RELIANCE CAPITAL

Reliance Capital Limited
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February 7, 2023

BSE Limited
Phiroze Jeejeebhoy Towers,
Dalal Street, Fort,
Mumbai 400 001
BSE Scrip Code: 500111

National Stock Exchange of India Limited
Exchange Plaza, 5th Floor, Plot No. C/1,
G Block, Bandra Kurla Complex,
Bandra (East), Mumbai 400 051
NSE Scrip Symbol: RELCAPITAL

Dear Sir(s),

Ref.: Intimation under Regulation 30 of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015.

This has reference to our intimation dated December 7, 2021 regarding the initiation of corporate insolvency resolution process ("CIRP") in the case of Reliance Capital Limited ("the Company") under Section 227 read with clause (zk) of sub-section (2) of Section 239 of the Insolvency and Bankruptcy Code, 2016 (Code) and Rules 5 and 6 of the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudication Authority) Rules, 2019 ("FSP Insolvency Rules").

In continuation to our previous disclosure dated January 4, 2023, we wish to inform you that the Hon'ble National Company Law Tribunal, Mumbai Bench has disposed of Interlocutory Application ("IA") No.01 of 2023, IA No. 99 of 2023 and IA No. 150 of 2023, pursuant to its order dated February 2, 2023 and subsequently corrected by its order dated February 3, 2023. (Copy attached)

The Committee of Creditors of Reliance Capital Limited thereafter have preferred an appeal before the Hon'ble National Company Law Appellate Tribunal ("NCLAT").

The said appeal was listed before the Hon'ble NCLAT on February 7, 2023.

Kindly take the same on records.

Thanking you.

Yours faithfully,
For **Reliance Capital Limited**

NAGESWARA RAO YALAMANCHILI
Digitally signed by NAGESWARA RAO YALAMANCHILI
Date: 2023.02.07 17:15:57 +05'30'

Nageswara Rao Y
Administrator of Reliance Capital Limited

Administrator appointed in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016 read with the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudication Authority) Rules, 2019 as per the order of the Hon'ble National Company Law Tribunal bench at Mumbai dated December 6, 2021. The Administrator is acting for and on behalf of Reliance Capital Limited without any personal liability.

NATIONAL COMPANY LAW TRIBUNAL
COURT-I, MUMBAI BENCH

Item 65

IA 1/2023 IA 99/2023 IA 150/2023 in C.P. (IB)/1231(MB)2021

CORAM:

SH. SHYAM BABU GAUTAM	JUSTICE P.N. DESHMUKH (Retd.)
HON'BLE MEMBER (T)	HON'BLE MEMBER (J)

ORDER SHEET OF THE HEARING ON **03.02.2023**

NAME OF THE PARTIES: - **Reserve Bank of India V/s Reliance Capital Ltd**

Appearance (via video-conference):

For Torrent Investments Private Limited	:	Harit Lakhani i/b Shardul Amarchand Mangaldas & Co.
For the Administrator	:	Adv Rohan Kadam a/w Adv Abhishek Adke & Adv Sagar Vichare i/b Adv Abhishek Adke

Section 60(5) & 7 of the Insolvency and Bankruptcy Code, 2016

ORDER

This Company Petition is *suo moto* taken on Board for effecting Correction of minor Typographical error appeared inadvertently in the title of the common Order dt. 02.02.2023, passed in the Interlocutory Applications bearing IA Nos. 1/2023, 99/2023 & 150/2023, whereby the Respondent No. 1, is referred as "Administration" instead of "Administrator". The Bench is of the considered view that this inadvertent typographical error needs to be corrected. Accordingly, it is ordered that necessary substitution be made as above in the Original Order as well as in the Order uploaded on the Server.

Ld. Counsel for the Administrator has pointed out that in Para 83, of the said Order it is recorded that *"the CoC's interpretation on Regulation 39 (1- A) and (1-B) of the CIRP Regulations is misconceived".* Ld. Counsel for the Administrator submits that instead of "CoC's interpretation" it should be as of "Applicant's interpretation". On reading the Para as a whole, the Bench is of the considered view that this inadvertent typographical error also needs to be corrected. Necessary substitution be made as above in the Original Order as well as in the Order uploaded on the Server. Rest of the Order shall remain unaltered.

Sd/- **Sd/-**

SHYAM BABU GAUTAM
Member (Technical)

JUSTICE P.N. DESHMUKH
Member (Judicial)

Vedant Kedare

IN THE NATIONAL COMPANY LAW TRIBUNAL,

MUMBAI BENCH-I

IA No. 1/MB/C-I/2023
And
IA No. 99/MB/C-I/2023
And
IA No. 150/MB/C-I/2023

In
C.P (IB) No. 1231/MB/C-I/2021

An application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016

Filed by

In IA No. 1 of 2023

Torrent Investments Pvt. Ltd. ...Applicant

Versus

Y. Nageswara Rao, Administrator.

...Respondent

In IA No. 99 of 2023 in IA No. 1 of 2023

Torrent Investments Pvt. Ltd. ...Applicant

Versus

Y. Nageswara Rao, Administrator and Ors.

...Respondents

In IA No. 150 of 2023

IndusInd International Holding Limited.

...Applicant

Versus

Torrent Investments Pvt. Limited and Anr.

...Respondents

IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH-I

In the matter of

Reserve Bank of India

…Financial Creditor

Versus

Reliance Capital Limited.

… Corporate Debtor

Order Pronounced on: 02.02.2023

Coram:

Hon'ble Member (Judicial)	:	Justice P. N. Deshmukh (Retd.)
Hon'ble Member (Technical)	:	Mr. Shyam Babu Gautam

Appearances:

For Applicant – IA 99 in IA 1/23	:	Mr. Mukul Rohatgi, Sr Advocate, Mr. Darius Khambata and Sr. Advocate, Mr. Vikram Nankani, Sr. Advocate with Mr. Anoop Rawat, Ms. Meghana Rajadhyaksha, Vaijyant Paliwal, Mr. Karan, Mr. Sagar Dhawan, Mr. Rishabh Jaisani, Mr. Nikhil Mathur, Mr. Harit Lakhani, Mr. Ahkam Khan, Mr. Daksh Kadian and Ms. Samidha Mathur, Advocates i/b Shardul Amarchand Mangaldas & Co.
For the Applicant – IA 150	:	Navroz Seervai, Senior Counsel a/w Bhumika Batra, Shadab Jan, Parita Dave, Vidhi Dhanuka and Manthan Jhaveri i/b M/s. Shailendra Kanetkar.
For Respondent/Administrator – IA 99 in IA 1/2023	:	Sr Adv Ravi Kadam, Adv. Rohan Kadam a/w Adv. Abhishek Adke and Adv. Sagar Vichare i/b Adv. Abhishek Adke.

For R2 to R4 – IAs 99 in IA 1	: Sr. Adv. Kapil Sibal a/w Adv. Prateek Seksaria, Adv. Pooja Dhar, Adv. Piyush Mishra, Adv. Sanjeev Kumar, Adv. Anshul Sehgal, Adv. Divyanshu Jain, Adv. Rishabh Parikh, Adv. Anusha Nagarajan I/b Luthra & Luthra Law Offices India.
For the Financial Creditors	: Bhalchandra Palav a/w Aniket Dighe i/b Bhal & Co- Advocates.

ORDER

Per Coram:

1. The present Interim Application is filed by Torrent Investment Private Limited ("**Torrent**"), Resolution Applicant of the Corporate Debtor, seeking the following reliefs:

   a) *Order and declare that the Challenge Mechanism for financial bids with respect to the Corporate Debtor under the Challenge Process Note stood concluded on 21.12.2022 with the financial bid of the applicant at INR 8,640 Crores being the highest financial bid as communicated by the respondent by its email dated 21.12.2022;*

   b) *Order and direct the respondent to not consider or submit for evaluation by CoC illegally modified resolution plan of Hinduja Group or any other resolution applicants which is not in compliance with the Challenge Mechanism conducted under the Challenge Process Note read with Regulation 39 of the CIRP Regulations and/or any*

submission/proposal which is beyond/not in terms of the 4th round of the challenge Mechanism conducted under the Challenge Process Note;

c) *Order and direct the respondent to consider and submit only the bids submitted in compliance with the Challenge Mechanism and to act in compliance with the Regulation 39(1A) of the CIRP Regulations, read with the provisions of the Code and the applicable laws;*

d) *Order and direct Respondent to disclose all documents/material received pursuant to the Challenge Mechanism under the Challenge Process Note, including the minutes of meeting of CoC held on 20.12.2022 and thereafter, bids, communications/correspondence, financial bids and resolution plans of the prospective resolution applicants, and any other information relevant to the selection process of resolution applicants to the Hon'ble Tribunal;*

Brief Facts:

2. The Corporate Debtor i.e. Reliance Capital Limited was admitted into Corporate Insolvency Resolution process **("CIRP")** vide Order dated 06.12.2021 and Mr. Nageshwara Rao was appointed as the Administrator.

3. On 18.02.2022, the Administrator issued Invitation for Expression of Interest ("EOI") in terms of Section 25(2) of the Code and Regulation 36A(1) of CIRP Regulations for the purpose of submission of Resolution Plans from eligible potential Resolutions Applicants.

4. On 19.04.2022, the list of Prospective Resolution Applicants **("PRAs")** was issued which included the name of the Applicant. The list was further revised on 20.10.2022

5. Thereafter, the Administrator issued Request for Resolution Plan **("RFRP")** on 26.04.2022 in terms of Section 25(2)(h) of the Code and Regulation 36B of the CIRP Regulations inviting submissions of the Resolution Plans. The RFRP laid down the detailed terms and conditions and process to be abided by the PRA's in submissions of the Resolution Plans. Since, the value of the such bids and plans were found to be inadequate by the CoC, the RFRP was re issued basis Regulation 36B(7) of CIRP Regulation.

6. On 28.11.2022 the final Resolution Plan was submitted by the Applicant and IIHL under Option 1 in compliance with RFRP read with the Process Paper.

7. For the purpose of value maximization of the assets of the Corporate debtor, on 14.12.2022 the administrator issued the Challenge Process Note detailing the procedure for conduct of Challenge Mechanism pursuant to Regulation 39(1A) of the CIRP Regulations.

8. The Applicant on 17.12.2022 addressed a letter to the administrator seeking certain clarifications on the challenge process note, to which the

administrator vide its email dated 20.12.2022 categorically confirmed that no change in the financial proposal as finalized in the challenge mechanism will be permitted at the time of submission of revised resolution plan after the conclusion of the challenge mechanism.

9. Further, the Administrator issued the steps on 19.12.2022 for conduct of challenge mechanism. Thereafter, on 21.12.2022 the challenge mechanism was conducted, only two resolution applicants i.e. the Applicant and IndusInd International Holdings Limited **("IIHL")** participated in the Challenge Mechanism.

