SL. No.1

NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH
COURT HALL NO: II

(PHYSICAL HEARING)

CORAM: JUSTICE TELAPROLU RAJANI – HON'BLE MEMBER (J)
CORAM: SHRI CHARAN SINGH - HON'BLE MEMBER (T)

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL, HYDERABAD BENCH, HELD ON 23.01.2023 AT 02:30 PM

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	**IA (IBC)/37/2023 in CP (IB) No.184/7/HDB/2019**
NAME OF THE COMPANY	**Meenakshi Energy Ltd**
NAME OF THE PETITIONER(S)	**State Bank of India**
NAME OF THE RESPONDENT(S)	**Meenakshi Energy Ltd**
UNDER SECTION	**7 of IBC**

ORDER

This application is dismissed, vide separate order.

Sd/-
MEMBER (T)

Sd/-
MEMBER (J)

IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH – II

IA No.37/2023 in
CP(IB) No. 184/7/HDB/2019
U/s. 60(5) of IB Code, 2016

In the matter of:

M/s. Consortium of Prudent ARC Ltd. &
M/s. Vizag Minerals & Logistics Pvt. Ltd.
Represented by Mr. Chandan Sau, Director

.... Applicant

Vs.

1. Mr. Ravi Sankar Devarakonda
   Resolution Professional of
   M/s.Meenakshi Energy Ltd.
   The Skyview 10, 18th Floor, Zone-A
   Survey No.83/1, Raidurgam
   Hyderabad – 500 008

....Respondent No.1

2. Committee of Creditors of Meenakshi Energy Ltd.
   Through its Lead Lender
   State Bank of India
   Havings its Office at
   Resolution Group, 21st Floor
   Maker Tower 'E', Cuffe Parade
   Mumbai – 400 005

....Respondent No.2

Date of Order: 23.01.2023

CORAM:

Hon'ble Justice Smt. Telaprolu Rajani, Member (Judicial)
Hon'ble Shri Charan Singh, Member (Technical)

Counsels present:

For the Applicant : Mr. S. Niranjan Reddy, Senior Advocate
For the RP : Mr. S. Ravi, Senior Advocate
For the CoC : Mr. Vivek Reddy, Senior Advocate

Heard on : 16.01.2023

[PER: BENCH]

ORDER

I. This application is filed by the Applicant M/s. Consortium of Prudent ARC Ltd. against the Resolution Professional of M/s. Meenakshi Energy Ltd. and Others, seeking to restrain the Respondents from proceeding with the Challenge Process and to direct Respondent Nos.1 & 2 to accept the Resolution Plan as submitted on 28.10.2022 and to restrain Respondent No.1 from considering all the Resolution Plans submitted after 28.10.2022.

II. The grounds on which the above prayer is based, are as follows:

i. The Respondent owns a 1000 MW thermal power and was incorporated on 21.08.1996. Presently, it has a capacity of 300 MW, out of which it has been supplying 200 MW electricity to Bangladesh Power Development Board (BPDB) through PTC India Ltd which had entered into a Power Purchase Agreement dated 29.10.2018 with Meenakshi Energy Limited (MEL). MEL has availed term loan and working Capital facilities from time-to-time from a consortium of lenders including State Bank of India (SBI), State Bank of Hyderabad, State Bank of Bikaner and Jaipur, State Bank of Mysore and State Bank of Travancore, in two different phases, to set up a 300 MW coal based power project and 700 MW coal based thermal power project respectively,

in terms of Common Loan Agreement dated 10.07.2009 and 01.10.2010 respectively. On account of default of M/s.Meenakshi Energy Ltd. to pay its alleged financial debt, an application on u/s 7 was moved by the SBI which was admitted and CIRP was ordered against the Corporate Debtor. Respondent No.1 was appointed as Interim Resolution Professional and later he was confirmed as Resolution Professional by the CoC on 05.12.2019. After inviting Expression of Interest (EoI) to which the Applicant submitted Expression of Interest (EoI) on 21.02.2020, Respondent No.1 prepared a final list of Prospective Resolution Applicants (PRA) on 23.03.2020. But due to onset of COVID-19, Respondent No.1 lost considerable time and sought for extension from the Adjudicating Authority which granted extension of time till 25.3.2020. Again Respondent No.1 approached the Adjudicating Authority for exclusion of lock-down period. Respondent No.1 filed an application seeking 2nd extension of CIRP period since 275 days have expired and in the meantime, he circulated the request for Resolution Plan dated 29.10.2020 as per the provisions of IBC. CIRP period was extended for 60 days. Again an extension of 60 days was sought for and granted, with a condition that since the NCLT mandated completion of CIRP in a period of 330 days, failing completion, liquidation process would be initiated, Respondent No.1 filed an appeal before the NCLAT. But, the appeal was not entertained on the ground of bid being pre-mature. But, it directed the

Adjudicating Authority to take-up IA 120 of 2021 and dispose of the same on merits.

