NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1395 – 1397 of 2023

[Arising out of order dated 06.10.2023 passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench, Court – IV), in I.A. No.3399/2023 & I.A. No. 3336/2023 in I.A. No. 2794/2023 in C.P. (IB)/893(MB)2021]

IN THE MATTER OF:

Sarda Energy and Minerals Limited
125 B Wing Mittal Court, Nariman Point,
Mumbai 400 021 **...Appellant**

Versus

1. Ashish Arjunkumar Rathi
Resolution Professional
SKS Power Generation (Chhattisgarh) Ltd.
19/503, NRI Complex,
Sector 54, 56, 58, Seawood,
Nerul, Navi Mumbai – 400706 **...Respondent No. 1**

2. Committee of Creditors
Through Bank of Baroda
Stressed Assets Management Branch
17/B, First Floor, Homji Street,
Horniman Circle, Mumbai -23 **...Respondent No. 2**

3. Torrent Power Ltd.
Samanvay, Tapovan,
Ambavadi Ahmedabad,
Gujarat – 380 015

...Respondent No. 3

Present:

For Appellant : Mr. Arun Kathpalia, Mr. Krishnendu Datta, Mr. Abhijit Sinha, Sr. Advocates with Mr. Manu Krishnan, Ms. Pooja Mahajan, Mr. Savar Mahajan and Ms. Geetika Sharma, Advocates.

For Respondents : Mr. Abhinav Vasisht, Sr. Advocate with Mr. Bishwajit Dubey, Mr. Somesh Srivastava, Mr. Rama Kant Rai, Mr. Shivam Wadhwa, Advocates for R-1/(RP).

Mr. Gopal Jain, Sr. Advocate with Mr. Madhav V. Kanoria, Ms. Srideepa Bhattacharyya and Ms. Neha Shivhare, Advocates for R-2.

Mr. K. Venugopal, Sr. Advocate with Ms. Gauri Rasgotra, Ms. Priyashree Sharma, Mr. Shivansh Agarwal and Mr. Krishnan Agarwal, Advocates for Intervenor in I.A. No. 1214/2024.
Mr. Kapil Sibal, Mr. Ramji Srinivasan, Sr. Advocates with Ms. Ruby Singh Ahuja, Ms. Hancy Maini, Mr. Varun Khanna, Mr. Devang Kumar, Mr. Manisha Singh and Ms. Namrata Saraooh, Advocates for R-3.

WITH

Company Appeal (AT) (Insolvency) No. 1445 of 2023

[Arising out of order dated 06.10.2023 passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench, Court – IV), in I.A. No. 3336/2023 in I.A. No. 2794/2023 in C.P. (IB)/893(MB)2021]

IN THE MATTER OF:

Vantage Point Asset Management Pte. Ltd.
A Company incorporated under the laws of
Singapore having Company No. 201708761H.
Having its Registered Office at:
6 Battery Road, #03-01,
Singapore 049909 **...Appellant**

Versus

1. Ashish Arjunkumar Rathi
Resolution Professional
SKS Power Generation (Chhattisgarh) Limited
Having address at 19/503, NRI Complex,
Sector 54, 56, 58, Seawood,
Nerul, Navi Mumbai – 400 706 **...Respondent No. 1**

2. The Committee of Creditors of SKS Power Generation Chhattisgarh Limited
Through Bank of Baroda
Stressed Assets Management Branch **...Respondent No. 2**
17/B, First Floor, Homji Street,
Horniman Circle, Mumbai -23

Present:

For Appellant : Mr. Arvind Nayar, Sr. Advocate with Mr. Sahan Ull, Mr. Samir Malik, Mr. Pranav Khanna and Mr. Varun Kalra, Advocates.

For Respondents : Mr. Abhinav Vasisht, Sr. Advocate, Mr. Bishwajit Dubey, Mr. Somesh Srivastava and Mr. Rama Kant Rai, Advocates for R-1/(RP).
Mr. Gopal Jain, Sr. Advocate with Mr. Madhav V. Kanoria, Ms. Srideepa Bhattacharyya and Ms. Neha Shivhare, Advocates for R-2.

WITH

Company Appeal (AT) (Insolvency) No. 1535 of 2023

[Arising out of order dated 06.10.2023 passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench, Court – IV), in I.A. No.3399/2023 & I.A. No. 3336/2023 in I.A. No. 2794/2023 in C.P. (IB)/893(MB)2021]

IN THE MATTER OF:

Ashish Arjunkumar Rathi
Resolution Professional of
M/s. SKS Power Generation (Chhattisgarh) Limited
Having the registered office address at
19/503, NRI Complex,
Sector 54, 56, 58, Seawood, **...Appellant**
Nerul, Navi Mumbai – 400 706

Versus

1. Torrent Power Limited
Having registered office at:
Samanvay, 600, Tapovan, Ambawadi,
Ahmedabad, Gujarat, India – 380015.
Email: adv.shikharmittal@gmail.com
SaurabhMashruwala@torrentpower.com **...Respondent No. 1**

2. Committee of Creditors
Through Bank of Baroda
Stressed Assets Management Branch
17/B, First Floor, Homji Street,
Horniman Circle, Mumbai -23
Email: madhav.kanoria@cyrilshroff.com
sammum@bankofbaroda.com **...Respondent No. 2**

3. Sarda Energy & Minerals Limited
Having Registered office at:
125 B Wing, Mittal Court,
Nariman Point, Mumbai 400 021
Email: geetika.sharma@agalaw.in
cs@seml.co.in **...Respondent No. 3**

Present:

For Appellant	**:**	**Mr. Abhinav Vasisht, Sr. Advocate, Mr. Bishwajit Dubey, Mr. Somesh Srivastava, Mr. Rama Kant Rai, Advocates.**
For Respondents	**:**	**Mr. Gopal Jain, Sr. Advocate with Mr. Madhav V. Kanoria, Ms. Srideepa Bhattacharyya and Ms. Neha Shivhare, Advocates for R-2.**

J U D G M E N T

ASHOK BHUSHAN, J.

These three Appeals have been filed against the Order dated 06.10.2023, passed by the Learned Adjudicating Authority (National Company Law Tribunal, Mumbai Bench, Court IV).

2. Comp. App. (AT) (Ins.) No. 1395-1397 of 2023 have been filed against the Order dated 06.10.2023 passed in I.A. 3399/2023 and I.A. 3336/2023 as well as in I.A. No. 2794/2023 in C.P.(IB)-893(MB)/2021. Comp. App. (AT) (Ins.) No. 1445 of 2023 has been filed challenging the order dated 06.10.2023 passed in I.A. 3336/2023 in I.A. 2794/2023 in C.P.(IB)-893(MB)/2021. Comp. App. (AT) (Ins.) No. 1535/2023 has been filed challenging the order dated 06.10.2023 in I.A. 3399/2023 in I.A. No. 2794/2023 in C.P.(IB)-893(MB)/2021.

3. All the appeals having arisen out of the same order dated 06.10.2023, all the appeals have been heard together and are being decided by this common Judgment.

4. Brief facts of the case necessary to be noticed for deciding the appeals are:

i. Corporate Insolvency Resolution Process (CIRP) was initiated against the SKS Power Generation Chhattisgarh Limited, the Corporate Debtor vide order dated 29.04.2022.

ii. Resolution Professional (RP) published `Form-G', inviting Expression of Interest (EoI) from Prospective Resolution Applicants (PRA).

iii. On 12.08.2022, RFRP, Information Memorandum, and access to Virtual Data Room was provided to PRA.

iv. Timeline for submission of Resolution Plan was extended upto 30.12.2022.

v. 7 Resolution Applicants including the Appellant, Vantage Point Asset Mangament Pte. Ltd. and Torrent Power Limited submitted their Resolution Plan.

vi. Resolution Applicants were called for discussions and negotiations. Revised Resolution Plan was submitted by the Appellant, Vantage Point Asset Management Pte. Ltd., Torrent Power Limited, NTPC & Jindal.

vii. RP apprised Resolution Applicant that inter-se bidding process shall be conducted on 19.04.2023 as per Process Note, which was issued on 13.04.2023.

viii. On 19.04.2023, inter-se bidding process was conducted and concluded after four rounds.

ix. The Resolution Applicants were asked to submit the revised Resolution Plan to the RP incorporating the financial proposals submitted during the inter-se bidding.

x. By 28.04.2023, all five Resolution Applicants who participated in the inter-se bidding submitted their revised Resolution Plan.

xi. 29th Committee of Creditors (CoC) Meeting held on 06.05.2023, CoC directed the RP to seek clarifications from some of the Resolution Applicants without any change in commercial terms.

xii. RP sought clarification from Jindal, Torrent Power Ltd., Vantage Point Asset Management Pte. Ltd. and Appellant – SEML.

xiii. Clarifications were submitted by 10.05.2023 in form of an addendum to Plan as was required by the email of RP dated 08.05.2023.

xiv. 31st CoC Meeting held on 16.05.2023, CoC discussed distribution of proceed and the Resolution of the Resolution Plan. 7 Plans were put for voting. E-voting was conducted for approval of the Plan from 28.05.2023 to 08.06.2023. On 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 shares.

xv. On 08.06.2023, RP issued a Letter of Intent (LoI) to SEML who was called upon to submit Performance Guarantee of INR 150 Crores.

xvi. On 12.06.2023, SEML unconditionally accepted the LoI and submitted Performance Guarantee of INR 150 Crores in favour of Bank of Baroda (BoB).

xvii. On 17.06.2023, RP filed an I.A. No. 2794/2023 before the Adjudicating Authority for approval of SEML Plan as approved by the CoC.

xviii. On 20.06.2023, RP informed Torrent Power Ltd. and other Resolution Applicants about the approval of the Resolution Plan by the CoC.

xix. The Earnest Money Deposit (EMD) received from other Resolution Applicants were refunded by the RP.

xx. I.A. 2794/2023 was heard by the Adjudicating Authority and by order dated 10.07.2023, reserved for orders.

xxi. On 01.08.2023, I.A. 3336/2023 was filed by Vantage Point Asset Management Pte Ltd., an unsuccessful Resolution Applicant praying for various reliefs in the application.

xxii. On 03.08.2023, I.A. 3399/2023 was filed by Torrent Power Limited, an unsuccessful Resolution Applicant seeking various prayers.

xxiii. On 07.08.2023, I.A. 3336/2023 and I.A. 3399 of 2023 were heard and reserved for orders.

xxiv. By order dated 07.08.2023, Adjudicating Authority also directed the RP to place on record the correspondence with Resolution Applicant and Minutes of the Meetings.

xxv. The Torrent Power Ltd. also filed a further Affidavit sworn on 06.09.2023 in I.A. 3399/2023 which was filed on 07.09.2023 before the Adjudicating Authority.

