the financial offers made in the Resolution Plan by the Sarda. In the query dated 08.05.2023, a query was made from the Sarda that whether as per Clause 6.3.2(b), Sarda will pay a "*discounted amount of INR 240 crores to the CoC, in case CoC wishes*

to obtain the deferred portion of INR 240 crores upfront". Answer given by Sarda was "No" and it was clarified that value of INR 240 crores is the discounted value of deferred payment (which includes principal amount of NCDs i.e. INR 240 crores plus interest on such NCDs). It was clarified that if CoC exercised the option to obtain the value upfront, then the RA will pay INR 240 crores upfront i.e. the principal amount of NCDs. The clarification issued by Sarda was in consonance with the Resolution Plan Clause 6.3.2, sub-clause (b). The Resolution Plan itself gave an option to the CoC to decide to take the deferred amount compensation, no NCDs, shall be issued and no interest on the deferred amount shall be payable to the secured Financial Creditors. The submission advanced by the Appellant(s) that Sarda was allowed to change its deferred payment of INR 240 crores as upfront payment is not as per the Clauses of Resolution Plan and the reply given by Sarda. The submission of the Appellant(s) cannot be accepted that in guise of clarification, Sarda has modified its financial offers and has deviated from the offer, which was made in the Resolution Plan. The Resolution Plan, Appendix-1 as noted above clearly mentioned that upfront payment offered is INR 1553 crores and deferred payment was INR 301 crores (net present value was INR 240 crores), for which an option was given to CoC. From the Clauses of Resolution Plan, the CoC was under the impression that Sarda was offering discounted value of INR 240 crores, which was clarified by Sarda that if CoC opt for the said amount upfront, which was clarified by the Sarda that there will be no discounting in INR 240 crores, since INR 240 crores itself is a discounted value of deferred payment of INR 301.64 crores.

57. We, thus, reject the submission of the Appellant(s) that the amount offered by Sarda which was to be paid as deferred payment has been permitted to be paid as upfront in guise of clarification. The deferred payment, which was offered was INR 301.64 crores and not INR 240 crores. INR 240 crores was the discounted value of deferred payment applying 10% discounting as per the Appendix-1 itself. Ratio of discount as per Appendix-1 was for one year it was 8% more than two years but less than three years it as 10%. Thus the query raised by the RP under the instruction of CoC was answered and the same in no manner can be read as modifying the commercial proposal, which was given by Sarda on 19.04.2023 and which is part of Appendix-1 brought on record along with the affidavit of SRA. We, thus, also do not find any substance in submission of the Appellant(s) that Sarda was allowed to modify its commercial offer in the guise of clarification. The Commercial offer given by Sarda were not changed by clarifying to the queries raised by the RP.

58. As noted above, the above queries was raised by RP for the complete assessment of the feasibility and viability as well as commercial acceptability of each of the Resolution Plans and in the email dated 08.05.2023, the RP himself stated that the said clarification is necessary to enable the CoC and RP to evaluate the Resolution Plan and complete the CIRP in the timelines prescribed under the IBC. The email dated 08.05.2023 further provided that the clarification must be provided by way of addendum to the Resolution Plan submitted on 28.04.2023. It further mentions that "*the addendum may contain necessary consequential*

changes (if any) pursuant to the points raised in your Resolution Plan". It is further relevant to notice that the other Resolution Applicants have also sent the clarification by way of addendum to the Resolution Plan submitted on 28.04.2023 including Sarda, which were all deliberated and voted in the CoC meeting held on 16.05.2023. The CoC, was thus, well aware of Resolution Plan, clarification and addendum and the voting was made by the CoC, taking into consideration of all aspects, including the Resolution Plan submitted by all Resolution Applicants with the commercial offers and evaluation matrix of Resolution Applicants. The CoC, which consists of leading financial institutions, was well aware of all commercial/ financial aspects of each Plan and it cannot be accepted that while taking their commercial decision, the CoC was not able to comprehend the financial aspects of the Resolution Plan along with addendum. As observed above, neither the queries raised by RP, nor reply given by Sarda can be said to any opportunity or permission to change the commercial offers by the SRA. The above submissions advanced by the Appellant(s) are without any substance.

