NATIONAL COMPANY LAW TRIBUNAL
COURT-I, MUMBAI BENCH

Item 13

IA 1271/2021 IA 1744/2021 IA 2598/2021 in C.P.(IB)920/MB/2020

CORAM:

SH. K. K. VOHRA	JUSTICE P.N. DESHMUKH (Retd.)
HON'BLE MEMBER (T)	HON'BLE MEMBER (J)

ORDER SHEET OF THE HEARING ON **27.06.2022**

NAME OF THE PARTIES**: -** **State Bank of India**
Vs.
Uttam Galva Steel Ltd

Appearance (via video-conference):

For the Resolution Applicant	:	Senior Advocate Mr. Ravindra Kadam, Advocates Ms. Ruby Singh Ahuja, Mr. Sudip Mahapatra, Mr. Shahezad Kazi, Mr. Vishal Gehrana, Ms. Aishwarya Singh, Mr. Ashutosh Shukla and Mr. Ankit Pathak i/b. S&R Associates
For the Resolution Professional	:	Sr. Counsel Mr. Janak Dwarkadas and Mr. Chetan Kapadia a/w Mr. Nitesh Jain, Mr. Siddharth Ranade, Ms. Nishi Bhankharia, Ms. Ritika Ajitsaria and Ms. Angelika Awasthi i/b Trilegal
For the CoC	:	Senior Advocate, Mr. Soli Cooper along with Advocates, Meghna Rajadhyaksha, Shivani Sinha and Apeksha I/b Shardul Amarchand Mangaldas & Co.

Section 30,42 and 7 of IBC, 2016

ORDER

IA 1271/2021 IA 1744/2021 IA 2598/2021

Ld. Sr. Counsels for the Parties are present. As one of the members (SH. K.K. VOHRA, Member Technical) is demitting the office after office hours today (i.e. 27.06.2022), this Case which was closed for Judgment is now dereserved. Registry to list this matter on Board on **15.07.2022,** for fixing the date for de-novo hearing of the matter.

Sd/- **Sd/-**

K. K. VOHRA
Member (Technical)

JUSTICE P.N. DESHMUKH
Member (Judicial)

Vedant

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL,

MUMBAI BENCH-I

IA No. 1098/MB/C-I/2021

In

C.P (IB) No. 920/MB/C-I/2020

Under section 60(5) of Insolvency and Bankruptcy Code, 2016.

Filed by
GAIL India Limited

…Applicant

Versus

Mr. Milind Kasodekar,

Resolution Professional of Uttam Galva Steel Limited

…Respondent

In the matter of

State Bank of India

…Financial Creditor

Versus

Uttam Galva Steel Limited

… Corporate Debtor

Order Pronounced on: 27.06.2022

Coram:

Hon'ble Member (Judicial)	:	Justice P. N. Deshmukh (Retd.)
Hon'ble Member (Technical)	:	Mr. Kapal Kumar Vohra

Appearances:

For the Applicant	:	Mr. Janak Dwarkadas, Counsel.
For the Respondent	:	Mr. Akshat Khare, Counsel.

ORDER

Per: Justice P. N. Deshmukh, Member (Judicial)

1. This is an application filed GAIL India Limited (hereafter referred as "GAIL") which is a Government Company under Section 617 of the Companies Act, 1956, bearing CIN L40200DL1984GO1018976, having its Registered Office at 16 Bhikaiji cama Place, R K Puram, New Delhi – 110066, seeking admission of claim of Rs.9,775.19 Crores (approx.) which was rejected by the Resolution Professional stating that the said quantum of claim relates to future liabilities under GSA which is not duly performed and as such not being covered under the definition of "claim" as defined in Sec. 3 (6) of IBC.

Brief Facts of the Case:

2. The State Bank of India, Financial Creditor of the Corporate Debtor, had filed an application under Section 7 of the Insolvency and Bankruptcy Code (hereafter referred as "Code"), r/w rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 201, for initiation of the Corporate Insolvency Resolution Process (hereafter referred as "CIRP") against Uttam Galva steel Limited (hereafter referred as "Corporate Debtor").

