NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH COURT III

Item No. 01
I.A. 4193/2024
In
C.P. (IB) 513(MB)/2022

CORAM:
SH. HARIHARAN NEELAKANTA IYER
Member (Technical)

MS. LAKSHMI GURUNG
Member (Judicial)

ORDER SHEET OF THE HEARING ON **10.07.2026**
(HEARING THROUGH: HYBRID MODE)

NAME OF THE PARTIES: Foresight Innovations Private Limited

VS

Future Enterprises Limited

Appearance

For Respondent : Adv. Kaushik Puranik i/b Chandhiok & Mahajan (PH).

SECTION 9 OF THE IBC, 2016

ORDER

This application is listed for pronouncement of order. The same is pronounced in open court, vide a separate order.

Sd/-
HARIHARAN NEELAKANTA IYER
Member (Technical)

Sd/-
LAKSHMI GURUNG
Member (Judicial)

---Azad---

IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH COURT-III

I.A No. 4193/2024

In

CP No. 513/2022

Under Section 60(5)(c) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the NCLT Rules, 2016.

Jindal India Limited

Plot No. 12, Sector – B1, Local Shopping Complex, Vasant Kunj, New Delhi – 110070

… Applicant

Vs

1. Mr. Avil Menezes

Resolution Professional of Future Enterprises Limited

106, 1st Floor, Kanakia Atrium 2; Cross Road A, Behind Courtyard Marriott, Chakala, Andheri East, Mumbai – 400093

2. Committee of Creditors of Future Enterprises Limited

Through Central Bank of India

106, 1st Floor, Kanakia Atrium 2; Cross Road A, Behind Courtyard Marriott, Chakala, Andheri East, Mumbai – 400093

… Respondents

In the matter of

Foresight Innovations Private Limited

… Petitioner

Vs

Future Enterprises Limited

… Corporate Debtor

Order pronounced on: 10.07.2026

Coram:

Sh. Hariharan Neelakanta Iyer Member *(Technical)*	Ms. Lakshmi Gurung Member *(Judicial)*

Appearances:

For Applicant	: Adv. Shyam Kapadia a/w. Adv. Princi Jaiswal, Adv. Janhavi Hirlekar i/b. Dhir & Dhir Associates
For Resolution Professional	: Adv. Pulkit Sharma a/w. Adv. Pooja Mahajan, Adv. Karan Vir Khosla, Adv. Kaushik Puranik, Adv. rohan Vasa, Adv. Naman Jain i/b. Chandhiok & Mahaja

Per:* Ms. Lakshmi Gurung, Member *(Judicial)

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1. The Interlocutory Application (IA) bearing no. 4193/2024 has been filed by Jindal India Limited (**Applicant**) against the Resolution Professional (**RP**) and Committee of Creditors (**CoC**) of M/s Future Enterprises Limited (**Corporate Debtor**) under section 60(5) of the Insolvency and Bankruptcy Code, 2016 (**I&B Code**) read with Rule 11 of National Company Law Tribunal (NCLT) Rules, 2016, seeking following reliefs:

   a. *Allow the instant Application filed by the Applicant;*

   b. *Set aside the e-mail dated 09.03.2024 as addressed by the Respondent No. 1/ Resolution Professional to the Applicant;*

   c. *Direct the Resolution Professional of the Corporate Debtor to refund the Earnest Money Deposit to the tune of INR 10,00,00,000/- (Rupees Ten Crore only) as submitted by the Applicant for the purpose of Resolution Plan, to the Applicant, along with interest accrued thereon for the period of delay;*

d. *Direct the Respondents to not appropriate the EMD submitted by the Applicant during the pendency of the instant Application;*

e. *Pass any other Order that this Ld. Tribunal deems necessary in the interests of justice.*

2. **Facts emerging from the pleadings:**

2.1 The Corporate Insolvency Resolution Process (**CIRP**) was ordered against Future Enterprises Limited (**Corporate Debtor**) vide Order dated 27.02.2023 in CP/513/2022 and Mr. Jitender Kothari was appointed as the Interim Resolution Professional (**IRP**). The IRP made public announcement on 08.03.2023 inviting claims from the creditor. After receipt of the claims, the Committee of Creditors (**CoC**) was constituted on 28.03.2023.

2.2 In the 3rd CoC Meeting held on 22.05.2023, the CoC resolved to appoint Mr. Avil Menezes as the Resolution Professional (**RP**) who was so appointed vide order dated 22.06.2023.

2.3 In the meantime, the IRP issued Form-G inviting Expression of Interest (**EoI**) on 10.06.2023. Subsequently, a corrigendum to Form-G was published on 24.06.2023.

2.4 Pursuant to the issuance of Form G, the RP received EoI from 3 (three) Prospective Resolution Applicants (**PRAs**). The RP prepared the provisional list of PRAs on 10.07.2023. Subsequently, with the approval of the CoC, the RP issued the Request for Resolution Plan (**RFRP**), the Evaluation Matrix (**EM**) and the Information Memorandum (**IM**). On 25.07.2023, the RP prepared the final list of PRAs. The last date for submission of resolution plans was 24.08.2024.