10. The auction commenced with minimum Threshold bid (i.e. amount required to be bid in order to continue to the next round) of INR 6,500 Crore in accordance with the Challenge Process Note on 21.12.2022. The Round 1 of the Challenge Mechanism concluded with the maximum net present value offered by one of the resolution applicants being INR 7,210 Crores. Round 2 of the Challenge Mechanism concluded with maximum net present value offered by one of the Resolution Applicants being INR 7620 Crores. Round 3 of the Challenge Mechanism concluded with maximum net present value being INR 8,550 Crores. At the end of Round 3 the highest net present value bid submitted was by the Applicant at INR 8,550 Crores. Thereafter, the Applicant participated in the fourth round

of the Challenge Mechanism and increased its net present value offer to INR 8,640 Crores. IIHL participated until the third round of challenge mechanism at INR 8110 crores.

11. An email dated 21.12.2022 (with the subject line "Conclusion of the Challenge Mechanism") was also circulated by the Administrator to all resolution applicants during the Challenge Mechanism, stating that the highest NPV bid of INR 8640 crores was received in accordance with the Process Note, in particular Section 6 of the Process Note.

12. Subsequently, on 22.12.2022 the Administrator requested the Applicant and IIHL to submits its plan within 24 hours incorporating its highest bid amount in the Challenge process.

13. The Applicant and IIHL submitted draft plans with the Administrator, pursuant to the request of the Administrator, in password protected files.

14. The covering email of the bidders was read in the presence of the CoC members. It was noticed that the covering email of IIHL included revised NPV of INR 9,000+ crores, which was in deviation from the final bid submitted by them in the challenge mechanism process i.e., INR 8,110 crores.

15. The Applicant submits that it learnt through media sources that, the Hinduja Group had submitted an illegally revised financial proposal along with its resolution plan incorporating a revised bid amount which was

higher than the amount it had submitted to the Administrator during the Challenge Process ("Non-compliant Plan").

16. The Applicant addressed a letter dated 23.12.2022 to Administrator delineating its objections to revised bid submitted by IIHL and requested the Administrator to not accept the revisions in the bid by IIHL in breach of its own process documents including RFRP, the process paper, the Challenge Process Note and the steps issued to the PRA's.

17. The Applicant apprehends that the said non-compliant plan may be presented by the Administrator before the CoC in its meeting on 03.01.2023 and hence the present Application is filed.

18. We heard the Ld. Senior Counsel Mr. Darius Khambata for the Applicant and on considering the apprehension raised that the Administrator may present the non-complaint plan before the CoC. This bench granted interim relief for stay in terms of prayer clause "E" of the present Application till the next date of hearing. Simultaneously, the Applicant was granted liberty to add CoC as a party respondent to the Application. The aforesaid Interim Order was directed to be continued till further Orders on 16.01.2022.

19. The Interlocutory Application bearing IA No. 99 of 2023 is taken out by the Applicant in the Interlocutory Application bearing IA No. 1 of 2023, where in addition to the Administrator, the Committee of Creditors are

arrayed as a party Respondent.

20. IA No. 150 of 2023 is filed by IndusInd International Holdings Limited for impleadment as party Respondent in IA No. 1 of 2023. The impleadment of the IndusInd International Holdings Limited as a party Respondent in IA No.1 of 2023 filed by Torrent Investment Private Limited was allowed on 18.01.2023.

Submissions made by the Ld. Sr. Counsel for the Applicant:

The RFRP and the Challenge Mechanism must be read in a manner that complies with the Code and the CIRP Regulations

21. The Applicant submits that RFRP was issued under Regulation 36B of the CIRP Regulations. The Challenge Mechanism has been issued pursuant to the RFRP which was re-issued on 22 October 2022 under Regulation 36(B)(7) of the CIRP Regulations in terms of the Process Paper. The Challenge Mechanism and the RFRP must be read together in a consistent manner. Since both the Process Paper and the Challenge Mechanism have been issued in terms of the scheme envisaged under Regulation 36B(7) and 39(1-A) respectively, the steps/terms contained therein were issued by the Administrator (with the approval of the CoC), being cognizant of the express provisions of the RFRP. Accordingly, such steps/terms cannot be superseded or defeated (whether by reliance on generic provisions of the RFRP allowing multiple modifications despite

the express provisions contained in the CIRP Regulations or otherwise) through the illegal exercise of commercial wisdom, in derogation of and outside the scheme permitted and prescribed under the Code and the CIRP Regulations.

22. As the RFRP and by extension, the Challenge Mechanism, are both issued under the Code and the CIRP Regulations, they must be read in a manner that complies with the Code and the CIRP Regulations, otherwise they would be contrary to law and of no legal effect.

23. Therefore, it is submitted that any discretion or reservation of rights that vests with the Administrator and/or the CoC by virtue of the RFRP and the Challenge Mechanism, can only be read in a manner consistent with the Code and the CIRP Regulations.

Only Compliant Plans can be submitted to the CoC for consideration

24. Ld. Senior Counsel for the Applicant submits that Sections 30(2)(e), 30(2)(f) and 30(3) of the Code read with Regulation 39(3)(a) of the CIRP Regulation mandate that the Administrator shall only submit resolution plans "which comply with mandatory requirements of the Code and the regulations made thereunder" to the CoC for consideration. Regulation 39(1B)(c) mandates that the CoC can consider only resolution plans that comply with Regulations 39(1A) and 6A.

25. Further, reliance is placed on Clause 3.17.17 of RFRP which incorporates

the mandatory requirement that only resolution plans that comply with Regulation 39 can be placed before and considered by the CoC.

26. The Administrator and the CoC rely on Clauses 4.2.4 and 4.2.9 of the original RFRP to clothe themselves with ultra vires powers under the guise of 'commercial wisdom'. Torrent submits that Clauses 4.2.4 and 4.2.9 cannot be read to override or depart from Regulations 39 (1A), 39(2) and 39(3)(a). Hence, these provisions can only mean compliant resolution plans and not non-compliant resolution plans.

27. The Applicant contends that the mandate to ascertain whether or not a resolution plan complies with the mandatory requirements of the Code and the CIRP Regulation is that of the Administrator. CoC cannot have any involvement in the review of resolution plans before the Administrator can decide whether or not they comply with the Code and the CIRP Regulations. It is only after this determination, and after the Administrator has placed compliant plans before the CoC, that the CoC can review these compliant resolution plans. In the present case, the CoC is attempting to illegally usurp the functions of the Administrator and participate in determining compliance of resolution plans.

CoC has irrevocably elected under Regulation 39(1-A)(b) of the CIRP Regulations and cannot arbitrarily abandon its decision

28. It is submitted that the Challenge Mechanism was introduced by the Administrator under Regulation 39(1-A) and the said Regulation is mandatory. The purpose of Regulation 39(1-A), which was introduced on 30 September 2021, was to take away the CoC's discretion to consider belated, unsolicited bids made after the timelines were exhausted as this resulted in delays and litigation in the process by acceptance of unsolicited bids after the timelines were exhausted;

29. Based on a complete reading of Regulation 39, it provides for consequences for not complying with Regulation 39(1-A): Regulations 39(2) and 39(3) clearly provide that if a resolution plan does not comply with the "Code and regulations made thereunder", which includes Regulation 39(1-A), it cannot be submitted by the Administrator to the CoC for consideration. It is settled law that if a provision provides for consequences for non-compliance, that provision is mandatory and not directory.

30. The Resolution Plan Submission Process for Reliance Capital Limited ("Revised RFRP") which was issued on 22 October 2022 in furtherance of Regulation 36B (7), prevails over the RFRP (including the provisions which purport to bestow an unfettered right to negotiate on the CoC).

31. It is submitted that the Revised RFRP, which details the steps of the insolvency process, clearly states that "This is a part of the RFRP. No other term of the RFRP shall be considered amended or modified and should any contradictions arise between the RFRP and this Process Paper, the Process Paper shall prevail".

32. Secondly, the Revised RFRP provides for 6 steps to complete the corporate insolvency resolution process. Of these, step 6 provides for one (and only one) challenge mechanism, and step 7 provides that the resolution plan "identified pursuant to the challenge mechanism in step 6, incorporating the financials as finalized post step 6 and compliant with the provisions of the IBC and the provisions of the RFRP shall be submitted for voting by the CoC". Further, the revised RFRP does not reserve any all-consuming right to negotiate for the CoC.

33. The word 'may' in Regulation 39(1-A) only points to the discretion of the CoC and the resolution professional to choose between the two options provided in (a) and (b) or to accept resolution plans as they are submitted. It does not license the CoC/resolution professional to change its decision or modify the approach prescribed under (a) or (b), if it does elect to opt for one of the two options under Regulation 39(1-A). Therefore, if the CoC/resolution professional chooses the either

option under Regulation 39(1-A), which the CoC in this case has, such option is binding and it is mandatory to implement it.

34. Reliance is placed on the decision of the Hon'ble NCLAT in ***Jindal Stainless Ltd. v Shailendra Ajmera Comp. App. (AT) (Ins.) No. 1058 of 2022*** by its Order dated 18 January 2023 wherein the question for determination was "*whether after closure of Challenge Process on 15.07.2022 and consequent receipt of Resolution Plan by 18.07.2022, the Adjudicating Authority could have directed for consideration of the revised plan submitted by the Respondent No. 2 thereafter.*"

The relevant paragraphs of the aforesaid Judgment are reproduced herein below:

> *"24. The above judgment of the Hon'ble Supreme Court fully supports the case of the Appellant that after the adopting of Swiss Challenge Method to find out the best plan one Resolution Applicant cannot be allowed to submit a revised plan.*
>
> *25. It is well settled that the timeline in the IBC has its salutary value and it was the wisdom of the CoC which decided to vote on the Resolution Plan after completion of Challenge Process and not to proceed to take any further negotiation or further modification of the plan, that decision ought not to have been interfered with."*

35. Clause 8 of the rules of challenge process in *Jindal Stainless* permitted the CoC "… *the unconditional right to cancel/ modify/ withdraw/amend the Challenge Mechanism Process at any stage (including when the challenge process is underway and/or in progress), and/or in that event at its absolute discretion and to follow any other method as it may deem fit subject to applicable law. Upon such action, CoC's decision in this regard shall be final and binding on all parties without any recourse whatsoever*".

36. However, the CoC did not exercise the above right to undo the challenge mechanism and "decided to go ahead with the voting on the final plans received after the Challenge Process".

37. This right to undo the challenge process clearly flowed from clause 8 of the rules of the challenge process in that case.

38. The Hon'ble NCLAT set aside impugned order which stopped the voting process underway and which directed the CoC in that case to consider a revised plan that was submitted after the conclusion of the challenge mechanism and after the CoC had received signed resolution plans.