3. That the said application was admitted by this Tribunal, by its order dated 01.10.2020 (hereafter referred as "Admission Order") in terms of

which, Mr. Milind Kasodekar (Reg. No. IBBI/IPA-002/IP-N00116/2017-18/10285), the Respondent herein, was appointed as the Interim Resolution Professional (hereafter referred as "IRP"). That upon receipt of the Admission Order on 06.10.2020, Respondent/IRP published a public announcement for initiation of CIRP and invitation of claims from creditors, in Form A on 08.10.2020 in terms of Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Regulation Process for Corporate Persons) Regulations, 2016. The last date for submission of claim was 20.10.2020.

4. Pursuant to the Public Announcement, the Applicant herein filed its claim in Form B on 16.10.2020 and subsequently received the same and re-filed it on 20.10.2020 (hereafter referred as "Claim Forms").

<u>Case of the Applicant</u>:

5. The Applicant states that he is also one of the Operational Creditors of the Corporate Debtor pursuant to execution of three Gas Sale Agreement for long term (i.e. 20 years) supply of Re-gasified Liquid Natural Gas (hereafter referred as "RLNG") described as under

   I. Gas Sale Agreement – LT RLNG date 18.05.2009 (further referred as "GSA-1") for UGSL plant at Khopoli Pen Road, Village –

Donvat, Tal – Khalapur, Dist – Raigad for long term supply of natural gas 0.065450 MMSCMD from 31/12/2009 to 30/04/2028.

II. Gas Sale Agreement – LT RLNG dated 18.05.2009 (further referred as "GSA-2") for UGSL Plant at Pali Road Complex, Village Dahivali, Talauka Khalapur, Dist – Raigad for long term supply of natural gas 0.013090 MMSCMD from 31/12/2009 to 30/04/2028.

III. Gas Sale Agreement – HH RLNG dated 10.10.2014 (further referred as "GSA-3") for UGSL Plant at Khopoli Pen Road, Village – Donvat, Tal – Khalapur, Dist – Raigad for long term supply of natural gas 0.12753 MMSCMD from 01/10/2017 to 31/12/2037.

The applicant is a Central Public Sector undertaking under aegis of Ministry of Petroleum and Natural Gas, Government of India.

6. The provisions of annual contracted quantity between the parties has been specified in Article No. 6 and the provisions of "Take or Pay" obligations have been specified in Article No. 14.1. As per said Article No. 6, the Corporate Debtor was required to take minimum quantity of gas as described therein and against which the applicant would raise the gas supply bills to the Corporate Debtor, which was required to be paid within 7 days by the Corporate Debtor. The Payment due date is defined in Article No. 12.3 of GSAs.

7. Under the said guaranteed demand by the Corporate Debtor in GSAs, the applicant would have to ensure the supply of the said guaranteed quantity of gas at any point of time to the Corporate Debtor. As natural gas being rare natural resourse, there has been regular industry practice across the world to incorporate "Take or Pay" obligation/charges (further referred as "TOP" obligation/charges) which is required to be paid by the buyer of the gas to the seller of the gas if the buyer fails to offtake or draw minimum guaranteed demanded quantity of gas. In other words, in the instant case, the Corporate Debtor has guaranteed a minimum demand of total 0.20607 MMSCMD (Metric Million Standard Cubic Metre per Day) approximate average daily volume quantity of gas per day under three GSAs from the applicant under the Article No. 6.1 of respective GSAs. If the Corporate Debtor fails to consume /receive the said minimum guaranteed demanded natural gas then Corporate Debtor would be required to pay charges for the said minimum guaranteed gas quantity which he has failed to consume/receive. Therefore, in terms of Article 14.1 of GSA, the applicant has raised its claim letters/bills towards the TOP charges for claiming the payment of gas which was made available by the applicant

as a guaranteed demand to the Corporate Debtor, but the Corporate Debtor has not consumed it.

8. The applicant has already raised its claim towards the said unpaid contractual dues by the Corporate Debtor in the years 2014, which was settled by execution of Indenture(s) on 31.08.2015 under LT RLNG GSA (s). As per Article 6.2(f) under LT RLNG GSA(s), Downward Flexibility for CY 2015 was exercised by UGSL through execution of Side Letter(s) dated 19.01.2016, to avail the downward revision in ACQ. This downward Flexibility Quantity of RLNG with respect to CY 2015 is also required to be off-taken or drawn by UGSL.

