

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
SPECIAL BENCH (COURT-II)
KOLKATA**

**I.A. (IB) No. 1020/KB/2022
and
I.A. (IB) No. 828/KB/2023
and
CP (IB) No. 138/KB/2021**

A Petition under section 7 of the Insolvency and Bankruptcy Code, 2016.

In the matter of

REC Limited

(formerly known as Rural Electrification Corporation Limited)

... Financial Creditor

Versus

Hiranmaye Energy Limited

(formerly known as India Power Corporation (Haldia) Limited)

... Corporate Debtor

And

I.A. (IB) No. 1020/KB/2022

*An application under section 60(5) of the Insolvency and Bankruptcy Code, 2016 read
with rule 11 of the National Company Law Tribunal Rules, 2016.*

In the matter of

Hiranmaye Energy Limited

(formerly known as India Power Corporation (Haldia) Limited)

... Applicant

Versus

REC Limited

(formerly known as Rural Electrification Corporation Limited)

... Respondent

And

IA (IB) No. 828/KB/2023

*An application under section 10A of the Insolvency and Bankruptcy Code, 2016 read
with rule 11 of the National Company Law Tribunal Rules, 2016.*

In the matter of

Hiranmaye Energy Limited

(formerly known as India Power Corporation (Haldia) Limited)

... Applicant

Versus

REC Limited

(formerly known as Rural Electrification Corporation Limited)

... Respondent

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REC Ltd. V. Hiranmaye Energy Ltd.

Coram:

Shri Rohit Kapoor : Member (Judicial)

Shri Balraj Joshi : Member (Technical)

Appearances (via hybrid mode):

For the REC Ltd. : 1. Mr. Abhinav Vashisth, Senior Advocate
2. Mr. Anoop Rawat, Advocate
3. Mr. Sauran Panda, Advocate
4. Mr. Deepanjan Dutta Roy, Advocate
5. Ms. Mohana Nijhawan, Advocate

For the Hiranmaye Energy Limited : 1. Mr. Joy Saha, Senior Advocate
2. Mr. Subhankar Nag, Advocate
3. Ms. Urmila Chakraborty, Advocate
4. Mr. Aasish Choudhury, Advocate
5. Mr. Rabindra Kr. Mishra, Advocate
6. Ms. Muskaan Bangani, Advocate
7. Mr. Jai Kumar Surana, Advocate

Order pronounced on: 02 January 2024

COMMON ORDER

Per: Balraj Joshi, Member (Technical)

1. This Court convened through hybrid mode.

Brief facts of the case

2. The underlying Company Petition has been filed by REC Limited (**Financial Creditor**) and thereafter I.A. (IB) No. 1020/KB/2022 was filed by Hiranmaye Energy Limited, (**Corporate Debtor**) which was heard and reserved for orders. Thereafter, the Corporate Debtor filed another I.A. (IB) 828/KB/2023, wherein the maintainability of the Company Petition was challenged on account of being hit by Section 10A of IBC. This IA could be heard on a later date due to re-constitution of the benches i.e. 17 July 2023.

C.P.(IB) No. 138/KB/2021 and I.A. (IB) No. 1020/KB/2022

3. The Company Petition filed under section 7 of the Insolvency and Bankruptcy Code, 2016 ("**Code**") by REC Limited, represented by its Mr. Dinesh Kaushik, Deputy General Manager (Law) to initiate Corporate Insolvency Resolution Process ("**CIRP**") against Hiranmaye Energy Limited ("**Corporate Debtor**").

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4. The Corporate Debtor was incorporated on 28 April 2008, having CIN: U40105WB2008PLC125220. Its registered office is Plot X, 1, 2 & 3, 2nd Floor, Block EP, Sector V, Salt Lake, Kolkata- 700091. Therefore, this Bench has jurisdiction to deal with this petition.
5. The Company Petition was filed before this Adjudicating Authority by the Financial Creditor on the ground that the Corporate Debtor has defaulted to make a payment of a sum of Rs.21,83,19,16,896/- (Rupees Two Thousand One Hundred Eighty-Three Crore Nineteen Lakh Sixteen Thousand Eight Hundred and Ninety-Six only) as on 05 June 2021. The date of the default has been stated as 31 March 2018.
6. The Corporate Debtor filed its affidavit-in-reply affirmed on 22 April 2022 in the main Company Petition. The I.A. has been filed by the **Corporate Debtor** against the **Financial Creditor** under section 60(5) of the Insolvency and Bankruptcy Code, 2016 seeking the following reliefs:
 - a) *C.P. (IB) No. 138/KB/2021 be disposed of and/or dismissed recording the proposals of the alleged Corporate Debtor to make payment in the manner stated in paragraphs 11 and 12 above;*
 - b) *Permanent injunction restraining the Petitioner from proceedings with or from taking any other or further steps in connection with the said C.P. (IB) No. 138/2021;*
 - c) *Stay of all further proceedings in C.P. (IB) No. 138/2021;*
 - d) *Declaration that the restructuring agreements dated 24th September, 2020 and 14th January, 2021 are valid and in force and stand modified by the proposal;*
 - e) *Leave be granted to the alleged Corporate Debtor to make payment of the claims of the Petitioner in the manner as contained in the restructuring agreements dated 24th September 2020 and 14th January, 2021 on and from the month beginning September 2022 and to make payment of the arrears of interest in 24 instalments commencing from the month of September 2022 as more fully and particularly stated in paragraph 11 and 12;*
 - f) *Ad interim Order in terms of the prayers above;*
 - g) *Such further or other order and/or orders as this Hon'ble Tribunal may deem fit and proper.*

7. *Submissions of the learned Senior Counsel appearing on behalf of the Financial Creditor*

7.1. The learned Senior Counsel submitted that an amount of Rs.1347,12,00,000/- (Rupees One Thousand Three Hundred Forty-Seven Crore and Twelve Lakh only) was availed by the Corporate Debtor under various facilities.