39. In our case, the challenge process stood concluded on December 21, 2022 which has also been affirmed by the Administrator through his email dated December 21, 2022 declaring the conclusion of process with the highest NPV bid of INR 8640 crores of Torrent as well as the minutes of the CoC meeting held on December 23, 2022.

40. Therefore, it is submitted that, based on the provisions of the RFRP (particularly item 7 of the revised RFRP dated 22 October 2022 which requires the CoC to proceed directly to vote on all compliant plans once the Challenge Mechanism is concluded) and the Challenge Mechanism, read with Regulation 39(1A), the CoC must imitate the CoC in Jindal Stainless i.e. it must now vote on compliant resolution plans submitted upon the conclusion of the challenge mechanism.

The CoC cannot nullify a concluded challenge mechanism

41. In its commercial wisdom, the CoC decided upon the Challenge Mechanism, including the threshold amounts for the challenge mechanism, "with the intent of achieving the objective of the Code to maximize the value of the assets of the Corporate Debtor". Further the Challenge Mechanism provided that:

"*No change in the Financial Proposal post the Challenge Mechanism shall be permitted*". In response to Torrent's request for clarification on the rules of the Challenge Mechanism, the Administrator confirmed that no belated bids post the challenge mechanism shall be allowed.

42. Once three consecutive rounds do not see any higher bid or if all continuing bidders convey their inability to participate further, the Administrator would announce the conclusion of the Challenge

Mechanism and the highest NPV offered at the conclusion of the last round.

43. At the end of round four, the Administrator declared Torrent's bid of Rs. 8,640 crores as the highest NPV offered, announced the conclusion of the challenge mechanism (as per Key Note 28 and Clause 6 of Section IV of the Challenge Mechanism), and, based on the Administrator's email dated 21 December 2022, presumably called upon all resolution applicants to submit their signed bids (as per Clause V of the Challenge Mechanism). In this manner, following Torrent's bid of Rs. 8,640 crores being declared the highest NPV, the Challenge Mechanism stood concluded.

44. As disclosed by the Minutes of the 29th Meeting of the CoC held on 23rd December 2022, IndusInd International Holdings Limited had not submitted the bid by the rules of the Challenge Mechanism, whereas Torrent's bid was as per the Challenge Mechanism

IIHL's Resolution Plan is not compliant with the Challenge Mechanism

45. The revised bid submitted by IIHL is not in consonance with the Challenge Mechanism and continues to be non-compliant. IIHL has proposed an illegal financial proposal wherein additional and bonus payments to the tune of INR 890 crores over and above the NPV bid

amount of INR 8110 crores. The said proposal forms part of the Limited Affidavit filed by IIHL.

46. The submission of resolution plan on December 22, 2022 was to only incorporate the highest NPV bid of the resolution applicant in its resolution plan. As per the template, IIHL could not have payments over and above the NPV bid amount in form of additional payments or bonus amounts. Furthermore, it is not by accident and co-incidence that the values in the revised resolution plan submitted by IIHL still add up to INR 9000 crores. It is an attempt of IIHL to portray and mislead that NPV remains at INR 8110 crores and a few payments unrelated to NPV are being made.

47. Further the Minutes of the 23rd Meeting of the CoC record that "The Authorized representative of the Administrator mentioned that currently IIHL has not submitted the Bids by the rules of the challenge mechanism whereas Torrent has submitted as per the rules of the challenge mechanism subject to verification of the NPV submitted as per the challenge mechanism by the COC advisors."

The Second Challenge Mechanism is Illegal

48. The Applicant submits that the CoC is attempting to conduct a fresh challenge mechanism, in complete violation of Regulation 39(1-A) and the terms of the Challenge Mechanism.

49. Further, the it is the Applicant's contention that the purported challenge mechanism is not a continuation of the earlier challenge mechanism but a completely new challenge mechanism. The Administrator had already announced that the Challenge Mechanism stood concluded and the same is recorded in the 29th meeting of the CoC held on 23.12.2022.

The CoC cannot rely on general provisions, flexibility, 'commercial wisdom' and value maximization to render the concluded challenge mechanism and Regulation 39(1-A) otiose

50. The CoC cannot ignore the Code, the CIRP Regulations and the terms of the RFRP and the Challenge Mechanism under the garb of 'commercial wisdom' and 'value maximization'. The Code and the CIRP Regulations prevail and must be followed notwithstanding the deference to CoC's commercial wisdom. Moreover, the CoC cannot review or revisit its earlier decision in the shelter of maximization of value of assets.

This Tribunal has jurisdiction to intervene in this matter under Section 60(5) of the Code.

51. In the present case, this Tribunal has the jurisdiction to intervene and restrict the Administrator and the CoC from conducting the

insolvency process in an illegal manner.

52. The CoC argues that the Tribunal only has jurisdiction when a resolution plan has been approved by the CoC and has been filed for approval under Section 31 and not intervene before. And, in support, it relies on ***ArcelorMittal v Satish Kumar (2019) 2 SCC 1.*** To this the Applicant states that the argument is misconceived as Section 60(5) of the Code does not contain any such restrictive language limiting the NCLT's jurisdiction to post approval stages. The observations of *ArcelorMittal* on the jurisdiction of the NCLT are in the context of Section 31(1) and (2) of the Code. They do not restrain the jurisdiction under Section 60(5).

53. The Applicant has relied on the following Judgments: -

i. ***Dwarkadhish Sakhar Karkhana Ltd. vs. Pankaj Joshi, Company Appeal (AT) (Ins) No. 233 of 2021 (upheld by the Hon'ble Supreme Court vide its order dated July 12, 2021 in Civil Appeal No(s). 2317/2021),*** *it was categorically held the Adjudicating Authority has the power to decide any questions of law/facts/priorities that arises even before the determination under Section 31 of the Code. The NCLAT judgment in Dwarkadhish, in para 22, has considered and differentiated the findings of the Hon'ble SC in Arcelor Mittal relied upon by the*

CoC.

ii. *In **Vallal RCK v Siva Industries & Holdings Ltd (2022) 9 SCC 803** it held that "… The interference would be warranted only when the adjudicating authority or the appellate authority finds the decision of the CoC to be wholly capricious, arbitrary, irrational and dehors the provisions of the statute or the Rules", which is the case here.*

iii. *In **Ebix Singapore v Educomp Solutions (2022) 2 SCC 401** , the Supreme Court emphasized the importance of the procedural design and the sanctity of the resolution process and that systemic delays which are caused, amongst others, by late unsolicited bids, "cause commercial uncertainty, degradation in the value of the corporate debtor and makes the insolvency process inefficient and expensive." .*

iv. *The Supreme Court in **Committee of Creditors of Essar Steel v Satish Kumar (2020) 8 SCC 531** held that this Tribunal can interfere in the merits of a business decision of the CoC if it does not comply with the provisions of the Code and the CIRP Regulations. It has been held that "… there is no residual equity jurisdiction in the Adjudicating Authority or the Appellate Tribunal to interfere in the merits of a business decision taken by the requisite majority of the*

Committee of Creditors, provided that it is otherwise in conformity with the provisions of the Code and the Regulations, as has been laid down by this judgment."

Minutes of the Meetings of the CoC testify that IIHL's Resolution Plan is non-compliant; Challenge Mechanism has concluded; and unfairness to Torrent

54. The Applicant submits that the Minutes of the Meeting of the CoC held on 23rd December 2022, 3rd January 2023 and 6th January 2023 plainly contain the admissions that the challenge mechanism was already concluded with the announcement by the Administrator of the highest NPV. In round 3, IIHL submitted their bid below the threshold limit. Thereafter, in Round 4 Torrent submitted a bid below the threshold limit of Round 4. Torrent conveyed its inability to continue further and since there were no other participants, the challenge mechanism was concluded after receiving a formal confirmation from Torrent on request in relation to their exit from the challenge mechanism process.

55. The Second Challenge Mechanism is not a continuation of the Challenge Mechanism but a new process. Moreover, the

Administrator is obliged to only "*submit to the CoC every and all compliant Resolution Plans*"

56. It is the Applicants contention that as early as on 23rd December 2022, the Administrator had determined that IndusInd International Holdings Limited's plan was not as per the challenge mechanism. He had nevertheless placed IndusInd International Holdings Limited's non-compliant plan before the CoC for consideration, and the CoC was considering this plan along with Torrent's plan.

57. The Applicant submits Minutes of the Twenty Ninth Meeting of the CoC record that Resolution Plan submitted by the Applicant after the end of the challenge mechanism was as per the challenge mechanism and the IIHL's Plan was not: "*The Authorized representative of the Administrator mentioned that currently IIHL has not submitted the Bids by the rules of the challenge mechanism whereas Torrent has submitted as per the rules of the challenge mechanism subject to verification of the NPV submitted as per the challenge mechanism by the COC advisors*" that is, IIHL's Plan "*was in deviation from the final bid submitted by them in the challenge mechanism process i.e. INR 8,110 crores*"

Torrent's Resolution Plan submitted on 6th January 2023 is not a 'revised' plan

58. The Applicant submits that all Resolution Applicants were required to submit their bids in the challenge mechanism in a particular format. As per this format, the resolution applicants were required to bid "the Net Present value ('NPV') of Financial Proposal (Total Payment to Creditors)" which was to be self-certified. Therefore, the financial proposal bid was only for the NPV amount. Following this format, Torrent bid for an NPV of 8,640 crores i.e. total payment to creditors and, in its ensuing proposal filed on 22nd December 2022, it provided for a breakup of its NPV (that is upfront payment and deferred payment, as per Clause V of the Challenge Mechanism Process Note). The break up was not the highest NPV submitted during the Challenge Mechanism.

59. The evaluation matrix and the format only provided for discounting rates and no calculation methodology for deferred payments. The discount rate was 10% for year 1; for 1 to 2 years, the discount rate was 12%; and for payments for 3 to 5 years the discount rate was 15%. Torrent's proposal provided for 3 equal instalments payable at the end of the 3rd, 4th and 5th year, after payment of the upfront amount. In the absence of a template from the CoC/Administrator, based on a reasonable reading, Torrent applied a discount rate of 10% for the first year, 12% for the second year, and 15% for the third year to fifth year. As per its reading and calculation, Torrent's proposal consisted of Rs. 3,750 crores upfront and Rs.7915

crores in deferred payment, which, applying the provided discount rates, equaled an NPV of 8,640 crores.

60. It appears that instead of applying discount rates of 10%, 12%, and 15% to the first, second, and third to fifth years respectively, the Administrator/CoC applied the discount rate of 15% for all years, which is why, as per their calculation, Torrent's NPV in its proposal was not Rs. 8,640 crores but Rs. 8,310 crores.