2.5 M/s Jindal India Limited (**the Applicant**) submitted its EoI on 23.06.2023 along with an affidavit confirming the eligibility of the Applicant under section 29A of the Code and Earnest Money Deposit (in short **EMD**) of Rs. 10 crores. The Applicant also submitted a list of related parties. The Applicant was in the list of the final PRAs.

2.6 The last date for submission of resolution plans was extended by the CoC from time to time and the extended last date was 16.10.2023.

2.7 On 16.10.2023, the Applicant submitted its resolution plan which was the only plan received by the RP within the stipulated time. The resolution plan was opened by the RP in the presence of the CoC at the 10th CoC Meeting held on 16.11.2023.

2.8 Axis Bank, one of the CoC Members, had sent an email dated 21.11.2023 to the RP stating that the account of one M/s Jindal India Thermal Power Limited (**JITPL**) which is a related party of the Applicant has been classified as a Non-Performing Asset (**NPA**) and requested the RP to check the eligibility of Applicant under section 29A of the Code.

2.9 Another email was sent by the Axis Bank to the RP on the same date i.e. 21.11.2023 opining that the Applicant is not eligible to submit a resolution plan and is disqualified.

2.10 The RP forwarded the emails of Axis Bank to the Applicant and sought clarification. The Applicant responded vide email dated 22.11.2023 and claimed that it is eligible under section 29A of the Code since JITPL had paid the entire resolution amount of Rs. 2450 crores by 29.04.2022 and there exists no overdue amount in any of the group or associate companies of B. C. Jindal Group as on the date of submission of resolution plan i.e. 16.10.2023.

2.11 The RP vide his email dated 22.11.2023 requested the Applicant to provide documents to substantiate its clarification of eligibility under section 29A of the Code. In response thereto, the Applicant sent email dated 23.11.2023 and shared a letter dated 07.10.2022 of Punjab National Bank (**PNB**) given to JITPL.

2.12 The RP sent email dated 23.11.2023 to the Applicant and sought confirmation as to whether Axis Bank is a member of consortium which was led by PNB. The Applicant confirmed that Axis Bank was a part of the consortium of JITPL.

2.13 The correspondence exchange between the RP and Applicant was placed before the CoC through email dated 23.11.2023 and the RP also asked Axis Bank to provide documents to substantiate the Bank's opinion that the Applicant is ineligible under section 29A of the Code.

2.14 On 29.11.2023, the RP requested the Applicant to provide the audited financial statements of JITPL for the Financial Year (**FY**) 2022-23 which was shared by the Applicant on 01.12.2023.

2.15 In the 11th CoC meeting held on 01.12.2023 which was also attended by the representatives of the Applicant, the Axis Bank apprised that the lenders of JITPL have not issued any No Dues Certificate to JITPL and that the account of JITPL continues to remain NPA. The CoC instructed the RP to conduct an audit to check the eligibility of the Applicant under section 29A of the Code.

2.16 The CoC was also of the view that the resolution plan of the Applicant was unsatisfactory and accordingly, decided to scrap the process and to issue a fresh Form G. Accordingly, the RP issued a fresh Form G on 26.12.2023 for submission of resolution plans for one or more assets of the Corporate Debtor from the PRAs.

2.17 The decision of the CoC to issue fresh Form G was communicated to the Applicant by the RP through email dated 14.12.2023. The RP also stated that if the Applicant is found to be ineligible to submit resolution plan under section 29A of the Code, the RP, on instructions of the CoC, shall have the right to forfeit the EMD submitted by the Applicant.

2.18 The Applicant responded through email dated 14.12.2023 and reiterated that it is eligible under section 29A of the Code and also sought refund of the EMD.

2.19 Thereafter, upon obtaining approval from the CoC at the 12th CoC Meeting held on 15.12.2023, the RP appointed CLA Indus Value Consulting (**CLA**) for the purpose of compliance check.

2.20 On 21.12.2023, the RP asked for KYC details of directors/promoters of the Applicant which was provided by the Applicant. Subsequently, on 18.01.2024, the RP sought more information in respect of JITPL. The Applicant responded on 19.01.2024.

2.21 The CLA submitted its report on the eligibility of the Applicant under section 29A of the Code on 04.03.2024. The CLA in its report had opined that the Applicant is disqualified under section 29A(c) of the Code.

2.22 At the 16th CoC Meeting held on 04.03.2024, the CoC decided to forfeit the EMD submitted by the Applicant. Pursuant thereto, on 09.03.2024, the RP informed the Applicant about the forfeiture of its EMD in terms of clause 1.15.2.1(d) of the RFRP.

2.23 In the above factual backdrop, the Applicant has filed the present application seeking *inter alia* refund of the EMD.