7.2. The Corporate Debtor proposed to develop, own, design, finance, construct, commission, operate and maintain a 450 MW Thermal Power Plant at Haldia.

7.3. On 19 June 2013, a Common Loan Agreement was executed by the Financial Creditor and Power Finance Corporation Limited and the Corporate Debtor for a term loan amounting to Res.1859,00,00,000/- for setting up the project.

7.4. The Corporate Debtor informed the lenders that there was an increase in the Project Cost and requested the Lenders to increase the loan amount. On 30 October 2015, the Financial Creditor along with Power Finance Corporation Limited sanctioned an additional term loan facility.

7.5. It is submitted that the Corporate Debtor was unable to pay the outstanding amounts under the Original Term Loan Facility and Cost Overrun Facility since 31 March 2018.

7.6. Thereafter, the Financial Creditor and Power Finance Corporation Limited made various efforts to devise resolution of the financial stress in the Project and to implement a restructuring plan, however, no restructuring plan could be implemented as the Corporate Debtor failed to comply with the terms of restructuring plan as approved by the Financial Creditor and Power Finance Corporation Limited, and the project continued to be in stress. The learned Senior Counsel has submitted that there was no restructuring agreement.

7.7. The Financial Creditor has proposed the name of **Mr. Bhuvan Madan**, registration number IBBI/IPA-001/IP-P01004/2017-2018/11655, as the Interim Resolution Professional of the Corporate Debtor. The proposed Interim Resolution Professional has given his written communication in Form 2 as required under rule 9(1) of the Insolvency and Bankruptcy [Application to Adjudicating Authority] Rules, 2016 along with a copy of registration.

7.8. The Financial Creditor has chosen not to file any reply affidavit with respect to I.A. (IB) No. 1020/KB/2022.

8. ***Submissions of the learned Senior Counsel appearing on behalf of the Corporate Debtor***

8.1. The learned Senior Counsel referred to paragraph 12(iii), 13, 15 of the letter dated 24 December 2021, wherein the Corporate Debtor has shown willingness to make payment and has submitted that the Financial Creditor has accepted the payment of a sum of Rs.50 Crore which would be deemed as acceptance of the proposals contain in the said letter.

8.2. Hence, acceptance of the sum of Rs.50 Crore tantamount to novation of the terms and conditions of the two agreements of Restructure of Debtor dated 29 September 2020 and 14 January 2021. The Learned Senior Counsel placed reliance on ***Dasharathi Ghosh v. Khandkar Abdul Hannan, Vol. 32 CWN 359 and Gurpreet Singh v. Union of India, 2006 (8) SCC 457.***

8.3. It is further submitted that as per the restructuring agreements, the Corporate Debtor was to make payments from 31 March 2021 to 30 June 2022 for the Principal Amount of Rs.63.84Crore. The Corporate Debtor made a payment of approximately Rs.100 Crore which is a relevant fact to show that the Corporate Debtor is a solvent company.

8.4. It is submitted that the Company Petition was filed on 12 June 2021, even after filing the Company Petition, the Financial Creditor has demanded regular payments from the Corporate Debtor and has also accepted the payments made by the Corporate Debtor. The last payment was made on 19 January 2023. It is thus clear that the Operational Creditor is misusing the Code for recovery mechanism.

8.5. The learned Senior Counsel placed reliance on ***Swiss Ribbons Private Limited and Other v. Union of India, (2019) 4 SCC 17, SS Engineers v. Hindusthan Petroleum Corporation Limited and Ors., 2022 SCC OnLine SC 13, Anshul Vashistha v. Jayhind SteelTraders & Anr., 2022 SCC OnLine NCLAT 673, Invent Asset Securitisation and Reconstruction Pvt. Ltd. V. Ginar Fibres Ltd., 2022 SCC OnLine SC 808, India Resurgence ARC Private Limited v. Amit Metaliks Limited and Anr., 2021 SCC OnLine SC 409.***

8.6. The learned Senior Counsel further referred to letters dated 16 December 2021, 17 June 2022, 29 June 2022 and 31 August 2022 and 01 December 2022, wherein the Financial Creditor has admitted that the Corporate Debtor is in operation and has

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entered into Fuel Supply Agreements and has sufficient quantity of coal to carry on its power generation business.

8.7.It is further submitted that the Corporate Debtor has an ongoing Power Purchase Agreement (PPA) with WBSEDCL for purchase of the entire quantity of power generated by the Corporate Debtor.

8.8.Hence, the admission of the Corporate Debtor into Corporate Insolvency Resolution Process will hamper the business of the Corporate Debtor.