59. There are two additional submissions, which have been advanced by the Vantage, Jindal and Torrent which also need to be noted. The learned Senior Counsel appearing for the Vantage submits that Vantage has given the highest offer of INR 1815.04 crores. Hence, to fulfill the objective of IBC and to maximize the value of assets of the Corporate Debtor, the Resolution Plan submitted by Vantage needs approval and CoC has acted

arbitrarily in not considering the highest commercial offer made by the Vantage.

60. We have already noticed that the facts that Vantage has given highest offer, under the RFRP and the Process Note, it was clearly mentioned that the mere fact that Resolution Applicant has given the highest offer, the CoC is not obliged to approve its Resolution Plan, which has the highest value as per the identified criteria. Clause-9(e) of the Process Note, clearly incorporate the undertaking given by all Resolution Applicants. When the Vantage has acknowledged the aforesaid fact while submitting the Resolution Plan, it cannot be allowed to contend that its offer, which was highest, ought to have been accepted by the CoC. The CoC, while approving the Resolution Plan in its commercial wisdom, takes into account host of factors and overall feasibility and viability of Resolution Plan. The commercial wisdom of CoC, which did not approve a Resolution Plan, which has given the highest money, cannot be faulted.

61. The subsequent offer given by Vantage dated 14.06.2023, enhancing its offer by INR 50 crores, was rightly not considered by the CoC, which was expressly rejected by 100% vote by CoC in its meeting held on 17.06.2023. After approval of Resolution Plan, no Resolution Applicant is entitled to raise its offer or give any revised offer.

62. Now, we come to the additional submission raised by learned Senior Counsel for Jindal Power that Jindal Power provided for 10% upside equity, which was not included in the financial proposal of the Jindal for voting.

We need to notice one aspect with regard to Jindal Power. Jindal Power after approval of Resolution Plan of Sarda, accepted back two EMDs and had not raised any objection before the Adjudicating Authority by filing any Application or objection. When Appeal(s) were filed by Sarda, challenging the order dated 06.10.2023, Jindal also filed an Intervention Application in the earlier round of the Appeal filed by Sarda, which Intervention Application was rejected by this Tribunal by its order dated 10.05.2024. In paragraph 88 of the judgment dated 10.05.2024, following was held:

> "**88.** Coming to the IA filed by Jindal Power, we notice that Jindal Power, who had not filed any Application before the Adjudicating Authority and has filed IA in the present Appeal and prayed for certain reliefs, no reliefs can be granted to the Intervenor - Jindal Power Limited, in the present Appeal.

63. An unsuccessful Resolution Applicant, who has not raised any objection after approval of Resolution Plan, cannot be heard in proceeding, which were initiated by other unsuccessful Resolution Applicants to raise any grievance with regard to non-approval of its Resolution Plan. However, we have also proceeded to examine the submissions raised by Jindal Power on its merit. From Appendix-1, under which financial proposals are given, there is no consideration of upside equity, nor upside equity, which is offered by Resolution Applicant, can be added into upfront payment. Upside equity is part of evaluation matrix and marking is provided in evaluation matrix on the basis of upside equity offered by a Resolution Applicant. The RP as well as CoC are well aware of all Resolution Plan of each Resolution Applicants, including the evaluation matrix, under which the Resolution Plans are to be evaluated. The submission of the Appellant

that 10% upside equity offer by it ought to have been included in its upfront payment, in which event its financials could have increased to INR 2130.10 crores, cannot be accepted. In any view of the matter, all financial offers given by Applicant, in Resolution Plan along with evaluation matrix of Resolution Applicant, comes within the domain of business decision of CoC and Resolution Plan of the Applicant – Jindal Power Ltd. was evaluated, considered, deliberated and voted by the CoC. Jindal Power cannot be allowed to question the commercial decision of CoC on the ground that 10% upside equity offered by it ought to have been added in its upfront payment. We do not find any substance in the submission of Jindal Power to interfere with the decision of Adjudicating Authority in approving the Resolution Plan.

64. We also need to notice law laid down by the Hon'ble Supreme Court with respect to limit and extent of jurisdiction of NCLT and NCLAT while interfering with commercial decision of the CoC in approving a Resolution Plan in the CIRP Process.