3. **Submissions of the Applicant**

3.1 It is submitted that the RP had already carried out due diligence with respect to the Applicant's eligibility in terms of the Code and on this basis, the Applicant was added in the provisional as well as final list of PRAs. It is submitted that neither Axis Bank nor any other member of CoC had raised any query in this regard earlier and it was only after being declared as eligible that the Applicant submitted its resolution plan. Only after submission of the resolution plan, Axis Bank had for the first time raised this issue before the RP. Thus, the CoC and RP have not carried out the CIRP process as per the Code and have acted in a *mala fide* and unfair manner in forfeiting the EMD.

3.2 Without prejudice, it is submitted that the Applicant had promptly responded to the queries of the RP and the CLA Indus Value Consulting (CLA) and has submitted the requisite documents to reaffirm its eligibility under section 29A of the Code. However, the RP based on the report of CLA has classified the Applicant ineligible under section 29A(c) of the Code.

3.3 It is submitted that the Applicant is not ineligible under section 29A(c) of the Code for following reasons:

a) As per the first proviso to clause (c) of section 29A, the Applicant herein shall be eligible under Section 29A(c) if the Applicant or its connected person has made the payment of all overdue amounts with interest thereon and charges relating to any nonperforming asset accounts before submission of the Resolution Plan.

b) In the present case, the JITPL has entered into a Master Resolution Agreement with its lenders and undertook to pay Rs. 2450 crores. By 29.04.2022, the JITPL had paid the entire amount along with interest and charges which has been acknowledged by Punjab and National Bank in its letter dated 07.10.2022. Therefore, the ineligibility under section 29A(c) of the Code is not attracted. Reliance is placed on the judgment of Hon'ble Supreme Court in ***Arcelor Mittal India Pvt. Ltd. vs. Satish Kumar Gupta and Ors. (Civil Appeal Nos. 9402-9405 of 2018).***

3.4 Without prejudice, it is submitted that even if it is assumed for sake of arguments that the Applicant is ineligible under section 29A of the Code, even then the Respondents are not entitled to forfeit the EMD for the following reasons:

a) Regulation 36B (4) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (**CIRP Regulations**) provides that the RFRP shall not require any non-refundable deposit for submission of or along with resolution plan which implies that neither the Committee of Creditors, nor the Resolution Professional are entitled to forfeit the EMD submitted by the Resolution Applicant without following the due process of law.

b) The right to forfeit a refundable deposit is neither absolute nor discretionary and thus, it is not open for the Respondents to provide for forfeiture of the EMD on grounds which is contrary to the Code and the CIRP Regulations, in order to provide for unjust enrichment at the cost of the Applicant. The clause in the RFRP which provides for unilateral forfeiture of EMD merely on the basis of an apprehension of the CoC and/or Resolution Professional that the Applicant herein is ineligible is contrary to the settled principles of law.

c) As per Regulations 36A(7)(f) and 39(1)(c) of the CIRP Regulations, the only situation in which the refundable deposit is liable to be forfeited is in case of submission of any false information or record on part of the Resolution Applicant. However, in the instant case, the Applicant has submitted all correct information and record with respect to its eligibility, related parties etc., as well as other information and records, as sought by the Resolution Professional from time to time.

d) The forfeiture of EMD by the RP was only on the basis of the report of CLA in which in which the Applicant was declared ineligible under section 29A of the Code. It is submitted that it is a settled position of law as laid down by Hon'ble NCLAT in ***S. Hari Karthik versus Jayaram Chowdhary and Ors. (Company Appeal (AT) (CH) (Ins) No. 326 of 2021)*** that EMD cannot be forfeited on the grounds of ineligibility in terms of section 29A of the Code.

3.5 It is submitted that the RP did not send the Minutes of the CoC Meetings in which the alleged decisions for termination of CIRP process and forfeiture of EMD were taken. Further, the RP has also not provided the copy of the Report of CLA.

4. **<u>Reply of the Respondents</u>**

The Applicant has impleaded the RP and the CoC of the Corporate Debtor as Respondents No. 1 and 2 respectively. While no reply has been filed on behalf of the CoC, the RP filed his reply and submitted as follows:

4.1 It is submitted that the Applicant by way of an affidavit had confirmed that neither the Applicant nor its related parties are ineligible under section 29A of the Code. Further, even in the reply emails to the queries of the RP, the Applicant reiterated that the Applicant is not ineligible under section 29A of the Code.