8.9.It is submitted that since the Financial Creditor chose not to file any affidavit with respect to I.A. (IB) No. 1020/KB/2022, the rule of non-traverse shall apply. With this respect, the learned Senior Counsel has relied on ***Kewal Krishan and others v. Dina Nath, 1992 2 SCC 51 and Lohiya Properties Private Limited v. Atmaram Kumar, 1993 4 SCC 6.***

8.10. The restructuring agreement has been signed by the Chief General Manager of the Financial Creditor and the Corporate Debtor. The Corporate Debtor received a sum of Rs.137.84 Crore under the said restructuring Agreement and has subsequently repaid Rs.95.79 Crore to the Financial Creditor.

8.11. The Financial Creditor has not terminated the agreement dated 29 September 2020 and hence cannot now contend that the agreement does not exist.

I.A. (IB) No. 828/KB/2023

9. The present I.A. has been filed by Hiranmaye Energy Limited against REC Limited under section 60(5) of the Insolvency and Bankruptcy Code, 2016 seeking the following reliefs:

- a. *The order of this learned Tribunal dated 21 March 2023 reserving C.P. (IB) No. 138/KB/2021 for orders be recalled and/or set aside;*
- b. *C.P. (IB) No. 138/KB/2021 be heard afresh on the point of the alleged debt and default being barred by the provisions of section 10A of the Code;*
- c. *C.P. (IB) No. 138/KB/2021 be dismissed as being not maintainable;*
- d. *All further proceedings in C.P. (IB) No. 138 of 2021 be stayed including the passing of any order with regard to the final adjudication thereof pending the disposal of the present application;*
- e. *Ad-interim orders in terms of prayers above;*

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f. *Costs;*

g. *Such further and/or other order or orders and/or direction or directions as your Honour may deem fit and proper.*

10. Submissions on behalf of the Applicant in I.A. (IB) No. 828/KB/2023

10.1. The learned Senior Counsel submitted that the Corporate Debtor had given its approval for restructuring without change in ownership *vide* a letter dated 21 February 2020 in accordance with the Reserve Bank of India Circular dated 07 June 2019. According to the repayment schedule for the sustainable debt portion of Unit-I and Unit-II as contained in the approval letter dated 21 February 2020, the quarterly repayment began from 31 December 2019.

10.2. As per the said sanction letter, principal repayment of the sustainable debt was to be made over 89 structured quarterly instalments commencing from 31 December 2020 and interest was to be paid on monthly basis commencing from 30 June 2020. Hence, the date falls within the period as mentioned under section 10A of the Code.

10.3. The Financial Creditor placed reliance on several letters and contended that the loan amount has fallen due from 31 March 2020. The learned Senior Counsel submitted that the Financial Creditor in its email dated 30 June 2020 has stated that the demand has fallen due on 30 June 2020 and thereafter, by an email dated 24 September 2020, it is stated that the demand has fallen due on 30 September 2020, Similarly, in an email dated 24 December 2020 the Financial Creditor raised a demand claiming to be due on 31 December 2020.

10.4. Thus, it is evident that the default occurred on or after 25 March 2020 and hence the Company Petition is squarely hit by Section 10A of the Code.

10.5. The learned Counsel submitted that in order to evade the bar under section 10 A of the Code, the Financial Creditor has stated that the date of default is 31 March 2018 which is 90 days prior to the NPA date i.e. 30 June 2018. After the approval of the restructuring of debt, the Financial Creditor could not have gone back to the alleged date of default i.e. 31 March 2018.

10.6. It is further submitted that I.A. (IB) No. 1020/KB/2022 was heard and reserved but due to inadvertence and oversight, the issue with respect to the issue of default falling within section 10A of the Code was not argued. It is submitted that the issue of maintainability of the Company Petition with respect to section 10A of the Code

is a pure question of law and goes to the very root of the matter and hence, it must be considered even if the main matter has been reserved for orders.

11. ***Submissions on behalf of the Respondent in I.A. (IB) No. 828/KB/2023***

11.1. The learned Senior Counsel submitted that the present application filed under Section 10A of the Code, deserves to be dismissed on grounds of maintainability itself, having been preferred subsequent to the Company Petition being reserved after detailed arguments made by both parties.

11.2. It is further submitted that if the present I.A. is allowed to be entertained, every litigant will keep raising frivolous issues and multiply litigations, to avoid the delivery of admission orders, the present Section 10A Application militates against the core objective of the Code for summary proceedings.

11.3. The learned Senior Counsel referred to the order of 18 January 2023, in which the order records '*Post this IA along with the main CP for conclusion of arguments on 01.03.2023*', thus clearly recording that both the main petition and the IA filed by the Corporate Debtor were listed together. It is pertinent to highlight that no notice was issued by this Tribunal in the I.A. (IB) No. 1020/KB/2022, as it was submitted by the Financial Creditor that the IA does not merit any response and the affidavits already filed by the Financial Creditor adequately cover the response on all grounds raised in the application filed by the Corporate Debtor.

