

Avantha Holdings Limited And Anr vs Mr. Abhilash Lal Resolution ... on 4 July, 2022

Author: Ashok Bhushan

Bench: Ashok Bhushan

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 304 of 2022
(Arising out of Order dated 08.03.2022 passed by the Adjudicating Authority
(National Company Law Tribunal), Kolkata Bench, Kolkata in IA(IB)
No.537/KB/2021 in CP (IB) No.634/KB/2017)

IN THE MATTER OF:

1. Avantha Holdings Limited
 Thappar House, 124-Janpath,
 Delhi - 110001.
2. Mr. Anil Bhargava,
 Director of Suspended Board
 of the Corporate Debtor -
 Jhabhua Power Limited,
 C-2/5, 3rd Floor, Vasant Vihar-1,
 New Delhi - 110057.

.... Appellants

Vs

1. Mr. Abhilash Lal,
 Resolution Professional for
 Jhabua Power Limited,
 C-192 Belvedere Towers,
 DLF Phase II, Gurgaon - 122002.
2. Committee of Creditors of
 Jhabua Power Limited,
 Through Axis Bank Ltd.
 Corporate Banking Branch,
 3rd Floor, Plot No.25,
 Pusa Road, Near Karol Bagh,
 Metro Station, New Delhi-110005.
3. NTPC Limited,
 NTPC Bhawan,
 Scope Complex Institutional Area,
 Lodhi Road,
 New Delhi - 110003.

.... Respondents

Present:

For Appellants: Dr. Abhishek Manu Singhvi & Mr. K. Datta, Sr.

Advocates with Mr. Prateek Kumar, Ms. Raveena Rai and Ms. Smriti Nair, Advocates.

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For Respondents: Mr. Abhinav Vasisht, Sr. Advocate with Ms. Anindita Roy Chowdhury and Mr. Raghav Chadha, Advocates for R-1/RP.

Mr. Arun Kathpalia, Sr. Advocate with Mr. Vaijayant Paliwal, Mr. Nikhil Mathur, Ms. Prabha Simran Kaur and Anoop Rawat, Advocates for R-2/CoC.

Mr. Ramji Srinivasan, Sr. Advocate with Mr. Ramakant Rai, Ms. Rajshree Chaudhary, Mr. Varun Kumar Tikmani and Mr. Somesh Srivastava, Advocates for R-3, NTPC.

JUDGMENT

ASHOK BHUSHAN, J.

This Appeal has been filed against order dated 08.03.2022 passed by the National Company Law Tribunal, Kolkata Bench, Kolkata rejecting the IA (IB) No.537/KB/2021 filed by the Appellant seeking disqualification of the Successful Resolution Applicant under Section 29A of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "Code") and further praying to set-aside decision of the Committee of Creditors ("CoC") rejecting the proposal of the Appellant.

2. The Appellant No.1 Avantha Holdings Limited, is the Promoter and Shareholder of Avanta Power and Infrastructure Limited, which in turn hold 17.9% shares of Corporate Debtor (Jhabua Power Limited). The Appellants, Promoter of Corporate Debtor aggrieved by the order dated 08.03.2022 have come up in this Appeal. Brief facts of the case and sequence of events necessary to be noted for deciding this Appeal are:

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(i) On an Application filed by FLSmidth Private Limited under Section 9 of the Code, Adjudicating Authority vide its order dated 27.03.2019 initiated Corporate Insolvency Resolution Process ("CIRP") of Jhabua Power Limited. Mr. Abhilash Lal was appointed as Resolution Professional.

(ii) The Appellant on 03.06.2019 submitted a One Time Settlement ("OTS") offer to the Resolution Professional, which was considered by CoC and was not found prudent and commercially viable. Resolution Professional invited Expression of

Interest ("EOI") from prospective Resolution Applicants for submission of Resolution Plan vide advertisement dated 19.08.2019. The process document was issued on 01.10.2019 to the prospective Resolution Applicants, inviting Resolution Plans. Last date for submission of Resolution Plans was 31.12.2019.

(iii) An affidavit certifying its eligibility under Section 29A was submitted by NTPC on 22.10.2019. On 06.12.2019, NTPC has informed Resolution Professional that Ratnagiri Gas and Power Private Limited (hereinafter referred as the "RGPPL") and Konkan LNG Private Limited (hereinafter referred as the "KLL"), which were joint ventures of NTPC, have been declared Non-profitable Asset ("NPA"). The NTPC submitted Resolution Plan on 30.12.2019. The other Resolution Applicant, that is, Company Appeal (AT) (Insolvency) No. 304 of 2022 3 Adani Power Limited ("Adani") had also submitted its Resolution Plan.

(iv) The Resolution Professional in CoC meeting dated 24.01.2020 apprised the CoC about two quotations received from the Resolution Applicants. The Resolution Professional presented both the Resolution Plans before the CoC. The CoC decided to seek revised plan and/ or clarification from the Resolution Applicants. The Resolution Professional also informed the CoC that he has received objection regarding eligibility of the NTPC.