4.2 The RP has referred to the judgment dated 16.04.2024 passed by Hon'ble Delhi High in Writ Petition (C) No. 15218 of 2022 filed by JITPL which is admittedly a related party of the Applicant and submitted:

a) The account of JITPL was classified as NPA in the year 2016. Subsequently, JITPL entered into a Master Resolution Agreement (**MRA**) with its bankers and lenders, pursuant to which an amount of Rs. 2450 crores was to be paid to the lenders/bankers within a period of 4 years. Besides the payment of Rs. 2450 crores, JITPL was also required to transfer 10% of its equity shares on a fully diluted basis to its bankers/lenders within 10 days from the date of release of pledge held by the bankers/lenders over the equity shares of the JITPL.

b) JITPL paid the entire amount of Rs. 2450 crores by April 2022 and requested the banks to release the pledge over its equity shares. The Punjab National Bank (PNB) responded on 27.09.2022 that Axis Bank proposed to execute a share purchase agreement (**SPA**) between the bankers/lenders and JITPL which was agreed by the other banks in the consortium.

c) JITPL filed Writ Petition (C) No. 15218 of 2022 before Hon'ble Delhi High Court seeking *inter alia* to release the pledge over equity shares held by the lenders claiming that the full payment of resolution plan has been made by JITPL to the lenders. The Hon'ble Delhi High Court in its judgment dated 16.04.2024 observed that the dues owed by JITPL cannot be considered to be settled till transfer of equity shares and accordingly, the banks were directed to upgrade the account of JITPL from NPA to standard only after completion of transfer of equity shares.

4.3 Referring to the observations and directions of Hon'ble Delhi High Court in its judgment dated 16.04.2024, it is submitted that even as on 16.04.2024, the account of JITPL continues to be classified as NPA which demonstrates that the confirmation given by Applicant with respect to the eligibility under section 29A of the Code in its affidavit was false and misleading.

4.4 It is submitted that as per Clause 1.15.2.1(d) of the RFRP, the RP (acting on instructions of the CoC) shall have the right to forfeit the EMD if a resolution applicant is found to be ineligible under section 29A of the Code or if it found that the resolution applicant has made false or misleading declaration of eligibility. However, as per the observations of since the Applicant was disqualified under section 29A of the Code as per the CLA Report dated 04.03.2024, the CoC at its 16th meeting held on 04.03.2024 decided to forfeit the EMD in accordance with clause 1.15.2.1(d) of the RFRP. It is submitted that the observations of Hon'ble Delhi High Court in judgment dated 16.04.2024 further fortifies the stand of the CoC.

4.5 It is submitted that the Applicant's reliance on ***S. Hari Karthik vs. Jayaram Chowdhary and Ors.*** *(supra)* is misplaced since in the said case, the Hon'ble NCLAT had noticed that the RFRP did not provide for forfeiture of EMD on account of ineligibility under section 29A of the Code whereas in contrast, in the present case, the terms of RFRP stipulates that EMD may be forfeited if the the resolution applicant is found to be ineligible and/ or makes false/misleading declaration of eligibility under Section 29A of the Code.

5. **Rejoinder of the Applicant**

5.1 It is contended that the RP has not answered the issues raised by the Applicant in the present application regarding the applicability of the first proviso of section 29A(c) of the Code and the issue of unjust enrichment of the Respondents wherein the EMD has been forfeited after annulment of the CIRP process on commercial grounds.

5.2 It is submitted that even if it is assumed that the account of JITPL continues to be NPA, the Applicant cannot be held to be ineligible under section 29A of the Code by virtue of the first proviso of section 29A(c) of the Code which states that a person is eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to non-performing asset accounts before submission of resolution plan. In the present case, it is admitted fact that JITPL has paid the entire amount and therefore, non-availability of no dues certificate or any other documents which was sought by the RP is irrelevant and non-submission of same cannot be a ground to make the Applicant ineligible under section 29A(c) of the Code based only on a limited research carried out by CLA Indus Value Consulting.

5.3 It is submitted that the first proviso to Section 29A(c) of the Code is an exception to the general rule contained therein. As per the rules of interpretation, a proviso carves out an exception to the main provision to which it has been so enacted.

5.4 It is submitted that the reliance placed on the judgment of Hon'ble Delhi High Court is misplaced since the only issue before Hon'ble Delhi High Court was whether the Share Purchase Agreement ought to be entered into by JITPL in terms of the Master Resolution Agreement and not with respect to whether the entire dues has been paid or not. In fact, the said judgment records that the total resolution amount has been paid by JITPL. Without prejudice, it is submitted that the judgment was passed only on 16.04.2024 whereas the resolution plan was submitted on 16.10.2023 and therefore, as on the date of submission of resolution plan, the RP could not have categorised the Applicant as ineligible in terms of the observations in the judgment to substantiate its stand for forfeiting the EMD.

5.5 It is submitted that the clause 1.15.2.1(d) of the RFRP is in contravention to Regulation 36B(4) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (**CIRP Regulations**) which provides that that the Request for Resolution Plan shall not require any non-refundable deposit for submission of or along with the resolution plan. It is further submitted that Regulations 36A(7)(f) and 39(1)(c) of the CIRP Regulations specifically deals with instances wherein refundable deposit may be forfeited, however, the terms of RFRP for forfeiture of EMD is in contravention to the said Regulations.