11.4. In this regard, it is also important to highlight that the statement on behalf of the Corporate Debtor that the arguments on the Section 7 Application is pending, is also contradicted by their Section 10A Application in which they have categorically sought that "*the order of this learned Tribunal dated 21st March 2020 reserving CP(IB) No. 138 of 2021 for orders be recalled and/or set aside*" and that "*CP(IB) No. 138 of 2021 be heard afresh on the point of alleged debt and default being barred by the provisions of the section 10A of the Code;*"

11.5. The Corporate Debtor is blatantly misleading and trying to create confusion and somehow delay the adjudication of the section 7 Company Petition endlessly and has prayed for setting aside of the order dated 21 March 2023. It is further submitted that once a matter is reserved, it cannot be opened, one should draw a line somewhere.

11.6. It is submitted that the entire premise of the present I.A. is that the default has occurred in a period which is hit by section 10A of the Code, placing reliance on a failed restructuring proposal dated 21 February 2020 read with 29 September 2020 (“**Restructuring Proposal**”).

11.7. At the outset, it is pertinent to reiterate that the Restructuring Proposal¹, being relied on by the Corporate Debtor was merely a sanctioned restructuring proposal, which was subject to certain pre-implementation conditions being fulfilled by 28 February 2021² which never fructified. Once the pre-implementation conditions were not satisfied, the Restructuring Proposal failed to take effect as it was never implemented.

11.8. The learned Senior Counsel referred to the minutes of meeting dated 02 July 2021³ which clearly records the failure of the Corporate Debtor to meet the pre-implementation conditions of the Restructuring Proposal. Relevant part of the minutes is reproduced below:

Lenders discussed the following in this regard:

- *REC/Lenders have approved the Restructuring Proposal on many occasions since the commissioning of the project (i.e. 2 units) in December 2017. But the Borrower & promoters have been repeatedly failed on account of one pretext or others.*
- *In the last (i.e. 3rd) restructuring plan approved by the lenders, Borrower again failed to comply with certain pre-conditions for the implementation of Plan like continuous running of both units for 72 hrs, initial DSRA creation, upfront fund infusion and getting of tariff approval for project from WBERC. Borrower/Promoters were pursued rigorously by the lenders; but all the efforts of lenders went futile.*

11.9. The issue of extension of the validity of the Restructuring Proposal, which forms the crux and basis of the present I.A., was considered by the Hon’ble High Court at Calcutta in Writ Petition No. 10679 of 2021 filed by the Corporate Debtor, in which

¹ Pp. 924 and 938 of the C.P.

² Annexure 3 at Pg 40-47, Annexure 4 at Pg 54-55 of Affidavit filed by REC on 21.1.22

³ Annexure 7A at Pg. 130-131 of the Affidavit filed by REC on 21.1.22

the Hon'ble High Court at Calcutta has categorically dismissed the said writ petition vide order dated 02 July 2021⁴ holding *inter alia*.

“The actions of the respondent nos.3 and 4⁵ in the instant case are purely contractual nature and were purely guided specifically by the terms and conditions of the restructuring proposal. In matters of this nature, respondent nos.3 and 4 are guided by and must act strictly on commercial considerations, for recovery of the financial dues. The respondents appear to have given substantial leverage to the writ petitioner no.1 to comply with the terms and conditions of the restructuring proposal which the petitioner has failed.... The REC and PFC cannot be expected to wait indefinitely for compliance and fulfilment of all terms by the writ petitioners.”

11.10. The Corporate Debtor filed an appeal before the division bench of the Hon'ble High Court at Calcutta in FMAT No. 626 of 2021 wherein the Division Bench, vide order dated 07 October 2021 dismissed the appeal with the following observations:

“The restructuring plan having failed to take off, the same was visited at a meeting of the Consortium of Lenders and the appellant company (for short hereinafter referred to as the said Consortium Meeting) on 17th of February, 2021. It was, inter alia, agreed at the said Consortium Meeting that the settlement of the tariff or, the Tariff Order of the Commission, is crucial to the restructuring.

The settlement of the tariff or, the Tariff Order, being a pre-condition towards the restructuring arrangement arrived at in the meeting dated 17th February 2021, with the pronouncement of the Tariff Order by the Commission on the 31st day of May 2021, such pre-condition stood answered...It is evident that the restructuring exercise arrived at the said consortium meeting dated 17 February 2021 has not worked out.

H. The question hardly begs an answer that a non-viable tariff is no tariff at all. Equally, the Corporate Creditors cannot wait ad infinitum for the tariff adjudicatory process to be exhausted and their debts dry up. Needless to

⁴ Annexure 7 at Pp.110-129 in the Affidavit filed by FC on 21.01.2022

⁵ REC and PFC

emphasize, in all this, the commission must get its acts together since shoddy arithmetic fetches zero numbers.

I. At the same time, the action of R3 and R4 in proceedings straightway involving the IBC required to be positioned in the context of the action taken by the Appellant No.1/ the Company in terms of the said Consortium Meeting.

M. Therefore, the Tariff Order dated 31st May 2021 being fundamental to both the Corporate Debtor and the Corporate Creditor, its failure necessitated that the parties re-visit their positions or at least brief each other of their respective positions, prior to embarking upon their respective legal options, it would thus be open to the parties to keep the Tariff Oder dated 31st May 2021 one last time on the table and on failure to reach a commonality of perceptions either of the parties could them proceed with their chosen legal remedies.

N. This court is not at all unmindful of the primacy of the IBC Proceedings. This court is not at all unmindful of the fact that the survival of the corporate entity, viz the Appellant No.1/the Company, as distinguished from its Promoter Group, shall be given due and deep consideration under the IBC.