9. The applicant submits that thereafter the CIRP proceeding for Corporate Debtor had been initiated by order dated 01.10.2020 passed by the AA, NCLT, Mumbai in CP (IB) 920/MB/C-I/2020 filed under Section 7 of the IBC Code filed by one of the financial creditors being the State bank India. Pursuant to Section 13 and 14 of the IBC 2016 regarding moratorium period during the CIRP, the applicant had filed its Claim in Form-B on 16.10.2020 and revised claim Form-b on 20.10.2020 of Rs.5711.28 Crores approximately (more particularly described in claim form) towards entire contractual obligation under three GSAs for admission of its claim as Operational Creditor.

10. The applicant submits that the Respondent Resolution Professional (RP) has admitted the part claims of Rs.167.21 Crores (approx.) under "operational claims" and listed GAIL under the list of "Operational Creditors". However, RP had rejected the major portion of GAIL's claim of Rs.9775.19 Crores (approx.) with Note 1 stating that said quantum of claim relates to future liabilities under GSA which is not duly performed and not being covered under the definition of "claim" under section 3(6) of IBC.

11. The Applicant submits that the Resolution Professional was managing the affaires of the Corporate Debtor as going concern in terms of Sec.20 of IBC. It is therefore in due course of contract period under GSAs, the applicant had raised Demand Notice dt. 01.03.2021 towards actual gas supply & TOP claim for Contract year 2020 under all three GSAs were still in existing with the Corporate Debtor and GAIL was continuing to provide gas supply. Thus, GAIL has maintained "continuous supply" of the "essential goods" in nature of natural gas for steel plant which is essential for keeping furnace of steel plants in running mode. However, Respondent, vide letter dt. 17.03.2021, has requested GAIL to withdraw the demand raised towards TOP claims as the CD is not running in full capacity. Subsequently in reply, GAIL by letter dt. 08.04.2021, had

informed that GAIL has already up-stream commitments from where such gas has been imported and TOP claim has been claimed under contractual obligation/due.

12. The applicant further submitted that as per Article 12.1 of the Gas Sale Agreement, the invoices for the actual gas lifted by the Corporate Debtor are raised fortnightly and the claim towards adjusted annual contract quantity are raised annually after collaborating the total lifted gas quantity in the entire one-year contract period. In other words, the claim pursuant to the Article 14.1 towards "pay if not taken" or TOP obligation is finally calculated after one year for the entire duration of one year and then TOP claim are raised by the applicant with respective buyers. Thus, it is evident that applicant has regularly raised its claim regarding the TOP obligation every year and at the time of initiation of the CIRP period there was outstanding claim under the TOP obligation for entire contract year under three GSAs total amounting to Rs.9942,40,44,928/- as per admitted contractual provisions of the Gas Sale Agreements. The said applicant's total claim as an Operational Creditor of the Corporate Debtor includes all existing and future admitted liability or obligation of the Corporate Debtor under the respective GSAs for the entire remaining

contract period which would be reconciled at the end of every contract year.

13. The contracted claim of TOP is reflected in balance sheet of GAIL a noted items on year-on-year basis when the buyer fails to repay the same.

14. CIRP of CD commenced on 01.10.2020. GAIL has filed claim Form-B (Pg. No. 340) on 16.10.2020 within time and revised on 20.10.2020 (Pg. No. 349). The RP had admitted Rs.167 Crores approx. and rejected Rs.9775 Crores approx. with note no. 1 (pg. no. 373 and 376).

15. The contention of respondent is that GAIL's claim being unadjudicated as so same cannot be admitted. The said contention is contrary to Sec. 3(6) of IBC as per which a claim is a right to payment irrespective whether it has been reduced to judgement or not. Today GAIL is only claiming admission of its claim as Operational Debt.

16. The RP had relied Judgement dt. 04.10.2021 in Company Appeal No. 492/2019 passed by Hon'ble NCLAT in case GAIL vs RP of Alok Industries, The Company Appeal No. 492/2019 was filed by GAIL against Order dt. 08.03.2019 in IA No. 41/2019 in IA No. 259/2018 passed by NCLT Ahmedabad for approval of plan and rejection of objections. In case before NCLT Ahmedabad, the issue/objection raised by GAIL was whether in plan a Resolution Applicant can make class of

OC having claim less than Rs.3 Lakh (to whom entire claim is repaid) and a class of OC having more than Rs3 Lakh (to whom no amount would be repaid). The said aspect can be seen from para no.3 and 4 of said judgement and from the analysis of Hon'ble NCLAT in para no. 56 to 72 of said judgement. Moreover, GAIL had already filed SLA (C) Diary no. 828 of 2022 before Hon'ble Supreme Court challenging the said order.