(v) In February, 2020 lenders of RGPPL issued letters certifying that there was no overdue as on 31.12.2019. KLL entered into a Tripartite Debt Settlement dated 23.03.2020 and Deed of Novation dated 23.03.2020 with GAIL and KLL lenders for its debt restructuring. In terms of said restructuring, a part of the total outstanding debt of lenders of KLL was paid to the respective lenders and the remaining unpaid portion of the total outstanding debt of lenders of KLL was novated in favour of GAIL. Letters certifying that no dues were payable by KLL were issued by lenders in March 2020.

(vi) The Resolution Professional engaged one Mazars Business Advisors Private Limited ("Mazars") as Consultant, who submitted a Report dated 14.04.2020 certifying that NTPC is compliant with the requirements of Section 29A. On 18.09.2020 Mazars filed a Final Report certifying that NTPC is Company Appeal (AT) (Insolvency) No. 304 of 2022 4 eligible under Section 29A. The Report further mentioned that the lenders have confirmed about no due certificates issued by them with regard to RGPPL and KLL.

(viii) On 30.11.2020, NTPC submitted a revised Resolution Plan (2nd Plan), which was lower than the initial Plan submitted on 30.12.2019. Second Plan was supported by an affidavit under Section 29A categorically stating that no due certificates in respect of KLL has been received and with regard to RGPPL, there was no overdue amount.

(ix) On 21.12.2020, the Appellant made a proposal to the Members of CoC through Resolution Professional under Section 12A of the Code for settlement of debt owed by the Corporate Debtor. Further, a letter dated 26.12.2020 was written by the Appellant to the Resolution Professional containing the brief outline of the settlement proposal for the outstanding debt of the Corporate Debtor.

(x) On 31.12.2020, RGPPL entered into a Term Debt Settlement Agreement dated 31.12.2020, Deed of Novation dated 31.12.2020, Amendment of CRPC Subscription Agreement dated 31.12.2020 and Share Purchase Agreement dated 31.12.2020. In January 2020, lenders of RGPPL confirmed that no dues are payable by RGPPL pursuant to part payment of due by RGPPL One Time Settlement.

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(xi) The Appellant filed an I.A. No.213 of 2021 before the Adjudicating Authority seeking appropriate reliefs from the Tribunal for placing the Restructuring and Settlement Proposal made by the Appellant before the CoC for consideration.

(xii) 12th CoC meeting was held on 05.03.2021. The Resolution Plan submitted by NTPC was discussed. CoC was of the view that Resolution Plan submitted on 30.11.2020 was substantially lower than the earlier offer submitted by NTPC. CoC was of the view that in order to maximize the value of the Corporate Debtor fresh EOI be issued. On the withdrawal proposal submitted under Section 12A by the Appellant, CoC was of the view that CoC does not want to pursue any withdrawal under Section 12A and it does not want to go ahead with the proposal submitted by the Promoters.

(xiii) On 16.04.2021, the NTPC submitted another Resolution Plan (3rd Plan) and an affidavit dated 16.04.2021 under Section 29A, claiming that it is qualified to participate in the Resolution Plan and dues towards the lenders of KLL and RGPPL have been satisfied and lenders have provided no due certificates as on 30.03.2020 and January 2021 respectively.

(xiv) 14th Meeting of the CoC was held on 21.04.2021. CoC considered the revised Resolution Plan submitted by NTPC. CoC again considered the proposal of the Appellant under Company Appeal (AT) (Insolvency) No. 304 of 2022 6 Section 12A and took the view that Plan submitted by Promoters is not commercially viable. The proposal under Section 12A found to be unacceptable.

(xv) On 06.06.2021, the Appellant filed an I.A. No.537 of 2021 before the Adjudicating Authority seeking declaration that NTPC is not compliant with Section 29A of the Code and further praying to set-aside the CoC decision's rejecting the proposal under Section 12A.

(xvi) On 14.06.2021, NTPC submitted another revised Resolution Plan (4th Plan).

(xvii) The CoC in its 15th Meeting held on 15.06.2021 discussed the Resolution Plan submitted by NTPC. NTPC Plan was found to be compliant. The Plan was also found feasible and viable. CoC requested the Resolution Professional to proceed with the voting process of NTPC Plan. CoC has already noticed in the earlier Minutes that Adani being initially shown interest and submitted the

Plan, but has requested to withdraw the Plan and to return the Bank Guarantee, which was permitted by the CoC. The voting on the Plan took place on 26th and 27th June, 2021. The Plan was unanimously approved with 100% voting of the CoC. Thereafter, an I.A. No.586 of 2021 was filed by the Resolution Professional before the Adjudicating Authority for approval of the Resolution Plan.

Company Appeal (AT) (Insolvency) No. 304 of 2022 7 (xviii) Replies were filed to the disqualification application filed by the Appellant before the Adjudicating Authority and Adjudicating Authority vide its order dated 08.03.2021 rejected the I.A. No.537 of 2021 filed by the Appellant and held that the NTPC is not disqualified under Section 29A of the Code.

Aggrieved by the order passed by the Adjudicating Authority, this Appeal has been filed.