ii. After extension of CIRP period on the basis of the revised value of the Corporate Debtor due to expiry of PPA with Bangladesh Power Development Board, Respondent No.1 got Form G reissued on 25.01.2021 in furtherance of original Form G, it was earlier published on 21.01.2020. As per the said invitation of EoI, a final list of Resolution Applicants was drawn on 08.02.2020 and the Prospective Resolution Applicants (PRAs) were to submit their Resolution Plans on or before 8.3.2021. The Successful Resolution Plan was to be submitted before the Adjudicating Authority on 09.03.2021 for approval. In compliance with the same, the Applicant submitted its Resolution Plan on 06.03.2021, before the last day of 330 days of CIRP period. Additionally, the Applicant also made an E&D deposit. When his plan was placed before the CoC, Respondent No.1 highlighted certain discrepancies and requested the Applicant to provide certain supporting documents to perform due diligence. Respondent No.1 requested the Applicant to submit an excel model version of financial projections in relation to the Resolution Plan which were complied with by the Applicant. In the meantime, the PTC India Ltd issued Demand Notice to Respondent No.1 stating that supply from the project was highly unreliable and near complete shutdown of supply for about a month. After several deliberations between Respondent No.1 and the Applicant, the Applicant finally submitted a revised offer to

meet the needs of the CoC. Consideration of additional Resolution Plan by the CoC was done after the details of the Resolution Plan submitted by the Applicant was disclosed and deliberated with the CoC. Aggrieved by the same, the Applicant filed IA No.244 of 2021 before the Adjudicating Authority which was decided in favour of the Applicant, directing Respondent No.1 to consider only the Resolution Plan prior to the last extension of CIRP time line. Instead of complying with the said Order, Respondent preferred an appeal, which was dismissed. Pursuant to the directions of the NCLAT, Respondent No.1 intimated the Applicant to submit the signed Compliant Resolution Plan on or before 10.11.2021. The Applicant requested for 10 days' time. Thereafter, Respondent No.1 intimated that the last date of submission was 17.11.2021 and that the last submitted Plan was not compliant in terms of the Order in Ebix Singapore Private Ltd case. He also intimated that if the revised compliant plan was not received by the said date, they would not be able to put the Plan before the CoC. The Applicant requested for further time till 20.11.2021 on which date, the Applicant submitted the revised financial proposal by way of addendum "C" to the Resolution Plan.

iii. The addendum was submitted due to;

1. drastic change in the financial assumptions
2. increase in coal prices
3. the power plant being shut down during CIRP
4. change in the Management of the coal operator.

iv. During pendency of submission and approval of the Resolution Plans, the Power Purchase Agreement dated 29.10.2018 with M/s. Meenakshi was terminated by Bangladesh Power Development Board. The said termination was not brought to the knowledge of the Adjudicating Authority for ensuring that Bangladesh PPA is not cancelled and the CD is kept running as a going concern. Bangladesh PPA was the Corporate Debtor's sole contract. The same was not brought to the notice of the Adjudicating Authority. The Applicant submitted a revised financial proposal dated 09.12.2021 by way of addendum "D" to the Resolution Plan. The Respondent delayed approval of the Resolution Plan by failing to place the available plans for voting and approval, pursuant to the Order dated 25.10.2021. Instead of approaching this Tribunal to prevent the cancellation of Bangladesh PPA, Respondent No.1 chose to file Section 9 petition against the termination notice which was dismissed by the Hon'ble High Court of Delhi. It was informed to the Applicant only on 18.01.2022. Respondent No.1 preferred an application seeking for extension of CIRP period which was extended for 45 days with a condition that failing completion liquidation of the CD would be initiated.

v. In view of the power crisis faced by the Country, the Central Government has taken steps to the effect of the invocation of Section 11 of Electricity Act, 2003 by the Ministry of Power. Directions were issued on 06.05.2022, as per which Respondent No.1 was to continue to supply power until

31.10.2022. In view of the fact that CIRP period was coming to an end, Respondent No.1 moved an application seeking extension and also seeking permission to rerun the EOI expression of interest process and invite Resolution Plans from interested Resolution Applicants as there were currently no Resolution Plans pending consideration before the COC and rerunning of the EoI process would be for the benefit of all the stakeholders of the CD. This was wrongly represented to the Adjudicating Authority and there was already an existing viable Plan which has been submitted by the Applicant. As per Order dated 25.10.2021, passed by the NCLAT, Chennai, R1 & R2 were directed to discuss and finalise the approval of the plan as submitted by the Applicant. The Adjudicating Authority allowed the same and CIRP was extended for 60 days and Respondent No.1 was also allowed to restart the bidding process by publishing fresh Form G EoI. Accordingly, Respondent No.1 republished Form G fixing 29.08.2022 as the last date for submission of Resolution Plan. Pursuant to it, 3 PRAs submitted their plans who are Jindal Power Limited, Vedanta Limited and the Applicant. A negotiation-cum-discussion was held, post which, Resolution Applicants were asked to resubmit their plans.