17. Whereas, GAIL had filed IA no. 413 of 2018 before NCLT Ahmedabad against rejection of claim by RP himself without putting it even before CoC in CIRP of Alok Industries. The said IA came to be allowed by order dt. 13.02.2019 passed by NCLT Ahmedabad with directions to RP to admit the claim of GAIL. As a matter of fact, the legality of TOP claim has been held as valid legal contractual claim by Arbitral Tribunal comprising of Hon'ble former Justice C K Thakker, Retired Supreme Court Judge where similar claim of ONGC was allowed, copy of award is annexed to application.

18. The non-admission of GAIL's claim would adversely affect, as Hon'ble Supreme Court in the case of Ghanashyam Mishra & Sons Pvt. Ltd. Vs EARC & other, order dt. 13.04.2021, had held that if the claim is not admitted under CIRP then same cannot be agitated after approval of

Resolution plan. Moreover, the law on adjudicatory power of RP to adjudicate claims is settled by Hon'ble Supreme Court in case of Arcelor Mittal India Pvt. Ltd. Vs. Satish Kumar Gupta and Ors in Civil Appeal no. 9402-9405 of 2018 in para no. 77. The said issue of power of RP had also been decided by Hon'ble NCLAT in case of SBI Vs. S. Muthuraj & Other, order dt. 09.08.2017. Thus, as per settled position of law RP has no adjudicatory powers and thus his action of rejecting claim by email dt. 17.11.2020 is over exercising his jurisdiction. Also, RP has no adjudicatory powers as held by of Hon'ble Supreme Court in case of Swiss Ribbon Pvt. Ltd. & ans Vs. Union of India & Ors, AIR 2019 SC 739 (in para no. 85 to 90) and RP is really a facilitator of resolution process.

19. The claim of GAIL is required to be considered as any deviation from the long-term commitments either by the buyer or by the seller of any GSA (including both downstream and upstream transactions) result into affecting to the larger issue of "Current Account Deficit" and the "Balance of Payments" of India at international stage which is one of the boiling problems for the Government of India. Or else any un-lifted gas by various downstream buyers including the Corporate Debtor is required to be either resold on "spot basis" or such unused gas has to be

flared as when a gas enters into the distribution pipelines network in India, it cannot be stored for a longer period due to the technical and safety reasons and gas is constantly flowing in pipeline network for maintaining the requisite pressure in the pipeline. The gas supplies in pipeline network is akin to blood in the veins of human body. Thus, it is very important for any stakeholder in gas business (either seller or buyer) to maintain an equilibrium between demand and supply of gas.

20. GAIL's claim is required to be considered as an Operation Creditor as per statutory requirements and definition under IBC Code. The relevant provisions of IBC Code would be Sec. 3(6), 3(11), 3(12), Sec. 5(20), 5(21), Sec. 18(1)(b), Sec. 25(2)(e). Further, requisite documents is satisfied by GAIL. The said aspect has been pleaded in ground in para no. 5 of application filed by GAIL.

Contentions of the Respondent:

21. The Respondent Contended that while conducting the verification of the Applicant's claim, clarifications were sought on 28.10.2020, vide email with regard to the computation of the claim amount, i.e., whether any part of the claim relates to any amount accrued prior to Insolvency Commencement date i.e. Pre-ICD Amount and the legal basis for claiming amounts for a period pertaining to post Insolvency

Commencement date i.e. Post-ICD Amount. Pursuant to the clarification the Applicant vide letter dated 06.11.2020, revised the claim to an amount of Rs.10088,53,37,177/-, bifurcated the claim between Pre-ICD amount and Post-ICD Amount, and provided the following justification for computation:

(a) In respect of LT RLNG GSAs:

"Under the subject Gas Sale Agreement on the basis of the longterm demand by various buyers including the Corporate Debtor, GAIL has imported said gas from RasGas (a company incorporated under the law of Qatar) and was brought to the terminal of M/s Petronet LNG Limited (PLL) wherein the regasification of the gas process is being carried out. Thereafter, the said Reliquified natural gas (RLNG) is delivered to the delivery point of the Corporate Debtor as defined under LT RLNG Gas Sale Agreement (s) which is 'Donvat' and 'Pali Road Complex' in Khopoli, Dist Raigad, Maharashtra .. "