5. Adjudicating Authority by the impugned order dated 06.10.2023 allowed I.A. 3399/2023 partly. I.A. 3366/2023 was dismissed, in consequence of order passed in I.A. 3399/2023 and I.A. 3336/2023, the Resolution Plan pending for approval in I.A. 2794/2023 was remitted back to the CoC and I.A. 2794/2023 was disposed of accordingly.

6. Aggrieved by the order dated 06.10.2023, Comp. App. (AT) (Ins.) No. 1395-1397 of 2023 has been filed by SEML – the Successful Resolution Applicant.

7. The Vantage Point Asset Management Pte. Ltd. has filed the Appeal challenging the order dated 06.10.2023 in I.A. 3336/2023 filed in I.A. 2794/2023.

8. Resolution Professional has filed Comp. App. (AT) (Ins.) No. 1535/2023 praying for expunging the certain observation made by the Adjudicating Authority against the RP and the legal advisor of the RP in paragraph 9 of the order in I.A. 3399/2023.

9. We have heard Sh. Harish Salve, Sh. Arun Kathpalia and Sh. Krishnendu Datta, Sr. Advocates appearing for SEML. Sh. Arvind Nayar, Sr. Advocate has appeared for Appellant – Vantage Point Asset Management Pte. Ltd. Sh. Abhinav Vasisth, Sr. Advocate has appeared for the Resolution Professional. Sh. Mukul Rohatgi and Sh. Gopal Jain, Sr. Advocates appeared for the CoC. Sh. Kapil Sibbal and Sh. Ramji Srinivasan, Sr. Advocates have appeared for Torrent Power Ltd. Sh. K. Venugopal, Sr. Advocate appeared for the Intervenor – Jindal Power Limited in I.A. 1214/2024.

10. Learned Counsel for the Appellant appearing for SEML submitted that the Adjudicating Authority committed an error in passing the Order dated 06.10.2023. It is submitted that the Adjudicating Authority while examining the Resolution Plan is circumscribed by Section 31 of the Insolvency and Bankruptcy Code, 2016, (for short `the Code') and legislature has not endowed the Adjudicating Authority with the jurisdiction or authority to analyse or evaluate the commercial wisdom of the CoC. The Adjudicating Authority is required to evaluate the plan on the touchstone of Section 30(2) read with Section 31 of the Code. Adjudicating Authority is not required to examine the correctness of the decision taken by the CoC, as the decision to approve the Resolution Plan lies solely with the CoC in their commercial wisdom.

11. In the present case, Adjudicating Authority undertook exercise in analysing the interpretation of financial data before the CoC including

comparison on the terms of the Resolution Plan/addendums and clarifications and review of the emails, evaluation matrix, CoC minutes etc. Adjudicating Authority undertook its own assessment of how various Resolution Plans should have been scored on the Evaluation Matrix. Adjudicating Authority undertook its own analysis and assessment of what should or should not have been considered by the CoC in the upfront amounts offered by Resolution Applicants. Adjudicating Authority exceeded the jurisdiction vested under the Code while considering the approval of the Resolution Plan.

12. Adjudicating Authority embarked on process exercise and termed it 'perverse' justifying interference in the approval of Resolution Plan which is impermissible. Judgment of this Tribunal in `Darshak Enterprises and PNC Infratech' was misinterpreted by the Adjudicating Authority in finding a new ground to challenge the Resolution Plan. The CoC of the Corporate Debtor consisted of BoB and State Bank of India (SBI), India's largest two Banks who were fully aware of the provisions of various Resolution Plans, the treatment of Bank Guarantees/Margin Money/Equity Value. Adjudicating Authority has written factually incorrect findings regarding total Bank Guarantees/Bank Guarantee Margin Money. Incorrect assumption was made with regard to upfront amount and there was incorrect analysis regarding treatment of equity.

13. Adjudicating Authority has wrongly concluded that complete financial data was not placed before the CoC. Whereas CoC had minutely considered all the Resolution Plans and thereafter voted the Resolution Plan of the SMEL with 100% vote shares. The Unsuccessful Resolution Applicant i.e., Vantage

Point Asset Management Pte. Ltd. and Torrent Power Ltd. have no right to challenge the Resolution Plan approved by the CoC.

14. The Application I.A. 3336/2023 filed by Vantage Point Asset Management Pte. Ltd. on 01.08.2023 and I.A. 3399/2023 filed by the Torrent Power Limited on 03.08.2023, where the applications filed after order was reserved on the Plan approval application i.e., I.A. 2794/2023.

15. I.A. 3336/2023 and I.A. 3399/2023, no notices were issued by the Adjudicating Authority. Neither the SEML Successful Resolution Applicant nor CoC or RP were asked to file any Reply to the application filed by the Torrent Power Ltd. Both the I.A. 3336 & 3399/2023 were heard and reserved on 07.08.2023 without requiring Successful Resolution Applicant or CoC/RP to file any Reply or provide any clarification or documents.

16. Order dated 06.10.2023 allowing the I.A. 3399/2023 was in violation of Principles of Natural Justice. The reasons and grounds mentioned in the impugned order dated 06.10.2023 were neither pleaded in I.A. 3399/2023 nor argued at the time of hearing of the application on 07.08.2023. On the reasons which have neither been pleaded nor contained in the I.A. 3399/2023, Adjudicating Authority decided to remit the approved Resolution Plan to the CoC for considering of all other plans which stood rejected by CoC with 100% vote shares.

17. Adjudicating Authority without giving any opportunity to the CoC, RP and SRA to explain the various terms in the Resolution Plan of the SRA came to incorrect assumption that relevant data was not placed by RP before the CoC. Adjudicating Authority substituted the commercial wisdom of CoC with its own assessment and in the understanding of the Resolution Plan the

assessment and evaluation taken by the Adjudicating Authority is ex-facie incorrect and contradictory. Adjudicating Authority has made incorrect conclusion that SEML proposal only relate to INR 122.23 Crores of Margin Money and INR 58.08 Crores was not accruing to the Financial Creditor.

18. No clarification from RP or Process Advisor was sought by the Adjudicating Authority. Adjudicating Authority finding that equity value was not assigned by the review in the scoring of Resolution Plan of two PRA was again an incorrect assumption by the Adjudicating Authority.

19. On the Affidavits filed by the RP on 21.08.2023 i.e., after reserving of the order, no hearing was given nor any opportunity was given to respond the pleadings and documents, whereas the documents and pleadings brought on record after the reserving of the order were looked into. The process followed by Adjudicating Authority is in violation of the Principles of Natural Justice.

20. Sh. Arvind Nayar Sr. Advocate appearing for the Vantage Point Asset Management Pte. Ltd. challenging the order of the Adjudicating Authority rejecting I.A. 3336/2023 contends that the Vantage Point Asset Management Pte. Ltd. filed the I.A. 3366/2023 when it came to know that it has offered the highest bid and it ought to have been selected as the SRA. Vantage Point Asset Management Pte. Ltd. has also by email subsequent to the approval of the Resolution Plan has written to the RP increasing its offer by INR 50 Crore by email dated 14.06.2023, which was replied by the RP that CoC has approved the Resolution Plan. It is submitted that Vantage Point Asset Management Pte. Ltd. should have been awarded full score on qualitative parameters under evaluation matrix. Adjudicating Authority despite all the facts and documents being placed before the Adjudicating Authority rejected the I.A. 3336/2023 in

an erroneous manner without considering the objective of the IBC, which is to ensure maximisation of the value of the assets of the Corporate Debtor and to balance the interest of all the stakeholders. It is submitted that although application of Vantage Point Asset Management Pte. Ltd. was rejected whereas application filed by Torrent Power Limited being I.A. 3399/2023 was allowed on similar grounds.

21. Shri Kapil Sibbal Sr. Advocate appearing on behalf of the Torrent Power Limited refuted the submissions advanced by the Learned Counsel appearing for the SEML. It is submitted that present is not a case where the Adjudicating Authority has questioned the commercial wisdom of the CoC in approving the Resolution Plan. The Adjudicating Authority interfered with the approved Resolution Plan since the process adopted by the RP was found to be perverse, incomplete financial data was placed before the CoC by the RP, Process Advisor and its Legal Advisor. Adjudicating Authority was mindful of the fact that Adjudicating Authority cannot interfere with the commercial wisdom. Adjudicating Authority has limited itself to the stage prior to the stage of the commercial wisdom of the CoC and has steered away from the issue of commercial wisdom of CoC. Impugned order has been passed after Adjudicating Authority came to a finding that decision making process followed by CoC was perverse. It is submitted that intervention is warranted by the Adjudicating Authority or the Appellate Tribunal when decision of the CoC is wholly capacious, arbitrary and irrational. When the decision is arrived at by not knowing the material, such a finding is perverse and is amenable to interference by Adjudicating Authority.