65. Learned Counsel for the Appellant has placed reliance on the Judgment of the Hon'ble Supreme Court in the matter of ***`Ngaitlang Dhar' Vs. `Panna Pragati Infrastructure (P) Ltd.'***, reported in ***(2022) 6 SCC 172,*** to support his submission that NCLT can interfere if there is perversity or material irregularity. In ***`Ngaitlang Dhar' (Supra),*** Insolvency Process commenced in respect of Meghalaya Infratech Ltd., Expression of Interest (`EoI') was invited from Prospective Resolution Applicant. The Appellant, Ngaitlang Dhar, Respondent No. 1 Panna Pragati

Infrastructure (P) Ltd. one Mr. Abhishek Agarwal and Mr. Ashish Jaisasaria submitted their EoI. All of them submitted their Resolution Plans. In CoC Meeting held on 11.02.2020 and 12.02.2020, the Appellant Ngaitlang Dhar emerged as H-1 bidder, whereas Mr. Abhishek Agarwal emerged as H-2 bidder. In 7th CoC Meeting, held on 06.03.2020, the CoC, with a 100% voting share, approved the Resolution Plan of the Appellant, Ngaitlang Dhar (H-1 bidder), which was further approved by NCLT on 18.05.2020. The Respondent, PPIPL contended that in the CIRP Proceedings before the CoC held on 11.02.2020 and 12.02.2020, they had sought only one or two days' time to submit its Revised Resolution Plan, which was submitted on 14.02.2020 and I.A. No. 27 of 2020 which was filed by Respondent No. 1, seeking a direction to the RP to take on record its Revised Resolution Plan, dated 14.02.2020 was rejected vide Order dated 18.03.2020. The RP thereafter filed the Application for approval of the Resolution Plan which was allowed on 18.05.2020. The Order rejecting the Application of PPIPL and the Order approving the Resolution Plan came to be challenged by way of Company Appeals by PPIPL, the Appeals were allowed by NCLAT on 19.10.2020 against which the Appeals were filed before the Hon'ble Supreme Court.

66. Learned Counsel for the Appellant has relied on Paragraphs 28, 29 & 33 of the Judgment where the Hon'ble Supreme Court has observed that an equal opportunity has accorded to all the Prospective Resolution Applicants. In Paragraphs 28, 29 & 33, following was held:

> ***"28.*** *It could thus be seen that the RP as well as the CoC had acted in a totally transparent manner. An equal opportunity was accorded to all the prospective resolution applicants. However, Respondent 1 Ppipl, without improving his bid amount, went on insisting for more time, which request was specifically rejected by the CoC.*
>
> ***29.*** *Shri Abhijeet Sinha, learned counsel, fairly concedes that though the final decision of the CoC would not be challenged on the ground that the "commercial wisdom" of the CoC should not be interfered with, it is only the process of decision-making, which can be challenged if there is any material irregularity in the said proceedings.*
>
> ***33.*** *No doubt that, under Section 61(3)(ii) IBC, an appeal would be tenable if there has been material irregularity in exercise of the powers by the RP during the corporate insolvency resolution period. However, as discussed hereinabove, we do not find any material irregularity."*

67. There can be no quarrel to the proposition laid down by the Hon'ble Supreme Court in the above. The argument was accepted by the Hon'ble Supreme Court that decision making process can be challenged there being material irregularity in the said Proceedings. Hon'ble Supreme Court has referred to Section 61(3)(ii) of the IBC where Appeal is tenable if there has been material irregularity in exercise of the power by the RP. Hon'ble Supreme Court, however, in the case did not find any material irregularity.

68. In the above case, Hon'ble Supreme Court has also noted the concept of the material irregularity and in Paragraphs 34 & 35 of the Judgment, following was laid down:

> ***"34.*** *We may gainfully refer to the following observations of this Court in Keshardeo Chamria v. Radha Kissen Chamria [Keshardeo Chamria v. Radha Kissen Chamria, (1952) 2 SCC*

329 : 1953 SCR 136] while considering the scope of the words "material irregularity", as are found in Section 115 of the Civil Procedure Code, 1908 : (SCC para 26)