(b) In respect of HH RLNG GSA:

"Under the subject Gas Sale Agreement on the basis of the long-term demand by various buyers including the Corporate Debtor, GAIL has imported said LNG under LNG Sale and Purchase Agreement with Sabine Pass Liquefication LLC ("Sabine LLC ") of United States of America (USA) from LNG Facility at Louisiana, and LNG is transported by LNG Ships from United States of America (USA) to India. This LNG was brought to the terminal of M/s Petronet LNG Ltd. (PLL) wherein the regasification of the gas process is being carried

out. Thereafter, the said Reliquified natural gas (RLNG) is delivered to the delivery point of the Corporate Debtor as defined under HH RLNG Gas Sale Agreement at 'Donvat, Dist Raigad, Maharashtra through Dahej-Uran-Dabhol-Panvel (DUPL-DPPL) Natural Gas Pipeline."

22. That in addition to the aforementioned correspondence exchanged, two meetings were convened with the Applicant on 13.11.2020and 19.11.2020 regarding the computation of Applicant's claim. During the said meetings, Respondent explained that after verifying and collating all claims received and RP is duty bound to admit claims to the extent of Pre-ICD amount. In view of this duty, Respondent requested the Applicant the claim amount be bifurcated between Pre-ICD and Post-ICD amounts.

23. Thereafter, under the instructions of the Respondent i.e. RP on 19.11.2020 wrote to the Applicant that due to the Covid-19 pandemic and the consequent lockdown, the Corporate Debtor's inability to off-take the gas must be treated as a force majeure event.

24. That pursuant to the discussion in the Meetings and the letter dated 19.11.2020, the Applicant amended its claim. Thereafter, vide letter dated 04.12.2020, the Respondent sought to further revise the claim filed on 20.10.2020. Accordingly, the total amount claimed by the Applicant as on 04.12.2020 was Rs.9942,40,44,928.47/- after adjusting the amount

as per force majeure clause in the GSAs (Total Claim Amount). The Total Claim Amount was computed on the basis of two component, namely, the TOP Liability and the interest thereon, till the end of the tenure of the respective GSAs, i.e., year 2028 for LT RLNG GSAs and year 2037 for HH RLNG GSA.

25. Thereafter, after collating, verifying and determination of the claim filed by the Applicant, the Respondent admitted the Pre-ICD Amount of Rs.1,67,21,36,550/- put of Total Claim Amount.

The Respondent's Submissions on legal and maintainability are categorized as below:

I. The Total Claim Amount, insofar it pertains to the period after commencement of CIRP, cannot be admitted by the Resolution Professional

21. That for any amount to be claimed in the CIRP of a corporate debtor, a creditor must furnish documents to demonstrate that it has a 'right to payment'. In this regard, the definition of 'claim' as per Section 3(6)(a) of the Code is reproduced as follows:

> *"(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured".*

22. Further, Section 3(11) of the Code defines the term 'debt' as follows:

"(11) "debt" means a liability or obligation re respect of a claim which is due from any person and includes a financial debt and operational debt".

Therefore, for an obligation or liability to qualify as a 'debt' it is must be due from the Corporate Debtor.

23. In light of the construction of the statute described above, Article 2.4 of the GSAs states that the gas sold by the Applicant to the Corporate Debtor shall be tendered to the Corporate Debtor at delivery point, i.e., pipeline connecting the gas transporter's facilities to the Corporate Debtor's plant (hereinafter referred to as "Delivery Point"). Further, the Article states that the Applicant shall be responsible for the title to and risk of such loss of gas up to the Delivery Point, and delivery of gas under the GSA will be deemed completed at the Delivery Point *and the title and risk of loss of such gas shall pass from the Applicant to the Corporate Debtor at Delivery Point.* Therefore, the title of the gas supplied gets transferred to the Corporate Debtor only when the gas reaches the Delivery Point thereby constituting a 'triggering event' for accrual of right to payment.

24. The aforesaid triggering event for accrual of right to payment is bolstered by the construction of other terms of the GSAs. Under Article 3.1 of the GSAs it is obligatory for the Corporate Debtor to purchase, receive and take the gas at the Delivery Point, and pay for gas at prices determined

in accordance with the GSA or *pay amounts in respect of TOP Liability in the event the Corporate Debtor fails to receive and take such gas* that is supplied in accordance with the Annual Contracted Quantity (ACQ) decided between the Applicant and the Corporate Debtor in terms of Article 6.1 of the GSAs.