vi. In view of the fact that extension granted by the Adjudicating Authority was coming to an end on 12.09.2022, Respondent No.1 moved another application seeking 90 days extension in

order to maximize the value of the assets of the CD. However only 60 days was granted as extension.

vii. Pursuant to the negotiations held earlier and subsequent to the revised bid submission from all three Resolution Applicants, RP, along with the major CoC members, held a further round of negotiations with the Resolution Applicants and final bids were submitted on 28.10.2022. Thus, two rounds of negotiations were completed. The Applicant submitted his Resolution Plan on 29.08.2022. Thereafter, basis a review of the original plan by the Respondents, the Applicant was provided with comments from the advices of the Resolution Professional and the CoC, for incorporation of changes to the Applicant's original plan inter-alia for a commercial prospective. The Applicant was also invited for discussions. Pursuant to various rounds of discussions on 06.09.2022 and 12.10.2022, the Applicant submitted a revised plan on 28.10.2022. Vedanta Limited further revised its plan by way of an addendum on 27.12.2022 contrary to the provisions of the Code. The revision of its plan by Vedanta was its 2nd revision, contrary to the Regulation 39(1A) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Contrary to the provisions of the Code and Regulations, the CoC decided to carry out the challenge process and a note was issued providing opportunity to the Resolution Applicants. Challenge bids were offered by the other Resolution Applicants. The Resolution Professional can either allow revision/

modification of the Resolution Plans not more than once or can employ a challenge mechanism. The rule is mandatory in nature having been couched in negative language. Respondent No.1 cannot permit more than one modification in the Resolution Plan and is duty bound to reject any process which is non-compliant with the said Regulations. The previous Plan of the Applicant was rejected and a fresh Form G was issued only after the entire Country started facing a power crisis and the Ministry of Power asked all the shut-down Power Plants to start operating. The present process also smacks of mala fide and bias.

viii. Vide email dated 04.01.2023, one of the partners of the Applicant consortium protested against the challenge process. Its partner however sought for extension of time. Notwithstanding the inherent competition, the challenge process is invalid in Law. Respondent No.1 vide an email dated 04.01.2023 decided to proceed ahead with the challenge process. Hence this application with the above mentioned prayers.

III. Respondents filed separate counters. In the counter filed by the 1st Respondent, Resolution Professional, it is contended as follows:

i. The prayers made by the Applicant are untenable.

ii. Prayer No.1 is rendered infructuous, as challenge process is already concluded and the voting on the Resolution Plans has commenced from 06.01.2023.

iii. The 2nd prayer is beyond the scope of this Tribunal, since the Code does not permit the Tribunal to give a direction to accept a particular Resolution Plan. However, the 2nd prayer is not pressed by the Respondents, hence need not be granted.

iv. Prudent ARC Limited has been communicating on behalf of the Applicant, but the present application has been filed by Vizag Minerals & Logistics. Further, Prudent vide its e-mail dated 3.1.2023 informed R1 about its intention to participate in the challenge process which is a stand contrary to the one taken by the Applicant. Prudent holds 80% majority control of the Applicant Consortium whereas Vizag holds only 20%. Hence, the Application is not maintainable by Vizag.

v. The Applicant has not submitted that the reason for submitting the revised Resolution Plan was because the earlier Resolution Plan was conditional. In the light of the judgement of the Hon'ble Supreme Court in Ebix Singapore Private Limited, the plans submitted were rendered non-compliant, hence the Applicant was required to submit the revised Plan. The Applicant submitted an unsigned copy of the revised Resolution Plan as an addendum at 12.40 p.m. The Applicant submitted that Respondent No.1 delayed approval of its Resolution Plan by failing to immediately place before Respondent No.2 for voting. As the Resolution Plan

submitted by the Applicant was non-compliant, Respondent No.1 could not place it before Respondent No.2 for voting. In order to give a fair and equal chance to both the Resolution Applicants, Respondent No.2 provided time until 09.12.2021.

vi. The NCLAT Order only directed R1 & R2 to discuss and vote upon the Plans submitted before the expiry of 330 day period, which was done. The applicant has admitted that its Resolution Plan dated 09.12.2021 has been rejected by Respondent No.2.

vii. The background facts leading to the present application are stated as follows:

1. The CIRP commenced on 07.11.2019. Thereafter it was being extended from time-to-time. Due to severe power crunch in India, on 05.05.2022, the Ministry of Power (MoP) issued a direction u/s 11 of the Electricity Act, 2003 to all imported coal-based Power Plants to generate power to their full capacity. It also mandated the Resolution Professional of imported coal-based Power Plants, which are undergoing CIRP, to take steps to make such plants operational. In all to comply with the same, Respondent No.1 needed to restart the Power Plant of the CD for which extension was needed. The CD's Power Plant was in operation till 29.07.2021 but was forced to shut-down due to unprecedented increase in the price of imported coal. In view of the mandate of the MoP, R1 filed application for

extension of CIRP period, which was allowed. The Tribunal also allowed the CD to restart the bidding process of the CD. The time lines for invitation of EoI were discussed in the 35th CoC meeting. R1 issued Request for Resolution Plan dated 10.08.2020 (RFRP). As per Clause 11 of the RFRP, the last date for submission of the Resolution Plan was 29.08.2022, but the same was extended. On 29.08.2022, the Resolution Plans were received by Respondent No.2 from Vedanta Ltd, Jindal Power Ltd and the Applicant. The Vedanta had bid an amount of Rs.600 crores (NPV of Rs.472 crores), Jindal bid an amount of Rs.1008 crores (NPV of Rs.661 cores) and the Applicant bid an amount of Rs.1360 crores (NPV of Rs.817 crores). In order to consider the plans, further extension of the CIRP period was done by 60 days. Discussions with regard to improvement of plan value took place. R1 received revised signed plans from each of the Resolution Applicants on 28.10.2022, which were circulated to the CoC Members. Vedanta bid a revised amount of Rs.650 crores (NPV of 509 crores), Jindal bid a revised amount of Rs.1269 crores (NPV of 820 crores) and Prudent bid a revised amount of 1790 crores (NPV of 1086 crores). The CoC members sought for certain clarifications from the RAs. Further extension of time was sought for by R1 which was allowed. On 21.12.2021 one Mr. Amarjeet Kochar from Prudent sent an email to the Resolution Professional stating that the Applicant intends to modify its plan to include an alternate structure for a partial

assignment of debt to Prudent. Vedanta submitted an improved offer by way of an addendum and informed that it improved its financial bid from Rs.650 crores to Rs.1440 crores. The same was not considered by R1 & R2. The Applicant consortium issued an undertaking stating that it is submitted after being satisfied with the terms provided in the RFRP. Respondent No.1 sent an email requesting the Applicant to submit the alternate structure as an addendum to its Resolution Plan. If it was not the intention of R1 & R2 to consider the Applicant's plan, then they would not have asked to revise the Applicant's plan.

2. R2 in its 43rd meeting held on 29.12.2022, by a majority of 99.18% resolved to undertake the Challenge Process for value maximization and R1 was directed to run the Challenge Process on 03.01.2023. R2 approved the Challenge Process Note on 31.12.2022. The Resolution Applicants were appraised of the same vide email dated 01.01.2023.

3. Prudent and Jindal sent emails dated 03.01.2023 requesting R1 to reschedule the Challenge Process. Jindal requested for an extension of one day, while Prudent requested for an extension of one week. It also expressed that it would participate in the Challenge Process. However, it could not do so, as its concerned higher management was not available, to participate in the process. Vedanta and Jindal submitted their addendum

and amended financial proposals on 04.01.2023. Vizag, one of the partners of the Applicant consortium, sent an email dated 04.01.2023 to Respondent No.1 protesting the Challenge Process. Prudent sent an email stating that the Challenge Process has to be withdrawn on the grounds that R1 cannot allow modification of Resolution Plan more than once. During the Challenge Process, Vedanta revised the bid amount of Rs.1440 crores (NPV of Rs.1143 crores), Jindal revised the bid amount of Rs.1344 crores (NPV of Rs.860 crores). The Applicant did not submit the revised bid. In view of the same, the previous bid of the Applicant would be considered.

4. Vizag sent an email at 11.02 AM to R1 informing that it does not intend to participate in the Challenge Process. R1 requested the Applicant consortium to join the meeting stating that the Challenge Process was rescheduled on its request. In the 44th CoC meeting, it was decided that the voting lines would be opened on 06.01.2023.

5. The objective of the Code is value maximization of the Corporate Debtor which is evident from the preamble of the Code. The Hon'ble Supreme Court has time and again upheld the said principle. The Legislature has consciously not provided any ground to challenge the commercial wisdom of the individual financial creditors or their collective decision and the decision of CoC commercial wisdom is made non-justiciable. Code does not provide

any vested right to the Prospective Resolution Applicants to challenge any aspect of the CIRP before the approval of Resolution Plan by R2. Hence, R2 is free to take any decision for value maximization of the Corporate Debtor. The decision to run the Challenge Process was not taken solely by R1, R2, by majority of 99.18% resolved the same. The contention of the Applicant is that the word `or' in Regulation 39(1A) has to be given its literal meaning and R1 & R2 can either ask modifications/revisions to the plans or undertake the challenge process. If the said interpretation is accepted, it would be in teeth of the objectives of the Code as it would restrict the CoC from achieving the objective of value maximization. In any case, Regulation 39(1A) would only be applicable to the Resolution Professional and not to the CoC, as held by the NCLT Bench, Chennai in the case of ***M.K. Rajagopala Vs. Rajendran Shanmugam & Another.***