In the backdrop of the above, discussion, this Court directs as follows:

II.R3 and R4 to address the Tariff Order dated 31st of May 2021 along with the extent of fulfilment of pre-conditions outlined in the said Consortium Meeting dated 17th February 2021 in a second consortium meeting with the Appellant No.1/ the Company, without prejudice to their respective rights and legal options”.

Therefore, evidently, the Hon’ble Kolkata High Court has also recognized that the Restructuring Proposal being repeatedly harped upon by HEL has failed.

11.11. The learned Senior Counsel further submitted that as is evident from the above, the Division Bench of the Hon’ble Kolkata High Court in view of the Tariff Order dated 31 May 2022, requested the lenders to consider the same in a joint lenders meeting (“JLM”) pursuant to which a JLM was held between the lenders and HEL on 11 November 2021, where the lenders informed HEL of the failure of the Restructuring Proposal⁶. Relevant part of the minutes is reproduced below:

⁶ Annexure 10 @Pp. 210-214 of the Affidavit filed by REC on 21.1.2022.

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“However, other pre-implementation conditions were not complied till 28.02.2021 and even till date, the Company is non-compliant to those conditions.....

Therefore, that restructuring plan as approved by lenders now is not valid and therefore, it cannot be implemented.....”

11.12. Under these circumstances, it is adequately clear that the Restructuring Proposal, being referred to by Corporate Debtor, failed to fructify and therefore any application seeking to place reliance on such Restructuring Proposal cannot be entertained especially when grounds challenging such proposals have already been dealt with during the hearing of the main Company Petition.

11.13. It is further submitted that during the pendency of the Company Petition, several attempts have been made by the Corporate Debtor to misleadingly assert the revival of the Restructuring Proposal either on the basis of earlier approvals for Restructuring Proposal, which subsequently did not fructify on account of not meeting the pre-implementation conditions or the payments made out of the Trust and Retention Account of the Corporate Debtor, which are mere part payments with huge amounts still outstanding, however, the Financial Creditor has consistently in every communication maintained that the Restructuring Proposal had not fructified and there have been continuing defaults.

11.14. It is also important to highlight that even if the Restructuring Proposal would have fructified, even then the Corporate Debtor has failed to comply with its terms as, among other breaches, even the payments have not been made in terms of the erstwhile Restructuring Proposal. Notably, the total amount which should have been paid in terms of the erstwhile Restructuring Proposal was Rs.414.52 Crore , while the actual amount paid out of the Trust and Retention Agreement is Rs.111.82 Crore.

11.15. It is submitted that the present I.A is another belated attempt to abuse the process of this Adjudicating Authority and delay the admission of the Corporate Debtor into insolvency under the Code while the promoters continue to enjoy the management of the Corporate Debtor, brazenly defaulting on payment of their dues.

12. *Rejoinder of the Applicant in I.A. (IB) No. 828/KB/2023*

12.1. The learned Senior Counsel submitted that the Restructuring Agreement of 21 February 2020 and 29 September 2020 were never given effect to is not correct.

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The learned Senior Counsel referred to the Restructuring Agreement of 21 February 2020 and 29 September 2020 wherein the Financial Creditor has conveyed its approval for Restructuring Plan.

12.2. The learned Senior Counsel submitted that a Court becomes functus officio only upon orders having been signed and orders having been pronounced in open court. In support of his argument, the learned Senior Counsel placed reliance on:-

a. ***Chandgi v. Mehar Singh, 1998 SCC Online Punjab and Haryana 405***, Para 6, Paras 13 & 14.

Para 6: ".. The final culmination of the judicial proceedings before the Court of competent jurisdiction would take place only upon the pronouncement of the judgment by the Court. It is this stage when the Court loses its jurisdiction over the matter for all intents and purposes. In other words, it becomes functus officio of the matter before it".

Para 14:".. the party would have a right to file an application for leading additional evidence prior to the pronouncement of the judgment under the provisions of Order18 Rule 17-A of the Code".

b. ***State Bank of India v. S.N. Goyal, 2008 (8) SCC 92***, Para 28Para 28: "Thus where a judgment is reserved, mere dictation does not amount to pronouncement, but where the judgment is dictated in open court, that itself amounts to pronouncement. But even after such pronouncement by open court dictation, the Judge can make corrections before signing and dating the judgment. Therefore, a Judge becomes functus officio when he pronounces, signs and dates the judgment (subject to section 152 and power of review)".

12.3. In support of the contention that a plaint may be amended even after the final hearing the Learned Senior Counsel placed reliance of the judgment of the Hon'ble Supreme Court in ***Life Insurance Corporation of India v. Sanjeev Builders Private Limited and Another, 2022 SCC OnLine SC 1128***

Para 70: "Our final conclusions may be summed up thus:

(vii) Where the amendment merely sought to introduce an additional or a new approach without introducing a time barred cause of action, the amendment is liable to be allowed even after expiry of limitation.