25. As per Article 14.1 of the GSAs, the Corporate Debtor is liable to pay for amount of gas which has not been lifted or received by it out of the ACQ at the end of each contract year. Therefore, the right to payment in respect of the TOP Liability gets conferred upon the Applicant only after the gas reaches the Delivery Point, thereby making the Corporate Debtor an owner of the supplied gas.

26. Article 12.2 entitles the Applicant to raise an Annual Statement of Settlement (Annual Statement), and thereafter issue a claim letter in terms of Article 14.1 calling upon the Corporate Debtor to pay the specified sum as calculated for that contract year. Pertinently, the Annual Statement can only be raised within 60 (Sixty) days from the end of a contract year. The contents of the Annual Statement *inter alia* include, the TOP Liability for the particular contract year.

27. Therefore, the Corporate Debtor becomes the owner of the gas only when the gas reaches the Delivery Point thereby triggering the right to

payment in favour of the Applicant, and thereafter, the Applicant shall calculate the TOP Liability and raise an invoice for the same only at the end of a particular year.

28. It is not the case of the Applicant, as indeed it cannot be, that the Applicant has generated Annual Statement and claim letter towards the amounts arising till the end of the entire tenure of the GSAs (i.e., 2028 and 2037). In absence of such Annual Statements, the Applicant has itself stated in the computation table annexed as Annexure F to the Application that the claim letter date mentioned in the table is simply a *"tentative date of issuing claim letter"*. At the threshold, the amount does not qualify as a claim as there is no basis for claiming such hypothetical amounts which may or may not be payable at a future date by the Corporate Debtor.

29. Notably, the triggering event for accrual of right to payment in respect of TOP Liability it yet to happen at a later point in time, when the gas will be supplied to the Corporate Debtor in the future, i.e., after commencement of CIRP. Therefore, the amount claimed in respect of TOP Liability does not qualify as a 'claim' in terms of the definition of 'claim' under the Code.

30. The amount claimed in respect of TOP Liability that may arise at a later point in time, does not qualify as an operational debt under Section 5(21) of the Code. Operational debt is defined as *"a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority".* It is apparent from a perusal of the definition that an operational debt can only arise against *provision of goods or services*. In the present case, the Applicant has failed to sub substantiate the provision of goods or services for which payment has remained outstanding.

31. It is a settled position of law that a right to payment that pertains to a period till the end of tenure of the GSAs (year 2028 & 2037) i.e. a period beyond the date of commencement of CIRP cannot be admitted by an RP. Hence, the Post-ICD Amount claimed by the Applicant fails to qualify as a claim at the threshold.

II. The Resolution Professional has complied with the Code and the CIRP Regulations

32. The Resolution Professional states that section 18 of the Code prescribes the duties of an IRP of a Corporate Debtor in relation to verification of claims. Sub-clause (b) of Section 18 states that an IRP is duty bound to

receive and collate all the claims submitted by creditors, pursuant to the public announcement made under Sections 13 and 15 of the Code. Section 23(2) provides that the powers and duties vested or conferred on the IRP shall be applicable to an RP. Further, Regulation 13 of CIRP Regulations states that an IRP is under a mandatory duty to *verify* the claims received an maintain a list of creditors with amount claimed by them and the amount of their claim admitted. A conjoint reading of the aforementioned provisions makes it clear that it is obligatory for an IRP/RP to verify the claims received from creditors of the Corporate Debtor, determine the amount admitted as at the insolvency commencement date basis the information provided and thereafter maintain a list of creditors.

33. It is a settled position of law that such verification is distinct from adjudication of claims, and an IRP is empowered to make a best estimate of the *amount of the claim based on the information available under Regulation 14 of CIRP Regulations.* It is the duty of an RP to verify each claim received, and admit the claim only to the extent it pertains to a period prior to the ICD based on the information available with them. Therefore, it is well within the powers of an IRP/RP to reject a claim or

portion thereof for want of sufficient documents/evidence backing up such a claim.