61. This prompted the Administrator/CoC to issue the email dated 4th January 2023 to Torrent, requesting for a clarification. Torrent responded by its email dated 6th January 2023 and with a view to avoid any interpretational ambiguity (as is sought to be relied upon by the CoC), submitted the financial proposal while simplifying the verification of the Applicant's highest NPV of INR 8640 crores, by clarifying that the entire amount of Rs. 8,640 crores was to be paid upfront, undeniably consistent with its NPV during the challenge mechanism. Pertinently, Torrent's NPV as submitted in the bid and the draft resolution plan on 6 January 2023 remained unchanged.

Submissions made by Ld. Senior Counsel on behalf of Respondent No.1:

62. At the outset, it is submitted that the Applicant is simply a prospective resolution applicant/ bidder whose status as successful or unsuccessful has

not been decided by the Committee of Creditors. Resolution plans compliant with the provisions of the IBC have not even been placed before the CoC. The process is at the draft submission and verification stage.

63. Therefore, when no resolution plans have been placed before the CoC and no final determination has taken place, the captioned Application is premature.

64. The Administrator also submits that he has neither abdicated his functions as the Resolution Professional under the Code nor has he acted in breach of this Tribunal's ad-interim order of January 3rd, 2023.

65. During the course of submissions, the Ld. Senior Counsel has taken through the events that have transpired in a chronological order. On 21.12.2022, the Challenge Mechanism of the CoC was conducted for the CIRP of the Corporate Debtor. Only two i.e. the Applicant and IIHL participated in the Challenge Mechanism. As Per Step 6 of the Challenge Mechanism Flow, the Administrator issued an email stating that during the Challenge Mechanism, the highest NPV bid of INR 8640 crores with the subject "*RCAP || Conclusion of the Challenge Mechanism*".

66. Draft resolution plans were submitted by the Applicant and IIHL on 22.12.2022. The covering emails accompanying these drafts and the draft plans themselves were opened for the first time by the Administrator before CoC in its meeting of 23.12.2022.

67. At that juncture itself on 23.12.2022, the Administrator pointed out that there appeared to be a deviation in IIHL's draft resolution bid vis-à-vis the NPV bid submitted in the Challenge Mechanism.

68. The Authorized Representative of the Administrator confirmed to the CoC Members that the financial proposal submitted by IIHL was indeed different from the final bid submitted on December 21st, 2022 as part of Challenge Mechanism process.

69. At that meeting, the Administrator and his representatives pointed out the arguments for and against considering the deviation. In other words, the Administrator exercised his advisory functions in order to enable the CoC to make an informed decision in exercise of its commercial wisdom to take a final decision on whether there was a deviation and to permit and/or reject the deviations that arose.

70. The Respondent No.1 submits that before the vetting process qua the two plans received on 22.12.2022 could be completed, the Applicant on 30.12.2022 filed the present Application.

71. On 03.01.2023, this Tribunal granted ad-interim relief in prayer clause 'e' of the Application. The Administrator has complied with this order and has not placed any non-compliant plan for consideration before the CoC.

72. On 06.01.2023, the CoC expressed its anguish and dissatisfaction with

the outcome of the Challenge Mechanism and held that it was 'sub-optimal'. In exercise of its discretion, it decided to conduct an Extended Round of the Challenge Mechanism.

73. Further, the Administrator submits that he had to only give his opinion, ultimately the final decision whether the plans stood verified or not vests with the CoC. The role of the administrator by law to only give a prima facie opinion on whether the plan complies with Section 30(2) of the Code.

74. The CoC had held a meeting on January 6th, 2023. At this meeting, the Administrator apprised the CoC that the highest NPV at that time was INR 8,640 crores. The CoC noted that draft plans which have been received had outstanding compliance and interpretational issues and the outcome of the challenge mechanism was not satisfactory. For these reasons inter alia the CoC exercised commercial wisdom and directed that an Extended Challenge Mechanism with the existing bidders be conducted.

75. It further took a decision that the bids received on December 21, 2022 as per the outcome of the Challenge Mechanism remained valid and any increment by the bidder in the extended round would be over and above the financial NPV bid submitted on 21.12.2022.

76. The administrator submits that the CoCs decision appears to be

prompted by the fact that there was more value to be discovered for resolving the Corporate Debtor's insolvency.

77. It is submitted that there is nothing in the RFRP, Process Paper and Challenge Mechanism note dated December 14, 2022 that prevented or precluded the CoC from pursuing this course of action. The Challenge Mechanism Note reserves the CoC's right to revise its terms and further declares that the mechanism shall be read along with the RFRP.

78. The process thus confers primacy upon the RFRP and renders the same an anchor document governing the process and which cannot be rendered otiose by the Applicant's misreading of the Challenge Mechanism Note. The RFRP empowers the CoC to call for revised bids from the PRAs, re-negotiate and take all such necessary steps for achieving the value maximization of the Corporate Debtor's assets. Reliance is placed on clauses 4.2.4, 4.2.9 and 4.3.7 of RFRP.

79. Regulation 36(B) of the CIRP Regulations which provides for 'Request for Resolution Plans' and accords primacy upon RFRP. In particular Regulation 36(B)(2) provides:

> "*The <u>request for resolution plans shall detail each step in the process, and the manner and purposes of interaction between the resolution professional and the prospective resolution applicant,</u>*

along with corresponding timelines."

80. In accordance with Regulation 36(B)(7) the Resolution Professional may with the consent of the CoC re-issue the RFPR and restart the entire process. The Regulation reads as under;

> *"The resolution professional may, with the approval of the committee, re-issue request for resolution plan, if the resolution plans received in response to an earlier request are not satisfactory, subject to the condition that the request is made to all prospective resolution applicants in the final list:*
>
> *Provided that provisions of sub-regulation (3) shall not apply for submission of resolution plans under this sub-registration."*

81. Therefore, it is argued that if the regulation contemplates a drastic power to scrap the entire process and to start afresh, the CoC can very well exercise a far lesser power to invite all resolution applicants to improve their bids. There is nothing arbitrary, illegal and/or capricious in the CoC acting in such fashion.

82. In this regard the CoC has issued the Extended Challenge Mechanism note on January 10, 2023.

83. It is further argued that the Applicant's interpretation on Regulation 39 (1-A) and (1-B) of the CIRP Regulations is misconceived as these provisions are procedural in nature as they carry no consequences for

breach. That apart Regulation 39(1-A) only applies to the Resolution Professional it does not impose any fetter on the CoC's powers and discretion to call upon all PRAs to improve their resolution plans for maximizing value. To support this contention Ld. Senior counsel has relied upon the Judgment of the Hon'ble Supreme Court in ***Ebix Singapore Pte Ltd. Vs Committee of Creditors of Educomp Solutions Ltd. ((2022) 2 SCC 401)*** wherein it was held that CIRP is creditor driven process, The aim of process, in preferential order, is to first, enable resolution of the debt by maintaining the corporate debtor as a going concern, in order to preserve the business and employment of the personnel; second, maximize the value of the assets of the corporate debtor and enable a higher pay-back to its creditors than under liquidation.

84. The Hon'ble Supreme Court in ***Food Corporation of India Vs. Kamdhenu Agro Industries Ltd. (1993) 1 SCC 71)*** has held as under:

> *"10. From the above, it is clear that even though the highest tenderer can claim no right to have his tender accepted, there being a power while inviting tenders to reject all the tenders, yet the power to reject all the tenders cannot be exercised arbitrarily and must depend for its validity on the existence of cogent reasons for such action. <u>The object of inviting tenders for disposal of a commodity is to procure the highest price while giving equal opportunity to all the intending</u>*

bidders to compete. Procuring the highest price for the commodity is undoubtedly in public interest since the amount so collected goes to the public fund. Accordingly, inadequacy of the price offered in the highest tender would be a cogent ground for negotiating with the tenderers giving them equal opportunity to revise their bids with a view to obtain the highest available price. The inadequacy may be for several reasons known in the commercial field. Inadequacy of the price quoted in the highest tender would be a question of fact in each case. Retaining the option to accept the highest tender, in case the negotiations do not yield a significantly higher offer would be fair to the tenderers besides protecting the public interest. A procedure wherein resort is had to negotiations with the tenderers for obtaining a significantly higher bid during the period when the offers in the tenders remain open for acceptance and rejection of the tenders only in the event of a significant higher bid being obtained during negotiations would ordinarily satisfy this requirement. This procedure involves giving due weight to the legitimate expectation of the highest bidder to have his tender accepted unless outbid by a higher offer, in which case acceptance of the highest offer within the time the offers remain open would be a reasonable exercise of power for public good."

85. In the present case, the CoC has issued an RFRP, process paper and Challenge Mechanism note to invite the best resolution offers for achieving inter alia value maximization of bringing about higher play back to all the creditors.

86. The CoC in its 6th January 2023 meeting has found that the NPV of INR 8,640 crores that has been presently offered to be a sub-optimal outcome especially since the said offer was even lower than the liquidation value of the Corporate Debtor. Accordingly, the CoC in exercise of commercial wisdom and pursuant to the RFRP inter alia called for further negotiations with all PRAs through the Extended Challenge Mechanism.

87. It is a reasonable exercise of a power since it facilitates a higher pay back for creditors owed in excess of INR 25,000 crores and is for the public good since significant debt owed by the Corporate Debtor is to public institutions such as LIC, EPFO and the Army Welfare Fund.

88. The Ld. Senior Counsel has distinguished the Judgements relied upon by the Applicant as follow:

i. ***Committee of Creditors of Essar Steel Limited v. Satish Kumar Gupta*** **[(2020) 8 SCC 531]** and ***Ebix Singapore (P) Ltd. v. Educomp Solutions Ltd. (CoC)*** **[(2022) 2 SCC 401]** –

It is submitted that the Applicant has cited only selectively paragraphs of the said Judgments and not as whole Paragraph 155 of Ebix Singapore clearly states that an analysis of the CIRP regulations and the ILC Reports indicate that the entire process is meant to be creditor driven and to inter alia enable higher pay back to the creditors than under liquidation.