5.6 It is submitted that RFRP is a legal document and is a creation of a statute and therefore, cannot override the mandatory provisions of the statute under which it is created. Therefore, the clauses of RFRP ought to be within the provisions of the Code and the CIRP Regulations. Thus, clause 1.15.2.1(d) of the RFRP is liable to be rejected for being in contravention of the CIRP Regulations.

5.7 It is submitted that the duty of the RP is to act in a fair and neutral and the role of RP is that of a facilitator, however, in the present case, the RP has assumed the role of an adjudicator to penalise the Applicant and the allegations levelled against the Applicant are not borne out of any material facts and/or documentary evidence. It is submitted that the meaning of 'fraud' implies something that is dishonest, deceitful and/or untrue and *mens rea* is a condition precedent for proving falsehood, however, in the present case the RP has failed to establish guilt or *mens rea* on part of the Applicant. It is submitted that the RP being an officer of the court cannot avoid the rigors of the Code by merely hiding behind the decisions of CoC.

5.8 It is submitted that the intent of the Respondents to forfeit the EMD is to unjustly enrich themselves at the cost of the Applicant since by the RP's own averments, it is admitted that the CIRP process was annulled by the CoC on account of the resolution plan being unsatisfactory. Thus, the scraping of the resolution process was on commercial grounds and not due to the alleged ineligibility of the Applicant. The annulment of the process would render the Form G, the Applicant's EoI as well as the RFRP null and void and thus, cannot be given effect to. It is submitted that once the process was cancelled by the CoC on its own accord, the EMD which is a refundable deposit made by the Applicant ought to have been forthwith refunded.

5.9 It is further submitted that the Applicant was included in the list of provisional PRAs as well as final PRAs and no clarification was sought with respect to JITPL at the time of submission of EoI and resolution plan. Therefore, once the eligibility of the Applicant was determined by the Respondents at the time of submission of EoI, it is not open for the Respondents to raise any objections qua the eligibility of the Applicant at the fag end of the process.

ANALYSIS & FINDINGS

6. Heard Ld. Counsel for the parties and perused the records.

7. The Corporate Debtor was admitted to CIRP on 27.02.2023. Mr. Avil Menezes, Respondent No. 1, was appointed as the RP of the Corporate Debtor.

8. Pursuant to issuance of Form G on 10.06.2023, M/s Jindal India Limited, the Applicant herein, had submitted its EoI along with an Affidavit under section 29A of the Code and Earnest Deposit Money (EMD) of Rs. 10 crores.

9. It is admitted fact that the Applicant's name was included in the provisional as well as final list of PRAs and the Applicant submitted its resolution plan for the Corporate Debtor on 16.10.2023. The plan was placed before the CoC for discussion and negotiation.

10. Meanwhile, Axis Bank which is one of the CoC members, had raised the alleged issue regarding the eligibility of the Applicant by referring to the NPA status of M/s Jindal India Thermal Power Limited/ JITPL which is one of the group companies of the Applicant.

11. There were subsequent email exchanges between the RP and the Applicant. After receiving the explanations given by the Applicant on its eligibility under section 29A of the Code, the RP placed it before the CoC. The CoC instructed the RP to conduct compliance check on the Applicant's eligibility and alongside, decided to scrap the CIRP process since the CoC found the Applicant's resolution plan to be unsatisfactory.

12. Upon approval of the CoC at the 12th CoC meeting held on 02.12.2023, the RP appointed CLA Indus Value Consulting (in short **CLA**) to conduct compliance check on the eligibility of the Applicant under section 29A of the Code. The CLA submitted its report on 04.03.2024 stating that the Applicant was ineligible under section 29A(c) of the Code.

13. The CoC at its 16th Meeting held on 04.03.2024 considered the Report of CLA and decided to forfeit the EMD submitted by the Applicant under clause 1.15.2.1(d) of the RFRP on the ground that the Applicant has provided false and/or misleading statement on its eligibility under section 29A of the Code.

14. Accordingly, a communication was sent by the RP to the Applicant vide email dated 09.03.2024 informing about the forfeiture of the EMD, as follows:

"Dear Sir,

As you are aware that pursuant to the Request For Resolution Plan dated 15 July 2023 ("RFRP") issued by me as the resolution professional ("RP") of Future Enterprises Limited ("FEL"/ "CD"), Jindal (India) Limited ("JIL") had submitted a resolution plan in the corporate insolvency resolution process ("CIRP") of FEL under the provisions of the Insolvency and Bankruptcy Code, 2016 ("Code"/ "IBC"). Along with the resolution plan, JIL had submitted an amount of INR 10 Crores towards earnest money deposit ("EMD") as required under the RFRP.