III. Resolution Plan, minutes of the meetings of Committee of Creditors and other relevant documents cannot be shared with the Applicant

34. The that the RP is bound to ensure the confidentiality of the information in relation to CIRP, under Clause 21 of the First Schedule under Regulation 7(2)(h) of the Insolvency and Bankruptcy Board of India (Insolvency Professional Regulations), 2016.

35. The section 25 of the Code mandates that the RP is duty-bound to *present all resolution plans to the Committee of Creditors.* In view of such express provisions in relation to Resolution Plans it is clear that the statutory mandate requires that a resolution plan can only be presented to the CoC and other members who attend the CoC such as certain Operational Creditors and erstwhile directors of the corporate debtor for CoC's approval and presented before this Tribunal for its satisfaction in approving the same. The code of the Regulations thereunder do not contemplate presentation or supply of a resolution plan or a copy thereof to any other body or entity. Therefore, only participants eligible to attend CoC meeting can be provided a copy of the Resolution Plans.

36. Regulation 24 of the CIRP Regulations provides that the RP shall circulate the minutes of the meeting to all participants of the Committee of Creditors by electronic means within forty-eight hours of the said meeting. In addition to the aforesaid, Regulation 26(5) states that an RP shall circulate a copy of the record made under sub-regulation (4) to all participants of the Committee of Creditors. Most pertinently, Regulation 23(3)(e) requires the RP to ensure that *no person other than the intended participants attends or has access to the proceedings of the meeting through video conferencing or other audio-visual means.*

37. In terms of Section 24(4) of the Code, Respondent duly informed the Applicant that the quantum of operational debt in the CIRP of the Corporate Debtor is in excess of 10% of the quantum of overall debt. In light of the same, it was suggested that the Applicant among other operational creditors to nominate a representative who shall be acting for or representing the operational creditors at the subsequent CoC meetings *vide* email dated 13.02.2021. It is further informed that until the operational creditors nominate a representative, the operational creditor with the highest share shall attend the meetings of the Corporate Debtor subject to execution of confidentiality undertaking. However, the email

addressed to the Applicant remained unanswered. A copy of the email dated 13.02.2021 is annexed as Annexure – 5 to the Reply.

38. In light of express provisions of the Code and settled position of law in this regard, the Resolution Applicant cannot share copies of Resolution Plans, minutes of meetings of the CoC and other relevant documents which are commercially sensitive and confidential records pertaining to the CIRP of the Corporate Debtor to any other person apart from the individuals expressly mentioned under the Code.

IV. Prayer regarding continued performance of the GSAs is untenable

39. By way of the present Application, the Applicant has sought for directions from this Tribunal regarding continued performance of the GSAs in the following terms:

"b. To pass an order for directing the Resolution Professional to ensure about continuation of the GSA-1, GSA-2, GSA-3 under the Resolution Plan submitted by the Resolution Applicant (if any)

c. Alternatively, for directing the Resolution Applicant to make a pre-requisite condition in the Resolution Plan for continuation of the GSA-1, GSA-2 & GSA-3".

40. The Respondent submits that this Tribunal is not empowered to grant specific performance of any contracts during the CIRP of the Corporate

Debtor and/or modify the terms of a Resolution Plan and hence, any such prayer is untenable. A Resolution Plan is submitted by a Resolution Applicant on the basis of various parameters with a view to restore the CD's business back to a commercially viable concern. Further, in this case, the Resolution Plan received has already been approved by 100% by the CoC of the CD on the basis of their commercial wisdom.

Findings:

41. We have perused the records and agreements, in light of the construction of the statute described above, Article 2.4 of the GSAs states that the gas sold by the Applicant to the Corporate Debtor shall be tendered to the Corporate Debtor at delivery point, i.e., pipeline connecting the gas transporter's facilities to the Corporate Debtor's plant (hereinafter referred to as "Delivery Point"). Further, the Article states that the Applicant shall be responsible for the title to and risk of such loss of gas up to the Delivery Point, and delivery of gas under the GSA will be deemed completed at the Delivery Point *and the title and risk of loss of such gas shall pass from the Applicant to the Corporate Debtor at Delivery Point.* Therefore, the title of the gas supplied gets transferred to the Corporate Debtor only when the gas reaches the Delivery Point thereby constituting a 'triggering event' for accrual of right to payment.