22. On the submission of the CoC and RP to substantiate their stand relying on 34th Meeting of the CoC held on 18.10.2023 pursuant to the impugned order of the Adjudicating Authority where CoC has arrived at the same conclusion and found the finding of the Adjudicating Authority to factually inaccurate, it is submitted that any subsequent Resolution of the CoC as alleged in Meeting dated 18.10.2023 cannot cure the deficiency as noticed by Adjudicating Authority in the impugned order. It is further submitted that Minutes of the Meeting dated 18.10.2023 has not been placed on the record of this Tribunal, hence the same cannot be relied for any purpose.

23. Adjudicating Authority has rightly taken the view that applications can be examined only on the issue of discussion of perversity. It is submitted that RP, by disguise of seeking clarification by email dated 08.05.2023 has given an opportunity to the SRA to change its commercial data.

24. In reply sent by SRA on 10.05.2023 by addendum, SRA has clarified about the discounted offer up to 240 Crores, which is a different offer. RP did allow the SRA to make a disguised changed offer which is discriminatory towards other Resolution Applicants.

25. There was no occasion for RP to seek clarification from the SRA that it will pay the discounted amount INR 240 Crore to CoC as upfront payment. No Resolution Applicant is entitled to change its offer by means of a clarification. The SRA intended to infuse only INR 103.83 Crores with the Corporate Debtor from its own sources as to replace the amount and SRA never agreed to infuse INR 180.49 Crores to the Corporate Debtor.

26. Appellant failed to produce any document, Plan or Resolution Plan i.e., offering INR 180.49 Crores in the Corporate Debtor for replacement of the Bank Guarantee.

27. Adjudicating Authority has rightly noted the clarification of SRA in paras 8.13, 8.13.1, 8.15 of the impugned Judgment. Total amount offered by Torrent Power Ltd. towards Bank Guarantee, Margin Money was 163.76 Crores which was much more than the amount of 103.83 Crores offered by SRA.

28. The order of the Adjudicating Authority does not violate Section 30(2) read with Section 31(1) whereas decision making of CoC suffers resulting in to perversity. The limited jurisdiction of the Adjudicating Authority under Section 60(5)(c) of the Code provides a wide discretion to Adjudicating Authority to adjudicate question of law or facts, arising out of or in relation to the Insolvency Resolution Process.

29. The submission that impugned order is in violation of Principle of Natural Justice is incorrect since all parties were heard on 07.08.2023, while I.A. 3399/2023 was heard. All parties were represented by Learned Counsel and no party objected to the proceedings. Thus, it cannot be said that opportunity was denied.

30. Learned Counsel for the RP submitted that no irregularity was committed in any process adopted by the RP, all financial data, relevant record, all the Resolution Plans with the comments of Process Advisor were placed before the CoC, financial data placed before the CoC was neither incorrect nor wanting in any manner. The observation of the Adjudicating Authority that incomplete financial data was placed by the RP is wholly

erroneous and without any basis. The CoC in its Reply, filed in this appeal has also affirmed that RP or its Legal Advisor has not placed incomplete financial data. It is submitted that Adjudicating Authority has recorded inaccurate finding regarding replacement of 100% margin, by Bank Guarantee. Impugned order wrongly determined that equity offered by Jindal Power Limited and Vantage Point Asset Management Pte. Ltd. should have been valued by an addendum to such amount and scoring should have been carried out accordingly. It is submitted that after reserving the order by the Adjudicating Authority, application filed by Torrent Power Ltd. and Vantage Point Asset Management Pte. Ltd. ought not to have entertained and the Adjudicating Authority was to consider the averments and pleadings in the application. Opportunity ought to have been given to the RP to file its Reply and explain the process.

31. In accordance with the impugned order the Resolution Plans received by the RP were reviewed by the CoC in 34th CoC Meeting dated 19.10.2023 wherein CoC has affirmed the said position and has re-verified the numbers and affirmed that RP did not place incorrect or incomplete Financial Data before the CoC.

32. Learned Counsel for the CoC submits that CoC approved the Resolution Plan of the SEML after evaluating it on a myriad factor in terms of the request of the Resolution Plan and considering its overall viability and feasibility which decision of the CoC is non-justiciable. It is submitted that under RFRP and the process document decision to approve the Resolution Plan is a collective business decision which jurisdiction solely vests in the CoC. CoC is not obliged to approve the Plan which have highest NPV or which has highest

upfront payments. Approval of Plan required consideration of several factors and anyone factor cannot not be a decisive or guiding factors for approval of Resolution Plan. It is a commercial wisdom of the CoC to approve a Resolution Plan. Learned Counsel for the CoC has referred to Clauses 9(a) & 9(e) of the Process Note, which provides that the CoC is under no obligation to any of the RA or any other person to approve the Resolution Plan which has the highest score as per the Identified Criteria, which is also inconsistent with Clauses 2.6.2 (d), 2.9.4, 4.1.8 and 4.1.11 of the RFRP. The Evaluation Matrix and the Process Note envisaged both upfront and deferred payments. It is thus fallacious to say that CoC is bound to approve Plans with only upfront payments. Allegation of partiality as was raised by Torrent Power did not find any favour by the Adjudicating Authority itself.

33. It is submitted that all Resolution Applicants were treated alike and the clarifications were called from all Resolution Applicants and no Resolution Applicant was given an opportunity to change its financial. The clarification was sought from each of the Resolution Applicants in accordance with the decision taken by the CoC.

34. Adjudicating Authority has made incorrect observation regarding treatment of Bank Guarantee under the Resolution Plan. The Appellant as SRA, SEML provided the treatment of 180.4 Crores of the Bank Guarantee. SEML Plan is commercially the best as far as treatment of BG was concerned, the finding recorded by the Adjudicating Authority with regard to the treatment of BG are incorrect and against the record. Adjudicating Authority has also made incorrect observation regarding treatment of upside equity offered by Vantage Point Asset Management Pte. Ltd. and Jindal Power Ltd.

As far as evaluation of equity offered to Financial Creditors is concerned, the same was to be assessed and marked separately in the Evaluation Criteria at Item 4. The Evaluation Matrix does not provide for any fair valuation of equity upside or to consider equity value as part of upfront consideration. Adjudicating Authority has wrongly noted in Para 8.19 that the evaluation criteria considered the equity upside offered to the financial creditors within 6 months as upfront cash. It is submitted that application of Intervention filed by Jindal Power Limited need to be rejected since no application was filed by Jindal Power Ltd. before the Adjudicating Authority and at this stage in this appeal, the Jindal Power Ltd. cannot be allowed to intervene or to seek any relief in its intervention application.

35. Learned Counsel for the Intervenor, Jindal Power Limited submits that the JPL's Resolution Plan is among the Plans found feasible and viable by the Process Advisor. The objective of the IBC is value maximisation. The process carried out by the RP has not been transparent, was filled with material irregularities and placed incomplete Financial Data before the CoC. Jindal Power Limited prays that this Tribunal may be pleased to allow Jindal Power Limited to intervene in the present appeal and direct all the Resolution Applicants be permitted to improve their offer in line with the email 08.05.2023 to the Appellant SEML inviting it to improve its upfront offer. In the alternative in view of the passage of time, this Tribunal may direct a fresh auction to enhance the value of the Corporate Debtor.

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

37. We need to first consider the submissions advanced by the SRA regarding violation of Principles of Natural Justice while allowing the I.A. 3399/2023, filed by Torrent Power Limited. As noted above Plan approval application being I.A. 2794/2023 was filed by the RP before the Adjudicating Authority for approval of the Resolution Plan on 17.06.2023, after approving Resolution Plan of SEML with 100% vote shares on 08.06.2023. Application I.A. 2794/2023 was heard by the Adjudicating Authority on 10.07.2023 and after hearing, the orders were reserved on the said application. It was on 01.08.2023 that I.A. 3336/2023 was filed by Vantage Point Asset Management Pte. Ltd., prayers of which application has been noted in para 2 of the order, which is as follows:

> *"a) This Tribunal be pleased to allow the Applicant to intervene in IA-2794/2023 and be impleaded therein as a party-Respondent;*
>
> *b) that this Tribunal be pleased to defer the hearing of IA-2794/2023 till such time as this Application is heard and disposed finally;*
>
> *c) that this Tribunal be pleased to order and direct the RP to supply a copy of IA2794/2023 together with the details, particulars and relevant documents with regard to the Resolution Plan approved by the CoC, and allow the Applicant to file its affidavit to oppose the IA-2794/2023;*
>
> *d) in the alternative to prayer b, that this Tribunal be pleased to permit the Applicant to file Affidavits/pleadings and make submissions at the time of hearing of IA2794/2023;*
>
> *e) pending the hearing and final disposal of this Application this Tribunal be pleased to stay the proceedings in IA-2794/2023."*

38. The Vantage Point Asset Management Pte. Ltd. was one of the Unsuccessful Resolution Applicant whose Plan was not approved. The application I.A. 3336/2023 has been rejected by the impugned order.

39. The application filed by Torrent Power Limited was I.A. 3399/2023, in which application following prayers have been made:

> *"a) to pass an order directing the First Respondent to serve a complete copy of the Plan Approval Application, along with all the annexures to the Applicant;*
>
> *b) to defer the pronouncement of orders in the Plan Approval Application until the adjudication and disposal of the present Application;*
>
> *c) to grant liberty to the Applicant to file its objections in the Plan Approval Application, if any, pursuant to reviewing the Plan Approval Application;*
>
> *d) to keep the Plan Approval Application in abeyance until the Applicant has reviewed the Plan Approval Application and filed its objections (if any) in the said Application."*

40. The Torrent Power Limited was also one of the Resolution Applicant who has submitted the Plan, which Plan was considered and voted and not approved.