It is not denied that the process is meant to be time driven, however it is frivolous applications such as the present Applicant, which delay the process and lead to a depreciation of value. If resolution applicants are permitted to intervene at this draft plan vetting stage, there would be no

end to frivolous litigation clogging the system and defeating the purpose of the Code.

ii. ***Sarla Goel v. Kishan Chand [(2009) 7 SCC 658]*** and ***Govindlal Chhaganlal Patel v. Agricultural Produce Market Committee [(1975) 2 SCC 482***] would not be applicable in the present case.

iii. ***Vallal RCK v. Siva Industries & Holdings Ltd*** **[(2022) 9 SCC 803**]; It is submitted that said Judgement does not support the cause of the Applicant. At paragraph 24 thereof, the Supreme Court recognised that minimal judicial interference is a well-settled principle under the Code. The Hon'ble Supreme Court noted that an appellate authority cannot sit in an appeal over the commercial wisdom of the CoC.

iv. ***Dwarkadhish Sakhar Karkhana Ltd v Pankaj Joshi*** **[Company Appeal (AT)(Ins) No 233 of 2021]*:*** This Judgement does not apply to the present case since the Resolution Professional in that case ignored the decision of the CoC and accepted a belated plan. It is no one's case in the captioned Application that the Administrator has acted contrary to the decision of the CoC.

v. ***Jindal Stainless Ltd. v. Mr. Shailendra Ajmera, Resolution Professional of Mittal Corp. Ltd. & Ors*** **:** It is argued that this Judgement infact reiterates the settled legal position that there can be no legal fetter on the CoC's right to solicit improved resolution plans from prospective resolution applicants. At paragraph 20, the Hon'ble NCLAT held that, "*there can be no fetter on the power of the CoC to cancel or modify any negotiation with the Resolution Applicant including a Challenge Process but it is the wisdom of the CoC to take a decision in that regard.*" The Hon'ble NCLAT recognised that, after

completion of the Challenge Process, the CoC could have proceeded to "*take any further negotiation or further modification of the plan*". Applying the said principle to the present case, it is clear that the CoC of the Corporate Debtor cannot be restrained from choosing to negotiate with the PRAs by way of the Extended Challenge Mechanism. It is submitted that in Jindal Stainless Ltd. the CoC had reserved the unconditional right to cancel/modify/ withdraw/ abandon/amend the process of the challenge process at any stage under clause 8 therein. Likewise, CoC enjoys identical rights in the present case as well under Note III "General Rules", clause 11 of the Challenge Mechanism, reserves a right to the CoC to revise the Challenge Mechanism.

Submissions made by the Learned Senior Counsel for the CoC

89. It is urged that the Application filed by Torrent is premature since all resolution plans are unsigned drafts. The resolution applicants had submitted signed plans only on November 28, 2022 which had a value which was less than half the values discovered as per Challenge Mechanism. The current set of resolution plans post November 28 are unsigned drafts that are non-compliant with: (i) the requirements of the IBC and regulations made thereunder, (ii) the RFRP; and (iii) the Challenge Mechanism Note. Even as per paragraph V of the Challenge Mechanism Process Note, the draft resolution plans submitted after the challenge rounds, are first to be verified by the Administrator and the

CoC, and its only thereafter that signed resolution plans are called upon. Until then, the challenge process itself cannot be said to have been completed.

90. Therefore, the stage of putting any plan to vote by the CoC has not arisen. The Administrator and CoC were still evaluating the plans and no decision was made or communicated in respect thereof when the Applicant approached this Tribunal. The agenda of the CoC meeting on 3rd January, 2023 was only to update on the resolution process of the Corporate Debtor no presentment of plan or voting was envisaged, or indeed could have been envisaged, since the plans were only drafts and were not compliant resolution plans. Under the framework of the IBC, as well as the provisions of the RFRP, only legally complaint plans can be placed before the COC for voting. Once a plan is approved by the CoC, the approved resolution plan would be submitted before the Adjudicating authority for their approval. In this regard reference is made to CIRP regulations 39 (2) and RFRP clause 4.4.7.

91. Further, the resolution applicant with the highest NPV in challenge mechanism has no vested right to be necessarily considered or declared as a successful resolution applicant. It is settled law that a bidder has no vested rights in the process merely by virtue of

participating in the process. In ***ArcelorMittal (India) (P) Ltd. v. Satish Kumar Gupta [(2019) 2 SCC 1]*** the Hon'ble Supreme Court observed that a resolution applicant has no vested right that his resolution plan be considered and that there is no vested right or fundamental right in the resolution applicant to have its resolution plan approved.

92. The Challenge Mechanism Process Note makes it sufficiently clear that the challenge mechanism does not confer any rights upon any resolution applicant, including the resolution applicant with the highest NPV. [Key Notes – para 5]. Further, under the Challenge Mechanism Process Note, the CoC has expressly reserved the right to modify or revise the challenge mechanism itself [General Rules of Challenge Mechanism Process Note – para 11].

93. The Challenge Mechanism Process Note clearly provided it shall be read alongwith the terms of the RFRP. Further, paragraph III, 29 of the note also provided as follows:

> "Any breach of the terms of this Challenge Mechanism shall be considered a breach of the RFRP and the consequences mentioned therein shall follow."

94. It is further submitted that under the RFRP also, the CoC has expressly reserved the right to call for modified resolution plan(s),

negotiate with more than one resolution applicant, and seek changes at any stage. Reference is made to Clause 3.17.17, clause 4.2.4, clause 4.2.9 clause 4.3.7, clause 4.4.4 and clause 4.4.7 of the RFRP. Neither the CoC, nor the Administrator has any obligation to deal only with such resolution applicant that offers highest NPV. RFRP Clause 4.2.9 (a) provides as follows:

> "The Resolution Applicant(s) should note that: (a) neither the Administrator nor the CoC shall have any obligation to undertake or continue the Submission Process with the Resolution Applicant and/or the resolution bidder having the best technical capabilities or the highest bid or highest/best financial plan. Notwithstanding anything contained hereinabove, the CoC reserves the right to engage in discussions with any Resolution Applicant(s) or Resolution Bidder(s)"

95. Thus, it is argued that the CoC and Administrator has to consider whether the final signed resolution plans, as submitted to them after incorporating their comments, comply with the requirements under the IBC and RFRP (including Challenge Mechanism) and are acceptable to CoC. That stage has not been reached as yet. No resolution applicant can seek the intervention of this Tribunal or even

otherwise ask the CoC to accept the bid of a particular resolution applicant on the basis that it offered the highest NPV.

96. The CoC contends that this Tribunal should not exercise jurisdiction at this stage. To support this contention reliance is placed on the Judgment of the Hon'ble Supreme Court in *ArcelorMittal (India) (P) Ltd. v. Satish Kumar Gupta [(2019) 2 SCC 1]* wherein it was held under

> *"Suppose a resolution plan is turned down at the threshold by a Resolution Professional under Section 30(2). At this stage is it open to the concerned resolution applicant to challenge the Resolution Professional's rejection?*
>
> …
>
> *Given the timeline referred to above and given the fact that a resolution applicant has no vested right that his resolution plan be considered, it is clear that no challenge can be preferred to the Adjudicating Authority at this stage. A writ petition under Article 226 filed before a High Court would also be turned down on the ground that no right, much less a fundamental right, is affected at this stage. This is also made clear by the first proviso to Section 30(4), whereby a Resolution Professional may only invite fresh resolution plans if no other resolution plan has passed muster.*
>
> …

Take the next stage under Section 30. A Resolution Professional has presented a resolution plan to the Committee of Creditors for its approval, but the Committee of Creditors does not approve such plan after considering its feasibility and viability, as the requisite vote of not less than 66% of the voting share of the financial creditors is not obtained. As has been mentioned hereinabove, the first proviso to Section 30(4) furnishes the answer, which is that all that can happen at this stage is to require the Resolution Professional to invite a fresh resolution plan within the time limits specified where no other resolution plan is available with him. It is clear that at this stage again no application before the Adjudicating Authority could be entertained as there is no vested right or fundamental right in the resolution applicant to have its resolution plan approved, and as no adjudication has yet taken place."

97. The Challenge Mechanism Process Note dated December 14, 2022 clearly provides that (i) It has to be read alongwith RFRP (ii) that COC will examine the plans received to ascertain compliance. Further, the Challenge Steps Note in paragraph 5 clearly provides that in case of any dispute on NPV calculation the decision of the CoC will be final and binding on the RA. Under the IBC the Resolution Professional is bound to present a plan to CoC that is legally compliant whether it

adheres to the RFRP /challenge mechanism or not. Therefore, the Administrator cannot ensure compliance with RFRP and by extension of Challenge Mechanism. The law laid down by the Hon'ble Supreme Court in *ArcelorMittal (supra)* and the provisions of the IBC, cast a duty on the Administrator to present all resolution plans to CoC for consideration, subject only to completeness and due diligence that they are in order. CoC alone can waive, amend or modify any requirements of the RFRP (including challenge mechanism) and determine compliance or non-compliance thereof.

98. It is submitted that the current plans and subsequent developments show that the process outcome was sub optimal and best value maximization was not achieved. The Ld. Senior Counsel appearing for the CoC invited our attention to Minutes of meeting of the CoC held on January 6, 2023 Minutes of meeting of the CoC held on January 6, 2023 which records that:

> *"The legal counsel of the Administrator apprised the CoC members that the highest NPV as per the last challenge mechanism was INR 8,640 crores. The CoC discussed at length the developments since the conclusion of its challenge mechanism. It was summarized as below. That the resolution plans were first received on November 28, 2022. Comments on plans were circulated to the bidders by the Administrator and CoC's process and legal advisors on December 12, 2022. Revised*

drafts were received from certain bidders on December 19/20, 2022. The draft plans that were received had outstanding compliance as well as interpretational issues. CoC expressed its anguish and dissatisfaction with the outcome of the process and the events that have transpired thereafter. The COC was of the view that it demonstrates that outcome of the challenge mechanism undertaken was sub optimal and not satisfactory. The CoC discussed various options and the extant provisions of the RFRP enabling the same were set out. The COC specified that the RFRP specifically contained provisions which enabled the CoC to improve resolution plans in such manner as it deems fit. Amongst other clauses, clause 3.17.17, clause 4.2.4, clause 4.2.9 clause 4.3.7, clause 4.4.4 and clause 4.4.7 specified that the CoC retained the right at all times to negotiate with bidders to improve the resolution plans. The challenge mechanism note had also specifically provided that the note will have to read along with the aforementioned provisions in the RFRP. The Administrator and his advisors gave their views on the way forward. However, in light of the above, the COC, in its commercial wisdom, proposed that an extended round of challenge mechanism with the existing bidders is conducted".

99. It is submitted that the conditions and values in the plans submitted by the Applicant as well IIHL were not acceptable to the CoC. Hence, CoC exercising its commercial wisdom (with 98% of the CoC voting in favour), decided to have an extended round of challenge mechanism with a view to achieve value maximisation.

100. It is clear that the present Application is a veiled attempt on the part

of the Applicant to seek exclusivity in negotiations with CoC, that too basis a draft non-compliant plan which offers significantly less upfront payment (Rs. 3750 crores) than other resolution plans.

101. It is submitted that the minutes of meetings clearly record that the CoC is not satisfied with the values offered at each stage, since the resolution value has been improved upon, at every stage. The values discovered for the two resolution applicants in question at different stages of the resolution process, are as follows:

	28th August, 2022	**November 28, 2022**	**Post Challenge Mechanism**
Torrent	Resolution Amount Rs. 4000 crores	Resolution Amount Rs. 4,500 crores	Resolution Amount Rs. 8,640 crores NPV
	Upfront Amount Rs. 1000 crores	Upfront Amount Rs. 1,100 crores	Upfront Amount Rs. 3,750 crores.
IIHL	Resolution Amount Rs. 4000 crores	Resolution Amount Rs. 5,060 cr	Rs. 8110 crores NPV Further, an amount of 660 crores in escrow and NCDs of 200 crores payable after 7 years 1 day.
	Upfront Amount not clear	Upfront Amount Rs. 4,100 crores	Upfront Amount Rs. 8110 crores

102. It is submitted that this action of the Resolution Applicants in making incremental offers clearly demonstrate that there is greater value to be discovered. In fact, even at this stage, the bids submitted by the resolution applicants are below the liquidation value of the Corporate Debtor. Therefore, the CoC has resolved to hold an extended challenge mechanism.