6. Procedural law is always subservient to the substantive law and what is given by the substantive law cannot be taken away by the procedural law. NPV of all the 3 Resolution Plans prior to running the Challenge Process was below the liquidation value of Rs.1100 crores. It was only after running the challenge process, that R2 was offered a Resolution Plan where the NPV was more than the liquidation value. However, CoC and its members are under no obligation to oblige the Resolution Applicants or any other person to approve a Resolution Plan which

might have scored the highest as per the evaluation criteria and the Resolution Plan shall be voted upon by CoC for approval, solely on the basis of the CoCs commercial wisdom and taking into account the feasibility and viability of each of the Resolution Plans as well as other factors.

7. The present application is filed at a premature stage as the Applicant can challenge the same at the stage of approval of the Resolution Plan. Respondent No.1 by way of memos had appraised this Tribunal about the termination of the PPA and steps taken by R1 to challenge the termination of PPA. Hence, the allegation that R1 did not inform the Tribunal about the termination of PPA is baseless.

8. It is evident from Clause 1.17 of RFRP that it provides for challenge process. Regulation 39(1A) is not applicable to Respondent No.2. Hence, the application is liable to be dismissed.

IV. Respondent No.2 CoC has filed a separate Counter. In its counter, it made almost the same contentions as that of the 1st Respondent. It further, contended that according to the judgement of the ***Hon'ble Supreme Court in the case of Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta***, the challenge for the Resolution process can be made;

a. At the stage when the Resolution Plans turned down at the threshold u/s 30(2)

b. At the stage where the Resolution Professional has presented a Resolution Plan to the CoC for its approval but the CoC does not approve such Plan after considering its feasibility and viability and

c. The CoC approves the Resolution Plan.

The reliance placed by the Applicant on the NCLAT order dated 25.10.2021 is misplaced, as the issue in those proceedings was with respect to the plans being considered after the expiry of the CIRP, which is not in the present case. As regards Regulation 39(1A) the word "or" occurring in the said Regulation cannot be given literal interpretation to make one of the two, as the same would not be in line with the value maximization. The observations of the Hon'ble Supreme Court in the case of Jayalalitha Vs. Union of India & Another (1999) File Sec 138 would support the above contention.

On the above grounds, the Respondent No.2 also seeks to dismiss the application.

V. Heard the arguments of Senior Counsel, Mr. S. Niranjan Reddy for the Applicant, Senior Counsel Mr. S. Ravi for the Resolution Professional and Senior Counsel Mr. Vivek Reddy for CoC and perused the written submissions filed on behalf of all the parties.

VI. The fore most contention made by the Counsel for the Applicant is with regard to the restriction incorporated under Regulation 39(1A) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Hence the same is taken as the first point for consideration.

1. Whether the word "Or" in Regulation 39 (1A) would mean as an alternative or can the word "or" be read as "And".

i. The said Regulation is extracted hereunder for ready reference:

(Clause 1A also to be extracted)

a. allow modification of the resolution plan received under sub-regulation (1), but not more than once; or

b. use a challenge mechanism to enable resolution applicants to improve their plans.

ii. According to the Counsel for the Applicant it is clear from the above Regulation that, for improvements in Resolution Plans from a value maximization perspective, the Resolution Professional can either allow revision/modification of Resolution Plans "not more than once" or can employ "a challenge mechanism". He contends that the language employed in the above said Regulation is crystal clear that the Resolution Professional can allow one avenue of improvement only in the financial proposal to the Resolution Applicant, either by way of modification or by employing a

challenge mechanism. He emphasizes that the word "or" used in the above Regulation cannot be read as "and" as that would result in the elongation of the CIR Process which will be contrary to the object of completing the insolvency process in a timely manner. He relies on the judgement of NCLT, Chennai in support of his contention. He also submits that the Regulation does not only bind the Resolution Professional but also the CoC, as exercise of both options would be contrary to the CIRP Regulations.

iii. On the other hand, the Counsel for the Respondents argues that the above Regulation is applicable to the Resolution Professional and not to the CoC and the decision to undertake the Challenge Process in this case among all the Resolution Applicants was taken by the CoC by a majority of 99.18% during its 43rd meeting held on 29.12.2022. They also relied on the same ***judgement of the NCLT, Chennai dated 28.09.2022 in "M.K. Rajagopala Vs. Rajendran Shanmugam & Anr (IA No.507 of 2022 in IA No.288 of 2022 in CP (IB) No.1 of 2017)"*** in support of their contention. The Counsel contends that Clause 1.17 of RFRP empowers the CoC to negotiate the terms of the Resolution Plans with the Resolution Applicants, including but not limited to determine the mechanism of such negotiations and also request the Resolution Applicants to resubmit the revised proposals on the basis of the discussions and negotiations. Under the RFRP the CoC gave to itself the power to "undertake simultaneous negotiations with various qualified Applicants

and/or adopt any other process of negotiation as they may deem appropriate, for maximization of value of the stakeholders in a time bound manner including, without limitation, open auction, Swiss challenge etc". They contend that Clause 1.17 is inclusive and not exhaustive and it empowers the CoC to adopt the process of negotiation as it deems appropriate, including but not limited to open bidding. Their further contention is that the power under this Regulation is subject to it being envisaged in the RFRP. Hence, if RFRP allows, both the methods mentioned under the Regulation can be exercised by the Resolution Professional.