3. We have heard Dr. Abhishek Manu Singhvi, learned Senior Counsel for the Appellant, Shri Ramji Srinivasan, learned Senior Counsel for NTPC (Successful Resolution Applicant), Shri Arun Kathpalia, learned Senior Counsel for CoC and Shri Abhinav Vashisht, learned Senior Counsel for Resolution Professional.

4. Dr. Abhishek Manu Singhvi, learned Senior Counsel for the Appellants submits that NTPC was not eligible to submit the Resolution Plan on 30.12.2019. The two related entities of the NTPC, that is, RGPPL and KLL had already been classified as NPA and by virtue of Section 29A(c) and (j), the NTPC was disqualified. Canara Bank had classified RGPPL as NPA. The eligibility of Resolution Applicant has to be there on the date of submission of the Resolution Plan. The NTPC being disqualified on the date of submission of Resolution Plan, that is, on 30.12.2019, all subsequent process is vitiated. The Code does not contemplate submission of more than one Resolution Plan. The NTPC being not eligible on the date of submission of 1st Resolution Plan, its name ought not to have been Company Appeal (AT) (Insolvency) No. 304 of 2022 8 included in the list of eligible Resolution Applicants. The Canara Bank classified RGPPL as NPA on 21.05.2018, with effect from, 01.04.2009. Similarly, Canara Bank has classified KLL as NPA with effect from 01.04.2009. Similarly, SBI and IDBI Bank had also classified both RGPPL and KLL as NPA. Even if, the claim that RGPPL and KLL entered into OTS with lenders and no due certificates were issued, the payment having not been made by NTPC, the proviso to Section 29A(c) is not attracted. The payment of all overdue amounts has to be made by person, who is to submit the Resolution Plan. The payments having not been made by NTPC, proviso to Section 29A(c) is not attracted and the ineligibility of NTPC cannot be said to have been removed by no due certificates granted by lenders in March 2020 and January 2021 respectively. The law shelters everyone under the same light and it should not be swirled for the benefit of few. The Adjudicating Authority has taken a decision in favour of NTPC, which discretion could not have been exercised in favour of any other Resolution Applicant. The CoC did not consider the proposal of settlement given by the Appellant under Section 12A with any application of mind and there is no reasonable basis for rejection of such proposal. The Financial Statements of 2017-2018 of both RGPPL and KLL show that NTPC was partner of both the entities. In the first affidavit filed in October 2019, NTPC failed to show that it is Promoter of RGPPL and KLL. In the affidavit, there was no disclosure that both the entities were NPA. Under the Scheme of the Code, no Resolution Applicant can submit four Plans. To permit one Resolution Applicant to revise its Plan shall be detrimental to level playing Company Appeal (AT) (Insolvency)

No. 304 of 2022 9 field for others. The object of Section 29A is that all overdues are cleared by the Resolution Applicant. The Adjudicating Authority has given a very flexible interpretation, whereas Hon'ble Supreme Court in "ArcelorMittal India private Limited vs. Satish Kumar Gupta (2019) 2 SCC 1" has preferred a strict interpretation of Section 29A. The disqualification under Section 29A(c) continues throughout all the Plans submitted by NTPC.

5. Shri Ramji Srinivasan, learned Senior Counsel refuting the submissions of learned Senior Counsel for the Appellants submits that there is no disqualification attached to NTPC under Section 29A(c). It is submitted that, firstly the Canara has classified RGPPL and KLL as NPA on 21.05.2018 and by that time period of one year from the date of commencement of CIRP has not elapsed. CIRP having commenced on 27.03.2019, disqualification under Section 29A(c) was not attracted. The NTPC was not ineligible to submit its Resolution Plan on 30.12.2019 and when it was not ineligible at the time of submission of first Resolution Plan, there is no occasion of attaching any eligibility during submission of subsequent revised Plans. It is further submitted that entire debt of KLL was settled through OTS in March 2020 and all lenders have issued no due certificates in March 2020 and as there was no old dues in loan account of RGPPL, no due certificates were issued by the lenders of RGPPL. On the date on 16.04.2021, when 3rd Plan was submitted, which ultimately was considered and approved in its revised form by the CoC, it was fully compliant of Section 29A. By clearing all overdues by virtue of proviso to Section 29A(c), the NTPC had become eligible. The date for testing eligibility Company Appeal (AT) (Insolvency) No. 304 of 2022 10 under Section 29A, is the date when the Plan is placed before the CoC for consideration. The provisions of the Code contemplate for submission of vertical Plans. The use of words 'Plans' in Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (hereinafter referred to as the "CIRP Regulations") indicate that submission of more than one plan is contemplated. Further, in accordance with Section 13, sub-section (2) of the General Clauses Act, words in singular shall include the plural and vice versa. Section 12A proposal submitted by the Appellant was duly considered by the CoC and was not accepted. The approval of the 90% of the CoC voting is necessary for passing an order under Section 12A by the Adjudicating Authority. The CoC having never granted its approval, there was no question of withdrawal under Section 12A.