By my email dated 14 December 2023, I had informed JIL that pursuant to discussions held in the 11th meeting of the committee of creditors ("CoC") of FEL, the CoC had decided to terminate/ close the process of consideration of JIL's resolution plan as being unsatisfactory for various reasons and to initiate a fresh process. Further, I informed that in terms of Clause 1.15.2.1(d) of the RFRP, if JIL is found to be ineligible to submit a resolution plan under Section 29A of the IBC and/ or JIL is found to have made a false or misleading declaration of eligibility under Section 29A of the IBC, the RP (acting on instructions of the CoC) shall have the right to forfeit/ appropriate the EMD submitted by JIL. I also informed JIL that the compliance check with respect to JIL's eligibility under Section 29A of the IBC is under process and the CoC/ RP reserved their rights under the RFRP to forfeit/ appropriate the EMD.

In this regard, I appointed CLA Indus Value Consulting ("CLA") to assist me in checking whether JIL is eligible under Section 29A of the Code to submit a resolution plan. In the course of the compliance checks, JIL was requested to provide various documents in respect of Jindal India Thermal Power Limited ("JITPL"), including, inter alia, no dues certificate from all the Lenders, current status of JITPL's account with all lenders, relevant documents relating to completion and payment of OTS amount, supporting documents relating to completion of equity portion of the transaction. However, JIL has not provided the required documents.

Instead of providing the required documents, JIL has responded claiming that the required payments have been made to the lenders and the settlement stands completed. As per JIL, the embargo of Section 29A of the Code does not apply as JITPL has allegedly already paid the entire outstanding dues as per master resolution agreement, to all the lenders on 29 April 2022, i.e. much before the submission of the resolution plan and duly complied with the law. According to JIL, the proviso to Section 29A(c) does not require any no dues certificate from any of the lenders.

Please note that pursuant to compliance checks and review of information/ documents (including reply sent by JIL), CLA has submitted a report in which it has arrived at the conclusion that JIL is ineligible under Section 29A(c) of the Code to submit a resolution plan for the CD ("CLA Report"). The CLA Report was discussed in the 16th meeting of the CoC, during which the CoC took note of the same and the provisions of Clause 1.15.2.1 of the RFRP. After discussions and deliberations, in view of the fact that JIL has been found ineligible under Section 29A of the Code, the CoC decided to forfeit the EMD of INR 10 Crores submitted by JIL and instructed me, as the RP, to notify JIL regarding the forfeiture of the EMD.

In the above backdrop, I wish to inform you that, as decided and instructed by the CoC, the EMD of INR 10 Crores submitted by JIL stands forfeited."

15. The present application has been filed seeking to quash and set aside the aforesaid communication dated 09.03.2024.

16. Based on the rival contentions of the parties, the following issues emerge for determination:

I. *Whether, in the facts and circumstances, the Applicant is ineligible under section 29A(c) of the Code?*

II. *Whether, in the facts and circumstances of the present case, the CoC and RP are justified in forfeiting the Earnest Money Deposit (EMD) paid by the Applicant?*

I. Whether the Applicant is ineligible under section 29A(c) of the Code?

17. The CLA which was appointed by the RP to conduct the compliance check with respect to the eligibility of the Applicant under section 29A submitted its Report on 04.03.2024 and stated that JITPL which is a connected party to the Applicant is ineligible to submit resolution plan under section 29A(c) of the Code and therefore, the Applicant is also ineligible to submit resolution plan.

18. Ld. Counsel for Applicant has contended that the CLA Report ought not be referred to since it was based on limited research.

19. Per contra, Ld. Counsel for the RP submitted that the Applicant was provided with multiple opportunities to clarify and provide documents to both the RP and CLA to demonstrate its eligibility under section 29A of the Code, however, the Applicant failed to provide the necessary documents/information. It is further submitted that the Applicant's eligibility under section 29A of the Code was determined in a fair and reasonable manner.

20. We note that the Applicant has submitted that it has promptly responded to all queries of the RP and CLA and that it has provided the requisite documents but has not categorically specified that all the documents including (a) No Dues certificates from all lenders, (b) documents relating to completion of OTS, (c) documents supporting transfer of equity shares as agreed, were provided to the RP and CLA by the Applicant. Rather the Applicant has stated that since JITPL has paid the entire dues, the non-availability of No dues certificate or other documents which were sought

by the RP/CLA is immaterial and non-submission of the same cannot be a ground to make the Applicant ineligible under section 29A(c) of the Code.

21. At this juncture, it would be apropos to refer to the Report dated 04.03.2024 of the CLA on the eligibility of the Applicant:

> *"**Comment from CLA Indus Value Consulting Private limited:***
> - *As per CARE Report available in public domain, it was mentioned that JITPL has undergone through an OTS process in 2021 and as per PNB Compliance letter dated 07th October 2022, provided to us for review, it was mentioned that OTS has been received and distributed among the Lenders.*
> - *Further, we had requested for various other required documents like No Due Certificate from all the Lenders, current status of Company account with all the Lenders, relevant document related to completion and payment of OTS, supporting documents relating to satisfaction for transfer of equity shares and settlement should include cash as well as equity settlement, if any agreed in the past and declaration signed and stamped by Authorized Person in the capacity of a Director declaring that none of the accounts of the company are NPA as on date of submission of resolution plan and all the previous dues related to NPA are settled.*
> - *However, all the above required documents were not provided to us for review.*
> - *In the absence of the above required documents, it cannot be ascertained that the One Time Settlement process has been completed or dues of all the Lenders has been satisfied.*
> - *Basis the Legal opinion received from LEx Aeterna Practices dated 12th February 2024, we are of opinion that one of the Connected Party of Jindal India Limited (i.e. Jindal India Thermal Power Limited) is not complied with Section 29A (c) of IBC Code, 2016 and Hence Jindal India Limited would be disqualified under Section 29A of IBC 2016."*