103. The CoC has contended that its wisdom must prevail and that the CoC has acted fairly, in a transparent manner, and in exercise of its commercial wisdom, by allowing each of the resolution applicants an opportunity to participate in an extended round of challenge mechanism and put their best bid forward to ensure value maximisation. In support of the same has relied on the following Judgments:

i. *K. Sashidhar v. Indian Overseas Bank* [(2019) 12 SCC 150] para 33

ii. *Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & others* [(2020) 8 SCC 531] para 38

iii. *Vallalal RKC v. Siva Industries and Holdings Limited,* [(2022) 9 SCC 803] para 21

iv. *Maharashtra Seamless Limited v. Padmanabhan Venkatesh*, [(2020) 11

SCC 467] Para 28

104. Further, it is claimed that the draft plans received were non-complaint with Law, RFRP and challenge mechanism. The bid of Rs. 8640 cores NPV submitted by the Applicant during Round IV of the challenge mechanism was incorrect. On verification of the draft resolution plan, submitted 24 hours after conclusion of challenge mechanism on December 22, 2022, it was found that the Applicant had made a calculation error. The actual NPV as per the draft plan worked out to be lesser than the bid amount by about Rs. 336 crores i.e. the NPV offered was not more than Rs. 8310 crores. Hence, the Applicant's bid was lower even than the Threshold Bid Amount of Round III (Rs 8500 crores) and it was not entitled to participate in Round IV.

105. As per Additional Affidavit of Applicant dated January 6, 2023 the Applicant has also changed the break-up of value and offered all cash upfront in its latest revisions. In such event, the Applicant has clearly contravened the Challenge Mechanism Process Note on the same grounds on the basis of which, the Applicant has alleged that the plans submitted by IIHL is non-compliant with the Challenge Mechanism Process Note. Hence, it is submitted that a resolution applicant cannot be allowed to approbate and reprobate to suit its own convenience.

106. As far as Regulation 39(1-A) is concerned it submitted that Regulation

39(1-A) applies only to signed resolution plans and not plans at the draft stage. Secondly, while under clause (a) of Regulation 39(1-A), there is an express restriction with respect to modification of a resolution plan "more than once", no such limiting expression is used in clause (b) of Regulation 39(1-A), which deals with challenge mechanism. In any event, in the present case, the CoC has merely extended the existing challenge mechanism, due to the bids being sub-optimal and non-satisfactory.

107. It is submitted that since it is within the powers of the CoC to reissue the RFRP under Regulation 36B and re-initiate the entire process without any limitation other than the prescribed timelines, there can be no legal impediment to the CoC extending the challenge mechanism. In fact, it is in the interest of achieving resolution in a time-bound manner that the CoC extended the challenge mechanism rather than re-initiating the entire process. The re-initiation of process will be prejudicial not only to CoC but also the other resolution applicants due to significant delay in rerun, return of the security provided by the resolution applicants and reissue of that security by resolution applicants that choose to participate. The possibility that some may choose not to participate cannot be ruled out. Out of the four resolution applicants only two participated in the challenge

mechanism.

108. Further, reliance placed by the Applicant on para 6 of the Key Notes of the Challenge Mechanism Process Note is misplaced, considering that it only restricts the resolution applicants from revising their offers. No part of the Challenge Mechanism (which is to be read along with the RFRP) places any fetter on the powers of the CoC to seek such revisions in the resolution plan(s) or adopt any transparent process to derive the best value. On the contrary, as submitted above, such rights are expressly reserved for the COC under the RFRP.

Submissions made by Learned Senior Counsel for IIHL i.e. the Applicant in IA No. 150 of 2022

109. It is submitted that IA No. 1 of 2022 is infructuous as the Administrator in line with the Order dated 3rd January 2023 passed by this Tribunal had placed the compliant plans before the Committee of Creditors.

110. After considering such plans (which included plans of Torrent as well as IIHL), the Committee of Creditors in exercise of its commercial wisdom decided that the plans as submitted are not satisfactory/responsive, and thus decided to conduct a further round

of bidding as per the Challenge Mechanism

111. In view of the above fact, that the prospective resolution applicants would be called upon to submit revised bids and enter into fresh rounds of negotiation/bidding with the Committee of Creditors, I.A. No. 1 of 2023 filed by Torrent has been rendered infructuous.

112. Moreover, amendments sought by the Applicant IA No.1 of 2023 not only introduce a wholly new cause of action but also change the frame of the application in its entirety. In fact, the proposed amendment replace and substitute the original grounds and reliefs (as sought in I.A. No. 1 of 2023)

113. Further, it is contented that the said IA No. 1 of 2023 is premature as the CoC / Administrator has not issued any Letter of Intent to any prospective resolution applicant as the resolution is still at a stage of consideration. A bare reading of Clause 4.4.8 of the RFRP would make the same evident that the status of Torrent at this stage is nothing more than a mere bidder upon whom no vested right or interest has accrued and not that of a Successful Resolution Applicant.

114. It is submitted that the Committee of Creditors has no obligation to accept the bid of Torrent, and Torrent cannot insist for its bid to be accepted by the Committee of Creditors. The decision to conduct re-bidding/further bidding and thereby modify the resolution process is

not only in the domain of commercial wisdom of the Committee of Creditors but also binding upon Torrent in terms of the RFRP. Reliance is placed on clause 4.2.9 of the RFRP.

115. The Hon'ble Supreme Court in various judgments has held that one who participates in the tender procedure is bound by the tender conditions. In the present case, Torrent having participated in the Change Mechanism is bound to follow each and every term and condition of the same. Therefore, being a mere participant, Torrent cannot dictate terms to the Committee of Creditors, and thus I.A. No.1 of 2023 filed by Torrent is wholly misconceived. (Arcellor-Mittal India Private Limited vs Satish Kumar Gupta (2019) 2 SCC 1 – Para 78 & 79 & Unicorn Buildtech vs Aishwarya Mohan Gahrana – NCLAT - Comp. App. (AT) (INS) No. 517 of 2021 – Para 6)

116. It is submitted that Torrent has filed I.A. No. 1 of 2023 on the false premise that IIHL has modified its NPV and the plan submitted by IIHL on 22nd December 2022 is non-compliant. In fact, the application filed by Torrent is entirely based on unreliable media reports and surmises. Torrent has failed to produce any documentary evidence or proof to substantiate its allegations.

117. However, it is has now come to light that the plan filed by Torrent is itself illegal as the modifications made in its submission comprises of

commercial components which are varied/different from the bid submitted in the challenge mechanism.

118. Further, the NPV of the Applicant was exaggerated NPV of Rs. 8640 Crores and it is on the basis of such exaggeration that Torrent has claimed to be the highest bidder in the Challenge Mechanism. In fact, it is pertinent to note that the actual correct NPV of Torrent is Rs. 8142 Crores only when calculated according to the evaluation matrix provided under the RFRP.

119. Furthermore, during the course of hearing, it has now been confirmed by the CoC, that the NPV computation of Torrent was erroneous and that the actual NPV of Torrent was Rs. 8,142 Crores which is much below the threshold for the 4th round of Challenge Mechanism.

120. It is stated that the draft plan submitted by IIHL is compliant. The decision on the compliance aspect of the draft plan submitted by IIHL is yet to be communicated by the Administrator, and the plan submitted by IIHL is compliant with the provisions of the Code (along with regulations thereunder) as well as the process document issued by the Administrator from time to time.

121. As per the Challenge Mechanism, IIHL was required to provide "Total Payment to Creditors" as a part of its "Financial Proposal". Even today, the Total Payment to Creditors submitted by IIHL is compliant with NPV

of Rs. 8110 Crores. Such Total Payment to Creditors include admitted creditors of the Corporate Debtor (as opposed to unadmitted creditors). Further, in the scheme of its draft plan, IIHL has offered another head of payments towards unadmitted creditors which is not inclusive under "Total Payment to Creditors". This additional component is part of the overall financial outlay offered by IIHL and does not affect the NPV determination of its plan.

122. It is argued that the Applicant has sought to restrain the Committee of Creditors in exercising its commercial wisdom and to achieve the objects of maximization of asset-value.

123. As per the provisions of the Request for Resolution Plan ("RFRP"), the Committee of Creditors has reserved in itself wide and sweeping powers which would allow the Committee of Creditors to conduct a comprehensive assessment of viability and thereby achieve the best possible value from the bidders.

124. Reliance placed by the Applicant on the judgment of Hon'ble Appellate Tribunal in Jindal Stainless Ltd. vs Shailendra Ajmera (Com. App. At Ins 1058 of 2022) is misplaced in suggesting that CoC does not have powers to re-negotiate after conducting a challenge mechanism under Reg. 39(1-A) (b) of the Regulations. Firstly, the decision in Jindal Stainless Ltd. is wholly distinguishable on facts as in the said case the CoC did not exercise

the decision to re-negotiate or conduct further challenge mechanism. Furthermore, in the case of Jindal (supra) itself, the Hon'ble Appellate Tribunal has explicitly laid down that the right of CoC to re-negotiate after conducting a challenge mechanism remains unfettered. The relevant paragraph of Jindal Stainless Ltd. (supra) is extracted below:

> *"20. There can be no fetter on the power of the CoC to cancel or modify any negotiation with the Resolution Applicant including a Challenge Process but it is the wisdom of the CoC to take a decision in that regard. CoC, in the facts of the present case, did not take any decision to disregard the Challenge Process completed in 13th CoC meeting held on 15.07.2022 and it decided to vote on the plan which voting process has begun."*