6. Shri Arun Kathpalia, learned Senior Counsel appearing for Committee of Creditors submitted that the CoC has duly considered the Settlement Proposal submitted by Appellant under Section 12A and found the same unacceptable. The proposal under Section 12A was examined by CoC in its meeting dated 05.03.2021 and by unanimous view, the proposal under Section 12A was rejected. Further, in meeting dated 21.04.2021, the proposal under Section 12A was again considered and it was held that proposal submitted by Appellant was not a viable option. In the proposal Appellant has proposed upfront payment of Rs.200 crores, which was significantly lower than the NTPC Resolution Plan, which provided upfront payment of Rs.905 crores. The CoC did not find the Settlement Plan Company Appeal (AT) (Insolvency) No. 304 of 2022 11 submitted by the Appellant as commercially viable. Reasons have been noticed in the Minutes of the CoC Meeting dated 21.04.2021 for rejecting the proposal under Section 12A, which decision being a commercial decision taken by CoC needs no interference. The Resolution Professional has carried out review from the perspective of Section 29A from Mazars, who had shared Final Reports dated 14.06.2021, categorically observing that NTPC is not disqualified under Section 29A. With reference to RGPPL, no due certificates were issued by the

lenders in January 2021, whereas as regard to KLL, no due certificates were issued by the lenders in March 2020. Thus, by virtue of proviso of Section 29A(c), the NTPC had become eligible to submit the Resolution Plan on the date when Resolution Plan dated 16.04.2021 was submitted as there were no dues on all connected entities, that is, RGPPL and KLL, hence, by virtue of proviso to Section 29A(c), NTPC was eligible and its Plan dated 16.04.2021, which was revised on 14.06.2021, which came for consideration and approval of the CoC was approved. The NTPC was thus fully eligible to submit the Plan.

7. Learned Counsel for Resolution Professional Shri Abhinav Vasisht also supported the submissions of Shri Ramji Srinivasan and Shri Arun Kathpalia. He submits that NTPC was eligible to submit the Plan and CoC with a due deliberations on the Resolution Plan, approved it with 100% vote. The Settlement Plan submitted by the Appellant under Section 12A was duly considered by the CoC in its meeting dated 05.03.2021 as well as 21.04.2021 and was duly rejected.

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8. We have considered the submission of learned Counsel for the parties and have perused the record.

9. We may first consider the submission of the Appellant regarding Restructuring Settlement Plan claimed to be submitted under Section 12A.

10. The Appellant submitted Restructuring/ Settlement offer on 25.01.2021 by way of letter dated 25.01.2021 to the RP, requesting him to place the proposal before the CoC. The Restructuring Settlement Plan of the Appellant is claimed to be submitted under Section 12A. We may first notice at this stage that Section 12A is a provision in Code, which permits withdrawal of Application under Section 7, 9 and 10, on an Application made by the Appellant with the approval of 90% voting share of the Committee of Creditors. Section 12A is as follows:

"12A. Withdrawal of application admitted under section 7, 9 or 10. - The Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety per cent. voting share of the committee of creditors, in such manner as may be specified."

11. Section 12A does not entitle Promoters of the Corporate Debtor to submit a Settlement Plan as is claimed by the Appellant. The Appellant has claimed before the Adjudicating Authority that the Settlement Plan submitted by the Appellant had not been considered by the CoC by any application of mind and it has been arbitrarily rejected. The pre-condition of accepting any withdrawal Application under Section 12A is on approval Company Appeal (AT) (Insolvency) No. 304 of 2022 13 by CoC by 90% of its voting shares. CoC having never granted its approval, Section 12A route was never open for withdrawal of CIRP. Furthermore, Section 12A proposal submitted by the Appellant was examined by the CoC in its meeting dated 05.03.2021. It is useful to notice the Minutes of the 12th Meeting of the CoC, where it did not agree with the withdrawal Application under Section 12A

and following observations have been noted by the CoC:

"RP requested comments from the CoC members in the matter of the proposal forwarded by Mr. B. Hariharan, Director of Avantha Holdings Limited to the RP and some members of CoC (circulated to all members by RP upon receipt). The representatives of PFC submitted that the proposal submitted by the promoters does not conform with Sec 12A of the IBC and the same should be noted in the hearing on the next date of hearing. This was agreed to by other members of the CoC who voiced a unanimous view that they do not want to pursue any withdrawal under Section 12A or go ahead with the proposal submitted by the promoters. The same was taken on record."

12. Further, in 14th CoC Meeting held on 21.04.2021 the CoC again examined the proposal of Settlement Plan submitted by Promoters in Agenda Item No.7. Following observations have been made by the CoC:

"Agenda A7: To discuss the proposal submitted by the promoters of the corporate debtor Company Appeal (AT) (Insolvency) No. 304 of 2022 14 RP team presented the contours of the restructuring proposal submitted by the promoters M/s Avantha Holdings Ltd.