(ix) *Delay in applying for amendment alone is not a ground to disallow the prayer. Where the aspect of delay is arguable, the prayer for amendment could be allowed and the issue of limitation framed separately for decision.*

(xi) *Where the amendment is sought before commencement of trial, the court is required to be liberal in its approach. The court is required to bear in mind the fact that the opposite party would have a chance to meet the case set up in amendment. As such, where the amendment does not result in irreparable prejudice to the opposite party, or divest the opposite party of an advantage which it had secured as a result of an admission by the party seeking amendment, the amendment is required to be allowed. Equally, where the amendment is necessary for the court to effectively adjudicate on the main issues in controversy between the parties, the amendment should be allowed. (See Vijay Gupta v. Gagninder Kr. Gandhi, 2022 SCC OnLine Del 1897)”.*

12.4. Thereafter, the learned Senior Counsel proceeded to distinguish the judgments relied on by the Financial Creditor:

a. ***Arjun Singh v. Mohindra Kumar, 1964 5 SCR 946.***

This judgment has no application whatsoever in that the same pertains to a matter under Order 9 of the Civil Procedure Code, where an ex-parte judgment had already been pronounced. In the present case the matter was only reserved for orders and no judgment was pronounced.

b. ***SSP Private Ltd.-us-Govindjee Dairy Milk Private Ltd. - NCLT, New Delhi.***

This judgment is wholly per incuriam in that the same does not follow the judgment of the Hon'ble Supreme Court in the matter of S.N. Goyal which was passed as far back as 2008.

c. ***Yash Mehra v. Arundhuti Mehra, 2006 SCC Online Delhi 964.*** This judgment has no application in that the same was passed in a matrimonial matter where a consent given by the wife was sought to be withdrawn after the conclusion of the hearing.

d. ***Rabiya Bi Kassim M. v. The Country Wide Consumer Financial Services Ltd. - ILR 2004 Karnataka 2215.***

In the said case after the conclusion of hearing an application was filed to adduce further evidence which was disallowed. In the present case no evidence or additional document is being sought to be introduced. The present I.A. is based on a pure question of law arising out of Section 10A of the Code.

e. ***Pujya Sindhi Panchayat v. C.L. Mishra - 2002 SCC Online Rajasthan 51.***

The said judgment is rendered by the Hon'ble High Court at Rajasthan in 2002. The same has no effect inasmuch as the law has since been declared by the Hon'ble Supreme Court of India in the matter of S.N. Goyal in the year 2008.

13. The Ld. Sr. Counsel also adverted to the Vidarbha judgement and presented revenue figures and other related facts to drive home the point that the Corporate Debtor is by no means an insolvent company. These assertions were filed by way of a supplementary affidavit by the Corporate Debtor.

Analysis and Findings

14. Heard the learned Sr. Counsel on both the sides and perused the pleadings.
15. That a debt is outstanding is an admitted fact and that the same is payable is also not disputed. However, it is the date of default that is contentious. The date of default as mentioned in part IV of the application has been stated as 31 March 2018, which is ostensibly on account of the original sanction of the load facilities and has been registered by the Information utility viz. NeSL on 05-06-2021 on application filed by the Financial Creditors on 10-10-2020. The contention of the CD is that the date of default now should be reckoned on the basis of the Re-structured loan, which falls under the time bracket stipulated for operation of Section 10A.
16. The following issues arise out of the submissions:
- a) Whether the re-structuring of a loan is tantamount to novation of the original contract and whether non-fulfilment of the conditions or pre-conditions of the re-structuring relegates the date of default back to the original default date?
 - b) Whether the NCLT is required to go into the details of the reasons of default, like non issuance of a Tariff order which could have a bearing on the purported default ?

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a) In order to examine this issue, it is important to have a look at the order sanctioning the restructured plan. The restructured plan that was sanctioned by REC *vide* no. REC/CO/SAM/HEL/2020-21/147 dated 29.9.2020 *inter-alia* contains a repayment schedule that envisages following payments spread over a period of 30 odd years.

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Repayment Schedule for Sustainable Debt Portion of Unit-I and Unit-II

Quarterly repayment schedule for the sustainable portion of debt is given below (for sustainable debt for Unit-I and Unit-II):