Findings

125. In the above backdrop of facts of the Application and submissions advanced as above, it is to be noted that the CoC having decided on the modalities of a challenge mechanism and the administrator having concluded the challenge mechanism in terms of the modalities of the challenge mechanism so decided by the CoC, the process under Regulation 39(1A) got concluded. It is important to note that the Administrator, either on its own or on the instructions of the CoC, never changed the modalities of the challenge mechanism or revised the

challenge mechanism despite reserving the power to do so under clause 11 of the challenge mechanism and instead concluded the challenge mechanism and declared so. Thereafter, the Administrator was required to undertake the steps for ensuring the compliance of the plans with the provisions of the challenge mechanism and also other compliances under the Code and the CIRP Regulations under Regulation 39(2) of the CIRP Regulations and thereafter, CoC is mandated to take voting on the compliant plans under Regulation 39(3) of the CIRP Regulations. At the stage of voting of the Resolution Plan, the CoC has the commercial wisdom to approve any plan and such commercial wisdom exercised in terms of Regulation 39(3) cannot be called in question by any Resolution Applicant. Perusal of the Regulation 39 and its objects and reasons brings out an unambiguous conclusion that Regulation 39 (1A) enabled the Resolution Professional and the CoC and recognized their right to carry out value maximization process even after submission of the resolution plans by the resolution applicants. However, along with this right, a responsibility and duty are casted to follow the value maximization process in a regulated manner i.e., in the manner prescribed in Regulation 39(1A) and therefore in the time bound manner, which is a fundamental principle of the IBC along with value maximization. Therefore, in our view any interpretation of Regulation 39(1A) which makes the process of

value maximization an endless exercise would be inconsistent with the objects of the Insolvency laws. Regulation 39(1A) is a stage of the insolvency process after the receipt of the plans under the process set out under Regulation 36B, and at this stage, before the consideration and voting on the plans under Regulation 39 (3), the RP can choose one of the alternate methods of value maximization under Regulation 39(1A), provided the same is authorized under the request for plans. The reference to the request for resolution plans is very important. At the time of the issuance of request for resolution plans, the CoC may approve contours of the value maximization process as contemplated in Regulation 39(1A) and at this stage rules of the alternate process need to be clearly spelt out. The CoC may at its commercial wisdom suggest various commercial parameters for the process to be undertaken by the Resolution Professional under Regulation 39 (1A), however once the process is determined and the Resolution Professional has decided to undertake one alternate process under Regulation 39 (1A), thereafter, the process need to be strictly followed. The process sanctity thereafter needs to be ensured by the Resolution Professional, being personally responsible for the conduct of the resolution process under the Code. The CoC is equally bound to follow such process. Once the process under Regulation 39(1A) is concluded, unless a fraud is detected, the result of the process concludes

the value maximization process. Thereafter, the Resolution professional need to complete the subsequent stages of resolution process which includes undertaking compliance check of the plans and submitting the complaint plans to the CoC. The CoC then have to complete the consideration of the plans and vote on the complaint plans in terms of Regulation 39(3). This scheme is to ensure that the corporate insolvency resolution process of the company is undertaken and completed in a time bound manner while ensuring adequate avenues for value maximisation.

126. We have also come across the judgment of the Hon'ble NCLAT in the matter of ***Jindal Stainless Limited vs Shailendra Ajmera (supra),*** where the challenge mechanism specifically reserved the right of the CoC to cancel or abandon the process at any stage including during the challenge process, however, the CoC in the present case did not prescribe such wide powers to the CoC, and in fact the challenge process was successfully concluded and as per their own process note approved by the CoC, after the conclusion of the challenge mechanism, the compliant resolution plans finalized in the challenge mechanism were required to be voted upon. The extended challenge mechanism in the instant case, as it appears from the minutes of the meeting of CoC held on 23.12.2022 and 03.01.2023 & 06.01.2023, was in fact decided on the basis of a late bid submitted by IIHL. In our view a late bid is not allowed to be considered

as per the challenge mechanism and the assurance given by the Administrator in its letter dated 22.12.2022, and therefore any decision on second challenge motivated by the late bid, besides running foul to the process set out in Regulation 39 (1A), suffers from the same infirmity as a late bid and any subsequent thought on sub-optimal or non-satisfactory apparently motivated on this basis should not be allowed.

127. ***Whether more than one challenge mechanism is permissible?***

The plain and simple language of Regulation 39(1A) suggest that if envisaged under the RFRP, the RP may allow either the RAs to either modify their resolution plan, but not more than once or conduct a challenge mechanism to improve value of their plans. The use of the article 'a' before the term challenge mechanism clearly indicates that the regulator has intended for the conduct of a single challenge mechanism, which interpretation is further bolstered by the single modification being the only other available option. If the RP/CoC is allowed to conduct multiple challenge mechanism, it would lead to an open-ended process with no finality and render Regulation 39(1A) and (1B) otiose and nugatory and further Discourage/dissuade the RA's from putting their best bids in the challenge mechanism in the hope of topping the results of challenge mechanism subsequently. Permitting such an interpretation would be against the settled principle of purposive interpretation and

would lead to the provision not remedying the mischief that the amendment sought to curb. Similar question had arose in the CIRP of Mittal Corp Limited, wherein the NCLT allowed the consideration of a late/unsolicited bid, post conclusion of the challenge mechanism. However, the order of the NCLT, was stayed in appeal in the interim and thereafter, finally overturned by the Hon'ble NCLAT, despite a specific plea taken by the CoC at para 4 of the Hon'ble NCLAT order whereby CoC sought NCLAT permission to all resolution applicants to submit revised plans after conclusion of the challenge mechanism. It is pertinent to note that the IBBI, had itself, filed an affidavit before the Hon'ble NCLAT in the said matter, wherein IBBI has taken a stance that a single challenge mechanism can only be conducted and no late/unsolicited bids can be considered post conclusion of such challenge mechanism, which was upheld vide the NCLAT judgment. The Hon'ble NCLAT in paragraph 24, has categorically held that after adoption of a challenge mechanism to find out the highest bid, one RA cannot be allowed to submit a revised plan in the form of a late and unsolicited toppling bid. In the same vein, it is further held that the CoC has unfettered power to cancel/modify/amend the negotiations with the RA's, including the challenge mechanism. While the observations by the Hon'ble NCLAT were peculiar to the facts of that case where the Challenge Process had

extensive powers reserved for the CoC to cancel or abandon the Challenge Process, however, no such extensive powers existed in the challenge process issued by the Administrator. Further, the objective of Regulation 39(1A) were upheld by the Hon'ble NCLAT while observing that the CoC may modify/amend the negotiations (including challenge mechanism) in exercise of its commercial wisdom in cases where the challenge process has not been concluded. Any other interpretation would render Regulation 39 (1A) meaningless and redundant since the CoC would simply abandon the concluded challenge mechanism. Also, since the Hon'ble NCLAT has not given any consequence of the abandonment of the Concluded challenge process itself indicates that the Hon'ble NCLAT did not allow the concluded challenge process to be ignored in view of the Regulation 39(1A) of the CIRP Regulations. Further, trigger for exercise of a commercial wisdom cannot be a late and unsolicited toppling bid, submitted illegally post conclusion of the challenge mechanism. Something which is not allowed directly cannot be allowed to be done indirectly. The Hon'ble NCLAT judgment refers to the Hon'ble Supreme Court Judgment in the case of ***Ngaitlang Dhar V/s Panna Pragati Infrastructure Private Limited***, ***Civil Appeal 3665 of 2020***, which had implied that there needs to be an element of fairness, transparency, and equity in

the challenge process and negotiations carried out by the CoC with the resolution applicants. While holding that the intent behind giving paramount status to commercial wisdom of the CoC is to ensure completion of the processes within the timelines prescribed by the Code, it was held that consideration by the CoC of a belated bid submitted/proposed to be submitted post conclusion of the open bidding process could be said to amount to material irregularity. The following para from the said judgment supports our view:

> ***"34. In the present case, leave apart, there being any 'material irregularity', there has been no 'irregularity' at all in the process adopted by the RP as well as the CoC. On the contrary, if the CoC would have permitted the PPIPL to participate in the process, despite it assuring the other.***
>
> ***Three prospective Resolution Applicants in its meeting held on 12th February, 2020, that the absentee prospective Resolution Applicant (PPIPL) would be excluded from participation, it could have been said to be an irregularity in the procedure followed."***

In the case in hand, the toppling bid from IIHL came after the conclusion of the challenge mechanism. It is not the case where the CoC has chosen to modify the challenge mechanism prior to the conclusion of the challenge mechanism in exercise of its commercial wisdom, which itself need to be based on legitimate and legal grounds. In fact, the

Administrator (with the approval and upon instructions of the CoC) had informed all the RAs that no revision to the financial proposal shall be permitted post conclusion of the challenge mechanism. A specific representation was given by the Administrator to the Applicant vide mechanism. A specific representation was given by the Administrator to the Applicant vide the 23rd December, 2022 letter. Further, in the minutes of the CoC meeting held on 23rd December, 2022, it was categorically recognized that the challenge mechanism was conducted in the completely fair, transparent, and non-arbitrary manner and that the late and unsolicited bid illegally submitted by the IIHL was in deviation to the challenge mechanism. It was only when the Administrator was restrained from placing such late and unsolicited bid from IIHL before the CoC through the NCLT's interim order dated 3rd January 2023 that the CoC, with a view to legitimize such bid, and in exercise of its commercial wisdom coloured with the receipt of such toppling bid, chose to conduct a second/extended round of challenge mechanism. Even in the case of Reliance Capital Limited, the CoC, both while laying down the terms of the challenge mechanism and while discussing the results of the challenge mechanism post its conclusion during the CoC meeting held on 23 December 2022, had accepted that no modification shall be allowed to the financial proposals and has only now sought to change its stance.

128. All cases on commercial wisdom of the CoC relied by the Learned Sr. Counsel for the CoC members pertain to CoCs rights to approve or reject complaint Resolution Plans but none of the cases deal with the issue of lack of exercise of commercial wisdom. The instant cases pertain to the later category where despite having the Resolution Plans, the Administrator has not completed the compliance check on the Resolution Plans and the CoC is refusing to exercise its commercial wisdom to consider and vote on the Resolution Plans.

129. **Whether Regulations 39 (1A) and (1B) are mandatory or directory?**

It is settled law that the decision on whether a particular rule/provision is mandatory or directory is not a mechanical exercise and requires contextual reading of the provision in the scheme of the statute. The primary consideration is the relation of that provision to the general object intended to be secured by the legislation. i.e. the intention of the legislature/regulator. Treating Regulation 39(1A) and 39(1B) of the CIRP Regulations as directory would defeat the intent behind the introduction of said regulation (i.e. inter alia prevention of unsolicited bids/las-minute revisions to the resolution plans which may delay the CIRP). In any case, it is trite law and settled principle of statutory interpretation that any provision which is couched in negative language (such as Regulation

39(1A) and Regulation 39(1B) is to ordinarily be construed as a mandatory and not directory provision (Refer ***Mannalal Khetan V. Kedar Nath Khetan, (1977) 2 SCC424)***. Thus, by introducing Regulation 39(1A) and 39(1B), the regulator has provided a specific framework for the CoC to be able to negotiate with the RAs in a time bound manner to achieve value maximization and no negotiation or value maximization exercise can be individually undertaken by the CoC dehors the mandate of Regulation 39(1A).

Whether any further negotiations could be allowed by the CoC after conclusion of value maximization under Regulation 39(1A), in exercise of its commercial wisdom, by either relying on general provisions of the RFRP or modifying /re-issuing the RFRP?