41. Before we proceed to further consider the submissions, it is necessary to notice the averments made in I.A. 3399/2023. In the application filed by Torrent Power Limited it is stated that the email was received from RP, that the Resolution Plan submitted by the SEML has been approved, although it received the information on 20.06.2023 but did not choose to file any objection or application. The EMD, which was given by Torrent Power Limited was also refunded by the RP.

42. The reason for filing of the application is contained in para 5.40 of the application which is as follows:

> *"5.40. In the meanwhile, the Applicant came across the Newspaper Report (which appears to have escaped the Applicant's notice at the relevant time) which stated that the commercial offer made by Vantage was the highest commercial offer during the Regulation Process. The Newspaper Report also mentioned that*

the Applicant made the second highest competitive offer for the Corporate Debtor which was less than the offer of Vantage by a mere INR 7 Crores followed by Jindal Power Limited and the Second Respondent. The relevant extracts of the Newspaper Report are reproduced hereinbelow:

> *Vantage Point is the highest bidder for SKS Power's bankruptcy*
>
> *05 May 2023 CW Team*
>
> *Vantage Point Asset Management of Singapore has made the highest offer of Rs 18 billion for the insolvent SKS Power Generation (Chhattisgarh), Ahmedabad-based Torrent emerged in second place, outbidding Vantage's offer by only Rs 70 million…*
>
> *Jindal Power, which is controlled by Naveen Jindal and is based in Nagpur and Sarda Energy also made competitive offers."*

43. When we look into the averment of the application filed by the Torrent Power Limited, it is pleaded that Torrent Power Limited has submitted highest upfront cash payment to the Creditors of the Corporate Debtor and SEML had offered the third highest commercial value to the stakeholders. In paragraph 5.41 to 5.44, following has been pleaded:

> *"5.41 It is at that time that the Applicant recollected what had transpired in the course of the Negotiation Process. While neither the identity of the H1 Bidder nor the Key Commercial Terms offered by other Resolution Applicants was disclosed to other Resolution Applicants, considering that: (a) the value of the Key commercial Terms offered by Vantage was higher than that of the Applicant by only INR 5 Crores; and (b) as per the Newspapers Report, Vantage and the Applicant emerged has the 2 (two) highest bidders in terms of the aggregate commercial offer made in terms of the Final Resolution Plan submitted by the Resolution Applicants on 28 April 2023 whereby the Aggregate Commercial Offer of Vantage was only INR 7 Crores higher than that of the Applicant, it appears that the Vantage was the H1 Bidder during the course of the Negotiation Process and that the Applicant was the second highest bidder during the course of the Negotiation Process. In light of these fact, the Second*

Respondent at best offered the third highest offer in terms of the Key Commercial Terms submitted by it during the course of the Negotiation Process.

5.42 It is submitted that during the Negotiation Process, the commercial offer made in the H1 Bid was displayed to the Resolution Applicants. The Applicant recollected that entire commercial offer of the Applicant was proposed to be paid by way of upfront payment of INR 2,000 Crores (including CIRP Costs) without consisting of any deferred payment component. The Applicant also recollected that H1 Bid proposed aggregated to a total commercial offer of INR 2,005 Crores (but the identity of the H1 Bidder was not disclosed to the Applicant). However, from the information displayed to the Resolution Applicants pursuant to the completion of the Negotiation Process, it was evident that the H1 Bid proposed an upfront payment of approximately INR 1,500 Crores (including CIRP Costs) and a deferred payment component of approximately INR 400 Crores. In other words, it is submitted that while the commercial offer of Vantage was INR 5 crores higher than the commercial offer of the Applicant, the Applicant made a commercial offer consisting entirely of upfront cash payment which was a factor given highest weightage by the CoC as evident from the e-mails dated 28 January 2023 and 9 March 2023. In fact, it is submitted that considering that : (a) the Applicant submitted the second highest bid during the course of the negotiation Process; (b) the bid offered by the Applicant consisted entirely of upfront cash payment; and (c) the upfront cash payment proposed by the Applicant was substantially higher than the H1 Bidder, it is evident that during the course of the negotiation process, the Applicant submitted the highest upfront cash payment to the creditors of the Corporate Debtor.

5.43 Furthermore, it is submitted that the Newspaper Report was published on 5 May 2023 i.e. shortly after the submission of Final Resolution Plans by the Applicants on 28 April 2023. This appears to indicate that even in terms of the Aggregate Offer proposed by the Resolution Applicants in the Final Resolution Plans submitted on 28 April 2023, Vantage and the Applicant are amongst the 2 (two) highest bidders for the Corporate Debtor in terms of the Aggregate Offer proposed under the Resolution Plan. This indicates that both in terms of Key Commercial Terms proposed during the Negotiation Process and in terms of

Aggregate Offer proposed in the Final Resolution Plan, the Second Respondent offered at best the third highest commercial value to the stakeholders of the Corporate Debtor.

5.44 In view of these facts, Applicant, which proposed the highest upfront payment of INR 2,000 Crores (which was even higher than the amount of approximately INR 1,500 Crores offered in H1 Bid), in line with the CoC's requirements which stated that entire amount proposed to be paid under the resolution plan be paid upfront without any deferred payment component, is most likely to have been declared the successful resolution applicant."

44. It is further stated that Torrent Power Limited has also pleaded in the application that Torrent Power Limited is not aware of the value of the commercial offer of the SEML. In paragraph 5.47, it was stated that Resolution Plan by SEML was approved by CoC despite the second respondent offering the third highest aggregate offer. In paragraph 5.47, following has been pleaded:

"5.47 It is reiterated and humbly submitted that it is inexplicable that the Resolution Plan submitted by the Second Respondent was approved by the CoC despite the Second Respondent offering at best the : (a) third highest Aggregate Offer in its Final Resolution Plan submitted on 28 April 2023; and (b) the third highest commercial offer during the Negotiation Process. In view of these facts, it appears to the Applicant that the Second Respondent had an additional opportunity to modify and increase its commercial offer during the course of the CIRP such that the commercial offer of the Second Respondent becomes higher than that offered by the Applicant; even though to the best of our knowledge, neither the Applicant nor any other Resolution Applicant was given the opportunity to : (a) increase/ modify the Key Commercial Terms, including the upfront cash payment proposed to be paid to the creditors of the Corporate Debtor post the Negotiation Process; or (b) increase/ modify the Final Resolution Plan pursuant to their submission on 28 April 2023. This is (a) in clear contravention of the resolution plan process and the terms expressly stated in the Process note and RFRP; and (b) amounts to abject preferential

treatment given to the Second Respondent considering that the none of the other Resolution Applicants were given similar opportunity to : (a) increase/ modify their Key Commercial Terms subsequent to the completion of the Negotiation Process; and (b) increase/ modify the Final Resolution Plans submitted on 28 April 2023."

45. In para 5.49, Torrent Power Limited pleaded as following:

"5.49. It is submitted that the aforesaid facts, call for a thorough examination of the manner in which the process of selecting the Second respondent as the successful resolution applicant needs to be considered and scrutinised by this Hon'ble Tribunal."

46. The reliefs prayed in the application have already extracted above.

47. The application filed by Torrent Power Limited i.e., I.A. 3399 of 2023, came for hearing before the Adjudicating Authority on 07.08.2023. Adjudicating Authority who had already reserved the order in the plan approval application did not issue a Notice on the application or call for any Reply from the SRA, RP or CoC. On 07.08.2023, Adjudicating Authority reserved the order in I.A. 3336/2023 and I.A. 3399/2023. On 07.08.2023, hearing was conducted only in I.A. 3399/2023 and I.A. 3336/2023. RP was directed to place on record certain brief note on the process, relevant pages in the application of approval of the plan and CoC minutes. The proceeding dated 07.08.2023 is as follows:

"1. Mr. Nirav Shah a/w Mr. Zaid Mansuri i/b DSK Legal, Ld. Counsel for the Applicant in IA-3336/2023 present. Mr. Janak Dwarkadas Ld. Senior Counsel a/w Mr. Aswin Ramaiah, Mr. Shyam Dasgupta i/b Khaitan, Ms. Rishika Harsh and Co., Applicant in IA-3399/2023 present. Ms. Poorva Garg i/b Mulla and Mulla, Ld. Counsel for the Respondent No.1 in IA-3963/2023 present. Mr. Prakash Shinde a/w Ms. Meghna Arvind Ld. Counsel for the Applicant in IA-3963/2022 present. Mr. Madhav Kanoria a/w Ms. Surbhi Parekh i/b Cyril Amarchand Mangaldas, Ld. Counsel for the CoC present. Mr. Gaurav Joshi Ld. Senior Counsel a/w Mr. Nishant Sogani, Mr. Saurabh

Bacchawat Ms. Shrishti, Ld. Counsel for the Successful Resolution Applicant present. Mr. Pradeep Sancheti a/w Mr. Somesh Srivastav and Ms. Apoorva Chandekar, Ld. Counsel for the Applicant/RP present.