This proposal submitted by the promoters was discussed pursuant to NCLT directions, and after due consideration, the CoC members from PFC, SBI, Axis Bank, PNB and REC stated that they do not consider the plan submitted by promoters to be commercially viable as the upfront payment is only INR 100 Cr, which is significantly lower than NTPC's offer. Majority of the sustainable debt payment is over a long period of 19 years and unsustainable portion of the debt is at negligible rate of interest and payable after 15 years over 5 yearly instalments. Having considered the commercials of NTPC offer and promoter proposal, it was noted that the offer from NTPC is better than the promoter proposal. Some of the CoC members also noted that some other accounts held by the promoters are under examination by various Govt. authorities/ commissions. The CoC counsel clarified that if the promoter plan is a resolution plan under the IBC, then it has potential section 29A issues and if it is a plan under 12A of IBC, then it is not in prescribed form and does not meet the requirements of 12A. RP counsel agreed that it is neither in the prescribed format nor routed through the lenders along with BG. In any event, CoC considered the commercial aspects of the proposal and have found it to be unacceptable.

CoC members also informed RP that lenders have not received any formal request from Promoters under Section 12A for withdrawal of application and moreover lenders are not keen on withdrawal from the CIRP in case Company Appeal (AT) (Insolvency) No. 304 of 2022 15 the plan is offered by the Promoters to the lenders to consider under Section 12a. Based on these points, the CoC unanimously decided not to pursue the restructuring plan further."

13. The above consideration by CoC clearly indicates that CoC has duly considered the proposal submitted by the Appellants, that is, Promoters of the Corporate Debtor and declined its consent to such proposal on high threshold, that is, 90% of CoC members rejected through vote.

14. The Hon'ble Supreme Court in Arun Kumar Jagatramka vs. Jindal Steel & Power Ltd. - (2021) 7 SCC 474, laid down the following:-

"An argument has also been advanced by the appellants and the petitioners that attaching the ineligibilities under Section 29-A and Section 35(1)(f) IBC to a scheme of compromise and arrangement under Section 230 of the 2013 Act would be violative of Article 14 of the Constitution as the appellant would be "deemed ineligible" to submit a proposal under Section 230 of the 2013 Act. We find no merit in this contention. As explained above, the stages of submitting a resolution plan, selling assets of a company in liquidation and selling the company as a going concern during liquidation, all indicate that the promoter or those in the management of the company must not be allowed a back-door entry in the company and are hence, ineligible to participate during these stages. Proposing a scheme of compromise or arrangement under Section 230 of the 2013 Act, while the company is undergoing liquidation under the provisions of the IBC lies in a similar continuum. Thus, the prohibitions that apply in the Company Appeal (AT) (Insolvency) No. 304 of 2022 16 former situations must naturally also attach to the latter to ensure that like situations are treated equally."

15. We are of the considered opinion that Section 12A proposal cannot be forced upon the lenders. The Promoters, who led to insolvency process of Corporate Debtor cannot claim to submit a Resolution Plan indirectly by way of proposal under Section 12A and ask the lenders to evaluate their Resolution Plan. Something which is not permissible directly by virtue of prohibition under Section 29A for submitting Resolution Plan by the Promoters, cannot be permitted to be done indirectly. Further, the commercial wisdom of the CoC, which is reflected in its Meeting dated 05.03.2021 and 21.04.2021 is not liable to be judicially reviewed.

16. We may also refer to the judgment of the Hon'ble Supreme Court in K. Sashidhar vs. Indian Overseas Bank & Ors. - (2019) 12 SCC 150 where following has been laid down "52. As aforesaid, upon receipt of a "rejected" resolution plan the adjudicating authority (NCLT) is not expected to do anything more; but is obligated to initiate liquidation process under Section 33(1) of the I&B Code. The legislature has not endowed the adjudicating authority (NCLT) with the jurisdiction or authority to analyse or evaluate the commercial decision of CoC much less to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors. From the legislative history and the background in which the I&B Code has been enacted, it is noticed that a completely new approach has been adopted for speeding up the recovery of the debt due from the defaulting companies. Company Appeal (AT) (Insolvency) No. 304 of 2022 17 In the new approach, there is a calm period followed by a swift resolution process to be completed within 270 days (outer limit) failing which, initiation of liquidation process has been made inevitable and mandatory. In the earlier regime, the corporate debtor could indefinitely continue to enjoy the protection given

under Section 22 of the Sick Industrial Companies Act, 1985 or under other such enactments which has now been forsaken. Besides, the commercial wisdom of CoC has been given paramount status without any judicial intervention, for ensuring completion of the stated processes within the timelines prescribed by the I&B Code. There is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. The opinion on the subject-matter expressed by them after due deliberations in CoC meetings through voting, as per voting shares, is a collective business decision. The legislature, consciously, has not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the adjudicating authority. That is made non-justiciable."

17. We, thus, are of the view that there is no error in rejection of the proposal submitted by the Appellant claimed to be under Section 12A by the CoC, after due consideration and the Adjudicating Authority has rightly refused to interfere with the commercial decision of the CoC in I.A. No.537 Company Appeal (AT) (Insolvency) No. 304 of 2022 18 of 2021 filed by the Appellants praying for setting aside the decision of the CoC rejecting their proposal.