22. When we look at the comments of CLA, it is abundantly clear that the Applicant did not provide 'No Dues Certificates' from all lenders, the documents evidencing completion of OTS and the supporting documents for transfer of equity as agreed by JITPL.

23. Now, we advert to Section 29A(c) of the Code:

> ***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 or 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.

24. Ld. Counsel for the Applicant would submit that the first proviso to section 29A(c) of the Code provides that the ineligibility under section 29A(c) of the Code shall not apply to cases where the entire overdue amount with interest has been repaid by the Applicant prior to submission of the

Resolution Plan. Since JITPL has paid the entire dues, the Applicant's case falls within the ambit of first proviso of Section 29A(c) of the Code.

25. The Applicant relies on the judgment of ***Arcelor Mittal India Pvt. Ltd. vs. Satish Kumar Gupta and Ors. [Civil Appeal Nos. 9402-9405 of 2018],*** wherein the Hon'ble Supreme Court has held that the first proviso to clause (c) of section 29A of the Code makes it clear that the ineligibility can be removed if the person submitting a resolution plan makes payment of all overdue amounts with interest thereon and charges relating to the non-performing asset in question before submission of a resolution plan.

26. We shall now refer to the observations of Hon'ble Supreme Court in the matter of ***Arcelor Mittal*** *(supra)* which has been relied upon by the Applicant:

"57. The interpretation of Section 29-A(c) now becomes clear. Any person who wishes to submit a resolution plan, if he or it does so acting jointly, or in concert with other persons, which person or other persons happen to either manage or control or be promoters of a corporate debtor, who is classified as a non-performing asset and whose debts have not been paid off for a period of at least one year before commencement of the corporate insolvency resolution process, becomes ineligible to submit a resolution plan. This provision therefore ensures that if a person wishes to submit a resolution plan, and if such person or any person acting jointly or any person in concert with such person, happens to either manage, control, or be promoter of a corporate debtor declared as a non-performing asset one year before the corporate insolvency resolution process begins, is ineligible to submit a resolution plan. ***The first proviso to clause (c) makes it clear that the ineligibility can only be removed if the person submitting a resolution plan makes payment of all overdue amounts with interest thereon and charges relating to the non-performing asset in question before submission of a resolution plan. The position in law is thus clear. Any person who wishes to submit a resolution plan acting jointly or in concert with other persons, any of whom may either manage, control or be a promoter of a corporate debtor classified as a non-performing asset in the period abovementioned, must first pay off the debt of the said corporate debtor classified as a non-performing asset in order to become eligible under Section 29-A(c).***

60. It is important for the competent authority to see that persons, who are otherwise ineligible and hit by clause (c), do not wriggle out of the proviso to clause (c) by other means, so as to avoid the consequences of the proviso."

27. Ld. Counsel for the RP submitted that in ***Arcelor Mittal*** *(supra)* relied upon by the Applicant, the Hon'ble Supreme Court has also observed that the Tribunal should see that the persons who are ineligible under section 29A(c) of the Code do not wriggle out the proviso thereto by other means so as to avoid the consequences.

28. Ld. Counsel for the RP has then taken us through the judgment dated 16.04.2024 passed by Hon'ble Delhi High Court in ***Writ Petition (C) No. 15215 of 2022*** which was filed by the JITPL seeking release of pledge held by the lenders over its equity shares. Perusal of the said judgment reveals that JITPL had executed a Master Resolution Agreement dated 29.05.2021 with its lenders. The following clauses of the Master Resolution Agreement provide for the terms of the settlement of dues:

"THE TERMS OF THE RESOLUTION PLAN

Subject to the terms hereof, the Parties have agreed to the following:

4.1 The Parties have, as a part of the Resolution Plan, agreed to settle the repayment of the Existing Financing Facilities and all outstanding dues in relation thereto with the Lenders, on the following terms and other terms and conditions provided in this Agreement:

4.1.1 ***<u>the payment of an amount of Indian Rupees Two Thousand Four Hundred and Fifty Crores (INR 2450, 00, 00, 000) (the "Resolution Amount") to the Lenders by the Borrower in the manner provided in Clause 8 of this Agreement</u>****, excluding the amount of Indian Rupees One Hundred and Fifty Crores only (INR 150,00,00,000/-) which has been cut back and appropriated by the Lenders from 1 November 2019 to 31 August 2020 ("Cut Back Amount");*