2. IA 3399/2023 is filed by M/s Torrent Power Limited, and IA 3336/2023 is filed by Vantage Point Asset Management Private Limited Both the Applicant are unsuccessful Resolution applicants in the Resolution Process of the Corporate Debtor and seeks direction for consideration of their plan afresh after providing another opportunity to offer better value. The Counsel for the Applicants takes us through the documents and pleads that there seems to a bias in evaluation process at the far end. The Counsel for the Applicant in IA 3336/2023 submits that its offer for higher amount, than offered by Successful Resolution Applicant (SRA), given to RP, was not considered after approval of plan of Successful Resolution Applicant, after approval of plan by CoC. The Counsel for Applicant in IA 3399/2023 further submits that the revised financial proposal of SRA ought not to have been considered, as no revision could have been done or permitted. Alternatively, it was argued that they were not afforded equal opportunity to do so. The Counsel for Applicant in 3399/2023 submits that it is ready to furnish non-disclosure undertaking and to abide by the confidentiality of information, which may come to him, if the re-bid is ordered. 3. Heard the Counsel. The RP is directed to place on record a brief note on the process; relevant pages in their application for approval of plan pending before this Bench for orders where the relevant CoC minutes taking care of these aspects is placed; and e-mail sent to all Resolution Applicants to submit updated Plan consequent to discussions in the last meeting taken place before all Resolution Plans were put to vote of CoC; and their reply to this communication, within 3 days from the communication of this order. A copy of these documents, to the extent not barred under Confidentiality of process, be served to other parties.

4. The Registry is directed to allow RP to place these documents in these two applications.

5. IA-3399/2023 and IA-3336/2023 reserved for orders."

48. In pursuance of the order dated 07.08.2023, RP has filed an Affidavit before the Adjudicating Authority on 21.08.2023, which has been noted by

Adjudicating Authority in the order. It is also relevant to notice that a further Affidavit was filed by Torrent Power Limited in I.A. 3399/2023 dated 06.09.2023, which has been brought on record by the Appellant itself at Page 356 of the Appeal Paper Book. The Affidavit was sworn on 06.09.2023.

49. When we look into the appeal filed by the Vantage Point Asset Management Pte. Ltd. i.e., Comp. App. (AT) Ins. No. 1445/2023, Vantage Point Asset Management Pte. Ltd. has also pleaded that it has filed Additional Affidavit on 04.09.2023.

50. When we look into the impugned order passed by the Adjudicating Authority, it is clear that Adjudicating Authority has proceeded to evaluate the treatment of Bank Guarantee by all the Resolution Applicants and further noticed that as BDO has not assigned any financial value to the 10% equity upside offered of the SRA in two cases to Financial Creditors.

51. In paragraph 8.17.1, 8.19, 8.20 and paragraph 9 following observations have been made:

> *"8.17.1 We are of the considered view that after taking into account the amounts, which got omitted by the Process Advisor, the above scores would also undergo change. Accordingly, any decision based on incorrect data is bound to be perverse and not fair, notwithstanding, that the COC may have decided exactly what they decided, even if updated financial numbers would have been placed before them.*
>
> *8.19 This Bench could not find the rationale for not including the fair market value of upside equity in the financial proposals placed before CoC before the voting, and why the value of upside equity website was not considered as a part of upfront amount while the valuation criteria considered the equity upside offered to the financial creditor within 6 months as upfront cash.*
>
> *8.20 We find that the BDO has considered amount paid towards replacement of BGs as money being offered to*

Secured Financial Creditors, which is not in conformity with the minutes of meeting dated 06.05.2023, which recorded the deliberations taken place at that meeting as "The representative of SBI mentioned that all the Bank Guarantees are secured by 100% cash margin. Bank Guarantees do not form part of the claim since the guarantees are not considered exposure on the company because of 100% cash margin available to secure the BGs. While submitting the claim to RP, SBI has duly mentioned this fact in the claim form. In addition, there are a number of judgements and as per which, as long as the liability of BG issuing bank remains, no one can lay it's claim against the margin money". We feel that the amount offered towards replacement of the BG cannot form part of the upfront amount offered to the financial creditor and considered as such in the analysis. Nonetheless, we find that the total Bank Guarantees, required to be replaced to keep the Corporate Debtor is Rs. 103.83 crores, and the margin money against remaining Bank Guarantees is free cash available to the Corporate Debtor, except margin money against Bank Guarantees to the lenders of the associate company of the Corporate Debtor which was to go to such lenders in terms of RFRP.

9. This Bench takes note of legal proposition that the Adjudicating Authority cannot interfere with the commercial wisdom of CoC, however, this bench feels that the decision taken by CoC on the basis of incomplete financial data placed before it for such decision making process by the legal advisor, process advisor and RP, makes such decision making process perverse and amenable to interference by this bench. Though, this bench cannot allow the prayer for supply of resolution plan of SEML and an opportunity to file objection to these two applicants in IA-2794/2023, this bench consider it appropriate to remit the Resolution Plan of SEML, which is pending for final orders in IA-2794/2023, to the committee of creditors for their re-consideration of all the plans, found feasible and viable by the Process Advisor, in the light of the above observations."

52. We have noticed that in the I.A. 3399/2023 filed by the Torrent Power Limited, there was no pleading with regard to the treatment of Bank Guarantee and value to the 10% of equity upside offered by two Resolution Applicants and the Adjudicating Authority had jumped to the conclusion that

decision based on incorrect data is found to be perverse and not fair. The discussion in the impugned order clearly indicates that the decision is based on factors which were not pleaded in the I.A. 3399/2023 filed by Torrent Power Limited.

53. In this context, we may also notice the Reply which was filed by RP in this appeal. It has been pleaded by RP in paragraph 10 of the reply that at the time of hearing conducted of the Plan approval application or the I.A. filed by Torrent Power Limited and Vantage Point Asset Management Pte. Ltd., scoring as per the Evaluation Matrix and the analysis of BG Margin were never raised. It is useful to extract para 10 of the Reply of the RP which is as follows:

> *"10. It is humbly submitted that the Hon'ble Tribunal while making observations against the Respondent No. 1 and the legal advisor of the Respondent No. 1 did not provide any opportunity to the Respondent No. 1 or the legal advisor of the Respondent No. 1 to clarify the correct factual position. The issues pertaining to treatment of BGs/ Margin Money, scoring as per the evaluation matrix and the analysis of BG margin were never raised argued upon or tested before the Hon'ble NCLT during the hearings conducted in the Plan Approval IA or in the application filed by TPL and Vantage. No clarifications were sought by the Hon'ble NCLT from the RP or the CoC in this context. Thus, the observations made by the Hon'ble NCLT in this context have not been made in accordance with law."*

54. The CoC has also filed a detailed Reply to the appeal. CoC in its Reply filed in SEML's appeal, has also pleaded that the findings in the impugned order are without any foundation in the written or oral pleadings made by the parties. In paragraph 10.4, 10.4.1, 10.4.2 and 10.4.3 following has been pleaded:

> *"10.4 The findings in the Impugned Order are patently illegal as they have been passed without any foundation in the written or oral pleadings made by the parties.*

10.4.1 It is submitted that the findings of the Ld. Adjudicating Authority are illegal and without any basis in the pleadings. In fact, the findings are completely dehors the grounds set out and the reliefs sought for in the Applications filed by the unsuccessful Resolution Applicants and the oral submissions made by the parties on August 7, 2023. It seems as though while passing the Impugned Order, the Ld. Adjudicating Authority assumed the role of CoC itself by substituting its own 'wisdom' in place of the CoC's commercial wisdom and undertook an exercise dehors the pleadings and arguments made before it and without even bothering to seek any clarification on this issue by the CoC or the RP.

10.4.2 The Impugned Order is therefore in violation of settled principles of law as per which a court or tribunal cannot go beyond the pleadings of the parties in passing its order and that a decision should not be based on grounds outside the pleadings of the parties. By way of the Impugned Order, the Ld. Adjudicating Authority has embarked on the process of making out a case suo motu, without any pleadings in that regard and therefore passed the Impugned Order in complete violation of well settled principles of law. It is submitted that the Ld. Adjudicating Authority did not even seek any clarification on the treatment of the margin money in respect of the BGs from the RP or the CoC before passing the Impugned Order on entirely erroneous understanding and venturing into the domain of commercial evaluation which is exclusively within the purview of the CoC as per several judicial precedents and the scheme of the Code and the regulations made thereunder.

10.4.3 Contrary to the aforesaid principle, in the present case, Ld. Adjudicating Authority has returned findings and made observations without them having any foundation whatsoever in the written or oral pleadings of the parties. The Ld. Adjudicating Authority erred in coming to a finding that certain information was not placed before the CoC while approving the resolution plan of the Appellant without even asking for any such clarification from the parties before it and the Ld. Adjudicating Authority, merely on the basis of certain assumptions and presumptions came to an incorrect finding of fact and consequently on the basis of that incorrect finding rejected the application for approval of Resolution Plan under Section 31 of the Code. The issue was neither

highlighted in any of the pleadings nor argued before the Ld. Adjudicating Authority. Even IA 3399 merely states Torrent's allegation that it was offering the highest upfront amount without going into the issues relating to treatment of margin money, bank guarantee or equity upside."

55. From the materials on record and pleadings of the party as noted above, it is clear that order passed by the Adjudicating Authority on 06.10.2023 is on the findings which are not based on any pleadings raised by Torrent Power Limited and Vantage Point Asset Management Pte. Ltd. in their application. Torrent Power Limited and Vantage Point Asset Management Pte. Ltd. were unsuccessful Resolution Applicants and they filed the applications subsequent to the order was reserved in the Plan approval application. Before the Adjudicating Authority for the first time the applications I.A. 3336/2023 & I.A. 3399/2023 listed on 07.08.2023 and on the same day, orders were reserved on the said applications, neither any notice was issued in the application nor any opportunity was given to file a Reply to the applications by the RP, CoC or SRA. The basis of the order of the Adjudicating Authority is that incomplete data was provided to the CoC by the RP and its Process Advisor, hence the decision of the CoC is perverse.

56. The grounds which were taken by the Adjudicating Authority were neither pleaded by the application filed by the Torrent Power Limited and Vantage Point Asset Management Pte. Ltd. nor they were addressed at the time of hearing of the application on 07.08.2023, as pleaded by the RP and CoC. It was incumbent on the Adjudicating Authority to give opportunity to the RP, CoC and SRA before coming to a finding that incomplete financial data was provided to the CoC.