18. Now we come to the submission of the parties regarding ineligibility of the NTPC to submit the Resolution Plan. As noted above, the submission, which has been advanced by Dr. Singhvi attracting the eligibility of NTPC is that eligibility of the Resolution Applicant has to be looked into at the time of submission of Resolution Plan on 30.12.2019, which is called as a First Plan. It is submitted that a Resolution Applicant, who is ineligible on the date, when he submits the Resolution Plan, all subsequent process regarding consideration of the Plan is vitiated and cannot enure to the benefit of Resolution Applicant. Shri Ramji Srinivasan, learned Senior Counsel appearing for Resolution Applicant has emphatically submitted that on the day when Resolution Applicant submitted the Resolution Plan, that is, on 30.12.2019, it was not ineligible under Section 29A, sub-clause (c). We, thus, proceed to examine the submission as to whether the Resolution Applicant was eligible on 30.12.2019 when it submitted the first Resolution Plan.

19. As noted above, the Resolution Applicant as per the invitation of submission of Resolution Plan was by 31.12.2019 and process documents was issued on 01.10.2019, the Resolution Applicant, that is, NTPC as well as another Resolution Applicant Adani Power Limited have submitted their Resolution Plans by 30.12.2019. The ineligibility of the Resolution Applicant is sought to be questioned on the strength of Section 29A(c) and

(j), Explanation (1). The relevant provisions of Section 29A are as follows:

Company Appeal (AT) (Insolvency) No. 304 of 2022 19 "29A. Persons not eligible to be resolution applicant. - A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person--

(c) at the time of submission of the resolution plan has an account, or an account of a corporate debtor under the management or control of such person or of whom such

person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949) or the guidelines of a financial sector regulator issued under any other law for the time being in force, and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor:

Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to nonperforming asset accounts before submission of resolution plan:

Provided further that nothing in this clause shall apply to a resolution applicant where such applicant is a financial entity and is not a related party to the corporate debtor.

Explanation I.- For the purposes of this proviso, the expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares 1[or Company Appeal (AT) (Insolvency) No. 304 of 2022 20 completion of such transactions as may be prescribed], prior to the insolvency commencement date.

Explanation II.-- For the purposes of this clause, where a resolution applicant has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset and such account was acquired pursuant to a prior resolution plan approved under this Code, then, the provisions of this clause shall not apply to such resolution applicant for a period of three years from the date of approval of such resolution plan by the Adjudicating Authority under this Code;

(j) has a connected person not eligible under clauses (a) to (i).

Explanation[I]. -- For the purposes of this clause, the expression "connected person" means--

- (i) any person who is the promoter or in the management or control of the resolution applicant; or
- (ii) any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan; or
- (iii) the holding company, subsidiary company, associate company or related party of a person referred to in clauses (i) and (ii):

Provided that nothing in clause (iii) of Explanation I shall apply to a resolution applicant where such applicant is a financial entity and is not a related party of the corporate debtor:

Company Appeal (AT) (Insolvency) No. 304 of 2022 21 Provided further that the expression "related party" shall not include a financial entity, regulated by a financial sector regulator, if it is a financial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares or completion of such transactions as may be prescribed, prior to the insolvency commencement date"

[Explanation II--For the purposes of this section, "financial entity" shall mean the following entities which meet such criteria or conditions as the Central Government may, in consultation with the financial sector regulator, notify in this behalf, namely:--

(a) a scheduled bank;

(b) any entity regulated by a foreign central bank or a securities market regulator or other financial sector regulator of a jurisdiction outside India which jurisdiction is compliant with the Financial Action Task Force Standards and is a signatory to the International Organisation of Securities Commissions Multilateral Memorandum of Understanding;

(c) any investment vehicle, registered foreign institutional investor, registered foreign portfolio investor or a foreign venture capital investor, where the terms shall have the meaning assigned to them in regulation 2 of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 made under the Foreign Exchange Management Act, 1999 (42 of 1999);

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(d) an asset reconstruction company register with the Reserve Bank of India under section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(e) an Alternate Investment Fund registered with Securities and Exchange Board of India;

(f) such categories of persons as may be notified by the Central Government."

20. We may now look into the classification of NPA of both the connected entities, that is, RGPPL and KLL. The Appellant has submitted the following chart to show the effective dates of NPA of both RGPPL and KLL:

"RGPPL and KLL were NPA from effective dates which were much prior to even one year prior to commencement of CIRP on 27 March 2019 Effective Date of NPA Effective date of NPA Classification (RGPPL Classification (KLL) Canara 01.04.2009 (On 21 01.04.2009 Bank May 2019) (Pg.230 Vol. (Pg.1029 Vol.IV-Cc @ I-CC @ pg. 4; pg.550 Pg.20; Pg.1388 Vol.VI-

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| | Vol.Ii-CC pg. 10,11) (Pg. 1594 Vol. VII of Mazars Report-CC @ Pg. 58) | CC @ Pg.162) (Pg.1596 Vol.VII of Mazars Report-CC @ Pg.60) |
| SBI | 30.06.2014 (In July 2019) Pg.1595 Vol. VII of Mazars Report-CC @ Pg.59) | (Sometime around September-October 2019) (Meeting of Lenders Meeting dated 18.10.2019 for KLL Page 187 NTPC Reply- CC @ Pg.160) |
| IDBI Bank | 01.05.2015 (On 30 June 2019) (Pg.1595 Vol. VII of Mazars Report-CC @ Pg.59) | (Sometime around September-October 2019) (Meeting of Lenders dated 18.10.2019 for KLL Page 187 NTPC Reply-Cc @ Pg.160) |

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21. The classification of NPA date of RGPPL and KLL are reflected from the financial documents of both the entities, which were brought on record.