iv. We have thoroughly gone through the judgment. The judgement of NCLT in the case of ***M.K. Rajagopala Vs. Rajendran Shanmugam & Another,*** has in fact primarily dealt with the question whether Regulation 39(1A) is applicable to the case therein, as it came into effect only from 30.09.2021, whereas, Form G and RFRP in the said case were issued by the Resolution Professional as earlier as on 28.06.2021 and 03.08.2021 respectively which dates are prior to the Regulation coming into effect. The said judgment is only in the context of allowing the revision of the Plan only once and not in the context of allowing both revision and challenge process in a single CIR Process. In that background of facts, NCLT Chennai held that the said Regulation does not apply to the case therein. But, however it also made an observation with regard to the contention of the Senior

Counsel made therein that there is no limit fixed on the CoC to seek improvement of the Resolution Plan and held that the said contention is tenable. It would be beneficial to look at the language of the said Regulation. It is a discretion vested in the Resolution Professional which can be understood from the word "May" used therein. The pre condition for the Resolution Professional is that the two modes should in the first place be envisaged in the RFRP. Hence, the word "or" used in Regulation 39(1A) does not put a restriction on the envisaging of the said methods in the Resolution Plan. If the same is not envisaged in the Resolution Plan, the Resolution Professional would not have any opportunity of exercising the discretion given therein. Hence, when there is no such embargo and there is freedom for a Resolution Applicant to envisage both the methods in the Resolution Plan, contending that the Resolution Professional may restrict the scope of the Resolution Plan by allowing only one method would be totally against the spirit of the freedom that is given for the Resolution Applicant to envisage both the methods in the Resolution Plan. Hence, we are not inclined to read the word "or" as meaning that either the method under Clause `a' or the method under Clause `b' alone can be permitted by the Resolution Professional.

v. After having observed as above, we now would like to peruse the RFRP. It is seen that Clause 1.17 of RFRP is couched in extremely wide terms, that the CoC may negotiate with other qualified Applicants that provide the next highest bid after

the H1 bidder or undertake simultaneous negotiations with various qualified Applicants and/or adopt any other process of negotiations, as they may deem appropriate for maximization of value to the stakeholders in a time bound manner (including, without limitation, open auction, Swiss challenge etc.). It further recites that the CoC may decide the successful Applicant by way of Swiss option and further, in case more than one Applicant scores equally as per evaluation matrix, the Resolution Professional / the CoC can reserve the right to conduct Swiss auction or any methodology to decide the highest qualified Applicant. The CoC also gives to itself the power to reject all the qualified Applicants and/or Resolution Plans submitted by the qualified Applicants and thereafter call for submission of new Resolution Plans by other Prospective Applicants. Any Member of the CoC individually or along with the other Members of the CoC shall have the right to submit the Resolution Plan on its own or instruct any of his advisors to submit the Resolution Plan for the Company. It has also given to itself the right to reject all the Resolution Plans and thereafter call for submission of new Resolution Plans from other Prospective Resolution Applicants. Hence, it can be seen that the CoC has reserved to itself ample powers and left sufficient scope with regard to the mode and method in which the Resolution Plans can be received and accepted.

vi. On the facts of this case, we conclude that the Regulation 39(1A) does not restrict the CoC from invoking any of the Clauses a & b under Clause 1A of Regulation 39.

vii. So far as permitting the modification of the Resolution plan by the Resolution professional more than once is concerned, we do not see any rationale in the said rule. When the CoC is given powers to permit modifications more than once, restricting the RP from doing so seems to be illogical, since no modifications would usually be permitted by the RP without the proposal of modification being placed before the CoC. However we take the help of Chennai bench's order and hold that since it is the CoC that permitted the modification, the restriction incorporated in Regulation 39 does not fetter the modifications being made more than once.

viii. Respondents have raised a contention that the application is liable to be dismissed for want of authority to the signatory of the application to sign on the same. Hence the said aspect is taken as a second point for consideration.