Date	Repayment %	Date	Repayment %	Date	Repayment %
31-Mar-21	2.00%	30-Sep-28	1.19%	31-Mar-36	1.25%
30-Jun-21	0.50%	31-Dec-28	1.19%	30-Jun-36	1.25%
30-Sep-21	0.50%	31-Mar-29	1.19%	30-Sep-36	1.25%
31-Dec-21	0.50%	30-Jun-29	1.25%	31-Dec-36	1.25%
31-Mar-22	0.50%	30-Sep-29	1.25%	31-Mar-37	1.25%
30-Jun-22	0.50%	31-Dec-29	1.25%	30-Jun-37	1.25%
30-Sep-22	0.50%	31-Mar-30	1.25%	30-Sep-37	1.25%
31-Dec-22	0.50%	30-Jun-30	1.25%	31-Dec-37	1.25%
31-Mar-23	0.50%	30-Sep-30	1.25%	31-Mar-38	1.25%
30-Jun-23	0.50%	31-Dec-30	1.25%	30-Jun-38	1.25%
30-Sep-23	0.50%	31-Mar-31	1.25%	30-Sep-38	1.25%
31-Dec-23	0.50%	30-Jun-31	1.25%	31-Dec-38	1.25%
31-Mar-24	0.50%	30-Sep-31	1.25%	31-Mar-39	1.25%
30-Jun-24	0.94%	31-Dec-31	1.25%	30-Jun-39	1.25%
30-Sep-24	0.94%	31-Mar-32	1.25%	30-Sep-39	1.25%
31-Dec-24	0.94%	30-Jun-32	1.25%	31-Dec-39	1.25%
31-Mar-25	0.94%	30-Sep-32	1.25%	31-Mar-40	1.25%
30-Jun-25	1.06%	31-Dec-32	1.25%	30-Jun-40	1.25%
30-Sep-25	1.06%	31-Mar-33	1.25%	30-Sep-40	1.25%
31-Dec-25	1.06%	30-Jun-33	1.25%	31-Dec-40	1.25%
31-Mar-26	1.06%	30-Sep-33	1.25%	31-Mar-41	1.25%
30-Jun-26	1.13%	31-Dec-33	1.25%	30-Jun-41	1.25%
30-Sep-26	1.13%	31-Mar-34	1.25%	30-Sep-41	1.25%
31-Dec-26	1.13%	30-Jun-34	1.25%	31-Dec-41	1.25%
31-Mar-27	1.13%	30-Sep-34	1.25%	31-Mar-42	1.25%
30-Jun-27	1.13%	31-Dec-34	1.25%	30-Jun-42	1.75%
30-Sep-27	1.13%	31-Mar-35	1.25%	30-Sep-42	1.75%
31-Dec-27	1.13%	30-Jun-35	1.25%	31-Dec-42	1.75%
31-Mar-28	1.13%	30-Sep-35	1.25%		
30-Jun-28	1.19%	31-Dec-35	1.25%		

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Additionally, the restructured package also envisaged certain pre-requisites to be fulfilled as given in Annexure -I to the sanction letter *ibid*, which include a condition to get a favourable tariff order from the WESERC, which forms the basis of the restructured plan. This had to be dove-tailed with a guaranteed output from the project,

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which is the central pivot on which the entire restructured plan is supposed to be a workable proposition. This ostensibly has not happened and hence the present situation. Be that as it may, the restructured plan is indeed a revised set of terms and conditions and a new financial contract complete with the details of the money lent and the manner of its repayment alongwith mode and manner of securitisation thereof by virtue of mortgage and/or issuance of OCDs etc. The terms and conditions as well as the sanction letter does not provide that in case of the failure of the repayment plan, the date of default shall be reckoned from a date prior to the sanction of the plan. It does not have a pre-empting or a remedial clause to that effect. Thus, the date of default cannot now be assumed to be outside this restructured plan.

Date	Principal	Interest
31 st March, 2021	28.37 Crores	77.81 Crores
30 th June, 2021	7.09 Crores	38.09 Crores
30 th September, 2021	7.09 Crores	38.32 Crores
31 st December, 2021	7.09 Crores	38.12 Crores
31 st March, 2022	7.09 Crores	37.10 Crores
30 th June, 2022	7.09 Crores	37.32 Crores
30 th September, 2022	7.09 Crores	37.53 Crores
Total	70.91 Crores	304.29 Crores

In the supplementary affidavit filed by the Corporate Debtor it has been affirmed that against the requirement of repayment above, the following payment have been made in the manner shown herein:

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Date	Amount
24 th December, 2021	50 Crores
12 th July, 2022	50 Crores
13 th September, 2022	50 Crores
22 nd September, 2022	20 Crores
Total	170 Crores

From the above two tables it is evident that the Corporate Debtor has made a payment of 170 Crore till 22nd September 2022 as against the total requirement of Rs 375.2 Crore. The important part however is that the first payment of Rs.50 Crore was made on 24th of December 2021, whereas it was supposed to be made by 31st March 2021 as per the revised sanctioned letter (supra). The default can thus be seen to have taken place on 31st March 2021 itself, which is outside the 10A period, though by a whisker. Even though the Corporate Debtor, by way of supplementary affidavits and also by way of the averments in the petition has sought to establish that he has made sizeable payments and also that it is financially a solvent company, the fact remains that the default has been committed in payment of the very first instalment of debt and interest that fell due even in terms of the revised restructuring plan of REC. It would be pertinent to extract here the definition of Debt and default as envisaged in the Code.

Section 3

*(12) "default" means non-payment of debt when whole or **any part or instalment** of the amount of debt has become due and payable and is not 1[paid] by the debtor or the corporate debtor, as the case may be;*

Thus, the argument of the Corporate Debtor that it has already made substantial payments to the Financial Creditor is of no consequence, as even if a part remains unpaid on the due date of payment, it would constitute a default. This fact unambiguously emerges from the discussion above that the Corporate Debtor is in default of repayment as per the re-structuring plan sanctioned by the Financial Creditor, with the provisions of Section 10A not coming to his aid

to escape the clutch of IBC. It has been contended that the onus of getting the pre-condition fulfilled was not only on the debtor but was also on the financial creditors as well as the WBSERC. In this context the judgment of Hon'ble High Court of Calcutta, in the matter of Appeal filed by the Corporate Debtor against the order of single bench on its writ petition, is of significance since it also directs the R3 & R4 to sort out and address the issue of Tariff order, that being the central to the restructuring plan. It has been *inter-alia* held as follows:

*In the backdrop of the above, discussion, this Court directs as follows:
II.R3 and R4 to address the Tariff Order dated 31st of May 2021 along with the extent of fulfilment of pre-conditions outlined in the said Consortium Meeting dated 17th February 2021 in a second consortium meeting with the Appellant No.1/ the Company, without prejudice to their respective rights and legal options”.*

The issue then would be whether it is incumbent upon this Adjudicating Authority to go into the nitty gritty of finding out as to what were the factors that were responsible for creating a situation leading to the default. However, the issue is no longer res-integra, and in this regard we rely on para 15 of the Judgement of Hon'ble NCLAT in the matter of **SBI v. N.S. Engineering Projects** delivered in **CA(AT)(Insolvency) 978, 1000 and 1039 of 2022**, which is reproduced below:

15. The Hon'ble Supreme Court has had occasion to examine the contours of Section 7 Application. The Hon'ble Supreme Court in Innoventive Industries Limited vs. ICICI Bank and Anr.- (2018) 1 SCC 407 had noted the Scheme of Section 7 of the Code and also contrasted it with the Scheme under Section 8 and 9. Paragraphs 28 and 29 of the judgment of the Hon'ble Supreme Court is as follows:

“28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the Explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor — it need not be a debt owed to the applicant

financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in Part II, particulars of the proposed interim resolution professional in Part III, particulars of the financial debt in Part IV and documents, records and evidence of default in Part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the “debt”, which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be. 29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate

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debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing—i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code”.

Further in Para 16 of the same judgement, it has been inter-alia mentioned that :

16. The Hon’ble Supreme Court in the above case has observed that the moment Adjudicating Authority is satisfied that default has occurred, the Application must be admitted, unless it is incomplete.

17. In view of the above facts and circumstances, we are satisfied that the present petition made by the Financial Creditor is complete in all respects as required by law. The Petition establishes that the Corporate Debtor is in default of a debt due and payable and that the default is more than the minimum amount stipulated under section 4 (1) of the Code, stipulated at the relevant point of time.

18. Accordingly, it is, hereby ordered as follows:-

- (a) The application bearing CP (IB) No. 138/KB/2021 filed by REC Limited, the Financial Creditor, under section 7 of the Code read with rule 4(1) of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 for initiating CIRP against **Hiranmaye Energy Limited**, the Corporate Debtor herein, is *admitted*.
- (b) There shall be a moratorium under section 14 of the IBC.
- (c) The moratorium shall have effect from the date of this order till the completion of the CIRP or until this Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 of the IBC or passes an order for liquidation of Corporate Debtor under section 33 of the IBC, as the case may be.

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- (d) Public announcement of the CIRP shall be made immediately as specified under section 13 of the Code read with regulation 6 of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- (e) **Mr. Bhuvan Madan**, registration number **IBBI/IPA-001/IP-P01004/2017-2018**, email: **madan.bhuvan@gmail.com** is hereby appointed as Interim Resolution Professional (IRP) of the Corporate Debtor to carry out the functions as per the Code subject to submission of a valid Authorisation of Assignment in terms of regulation 7A of the Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016. The fee payable to IRP or the RP, as the case may be, shall be compliant with such Regulations, Circulars and Directions as may be issued by the Insolvency & Bankruptcy Board of India (IBBI). The IRP shall carry out his functions as contemplated by sections 15, 17, 18, 19, 20 and 21 of the Code.
- (f) During the CIRP period, the management of the Corporate Debtor shall vest in the IRP or the RP, as the case may be, in terms of section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish information in their knowledge to the IRP within one week from the date of receipt of this Order, in default of which coercive steps will follow. No separate notice for cooperation by the suspended management should be expected.
- (g) The IRP/RP shall submit to this Adjudicating Authority periodical report with regard to the progress of the CIRP in respect of the Corporate Debtor.
- (h) The Financial Creditor shall deposit a sum of **Rs.4,00,000/- (Rupees Four Lakh only)** with the IRP to meet the expenses arising out of issuing public notice and inviting & processing claims. These expenses are subject to approval by the Committee of Creditors (CoC).
- (i) In terms of section 7(5)(a) of the Code, Court Officer of this Court is hereby directed to communicate this Order to the Financial Creditor, the Corporate Debtor and the IRP by Speed Post and email immediately, and in any case, not later than two days from the date of this Order.

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(j) Additionally, the Financial Creditor shall serve a copy of this Order on the IRP and on the Registrar of Companies, West Bengal, Kolkata by all available means for updating the Master Data of the Corporate Debtor. The said Registrar of Companies shall send a compliance report in this regard to the Registry of this Court within seven days from the date of receipt of a copy of this order.

19. In light of the above **I.A. (IB) No. 1020/KB/2022 and I.A. (IB) No. 828/KB/2023** are hereby **dismissed**.

20. **CP (IB) No. 138/KB/2021** to come up on **02-02-2024** for filing the periodical report. Consequently, **IA. (IB) No. 1946/KB/2023**, which is an I.A. filed by the Financial Creditor for early pronouncement of order is hereby dismissed as infructuous.

21. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.

22. Certified copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

23. File be consigned to the record.

Balraj Joshi
Member (Technical)

Rohit Kapoor
Member (Judicial)

Order signed on the 2nd day of January 2024.

GGRB_LRA