> *"26. Reference may also be made to the observations of Bose, J. in his order of reference in Narayan Sonaji Sagne v. Sheshrao Vithoba [Narayan Sonaji Sagne v. Sheshrao Vithoba, 1947 SCC OnLine MP 21 : AIR 1948 Nag 258] wherein it was said that the words "illegally" and "material irregularity" do not cover either errors of fact or law. They do not refer to the decision arrived at but to the manner in which it is reached. The errors contemplated relate to material defects of procedure and not to errors of either law or fact after the formalities which the law prescribes have been complied with."*

> ***35.*** *In the present case, leave apart, there being any "material irregularity", there has been no "irregularity" at all in the process adopted by the RP as well as the CoC. On the contrary, if the CoC would have permitted the Ppipl to participate in the process, despite it assuring the other three prospective resolution applicants in its meeting held on 11-2-2020 and 12-2-2020, that the absentee prospective resolution applicant (Ppipl) would be excluded from participation, it could have been said to be an irregularity in the procedure followed."*

69. Hon'ble Supreme Court in the above case has also held that the commercial wisdom of the CoC has been given paramount status without judicial intervention. Hon'ble Supreme Court reiterated that it has been consistently held that it is not open to the Adjudicating Authority (NCLT) or the Appellate Authority (NCLAT) to take into consideration any other factor other than the one specified in Section 30(2) or Section 61(3) IBC. In Paragraph 32 following has been laid down:

> ***"32.*** *It is trite law that "commercial wisdom" of the CoC has been given paramount status without any*

judicial intervention, for ensuring completion of the processes within the timelines prescribed by IBC. It has been consistently held that it is not open to the adjudicating authority (NCLT) or the appellate authority (Nclat) to take into consideration any other factor other than the one specified in Section 30(2) or Section 61(3) IBC. It has been held that the opinion expressed by the CoC after due deliberations in the meetings through voting, as per voting shares, is the collective business decision and that the decision of the CoC's "commercial wisdom" is non-justiciable, except on limited grounds as are available for challenge under Section 30(2) or Section 61(3) IBC. This position of law has been consistently reiterated in a catena of judgments of this Court, including:

(i) K. Sashidhar v. Indian Overseas Bank [K. Sashidhar v. Indian Overseas Bank, (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222] ,

(ii) Essar Steel India Ltd. (CoC) v. Satish Kumar Gupta [Essar Steel India Ltd. (CoC) v. Satish Kumar Gupta, (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443] ,

(iii) Maharashtra Seamless Ltd. v. Padmanabhan Venkatesh [Maharashtra Seamless Ltd. v. Padmanabhan Venkatesh, (2020) 11 SCC 467 : (2021) 1 SCC (Civ) 799] ,

(iv) Kalpraj Dharamshi v. Kotak Investment Advisors Ltd. [Kalpraj Dharamshi v. Kotak Investment Advisors Ltd., (2021) 10 SCC 401 : (2022) 1 SCC (Civ) 233] ,

(v) Ghanashyam Mishra & Sons (P) Ltd. v. Edelweiss Asset Reconstruction Co. Ltd. [Ghanashyam Mishra & Sons (P) Ltd. v. Edelweiss Asset Reconstruction Co. Ltd., (2021) 9 SCC 657 : (2021) 4 SCC (Civ) 638]"

70. We may also notice another Judgment of the Hon'ble Supreme Court in the matter of **`*Vallal RCK' Vs. `Siva Industries & Holdings Ltd.'*,** reported in ***(2022) 9 SCC 803,*** where Hon'ble Supreme Court had held that there is an intrinsic assumption, that Financial Creditors are fully

informed about the viability of the Corporate Debtor and feasibility of the proposed Resolution Plan. We may refer to Paragraphs 21 & 22, which are as follows:

> *"**21.** This Court has consistently held that the commercial wisdom of the CoC has been given paramount status without any judicial intervention for ensuring completion of the stated processes within the timelines prescribed by the IBC. It has been held that there is an intrinsic assumption, that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. A reference in this respect could be made to the judgments of this Court in K. Sashidhar v. Indian Overseas Bank [K. Sashidhar v. Indian Overseas Bank, (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222] , Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta [Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta, (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443] , Maharashtra Seamless Ltd. v. Padmanabhan Venkatesh [Maharashtra Seamless Ltd. v. Padmanabhan Venkatesh, (2020) 11 SCC 467 : (2021) 1 SCC (Civ) 799] , Kalpraj Dharamshi v. Kotak Investment Advisors Ltd. [Kalpraj Dharamshi v. Kotak Investment Advisors Ltd., (2021) 10 SCC 401 : (2022) 1 SCC (Civ) 233] and Jaypee Kensington Boulevard Apartments Welfare Assn. v. NBCC (India) Ltd. [Jaypee Kensington Boulevard Apartments Welfare Assn. v. NBCC (India) Ltd., (2022) 1 SCC 401 : (2022) 2 SCC (Civ) 165]*
>
> ***22.** No doubt that the aforesaid observations have been made by this Court while considering the powers of the CoC while granting its approval to the resolution plan."*

71. Hon'ble Supreme Court further emphasised the need for minimal judicial interference by the NLCT and NCLAT in the framework of IBC. Referring to the Judgment in the matter of **`*Arun Kumar***

Jagatramka' Vs. `Jindal Steel & Power Ltd.' reported in ***(2021) 7 SCC 474,*** following observations were made in Paragraph 27:

> ***"27.*** *This Court has, time and again, emphasised the need for minimal judicial interference by Nclat and NCLT in the framework of IBC. We may refer to the recent observation of this Court made in Arun Kumar Jagatramka v. Jindal Steel & Power Ltd. [Arun Kumar Jagatramka v. Jindal Steel & Power Ltd., (2021) 7 SCC 474] : (SCC p. 533, para 95)*
>
> > *"95. … However, we do take this opportunity to offer a note of caution for NCLT and Nclat, functioning as the adjudicatory authority and appellate authority under the IBC respectively, from judicially interfering in the framework envisaged under the IBC. As we have noted earlier in the judgment, the IBC was introduced in order to overhaul the insolvency and bankruptcy regime in India. As such, it is a carefully considered and well thought out piece of legislation which sought to shed away the practices of the past. The legislature has also been working hard to ensure that the efficacy of this legislation remains robust by constantly amending it based on its experience. Consequently, the need for judicial intervention or innovation from NCLT and Nclat should be kept at its bare minimum and should not disturb the foundational principles of the IBC."*

72. The law as laid down by the Hon'ble Supreme Court in above cases as well as the cases referred therein, clearly give paramount importance to the decision of the CoC taken in commercial wisdom to approve a Resolution Plan and Hon'ble Supreme Court has outlined the limited jurisdiction of NCLT and NCLAT to interfere with the said decision of the CoC.

73. Learned Counsel for the Appellant has also relied on one Judgment of the Hon'ble Supreme Court in the matter of ***`Ajay Gupta' Vs. `Pramod***

Kumar Sharma'**,** reported in ***(2022) 6 SCC 86,*** which was a case where in the CIRP Process, on an I.A. 367 of 2021 filed by one of the Resolution Applicants, the Adjudicating Authority granted prayer of Appellant to amend the Resolution Plan dated 22.10.2021 but, at the same time, also allowed the other Resolution Applicant to place any modification in the Resolution Plan before the CoC. The facts has been noticed in Paragraph 2 of the Order, which is as follows:

> ***"2.*** *The appellant seeks to question the judgment and order dated 13-1-2022 [Ajay Gupta v. Pramod Kumar Sharma, 2022 SCC OnLine NCLAT 93] as passed by the National Company Law Appellate Tribunal, Principal Bench, New Delhi (hereinafter also referred to as "Nclat" or "the Appellate Tribunal") in Company Appeal (AT) Insolvency No. 35 of 2022 whereby, the Appellate Tribunal declined to interfere in the order dated 13-12-2021 [Bank of India v. B.B. Foods (P) Ltd., 2021 SCC OnLine NCLT 662] passed in IA No. 367 of 2021 in CP No. (IB) 349/ALD/2018 by the National Company Law Tribunal, Allahabad Bench, Allahabad (hereinafter also referred to as "NCLT" or "the adjudicating authority") by which, the Tribunal granted the prayer of the appellant to amend his resolution plan dated 22-10-2021 but, at the same time, also allowed the other resolution applicant to place any modification in their resolution plan before the Committee of Creditors ("CoC" for short)."*

74. In the aforesaid case, the CoC, deliberated the Plan submitted by the two Resolution Applicants namely the Appellant and another Resolution Applicant, and pointed out certain defects after the deliberation, Appellant sent a communication letter dated 18.11.2021 where the Appellant put forth his gestures of making the payment upfront if the Bank allowing the same within 90 days of the receipt of the Order of NCLT approving the Resolution Plan, which request was declined by the RP thereafter the I.A.