2. Whether the application is bad for want of authority to the signatory of the application.

i. The Counsel for the Respondents though have not raised the contention with regard to the Authority of the person, who signed on the application, to file this application, during the argument, have taken the stand in their

Counters and also in the written arguments. They contend that the application is defective and not maintainable, as no Affidavit is accompanying the instant application, authorising any person from Vizag Minerals & Logistics Pvt. Ltd, to sign the application. The Applicant, which is shown as the Consortium of Prudent ARC Limited is not a legal or a statutory entity and therefore, the Consortium has no locus standi to file this instant application. It is further contended that the application has been filed by Consortium of Prudent ARC Ltd, but it neither executed the application nor has placed on record any Affidavit authorizing Vizag Minerals & Logistics to file the application on its behalf. Prudent ARC Ltd holds 80% majority control of the Consortium while Vizag Minerals holds only 20% control. While the Applicant in the present application has sought to restrain the challenge process, the Lead Member of the Consortium Prudent ARC Ltd vide email dated 03.01.2023 has expressed its willingness to participate in the challenge process. Prudent ARC Ltd is a single point of contact on behalf of the Consortium of the Resolution Professional of the CoC. Hence, in the light of absence of any authorization being given by Prudent ARC Ltd to Vizag Minerals & Logistics to file the application coupled with the fact that the Lead Member of Prudent ARC Ltd expressed his willingness to participate in the challenge process vide email dated 03.01.2023, the application is defective and is sought to be dismissed.

ii. As already observed, since the said argument is not made during the course of hearing, the Petitioner could not offer any answer to the said argument. But, however it is for the Office to see whether the Application is filed under proper Authority. But by oversight, the Office seems to have numbered the Application inspite of there being no authority given to Vizag Minerals & Logistics, which figured itself as the Authorised Signatory, to sign on this application.

iii. In the Expression of Interest (EoI) dated 08.08.2022 which was submitted to Mr. Ravi Sankar Devarakonda by Prudent ARC Ltd, it was mentioned that in case of bidding under Consortium, each member of the Consortium shall nominate and authorize a Lead Partner to represent and act on behalf of the Members of the Consortium. Such Lead Partner shall be the single point of contact on behalf of the Consortium with the Resolution Professional and the CoC, their Representative and Advisors in connection with all matters pertaining to the Consortium. Hence, from the above, it can be understood that there should be an authorization by each Member of the Consortium authorizing a person to represent and act on behalf of the Members of the Consortium, which glaringly is absent in this case. There is a mail by prudent expressing that they would participate in the challenge process, while on the next day of the mail by Prudent, Vizag has sent a mail taking objection to the challenge process. However it can

be seen from the mail of Vizag that the mail of Prudent was referred to. But when there are two entities in the consortium and when they are acting independently by giving mails in both the names, unless there is an authorisation in favour of the person filing this application, the application cannot be entertained. Moreover, Prudent ARC Ltd holds the major percentage in the Consortium and hence unless a specific authorization is given to Vizag Minerals & Logistics, it cannot be said that the application is filed under proper authority and consequently, the application stands to be irregular.

iv. The counsel for the applicant raises a contention with regard to the purpose of extension not being mentioned as challenge process, in the applications filed seeking for extension of time for CIRP. Hence the next point for consideration is:

3. Whether non mentioning of the challenge process as a reason for seeking extension of CIRP would come in the way of taking up the challenge process.

i. The Counsel for the Petitioner contends that the last extension of 60 days in respect of the CIR Process of the Corporate Debtor was sought on the ground of completing the revision process of Resolution Plans and for seeking clarifications from Resolution Applicants. Having sought time on this ground alone it is impermissible for the

Respondents to restart the process after receiving an unsolicited bid on 27.12.2022 which is contrary to RFRP and conduct the challenge process which is contrary to the CIRP Regulations, is the emphasised contention.

ii. The CIRP period stands extended till 23.01.2023 and there is no dispute with regard to the same. The contention that the ground mentioned in the application seeking for extension is not that the RP would be conducting a Challenge Process and hence the contention of the Counsel is that the Challenge Process cannot be taken up during the period which was extended totally on different grounds. But we are unable to accept the said contention. Though the extension was given on different grounds, the right of the CoC to make a choice, which it has, in terms of the RFRP cannot be defeated merely because the extension of CIRP period was made on different grounds. In can be seen from the record that while extending the CIRP period, this Tribunal has each time observed that it would be the last opportunity and also on few instances imposed a condition that if CIRP is not completed within the given time, the CD would be ordered for liquidation. But, however being convinced by the reasons put forth in the applications seeking for extension of CIRP period, it has extended the CIRP period. Hence, it cannot be said that the extension beyond 23.01.2023 would not be permitted inspite of the new reasons coming up for the CoC. The Law is well settled that the maximization of the value of the assets of the Corporate Debtor has to be given prime importance.