57. It is to be noted that the Adjudicating Authority after hearing on 10.07.2023 and 07.08.2023 did not ask for any clarification from CoC, RP or SRA but made following adverse interference in para 8.15 of the order:

> *"8.15 …From the perusal of the records, we could only infer, in the absence of any clarification on this aspect, that this difference of Rs. 78.56 Crores pertains to the difference between the amount of cash margin against all the bank guarantees amounting to Rs.180.31 and the amount of cash margin require for replacing existing bank guarantees of Rs.103.83. This further validates our conclusion at para.8.13 above that the amount of the cash margin of Rs. 58.08 Crores (based on these numbers) releasing on replacement of guarantees was not accruing to the Financial Creditors."*
>
> *(Underlined by us)*

58. The Adjudicating Authority did not give any opportunity to explain the financial data or any other issue with regard to which Adjudicating Authority had any doubt but observed that "in absence of any clarification", which could have been observed when any clarification is asked for.

59. It is also to be noticed that after closing of the hearing on 07.08.2023, the Adjudicating Authority directed the RP to file the process note, Minutes and correspondence. An Affidavit was filed by the RP dated 20.08.2023, with regard to which there was no opportunity to any other party to make their submission or response.

60. As noted above, both Torrent Power Limited and Vantage Point Asset Management Pte. Ltd. has filed Additional Affidavit in their application on 06.09.2023 and 04.09.2023, which is apparent from the record, which affidavits were filed after closing of the hearing on 07.08.2023. The process adopted by the Adjudicating Authority was not in consonance with the Principles of Natural Justice. Consideration of any material subsequent to

closing of the hearing without giving opportunity to other side to comment or to give a response is bound to prejudice the interest of other sides.

61. Thus, we find substance in the submission of the Counsel for the Appellant that process adopted by the Adjudicating Authority in proceeding to allow I.A. 3399/2023 has violated the Principles of Natural Justice. No notice was issued in the application, no reply was called on the applications and while allowing the said application the entire plan which was approved has been remitted for reconsideration.

62. We are thus satisfied that the impugned order deserves to be set aside on the ground of violation of Principles of Natural Justice.

63. One more submission which has been pressed on behalf of SEML is that the Adjudicating Authority traversed beyond its limited jurisdiction under the IBC to interfere with commercial wisdom of the CoC in approving the Resolution Plan.

64. Learned Counsel for the Appellant has also taken exception to the grounds on basis of which the Adjudicating Authority embarked on the enquiry to analyse various financial proposals and data which were up for consideration by the CoC while considering the Resolution Plan of Resolution Applicants. Adjudicating Authority had undertaken its own quantitative assessment/evaluation of the treatment of the Bank Guarantee, Margin Money across different plans which was only impermissible.

65. The submissions advanced by learned Counsel for the Appellant is that the jurisdiction of the Adjudicating Authority to interfere with the approval of Resolution Plan in commercial wisdom of CoC is confined to Section 30, sub-section (2). It is submitted that no other ground is available for the

Adjudicating Authority to interfere with the approval of Resolution Plan by the CoC. The learned Counsel submits that under Section 31, sub-section (1), the Adjudicating Authority jurisdiction is only to satisfy itself that Plan as approved by CoC under sub-section (4) of Section 30 meets the requirement of Section 30, sub-section (2) of the Code. It is submitted that if the Plan is approved by the CoC, there is no discretion left in the Adjudicating Authority to reject the Plan unless the Plan violates Section 30(2). The learned Counsel appearing for Torrent Power Limited, Shri Kapil Sibal refuting the submission submits that the Adjudicating Authority has rightly passed order, since incomplete data was placed before the CoC. The Adjudicating Authority has also rightly observed that it has jurisdiction to interfere with the Plan approved by the CoC, if there is discrimination or perversity. The learned Counsel for both the parties in support of their submissions have placed reliance on various judgments of Hon'ble Supreme Court and this Tribunal, which shall be noticed hereinafter.

66. We may first notice the judgments relied by the Appellant in support of its submission. The first judgment, which is relied by the Appellant is judgment of the Hon'ble Supreme Court in ***K. Sashidhar vs. Indian Overseas Bank & Ors. – (2019) 12 SCC 150***. It is submitted that the Hon'ble Supreme Court has held that there is intrinsic assumption that Financial Creditors are fully informed about the viability of the Corporate Debtor and feasibility of the proposed Resolution Plan. Reliance is placed on paragraphs 52 and 64, which are as follows:

> *"**52.** As aforesaid, upon receipt of a "rejected" resolution plan the adjudicating authority (NCLT) is not expected to do anything more; but is obligated to initiate liquidation*

process under Section 33(1) of the I&B Code. The legislature has not endowed the adjudicating authority (NCLT) with the jurisdiction or authority to analyse or evaluate the commercial decision of CoC much less to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors. From the legislative history and the background in which the I&B Code has been enacted, it is noticed that a completely new approach has been adopted for speeding up the recovery of the debt due from the defaulting companies. In the new approach, there is a calm period followed by a swift resolution process to be completed within 270 days (outer limit) failing which, initiation of liquidation process has been made inevitable and mandatory. In the earlier regime, the corporate debtor could indefinitely continue to enjoy the protection given under Section 22 of the Sick Industrial Companies Act, 1985 or under other such enactments which has now been forsaken. Besides, the commercial wisdom of CoC has been given paramount status without any judicial intervention, for ensuring completion of the stated processes within the timelines prescribed by the I&B Code. 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. The opinion on the subject-matter expressed by them after due deliberations in CoC meetings through voting, as per voting shares, is a collective business decision. The legislature, consciously, has not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the adjudicating authority. That is made non-justiciable.

64. *Suffice it to observe that in the I&B Code and the regulations framed thereunder as applicable in October 2017, there was no need for the dissenting financial creditors to record reasons for disapproving or rejecting a resolution plan. Further, as aforementioned, there is no provision in the I&B Code which empowers the adjudicating authority (NCLT) to oversee the justness of the approach of the dissenting financial creditors in rejecting the proposed resolution plan or to engage in judicial review thereof. Concededly, the inquiry by the resolution professional precedes the consideration of the resolution plan by CoC. The resolution professional is not required to express his opinion on matters within the domain of the financial creditor(s), to approve or reject the resolution plan, under Section 30(4) of the I&B Code. At*

best, the adjudicating authority (NCLT) may cause an enquiry into the "approved" resolution plan on limited grounds referred to in Section 30(2) read with Section 31(1) of the I&B Code. It cannot make any other inquiry nor is competent to issue any direction in relation to the exercise of commercial wisdom of the financial creditors — be it for approving, rejecting or abstaining, as the case may be. Even the inquiry before the appellate authority (NCLAT) is limited to the grounds under Section 61(3) of the I&B Code. It does not postulate jurisdiction to undertake scrutiny of the justness of the opinion expressed by financial creditors at the time of voting. To take any other view would enable even the minority dissenting financial creditors to question the logic or justness of the commercial opinion expressed by the majority of the financial creditors albeit by requisite per cent of voting share to approve the resolution plan; and in the process authorise the adjudicating authority to reject the approved resolution plan upon accepting such a challenge. That is not the scope of jurisdiction vested in the adjudicating authority under Section 31 of the I&B Code dealing with approval of the resolution plan."

67. Next judgment relied by learned Counsel for the Appellant is ***Pratap Technocrats Pvt. Ltd. vs. Monitoring Committee of Reliance – (2021) 10 SCC 623***, wherein the Hon'ble Supreme Court in paragraph 44 laid down following:

*"**44.** These decisions have laid down that the jurisdiction of the adjudicating authority and the appellate authority cannot extend into entering upon merits of a business decision made by a requisite majority of the CoC in its commercial wisdom. Nor is there a residual equity based jurisdiction in the adjudicating authority or the appellate authority to interfere in this decision, so long as it is otherwise in conformity with the provisions of IBC and the Regulations under the enactment."*

68. Next judgment relied on is ***Jaypee Kensington Boulevard Apartments Welfare Association and Ors. Vs. NBCC (India) Limited & Ors. – (2022) 1 SCC 401***, wherein in paragraph 107.1, following has been laid down:

> *"**107.1.** Such limitations on judicial review have been duly underscored by this Court in the decisions abovereferred, where it has been laid down in explicit terms that the powers of the adjudicating authority dealing with the resolution plan do not extend to examine the correctness or otherwise of the commercial wisdom exercised by the CoC. The limited judicial review available to adjudicating authority lies within the four corners of Section 30(2) of the Code, which would essentially be to examine that the resolution plan does not contravene any of the provisions of law for the time being in force, it conforms to such other requirements as may be specified by the Board, and it provides for : (a) payment of insolvency resolution process costs in priority; (b) payment of debts of operational creditors; (c) payment of debts of dissenting financial creditors; (d) for management of affairs of corporate debtor after approval of the resolution plan; and (e) implementation and supervision of the resolution plan."*

69. The Hon'ble Supreme Court further in ***Ramkrishna Forgings Limited vs. Ravindra Loonkar, Resolution Profession of ACIL Limited & Anr., Civil Appeal No.1527 of 2022*** again reiterated that Adjudicating Authority has jurisdiction only under Section 31(2) of the Code, which gives power not to approve the Plan, only when the Resolution Plan does not meet the requirements of the Code. In paragraph-31, following has been laid down:

> *"**31**. It is worthwhile to note that the Adjudicating Authority has jurisdiction only under Section 31(2) of the Code, which gives power not to approve only when the Resolution Plan does not meet the requirement laid down under Section 31(1) of the Code, for which a reasoned order is required to be passed. We may state that the NCLT's jurisdiction and powers as the Adjudicating Authority under the Code, flow only from the Code and the Regulations thereunder. It has been held in **Jaypee Kensington Boulevard Apartments Welfare Association v NBCC (India) Limited, (2022) 1 SCC 401**:*
>
> > ***'273.1. The adjudicating authority has limited jurisdiction in the matter of approval of a resolution plan, which is well-defined and circumscribed by Sections 30(2) and 31***

of the Code. In the adjudicatory process concerning a resolution plan under IBC, there is no scope for interference with the commercial aspects of the decision of the CoC; and there is no scope for substituting any commercial term of the resolution plan approved by the Committee of Creditors. If, within its limited jurisdiction, the adjudicating authority finds any shortcoming in the resolution plan vis-à-vis the specified parameters, it would only send the resolution plan back to the Committee of Creditors, for re-submission after satisfying the parameters delineated by the Code and exposited by this Court.'