In Financial Statement of 2018-19 of the RGPPL, which is brought on record along with the Appeal Vol.1, page 230, where in paragraph 26.2, following statement has been made "In the meantime, Canara Bank vide its letter dated 21st May, 2018, 20th July, 2018, 30th July, 2018 and 18th August, 2018 informed that they have downgraded RGPPL's Account from Standard Assets to NPA as per RBI Circular dated 12th February, 2018 withdrawing 5/25 scheme and that their participation/ implementation of 5/25 scheme (including conversion of debt into CRPS) is put on hold. Further, Canara Bank sought fresh resolution plan under the revised framework of RBI for resolution of stressed assets."

22. Similarly, with regard to KLL in the Financial Statement of 2018-19 with regard to NPA, following statement has been made:

"* The Canara bank, one of the lenders of the company (3.99% of outstanding as on 31.03.2019), has classified the company's account as Non Performing Asset (NPA) as on 31.03.2018 w.e.f. 01.04.2009 citing the reason of incomplete restructuring and as

per RBI circular dated 12.02.2018. The said RBI circular has been held unconstitutional and ultra vires by Hon'ble Supreme Court vide its order dated 02.04.2019. The company has been paying due interest (excluding penal interest) on loan amount w.e.f. 01.01.2016 till date. It is expected that in view of Hon'ble Supreme Court Order, Canara Bank Loan may be upgraded as Standard asset in due Company Appeal (AT) (Insolvency) No. 304 of 2022 24 course. The Canara Bank account as 31.03.2019 continues to be NPA in their books and has shown a recoverable of 161.24 cr against 147.73 cr in respect of initial loan due because of difference of penal interest on account of NPA."

23. From the date of the NPA classification, as noted above in Tabular Form, it is clear that classification of NPA of RGPPL and KLL by SBI and IDBI were on 21.05.2018. The first classification of NPA by the Canara Bank on 21.05.2018 was with effect from 01.04.2009. The submission, which has been pressed by Shri Ramaji Srinivasan is that classification date being 21.05.2018 and from that classification date the period of one year has not elapsed on 27.03.2019, when the CIRP of the Corporate Debtor commenced, hence, there is no disqualification under Section 29A(c). If we take the date 21.05.2018 as the date declared for classification of NPA, one year period has not elapsed on 27.03.2019, but the submission of Appellant is that the classification although declared on 21.05.2018, it was with effect from 01.04.2009 and more than one year period had elapsed, thus, the submission of Resolution Applicant (NTPC) that it was eligible under Section 29A(c) is to be rejected.

24. What is the purpose and object of expression in the statute that at least a period of one year has elapsed from the date of such classification, as appearing in Section 29A, sub-clause (c) falls for consideration and interpretation in this Appeal.

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25. The Hon'ble Supreme Court in Swiss Ribbons Private Limited and another vs. Union of India and Others - (2019) 4 SCC 17 in paragraph 105 has noticed:

"105.As a matter of legislative policy, therefore, quite apart from malfeasance, if a person is unable to repay a loan taken, in whole or in part, within this period of one year and three months (which, in any case, is after an earlier period where the corporate debtor and its financial creditors sit together to resolve defaults that continue), it is stated to be ineligible to become a resolution applicant. The reason is not far to see. A person who cannot service a debt for the aforesaid period is obviously a person who is ailing itself. The saying of Jesus comes to mind -- "if the blind lead the blind, both shall fall into the ditch." The legislative policy, therefore, is that a person who is unable to service its own debt beyond the grace period referred to above, is unfit to be eligible to become a resolution applicant. This policy cannot be found fault with. Neither can the period of one year be found fault with, as this is a policy matter decided by RBI and which emerges from its Master Circular, as during this period, an NPA is classified as a substandard asset. The ineligibility attaches only

after this one year period is over as the NPA now gets classified as a doubtful asset."