iii. Two philosophies run through the IB Code. One being the time boundedness and the other being the value maximization. The first one is to the benefit of the Creditors who are no other than primarily the CoC Members and the second is apparently for the benefit of the Corporate Debtor. But practically it is for the benefit of the CoC too, since the value maximisation of assets of the corporate debtor would consequently enure to the benefit of the creditors. When CoC itself decides to go beyond the time lines, for valid reasons, the time boundedness of the Code cannot be pitted against them to say that the maximization of the value of the assets cannot be done due to the obligation to stick to the time lines. Time lines are for the purpose of completing the CIRP, so that the creditors would be able to realize their debts without delay. But when the creditors themselves opt for extension on the basis of value maximisation of the assets, to say that they cannot do so, would be an anathema to the well-recognized, most harped upon and always upheld "Wisdom of the C0C" and would be an opinion that they cannot think about their priorities. Hence, we do not see that the grounds taken in the applications filed for extension of the CIRP period would come in the way of accepting the prayer made in this application.

iv. The next contention of the counsel for the applicant is that in the earlier round of litigation between the same parties, NCLT and NCLAT have held that the resolution plans submitted

after the time given by the Tribunal cannot be accepted and hence the same has to be applied in this case. Hence the next point that falls for our consideration is:

4. **Whether the orders of the NCLT and the NCLAT would bind this tribunal in permitting the challenge process undertaken by the RP.**

i. The Counsel for the Applicant takes us through the Orders of the NCLT & NCLAT passed in the earlier round of litigation between the same parties. It is contended that both NCLT & NCLAT have directed the Resolution Professional not to consider the Resolution Plans which are submitted beyond the period of 330 days. He seeks to apply the same principle in this case and direct the Resolution Professional to reject the Plans submitted by Vedanta. Hence, it would be beneficial to read the orders of the NCLT & NCLAT to see whether there is any direction that can be given in this case to reject the Plans submitted by Vedanta. A careful reading of the said judgments would show that the issue that was dealt with by the NCLT was whether the CoC can extend the timelines without the approval of the Adjudicating Authority. Both the NCLT & NCLAT held that the CoC does not have power to extend the timelines without the approval of the Adjudicating Authority. In that scenario, it ordered that the Resolution Plans received after the period of 330 days ie. During the period unilaterally extended by the CoC, cannot be considered by the Resolution Applicant. The ruling is

pointed on the authority of the COC to extend the time period of CIRP without the sanction of the Adjudicating authority and not that the adjudicating authority cannot extend the timelines beyond 330 days. Hence, the said judgements cannot be applied to the facts of this case where, the time is already extended by the Adjudicating Authority till 23.01.2023.

ii. The other plea taken by the Applicant on the basis of the above orders is that the fidelity and the confidentiality of the Resolution Plans are violated when the same is shared with Vedanta and hence it has to be rejected on the said ground also. The argument is that Vedanta could not have submitted an unsolicited revised plan for higher value, if it did not have the information about the plans given by other Resolution applicants. As contended by the Respondent's Counsel, in the first place, there is no pleading to the said effect made in the application. A perusal order of the NCLAT would show that the NCLAT has considered the averment made by the 1st Respondent therein that the Resolution Plan has been disclosed to the CoC and the contents of the same have been made known to all the Creditors, pursuant to disclosing all the confidential details of the Applicant's Plan and not maintained the secrecy of fidelity / confidentiality and came to a conclusion that the Resolution Plan of Vedanta which was submitted after the due date of 330 days cannot be considered by the CoC. Hence, in view of the undisputed fact that the said averment is not made in the application and

also in view of the fact that there is no evidence to, at least prima facie, conclude that the fidelity/ confidentiality is violated, the argument of the Counsel for the Applicant has to be dismissed.

iii. The last argument is on the addendum submitted by Vedanta, revising the earlier plan. Hence the next point that has to be considered is:

5. Whether the addendum submitted by Vedanta is valid in terms of clause 9 of RFRP.

i. The Counsel for the Applicant, by relying on Clause 9 of the RFRP, contends that the Resolution Plan submitted by Vedanta by way of an addendum to the original Resolution Plan cannot be accepted. Clause 9 of RFRP no doubt recites that the Applicant cannot amend the Resolution Plan once submitted unless it is required to be done pursuant to a request for additional information / clarification sought by the Resolution Professional or the CoC or upon invitation to submit a revised Resolution Plan during the negotiation process.

ii. We are unable to read the said Clause as a mandatory rule which prohibits submission of addendum under any circumstances. It can be noted at this juncture that the Applicant has revised his Plans more than once, without being solicited by the Resolution Professional or the CoC. The applicant cannot blow both hot and cold. Clause 9 in the

RFRP can only be looked at only as a Norm incorporated to discipline the process of receiving the Resolution Plans. But, when once the said Norm is violated and ratified by the CoC, it turns to be regular and does not fall fowl of clause 9 of the RFRP.

VII. In view of the conclusions drawn under the above points, we do not demur to dismiss the application. **IA No.37/2023 in CP(IB) 184/7/HDB/2019** is accordingly dismissed.

Sd/-

(CHARAN SINGH)
MEMBER (TECHNICAL)

Sd/-

(JUSTICE TELAPROLU RAJANI)
MEMBER (JUDICIAL)

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