367/2021 was filed by the Appellant which prayer was allowed but, at the time of granting the prayer of the Appellant, Adjudicating Authority allowed the other Resolution Applicant to place any modification in their submitted Resolution Plan before the CoC so as to provide a level playing field. Order passed by the Adjudicating Authority has been noticed in Paragraph 6 of the Judgment which is as follows:

> ***"6.*** *The order dated 13-12-2021 [Bank of India v. B.B. Foods (P) Ltd., 2021 SCC OnLine NCLT 662] so passed by the adjudicating authority reads as under : (B.B. Foods case [Bank of India v. B.B. Foods (P) Ltd., 2021 SCC OnLine NCLT 662] , SCC OnLine NCLT paras 1-5)*
>
> > *"IA No. 367 of 2021*
> >
> > *1. The learned counsel for the applicant present. The learned counsel for the CoC present. The learned counsel for the RP present. The learned Senior Counsel for the other resolution applicant whose plan is also being considered by the CoC present.*
> >
> > *2. This is an application filed by one of the resolution applicant seeking to amend the final resolution plan dated 22-10-2021 submitted by the applicant to make the following amendments:*
> >
> > *(a) To uncaps the CIRP costs on conditions stated therein;*
> >
> > *(b) To reduce term of the plan from 180 days to 90 days.*
> >
> > *3. At this point of time, we are conscious of the fact that the CIRP period will come to end on 6-1-2022 and a decision on the resolution plans will have to be taken first by the CoC and, thereafter by this adjudicating authority.*
> >
> > *4. Therefore, the ends of justice will be met if we direct the applicant herein to place the affidavits at pp. 290 to 298 along with the covering letter addressed to the sole member of*

the CoC for consideration. Since we do not wish to disturb level playing field, the other resolution applicants whose plans are also being considered will also be permitted to place any modification in their submitted resolution plan before the CoC for its consideration. Such modifications shall be communicated to the CoC, no later than 48 hours from now.

5. Accordingly, IA No. 367 of 2021 is disposed of."

75. Subsequently, the Resolution Plan considered by the CoC on 21.12.2021 and the Plan of other Resolution Applicant was approved. Appellant sought to question the Order dated 13.12.2021 before the Appellate Tribunal. Appellate Tribunal however did not find any substance and maintained the Orders as to maintain the level playing field. In Paragraphs 8 & 9 of the Judgment following has been observed:

"8. *The appellant, on the other hand, attempted to question the said order dated 13-12-2021 [Bank of India v. B.B. Foods (P) Ltd., 2021 SCC OnLine NCLT 662] before the Appellate Tribunal. The Appellate Tribunal took note of the grievance of the appellant that its resolution plan came to be known to everyone and hence, no opportunity should have been given to the others to modify.*

9. *The Appellate Tribunal found no substance in those submissions while taking the view that the adjudicating authority had passed the impugned order so as to maintain the level playing field. The Appellate Tribunal also took note of the fact that the resolution plans had already been considered by CoC on 21-12-2021."*

76. The Order of this Appellate Tribunal was questioned before the Hon'ble Supreme Court in the aforesaid Civil Appeal filed by the Ajay Gupta. The arguments raised before the Hon'ble Supreme Court was that there was no justification for the Adjudicating Authority granting liberty to

the other Resolution Applicant to modify its Resolution Plan, which argument was noticed in Paragraph 12 of the Judgment and rejected. It is useful to extract Paragraphs 12, 13 & 14 which are as follows:

> ***"12.*** *The learned Senior Counsel for the appellant has painstakingly taken us through the relevant contents of the request for resolution plan ("RFRP" for short) as issued by the resolution professional as also the minutes of the meeting of CoC and the affidavit filed by the appellant. The learned counsel would strenuously contend that so far as the appellant is concerned, it had not been a case of modification of the resolution plan because modification as such was not even permissible under the conditions of RFRP; and the submissions of the appellant by way of the affidavit dated 17-11-2021 had only been to meet with the requirements of the CoC, as reflected in the minutes of the meeting dated 2-11-2021 and for such a proposition, there was no justification in granting any liberty to the other resolution applicant to modify its resolution plan. The learned Senior Counsel has also contended that appellant had been rather prejudiced in the matter for the reason that the terms of its resolution plan became known to the other resolution applicant when the matter was examined by the adjudicating authority while passing order dated 13-12-2021 [Bank of India v. B.B. Foods (P) Ltd., 2021 SCC OnLine NCLT 662] .*
>
> ***13.*** *We do not find the submissions aforesaid making out a case for interference. This is for the simple reason that on a perusal of the order dated 13-12-2021 [Bank of India v. B.B. Foods (P) Ltd., 2021 SCC OnLine NCLT 662] , this much is clear that certain key features/stipulations of the resolution plan were sought to be amended by the appellant. Whether it was done in response to the requirement of the CoC or otherwise, the fact of the matter remains that there was going to be modification of the relevant terms of the resolution plan of the appellant. When that was being permitted at the request of the appellant himself, we cannot find fault in the adjudicating authority having passed an order so as to balance the position of the respective parties and to provide a level playing field by granting corresponding permission to the other*

resolution applicant to place its modification for consideration of CoC.

14. *So far as affidavit dated 17-11-2021 is concerned, though the appellant stated in Para 3 thereof that the payment of upfront amount under the resolution plan was in no way going to modify the plan but, that had only been an expression of the understanding of the appellant about the legal effect of the propositions put forward by him, which included the modification of the term of plan from 180 days to 90 days. Such a proposition could not have been treated as formal or innocuous or of no material bearing."*

77. Hon'ble Supreme Court observed in the said Judgment that the proposition put by the Appellant including the modification of the term of the Plan, hence the opportunity to other Resolution Applicant to modify the Plan was rightly granted and the Order of the Adjudicating Authority and the Appellate Tribunal was affirmed dismissing the Appeal. The above Judgment does not lend any support to the submission of the Appellant in the facts of the present case.

78. The present is the case where CoC and RP did not grant any opportunity to Sarda to modify or amend the terms of the Resolution Plan. Hon'ble Supreme Court in the said Judgment noticed that the above was a case where question of modification of the Resolution Plan was involved hence liberty was granted to other Resolution Applicant to modify its Plan which Order was maintained. In Paragraph 13 as noted above, observation of the Hon'ble Supreme Court are *"this much is clear that certain key features/ stipulations of the Resolution Plan were sought to be amended by the Appellant".* Thus, the Judgment of the ***`Ajay Gupta' (Supra)*** was in the background when Appellant sought to amend the Resolution Plan hence

the liberty was granted to other Resolution Applicants also to modify its Plan in Paragraph 10.

79. As noted above, in the present case by email dated 08.05.2023 sent by the RP clarifications was sought from Sarda. We have also noticed above that clarifications were also sought form Torrent, Jindal and Vantage seeking clarification of different Clauses of their respective Resolution Plan, which clarifications were sought after the decision of the CoC taken in the CoC Meeting dated 06.05.2023. The clarification asked for by the RP which we have already extracted above in no manner permitted the Sarda or any other Resolution Applicant to modify the Resolution Plan. Only clarifications were sought for and no Resolution Applicant was permitted to modify its Resolution Plan. We have already rejected the submission of the Appellant that under the guise of clarification dated 08.05.2024, the Sarda was permitted to modify its financial proposals which was given on 19.04.2024.

80. In view of the foregoing discussions, and law laid down by the Hon'ble Supreme Court laying down minimal interference in the commercial decision of CoC to approve the Resolution Plan, we do not find that any sufficient grounds have been made out within meaning of Section 61(3)(ii) of the IBC to interfere with the decision of the Adjudicating Authority approving the Resolution Plan of Sarda, in these Appeals filed by Unsuccessful Resolution Applicant.

81. In result, all the Appeals are dismissed. Parties shall bear their own costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

NEW DELHI

1st October, 2024

Ashwani/Anjali/Himanshu