26. The statutory provision under Section 29A, sub-clause (c) is plain and clear that grace period of one year has been given and if after expiry of grace period, Resolution Applicant is unable to pay the dues and the NPA continues, the Resolution Applicant becomes ineligible. The question to be Company Appeal (AT) (Insolvency) No. 304 of 2022 26 answered in the present case is as to what shall be the date of classification of NPA by Canara Bank, whether it is 21.05.2018 or 01.04.2009. From the materials on record, it is clear that classification was declared on 21.05.2018, although with effect from 01.04.2009. So, the date on which classification is declared is relevant or the date with effect from such classification is made to be effective is relevant for the purpose of 29A(c), is the straight question to be answered. The purpose of date of "such classification" is that from the date of such classification, within grace period, that is, one year, if one year period has expired and NPA still continues, the Resolution Applicant is ineligible. From reverting to the facts of the present case, the NPA classification was declared on 21.05.2018 with effect from 01.04.2009. So, 01.04.2009 is the backdate which has been given by Canara Bank, but actual date of classification is 21.05.2018. If we take the backdate as the date of classification, the purpose and object for giving the grace period will not be fulfilled. If date of classification is declared as a date which is nine years ago, there is no question of a Resolution Applicant to take any benefit of the grace period of one year. The purpose for statutory requirement that at least one year has elapsed from the date of such classification is to see that within a period of one year from classification, if the Resolution Applicant did not get away from NPA, it should be declared as NPA. But in case where the Resolution Applicant does not actually get the grace period whether by a backdate, which is of nine years ago, it can be denied the benefit of the expression statutory requirement of "at least period of one year has elapsed from the date of such Company Appeal (AT) (Insolvency) No. 304 of 2022 27 classification". We, thus, are of the view that date of NPA classification by the Canara bank shall be treated as 21.05.2018 and it cannot be taken as on 01.04.2009, which is the backdate, as has been given by the Canara Bank, with effect from which date NPA is declared. If the interpretation as put by learned Counsel for the Appellant is accepted, the purpose of statutory prescription under Section 29A(c) can be defeated by the Financial Institutions by declaring NPA on particular date and making it effective from back date, so that no Resolution Applicant can take the benefit of statutory provision as provided under Section 29A(c). We, thus, have to take the date of 21.05.2018, as the date of NPA classification by the Canara Bank. Similarly, the NPA classification by SBI and IDBI Bank are all subsequent to 21.05.2018, that is, in the year 2019. We, thus, have to take date of classification as 21.05.2018 on which date the Resolution Applicant was classified as NPA and the period of one year had not elapsed till 27.03.2019, when CIRP commenced. Since on the date of commencement of CIRP, period of one year has not elapsed, the disqualification under Section 29A(c) shall not attach to the NTPC, who was Resolution Applicant. We, thus, accept the submission of learned Senior Counsel for the Resolution Applicant that Resolution Applicant was eligible on 30.12.2019 when it submitted the Resolution Plan. When Resolution Applicant was eligible on 30.12.2019, it continued to be eligible in entire process of the CIRP. The CoC, which is statutorily authorised to conduct the CIRP with the object of reviving the Corporate Debtor is fully competent Company Appeal (AT) (Insolvency) No. 304 of 2022 28 to ask the Resolution Applicant to revise its Plan, improve its Plan and submit the revised Resolution Plan.

27. The Hon'ble Supreme Court in Kalpraj Dharamshi & Anr vs. Kotak Investment Advisors (2021) SCC OnLine SC 204 has held that CoC is competent to suggest modification to the prospective Resolution Applicant. Following observations has been made by the Hon'ble Supreme Court in the judgment:

"This Court held, that what is left to the majority decision of CoC is the "feasibility and viability" of a resolution plan, which is required to take into account all aspects of the plan, including the manner of distribution of funds among the various classes of creditors. It has further been held, that CoC is entitled to suggest a modification to the prospective resolution applicant, so that carrying on the business of the corporate debtor does not become impossible, which suggestion may, in turn, be accepted by the resolution applicant with a consequent modification as to distribution of funds, etc. It has been held, that what is important is, the commercial wisdom of the majority of creditors, which is to determine, through negotiation with the prospective resolution applicant, as to how and in what manner the corporate resolution process is to take place."

28. When we have found that the Resolution Applicant was eligible on 30.11.2019 when it submitted the first Resolution Plan, we see no necessity to enter into other submission raised by learned Counsel for the parties including the submission regarding applicability of the proviso to Section 29A(c). The Resolution Applicant being eligible, was entitled to submit Company Appeal (AT) (Insolvency) No. 304 of 2022 29 Resolution Plan and was also entitled to revise its Plan from time to time as per the Scheme of the Code. The Plan having approved by 100% vote of CoC, we do not find any error in the decision of the Adjudicating Authority rejecting the I.A. No.537 of 2021 filed by the Appellant.

29. For the reasons as indicated above, we thus, are of the view that Adjudicating Authority has rightly rejected the I.A. No.537 of 2021 seeking disqualification of the Resolution Applicant as well as praying for setting aside the decision of CoC rejecting the proposal of Appellant under Section 12A. Decision of the Adjudicating Authority on both the counts finds our approval. We, thus, do not find any merit in the Appeal. The Appeal is dismissed. No order as to costs.

[Justice Ashok Bhushan] Chairperson [Ms. Shreesha Merla] Member (Technical) [Naresh Salecha] Member (Technical) NEW DELHI 4th July, 2022 Ashwani Company Appeal (AT) (Insolvency) No. 304 of 2022 30