42. The aforesaid triggering event for accrual of right to payment is bolstered by the construction of other terms of the GSAs. Under Article 3.1 of the GSAs it is obligatory for the Corporate Debtor to purchase, receive and take the gas at the Delivery Point, and pay for gas at prices determined in accordance with the GSA or *pay amounts in respect of TOP Liability in the event the Corporate Debtor fails to receive and take such gas* that is supplied in accordance with the Annual Contracted Quantity (ACQ) decided between the Applicant and the Corporate Debtor in terms of Article 6.1 of the GSAs.

43. Article 12.2 entitles the Applicant to raise an Annual Statement of Settlement (Annual Statement), and thereafter issue a claim letter in terms of Article 14.1 calling upon the Corporate Debtor to pay the specified sum as calculated for that contract year. Pertinently, the Annual Statement can only be raised within 60 (Sixty) days from the end of a contract year. The contents of the Annual Statement *inter alia* include, the TOP Liability for the particular contract year.

44. As per Article 14.1 of the GSAs, the Corporate Debtor is liable to pay for amount of gas which has not been lifted or received by it out of the ACQ at the end of each contract year. Therefore, the right to payment in respect of the TOP Liability gets conferred upon the Applicant only after

the gas reaches the Delivery Point, thereby making the Corporate Debtor an owner of the supplied gas.

45. In the aforesaid backdrop of facts, it cannot be, that the Applicant has generated Annual Statement and claim letter towards the amounts arising till the end of the entire tenure of the GSAs (i.e., 2028 and 2037). In absence of such Annual Statements, the Applicant has itself stated in the computation table annexed as Annexure F to the Application that the claim letter date mentioned in the table is simply a *"tentative date of issuing claim letter"*. At the threshold, the amount does not qualify as a claim as there is no basis for claiming such hypothetical amounts which may or may not be payable at a future date by the Corporate Debtor.

46. Notably, the triggering event for accrual of right to payment in respect of TOP Liability it yet to happen at a later point in time, when the gas will be supplied to the Corporate Debtor in the future, i.e., after commencement of CIRP. Therefore, the amount claimed in respect of TOP Liability does not qualify as a 'claim' in terms of the definition of 'claim' under the Code.

47. It is a settled position of law that a right to payment that pertains to a period till the end of tenure of the GSAs (year 2028 & 2037) i.e. a period beyond the date of commencement of CIRP cannot be admitted by an

RP. Hence, the Post-ICD Amount claimed by the Applicant fails to qualify as a claim.

48. It is trite law that such verification is distinct from adjudication of claims, and an IRP is empowered to make a best estimate of the *amount of the claim based on the information available under Regulation 14 of CIRP Regulations.* It is the duty of an RP to verify each claim received, and admit the claim only to the extent it pertains to a period prior to the ICD based on the information available with them. Therefore, it is well within the powers of an IRP/RP to reject a claim or portion thereof for want of sufficient documents/evidence backing up such a claim.

49. Thus, the conclusion can be drawn from the submissions and the agreement that the TOP liability is calculated annually, the Obligation for TOP liability arises when Annual Contract Quantity is not lifted. The cause of action or triggering point for TOP liability is at the end of every Contract Year during which breach of contract occurred. A suit can be filed wherein TOP liability is required to be ascertained because the said liability cannot be allowed arbitrarily, as TOP liability is calculated annually upon non-lifting of the Annual Contract Quantity. Hence, the TOP liability claimed in the present case is for whole tenure of the

contract for which obligation has not arose as the same is not accrued at this point of time.

50. Therefore, we conquer with the view of the Resolution Professional regarding non-collating of Post-ICD claims. Resolution Professional has rightly collated Pre-ICD amount Rs.167,21,36,550/-.

51. Reliance placed by the Applicant on Alok Industries (Supra) is misplaced as claims allowed in case of Alok Industries were pertaining to Pre-ICD period for which it was accrued and invoices were raised.

52. In the present matter, claims made as TOP liability are not accrued yet. Therefore, TOP obligation for entire contract tenure for 3 GSAs total amounting to Rs. 9942,40,44,928/- Crores cannot be admitted.

53. With the aforesaid observation and for reasons present **IA No. 1098 of 2021 In C.P (IB) No. 920/MB/C-I/2020** is partly allowed, in above terms.

Sd/-	**Sd/-**
KAPAL KUMAR VOHRA	**JUSTICE P. N. DESHMUKH**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**

27.06.2022
SAM