(emphasis supplied)"

70. In ***Kalparaj Dharamshi v. Kotak Investment Advisors Ltd. – (2021) SCC OnLine SC 204***, again the same proposition has been reiterated by the Hon'ble Supreme Court, which is as follows:

"172. *No doubt, it is sought to be urged, that since there has been a material irregularity in exercise of the powers by RP, Nclat was justified in view of the provisions of clause (ii) of sub-section (3) of Section 61 of the I&B Code to interfere with the exercise of power by RP. However, it could be seen, that all actions of RP have the seal of approval of CoC. No doubt, it was possible for RP to have issued another Form 'G', in the event he found, that the proposals received by it prior to the date specified in last Form 'G' could not be accepted. However, it has been the consistent stand of RP as well as CoC, that all actions of RP, including acceptance of resolution plans of Kalpraj after the due date, albeit before the expiry of timeline specified by the I&B Code for completion of the process, have been consciously approved by CoC. It is to be noted, that the decision of CoC is taken by a thumping majority of 84.36%. The only creditor voted in favour of KIAL is Kotak Bank, which is a holding company of KIAL, having voting rights of 0.97%. We are of the considered view, that in view of the paramount importance given to the decision of CoC, which is to be taken on the basis of "commercial wisdom", Nclat was not correct in law in interfering with the commercial decision taken by CoC by a thumping majority of 84.36%."*

71. Judgment of this Tribunal in ***Express Resorts and Hotels Ltd. v. Amit Jain, Resolution Professional of Neesa Leisure Limited – Company Appeal (AT) (Insolvency) No.1158 of 2022*** has been relied, where in paragraph 25, following has been laid down:

> ***"25.*** *The present is not a case where in the process, which was completed by approval of the Resolution Plan by the CoC any breach has been committed. When after following the provisions of the Code and Regulations, the Resolution Plan has been approved by the Adjudicating Authority, the said approval by the CoC has to be respected and cannot be interfered with in exercise of judicial review by the Adjudicating Authority. More so, when there is no such ground that the Plan approved, violates any of the provisions of Section 30, sub-section (2). The object of IBC is to revive the Corporate Debtor and put it again on the track. When a Resolution Plan, has been approved after due deliberations, in exercise of commercial wisdom of the CoC, it has to be accepted that Corporate Debtor was decided to be revived by the Resolution Plan. The mere fact that certain other offers have been received after the approval of the Resolution Plan, CoC cannot have a change of heart and start clamoring before the Adjudicating Authority that they have no objection to sending back the Resolution Plan for reconsideration. This will be permitting an unending process, since by passing of time situation keeps on changing. After coming to know about the financial offer in a Plan, which has been approved by the CoC, any subsequent offer by any entity, who did not participate in the process earlier, cannot be entertained."*

72. Learned Counsel for the Appellant further relied on the judgment of this Tribunal in ***PNC Infratech Limited vs. Deepak Maini and Ors. – Company Appeal (AT) (Insolvency) No.143 of 2020***, where this Tribunal held that there is no mechanism under the Code that gives right to the Unsuccessful Resolution Applicant to challenge the decision of CoC, unless the Plan is in contravention of any law being in force or there is material irregularity in the powers exercised by the RP. In paragraph 39, following has been held:

> ***"39.*** *Further, there is no such mechanism under the Code that gives the right to the Unsuccessful Resolution Applicant to challenge the score granted as per the evaluation matrix prepared by the CoC and the Resolution Professional as per the provisions of CIRP Regulations. Though, Section 61 of the Code provides Appeals against the orders of the Adjudicating Authority and Sub-section (3) thereof provides an Appeal against an order approving a Resolution Plan under Section 31 which may be filed on the following grounds namely:*
>
> > *(i) The approval resolution plan is in contravention of the provisions of any law for the time being enforce.*
> >
> > *(ii) There has been material irregularity in exercise of the powers by the Resolution Professional during the Corporate Insolvency Resolution Period.*
> >
> > *(iii) ……..*
> >
> > *(iv) ……*
>
> *It is unequivocal, in preferring the Appeal by the aggrieved person under the above provision more particularly sub-section (3)(i) of Section 31 thereof which specifically provides that the approved Resolution Plan can be questioned / challenged on the ground that the plan is in contravention of the provisions. This Tribunal in clear terms observes and holds that there is no contravention in approving the Resolution Plan either by the CoC or by the Adjudicating Authority. The plan approved is in accordance with law and there is no material irregularity and cannot go into the technical issues with regard to evaluation and score matrix which is in the exclusive domain of the CoC."*

73. The judgments of the Hon'ble Supreme Court and this Tribunal as noted above, thus, clearly lays down jurisdiction of the Adjudicating Authority under Section 31, sub-section (1). The Adjudicating Authority in event when the Resolution Plan complied with the provisions of Section 30, sub-section (2), has to approve the Resolution Plan.

74. Shri Kapil Sibal, learned Senior Counsel, replying to the submissions of learned Counsel for the Appellant, submits that there cannot be any quarrel to the proposition that commercial wisdom of the CoC in approving the Resolution Plan cannot be questioned, nor can be interfered by the Adjudicating Authority in exercise of its power of judicial review. Shri Kapil Sibal, however, submits that there are two other grounds on which Adjudicating Authority can interfere, i.e. a ground of discrimination and perversity. Shri Sibal has referred to the judgment of this Tribunal in ***Darshak Enterprise Pvt. Ltd. vs. Chhaparia Industries Pvt. Ltd. & Ors. – (2018) SCC OnLine NCLAT 224***. The judgment in **Darshak Enterprises** has also referred to and relied by Adjudicating Authority in the impugned order, hence, we may need to notice the above judgment. The judgment of **Darshak Enterprises** was a case, where Appeal was filed by Operational Creditor against the order of Adjudicating Authority, where Adjudicating Authority has approved the Resolution Plan. The challenge to the Plan by the Operational Creditor was on the ground that the Resolution Plan has not taken care of the total outstanding dues of the Appellants and out of the total dues 5% of the principal amount has been allowed in favour of the Appellant. This Tribunal by the impugned judgment has dismissed the Appeal and affirmed the order of the Adjudicating Authority. Following observations were made in paragraph-6 of the judgment, which are as follows:

> ***"6.*** *In these cases as we find that in spite of receipt of their claim much beyond the period prescribed under the I & B Code, the 'Resolution Plan' has taken care of the claim of the appellants, we are not inclined to interfere with the order passed by the Adjudicating Authority. In a particular case, what should be the percentage of claim amount payable to one or other*

> *'Financial Creditor' or 'Operational Creditor or 'Secured Creditor' or 'Unsecured Creditor' can be decided by the Committee of Creditors based on facts and circumstances of each case. In absence of any discrimination or perverse decision, it is not open to the Adjudicating Authority or this Appellate Tribunal to modify the plan."*

75. The observation that in absence of any discrimination or perverse decision, it is not open to the Adjudicating Authority or this Appellate Tribunal to modify the Plan was in reference of the claim of Operational Creditor, which was under consideration in the said Appeal. The expression discrimination has to be understood in the context of the Operational Creditor, who as per the provisions of Section 30, sub-section (2) is entitled to an amount. In event the amount offered to the Operational Creditor is not in accordance with Section 30, sub-section (2), there may be a ground for interference. The concept of discrimination of payment to various creditors have been further explained and elaborated in by the Hon'ble Supreme Court in ***Essar Steel India Limited, (2020) 8 SCC 531,*** where it has been held that there can be different payment to various classes of creditors. Another expression used in paragraph-6 by this Tribunal is perversity. Shri Kapil Sibal in support of submission that there can be other grounds to interfere with the approval of the CoC has relied on the judgment of Hon'ble Supreme Court in ***M.K. Rajgopalan vs. Dr. Periasamy Palani Gounder and Anr. – (2024) 1 SCC 42***. In the case of **M.K. Rajgopalan**, the Resolution Plan was approved by the Adjudicating Authority, which order was set aside by the Appellate Tribunal vide its judgment dated 17.02.2022. An Appeal was filed against the order of this Tribunal before the Hon'ble Supreme Court, attacking the different grounds taken by this Appellate Tribunal in interfering with the order of the

Adjudicating Authority. The learned Senior Counsel has relied on paragraphs 159, 160, 162 and 168 of the judgment. Paragraphs 159 to 168 are consideration by the Hon'ble Supreme Court under heading '***Point D1 – Revision of resolution plan after approval by CoC'***. In the case before the Hon'ble Supreme Court, after approval of the Plan by the CoC, the Plan was modified without it being placed before the CoC for fresh approval, which was one of the grounds taken by the Appellate Tribunal in interfering with the order of the Adjudicating Authority approving the Resolution Plan. The Hon'ble Supreme Court in the above context in paragraph 159, 160, 162 and 168 laid down following:

> ***"159.*** *Even when the findings of the Appellate Tribunal as regards valuation process and non-compliance of other procedural requirements have not been approved by us, a material factor which otherwise may appear to be of another procedural requirement, has its significant bearing and cannot be ignored as mere technicality. It is concerning want of presentation of finally revised plan to the Committee of Creditors before being presented to the adjudicating authority.*
>
> ***160.*** *As noticed hereinbefore, commercial wisdom of CoC is given such a status of primacy that the same is considered rather a matter non-justiciable in any adjudicatory process, be it by the adjudicating authority or even by this Court. However, the commercial wisdom of CoC means a considered decision taken by CoC with reference to the commercial interests and the interest of revival of the corporate debtor and maximisation of value of its assets. This wisdom is not a matter of rhetoric but is denoting a well-considered decision by the protagonist of CIRP i.e. CoC. As observed by this Court in K. Sashidhar [K. Sashidhar v. Indian Overseas Bank, (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222] , the financial creditors forming CoC "act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. The opinion on the subject-matter expressed by them after due deliberations in CoC meetings through voting, as per voting shares, is*

a collective business decision." This Court also observed in K. Sashidhar [K. Sashidhar v. Indian Overseas Bank, (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222] that "[t]here is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan."