The amendments to introduce the proviso to Regulation 36B(5) and Regulation 39(1A) and (1B) were brought into force on 30 September 2021 much later than the introduction of Regulation 36B of CIRP Regulations on 03 July 2018. The regulator, while being conscious and cognizant of the scheme under the existing Regulation 36B, introduced these amendments to curb the mischief of unnecessary delays on account of late unsolicited bids/revision to bids and their acceptance by the CoC. Post the introduction of Regulation 39(1A) and (1B), the CIRP Regulations

recognize a linear process for negotiation of resolution plans, where the RFRP issued under Regulation 36B can be modified (but not more than once) in terms of Regulation 36B(5) or re-issued (if the plans received in relation to an earlier issue are unsatisfactory) in terms of Regulation 36B(7). However, once these options are exhausted, the only avenue for value maximization is through the statutory scheme envisaged under Regulation 39(1A) and once an option under Regulation 39(1A) is chosen to negotiate with the RAs or improve value of the received resolution plans, it is presumed that such conclusive negotiations are undertaken by CoC after finding that the results of the CIRP are satisfactory and there is no need for the re-issuance of the RFRP. Thereafter, upon conclusion of value maximization under Regulation 39 (1A) in compliance with Regulation 39 (1B), the RP is required to check whether the resolution plans are compliant, followed by submission of compliant resolution plan to CoC for its evaluation of feasibility and viability followed by voting in terms of Regulation 39(3). We agree with the submissions made that untrammeled powers of the CoC to negotiate under the provisions of the RFRP in exercise of its commercial wisdom is circumscribed by the framework for value maximization provided under the Insolvency and Bankruptcy Code, 2016 ("Code") read with the CIRP Regulations. The RFRP, being a creature of CIRP Regulations, its provisions cannot be

used to defeat the scheme laid down by the IBBI under the very same CIRP Regulations. It is settled law that any powers of the CoC, including the exercise of its commercial wisdom is limited/circumscribed by the provisions of the Code read with the Regulations.

130. The CoC erroneously assumed commercial wisdom to run a second challenge mechanism despite concluding a fair and transparent challenge mechanism on 21 December 2022. In our view, given the earlier pitfalls and anomalies in the negotiation processes of the CoC and the subsequent introduction of Regulation 39(1A) where the discretion of the CoC was circumscribed by a regulated process of value maximization, it would not be correct to view the process under Regulation 39(1A) as bestowing unbridled powers on CoC. In fact, the introduction of Regulation 39(1A) is correctly summarized by the report of the Finance Committee on pitfalls and solutions of the Insolvency processes which precedes the introduction of Regulation 39 (1A), following by the report of the Insolvency Law Committee dated May 2022 in the following words:

"Although deference to the wisdom of the CoC in commercial matters is an established norm, such commercial wisdom should be exercised as per the procedure laid down by the Code and the regulations. Where the regulations specify the procedure for conducting the CIRP, unless they are ultra vires to the Code, participants are required to comply with them. Non-compliance of the same undermines the certainty, predictability and transparency of the process

thereby making it unfair for the participants and being detrimental to the development of a market for resolution plans. Since the regulations are framed in furtherance of the objectives of the Code and its provisions, a reliance on its objectives (value maximisation) for non-compliance of the procedure will go against the scheme of the Code."

Indeed, value maximization is the most important objective of the Code however it needs to be achieved in a time bound manner and in accordance with the process established in the Code and the Regulations. Further, the revival of the business is an equally critical object of the Code. We noted the condition of the business of the Corporate Debtor from the minutes of CoC meeting held on 3 January in the following terms:

> ***"The chair raised concerns in relation to the operations of the Insurance Companies as they require infusion of capital for maintain solvency ratios as per the regulatory requirement and in case there is further delay on account of litigation and/or any other matter the value of these Insurance entities will deteriorate, and the policy holders of the Insurance entities are already raising concerns on the solvency of the company."***

We are in particular concerned with the tendency to make the process open-ended. It has also come to the knowledge of this bench basis the pleadings that more than 400 days have expired in the insolvency

resolution process and on several occasions request for proposals have been issued and re-issued and plans submitted finally leading to the conduct and conclusion of the challenge process and thereafter submission of the resolution plans. The submission by the Learned Senior Counsel for the CoC members that CoC has the power to conduct as many challenge processes as they want is not consistent with the regulatory provisions under Regulation 39(1A), which defeats the progress made in the development of sustainable insolvency regime in the country basis the lessons learnt in the past on account of this haphazard understanding of value maximization without looking at the aspects of certainty of process and time bound resolution.

131. The Learned Senior Counsel for the Administrator and the Learned Senior Counsel for the CoC members argued that the plans submitted by the Resolution Applicants are yet to be evaluated for their compliances with the provisions of the Code and the Regulation. The CoC advisor noted in the 3 January minutes of CoC meeting the mismatch of values in the Applicant's plans. It is also alleged that this finding came immediately after the issuance of the interim order. Thereafter for the first time letter was issued to Applicant and IIHL to submit corrected resolution plan incorporating the financial proposal finalized in the challenge mechanism and also requested them to show the bifurcation of their respective highest

financial proposal in the challenge mechanism. The Applicant and IIHL have responded to this request and have re-submitted their resolution plan on 6 January 2023. These resolution plans are still under consideration by Administrator and CoC as per the minutes of the meeting of CoC held on 6 January 2023. Having requested for the revised submission on 4 January, the Administrator is required to check compliance of these plans submitted on 6 January 2023. While arguments are advanced on behalf of Administrator and CoC that the: Applicant has submitted resolution plan with an offer of INR 8640 crore as upfront amount which is different from the bifurcation shown in resolution plan on 22 December 2022, however, the Administrator or CoC have not made any submission that the upfront amount of INR 8640 crore is different from the highest NPV submitted by the Applicant in the challenge process. Admittedly the challenge process was based on only NPV amounts without any restriction on the minimum or maximum amount of upfront and deferred as long as it is not below the minimum amounts offered in the submission of resolution plans made on 28 November 2022. In any case, having themselves issued a request for resubmission with correct financial proposal as per challenge mechanism with bifurcation into upfront and deferred amounts, it is not open for the Administrator or the CoC to question the resubmission unless the revised resolution plans are again not compliant with the respective highest NPV

amounts offered by the resolution applicants in the Challenge Mechanism. Therefore, we do not find any merit in the arguments made by the Administrator that the Applicant has not complied with his NPV financial proposal of INR 8640 crore.

132. Such challenge mechanism having been conducted and already concluded on 21st December 2022 with the Administrator's email confirming Torrent's highest NPV bid of INR 8,640 crores (in terms of the re-issued RFRP) in accordance with the challenge mechanism note and the steps, the avenues available for value maximization stand exhausted in light of express provisions of Regulation 39 (1A) as well as the term of the challenge mechanism note and steps and the clock cannot be reset through modification/re-issuance of RFRP once again so as to defeat the process paper, challenge mechanism note, and the regulatory scheme introduced vide the amendment dated 30 September 2021, rendering the same redundant and nugatory. We are also of the view that the Administrator/CoC, use a challenge mechanism for value maximization in terms of Regulation 39(1A), and they should lead the said challenge mechanism to its logical conclusion in terms of Regulation 39(3). The proposed second round of the challenge mechanism is ultimately and effectively leading to conduct of a fresh/second challenge mechanism in deviation with the process paper, challenge process note, and the CIRP

Regulations which is in violation of the scheme of Regulation 39(1A) of the CIRP Regulation. Further, under the provisions of the Code and the CIRP Regulations, there are specific triggers for the exercise of commercial wisdom (actions that specifically require either evaluation by or the approval of the CoC, e.g. actions under Section 28 of the Code, approval of resolution plans or evaluation of their feasibility and viability under Section 30 of the Code). The CoC, cannot exercise its commercial wisdom which is ultra vires the procedural framework provided under the Code read with the CIRP Regulations. This view is also upheld by the Hon'ble NCLAT in the case of ***Dwarkadhish Sakhar Karkhana Limited Vs. Pankaj Joshi, Company Appeal (AT) (Insolvency) No. 233 of 2021***, upheld by the Hon'ble Supreme Court vide its order dated 12th July, 2021 in Civil Appeal No(s). 2317/2021).

We are, thus, of the view that CoC cannot device an illegal mechanism to circumvent the scheme of Code to indirectly be able to negotiate further with the resolution applicants post conclusion of the statutory scheme of challenge process under Regulation 39(1A). The settled legal principle of 'Quando aliquid prohibetur ex directo, prohibetur et per obliquum' dictates that one cannot do indirectly what one cannot do directly. Applying this principle in the present case, consideration of the revised

financial proposal of the IIHL (revised after the conclusion of the challenge mechanism), being in gross violation of the challenge mechanism as well as Regulation 39(1A) & 39(1B) of CIRP Regulations, cannot be done indirectly under the garb of declaring the result of the challenge mechanism as sub-optimal and resetting the clock back to Regulation 36B in derogation of the regulatory intent, especially when the final financial proposal of the Applicant was much above the minimum threshold set in the challenge mechanism. The proposed second round of the challenge mechanism is nothing but an act to indirectly achieve what could not have been achieved by adhering to the challenge mechanism in terms of the challenge process note.

133. In view of our above observations and for the reasons stated above, we hereby allow Application bearing No. 1 of 2023 and declare that the challenge mechanism for financial bids with respect to the Corporate Debtor under the challenge Process Note stood concluded on 21.12.2022 with the financial bid of the applicant at INR 8,640 Crores being the highest financial bid as communicated by the respondent by its email dated 21.12.2022. It is hereby declared that issuance of process note for extended challenge mechanism is thus in violation of Regulation 39 (1A) of the CIRP Regulations.

134. The Respondents, Administrator and the CoC, shall not allow any

deviation in the highest NPV financial proposal of INR 8110 Crore of IIHL and the highest NPV financial proposal of INR 8640 Crore of the Applicant/Torrent. Further, the Resolution Plan of IIHL along with the Original Bid value of INR 8110 Crore, and not enhanced value shall be placed before the CoC along with the final plan of the Applicant/Torrent comprising of NPV of INR 8640 Crore.

135. It is further directed that the Administrator shall take the Resolution Process of the Corporate Debtor to its logical conclusion and the CoC in its own wisdom and absolute discretion shall take appropriate decision to complete the Corporate Insolvency Resolution Process, in compliance of the provisions enshrined in the code within stipulated period by adopting due process under Regulation 39 of the CIRP Regulations.

136. The Interlocutory Application bearing IA No. 1 of 2023, IA No. 99 of 2023 and IA No. 150 of 2023, are disposed of as allowed in the above terms.

Sd/-

SHYAM BABU GAUTAM
Member (Technical)

Sd/-

JUSTICE P. N. DESHMUKH
Member (Judicial)

02.02.2023
SAM/Priyal