162. *In light of the aforesaid position of law and its operation in relation to the decision-making process of CoC, it needs hardly any emphasis that each and every aspect relating to the resolution plan, and more particularly its financial layout, has to be before the CoC before it could be said to have arrived at a considered decision in its commercial wisdom.*

168. *We would hasten to observe that the requirement of the CIRP Regulations, particularly of placing the resolution plan in its final form before the CoC, has to be scrupulously complied with. No alteration or modification in the process could be countenanced. We say so for the specific reason concerning law that if the process as adopted in the present matter is approved, the very scheme of the Code and the CIRP regulations would be left open-ended and would be capable of inviting arbitrariness at any level. The minor procedural aspects which we have held to be not of material bearing hereinbefore and this aspect pertaining to approval of financial resolution plan by CoC stand at entirely different footing. The irregularity in the process of approval by CoC and filing before adjudicating authority are not the matters of such formal nature that deviation in that regard could be ignored or condoned. As stated above, when commercial wisdom of CoC is assigned primacy, it presupposes a considered decision on the resolution plan in its final form."*

76. Shri Kapil Sibal has placed reliance on the observation made in the above judgment 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, who have direct and substantial interest in the survival of Corporate Debtor and the entire CIRP. In the facts of the aforesaid case, the Hon'ble Supreme Court held that CoC Meeting was held on 21.01.2021 and the Resolution Plan submitted by the Appellant-

resolution applicant was approved, however, approval came with a significant condition that in view of the dissent by some of the Financial Creditor, the Plan would be sent back to the creditors for further revision, so as to make it compliant with Section 30, sub-section (2), which provides that amount paid to the dissenting Financial Creditor will not be less than the amount to be paid to such creditors in accordance with sub-section (1) of Section 53 of the Code. The revised Resolution Plan was submitted incorporating the changes, however, the revised Plan was not put before the CoC for approval, which ground was taken by the Appellate Tribunal in interfering with the order of the Adjudicating Authority. The Hon'ble Supreme Court affirmed the decision of the Appellate Tribunal. In paragraph 168, as noted above, the Hon'ble Supreme Court noted that in event the Plan, which was modified was not put before the CoC, there will be breach of requirement of placing the Plan in its final form before the CoC. The Hon'ble Supreme Court further observed that if the process adopted in the present matter is approved, the very scheme of the CIRP would be left open-ended and would be capable of inviting arbitrariness at any level. The above judgment, does support the submission of Shri Kapil Sibal that there can be a ground on which Plan approval can be interfered with by the Adjudicating Authority. The judgment in **M.K. Rajagopalan** was instance of one such cases, where Plan after being modified by the Resolution Applicant, was not placed for final approval before the CoC. Shri Sibal has also placed reliance on behalf of the Torrent Power Limited on one of the judgments of Hon'ble Supreme Court in ***Oswal Fats and Oils Limited vs. Additional Commissioner (Administration), Bareilly Division Barielly and Ors. – (2010) 4 SCC 728***. Reliance has been placed in

paragraph 20 of the judgment. The above case was a case where the Appellant has not apprised the High Court about the fact that the Appellant had taken 27.95 acres land on lease from the Government. In the above case observations were made in paragraph 19 and 20 of the judgment. In the facts of the present case, there can be no allegation against the Appellant about the concealment of any fact from the Adjudicating Authority. The Appellant was only a Resolution Applicant, who has submitted a Resolution Plan, which after evaluation was placed before the CoC by the RP.

77. The CoC being led by two leading Banks, i.e., Bank of Baroda and State Bank of India, having vote share of 92.77% and 7.23% respectively was well aware of the financial intricacies and there has to be intrinsic assumption that the Financial Creditors were well aware of all financials of each Resolution Plan.

78. In ***Civil Appeal No. 2801/2020*** in the matter of ***'Deccan Value Investors L.P. & Anr.' Vs. `Dinkar Venkatasubramanian & Anr.',*** the Hon'ble Supreme Court in the above case was considering the appeal against an order of this Tribunal, which has set aside an order of Adjudicating Authority approving a Resolution Plan. In the above case, Hon'ble Supreme Court has observed that financial statements and data are examined by domain and financial experts. It was further observed that it is rather strange to argue that the super specialists and financial experts were gullible and misunderstood the details, figures or data. Following observations were made by the Hon'ble Supreme Court in para 15:

> ***"15.*** *Resolution plans are not prepared and submitted by lay persons. They are submitted after the financial statements and data are examined by domain and*

> *financial experts, who scan, appraise evaluate the material as available for its usefulness, with caution and scepticism. Inadequacies and paltriness of data are accounted and chronicled for valuations and the risk involved. It is rather strange to argue that the superspecialists and financial experts were gullible and misunderstood the details, figures or data.....”*

79. One more judgment, which has been relied on behalf of Torrent Power Limited is judgment of this Tribunal in ***Ajay Gupta vs. Mr. Pramod Kumar Sharma, RP of M/s. B.B. Foods Pvt. Ltd.- (2022) SCC OnLine NCLAT 93***, paragraph 3 of the above judgment is as follows:

> ***“3.*** *The grievance of Mr. Abhishek Anand, Advocate is that, the modifications of the Applicant's plan were known to everyone hence no opportunity ought to have been given to others to modify their plan. We do not find any substance in the above submissions. The Adjudicating Authority has rightly observed that for not to disturb level playing field, the other resolution applicants were also permitted to give modifications of the resolution plan.”*

80. In **Ajay Gupta’s** case, the Adjudicating Authority permitted the Resolution Applicant, whose Plan was being considered to place any modification in the Plan before the CoC for its consideration. In the above context, observations were made in paragraph 3, rejecting the submission that no opportunity should have been given to others to modify their Plan. The judgment of this Tribunal in **Ajay Gupta** also came to be affirmed by the Hon’ble Supreme Court in ***(2022) 6 SCC 86 – Ajay Gupta vs. Mr. Pramod Kumar Sharma***, where in paragraph 13 and 14, following was laid down:

> ***“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."*

81. The Hon'ble Supreme Court noticed that certain key features/ stipulations of the Resolution Plan were sought to be amended by the Appellant. It was held that modification being permitted at the request of the Appellant, no fault can be found in the order of the Adjudicating Authority, giving opportunity to respective parties. The above judgment also does not help the Torrent Power Limited in the present case.

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.

83. The submission, which has been pressed by Shri Sibal is that perversity in the process is also one of the grounds on which Adjudicating Authority can interfere. We have noticed above that Adjudicating Authority has chosen to interfere with the Resolution Plan on the ground that incomplete financial data was placed before it by the RP and its Process Advisor. The findings of the Adjudicating Authority regarding incomplete financial data has been

challenged in the Appeals before us both by Sarda as well as RP and CoC. The findings and the factual basis of the Adjudicating Authority coming to the conclusion that incomplete financial data was placed, has been challenged, which we have already noticed in preceding paragraphs of this judgment. We having already taken a view that the impugned order passed by Adjudicating Authority dated 06.10.2023 deserves to be set aside, on the violation of principles of natural justice, consequent to which order, the matter needs to go back to the Adjudicating Authority for fresh consideration. We in view of the aforesaid, refrain ourselves from recording any findings on the respective submissions of the parties regarding incomplete data or perversity in the process, as sought to be contended on behalf of the Torrent Power Limited.

84. The learned Counsel for the Appellant has relied on judgment of the Hon'ble Supreme Court holding that a distinction has to be maintained between the decisions which are perverse and those which are not. Reliance has been placed on the judgment of the Hon'ble Supreme Court in ***Kuldeep Singh vs. Commissioner of Police and Ors. – (1999) 2 SCC 10***. In paragraph 10 of the judgment, following has been laid down:

> ***"10.*** *A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."*

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.

87. As observed above, we have already taken a decision to set aside the order and remitting the matter for fresh consideration, it is not necessary for us to return a finding on the various contentions raised by the parties on merits of the decision and the grounds. We are of the view that the Adjudicating Authority may take a fresh decision on the Plan approval Application as well as the Application filed being IA No.3336 of 2023 and IA No.3339 of 2023. We having noticed that no opportunity was given to the SRA, RP and CoC in respect of the IA Nos.3336 and 3339 of 2023, to obviate the delay in disposal of the matter, we allow two weeks' time to the SRA, RP and CoC to file their reply along with relevant materials to the I.A. 3336/2023 and I.A. 3399/2023 before the Adjudicating Authority.

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.

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.

No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Arun Baroka]
Member (Technical)

NEW DELHI

10th May, 2024

himanshu/ashwani