4.1.2 ***<u>transfer of 10% (Ten percent) equity shares of the Borrower held by the shareholders of the Borrower to</u>***

> ***the Lenders in the manner provided in Clause 4. 5 of this Agreement****; and*
>
> *4.1.3 replacement by the Borrower of the NFB Facilities within four (4) years from the Effective Date.*

As a part of the Resolution Plan, the Lenders have agreed for full and final settlement of the outstanding dues in relation to the Existing Financing Facilities ***with the payment of the Resolution Amount as mentioned in Clause 4.1.1 and Clause 4.1.2 above along with the interest and charges stipulated in this Agreement*** *and the replacement of the NFB Facilities as mentioned in Clause 4.1.3. Further, the Parties agree that, after the occurrence of the Final Settlement Date, the Lenders shall write off the balance amount of the outstanding monies payable by the Borrower, including interest, penal interest and all other charges payable under the Financing Facility Agreement, after deducting the payment of Resolution Amount as mentioned in Clause 4.1.1 and Clause 4.1.2 above along with the interest and charges stipulated in this Agreement.*

4.2. The Parties hereby agree that the Financing Facility Agreements shall be in abeyance till the repayment of the Resolution Amount in terms of this Agreement or the occurrence of a Termination Event. However, the Final Settlement Date for the Existing Financing Facilities under the Financing Facility Agreements shall be deemed to be achieved and ***the entire dues of the Borrower shall be deemed to be settled only upon the Resolution Amount (including all interest), as required to be paid by the Borrower in terms and conditions of this Agreement, shall have been paid in full by the Borrower to the Lenders, 10% (Ten percent) equity shares of the Borrower held by the shareholders of the Borrower are validly transferred to the Lenders on fully diluted basis*** *(i.e. valid transfer of such shares by the shareholders of the Borrower to the Lenders as per all Applicable Law, including completion of all procedure and steps with respect to effecting such transfer as per Applicable Law) and the NFB Facilities are replaced by the Borrower, in compliance of this Agreement. Upon compliance of the aforesaid term and conditions, in terms of the Resolution Documents, no further amount shall be payable by the Borrower and the lenders shall not have any Claim or outstanding under the Financing Facility Agreements.*

However, notwithstanding anything contained in this Agreement, in case of occurrence of Termination Event, the provisions of Clause 10.4.2 shall apply."

(emphasis supplied)

29. At the first blush, the argument of the Applicant seems to be attractive that all overdue amounts with interest have been paid thereby making the Applicant eligible to submit resolution plan by virtue of the first proviso to section 29A(c) of the Code. However, when we examine the relevant clauses of the Master Resolution Agreement dated 29.05.2021 executed between JITPL and its lenders, the parties have agreed that for full and final settlement of the outstanding dues, JITPL was required to adhere to the following terms:

    a. Payment of Rs. 2450 crores,
    b. Transfer of 10% equity shares of the Borrowers to the lenders, and
    c. Replacement of non-fund based facilities by JITPL.

30. It is well accepted principle of law that repayment of a loan can be made by way of all cash or partly by cash and partly by equity. The present case falls in the latter category where the borrower i.e. JITPL agreed to settle the dues of the lenders by making payment of Rs. 2450 crores and partly by transferring shares to the Lenders. While cash component of Rs. 2450 crores stood paid, however, admittedly, the 10% equity shares of the Borrower were not transferred to the lenders.

31. It is pertinent to note that the Applicant has nowhere denied the status of JITPL as its related or connected party which is why, the Applicant seeks to avail the benefit of the first proviso to section 29A(c) of the Code by submitting that JITPL has made the payment to the lenders. However, we are of considered view that payment of full settlement amount was not done by JITPL as the equity component was not paid to the lenders. We are fortified by the judgment dated 16.04.2024 of Hon'ble Delhi High Court in ***Writ Petition (C) No. 15215 of 2022*** wherein it has been categorically observed:

"31. Therefore, it is clear that though the petitioner has paid full amount under the OTS, however, its entire dues cannot be said to be settled, till valid transfer of equity shares is done in terms of categorical stipulation as envisaged in the MRA, as per all Applicable Laws, including completion of all procedure and steps with respect to effectuating such transfer as per the Applicable Laws."

32. Ld. Counsel for the Applicant sought to argue that the said judgment of Hon'ble Delhi High Court was passed subsequent to submission of the resolution plan by the Applicant on 16.10.2023 and therefore, as on the date of submission of resolution plan, the Applicant cannot be termed as ineligible based on a subsequent judgment.

33. However, the terms of the Master Resolution Agreement itself clearly reveal that until the equity shares of JITPL are transferred to the lenders, it cannot be considered that the entire dues are settled which is substantiated by the judgment of Hon'ble Delhi High Court. The Applicant has not specifically stated that all the payments agreed by the parties under the Master Resolution Agreement including the equity component have been paid.

34. Therefore, the RP's decision, instructed by the CoC, to hold JITPL ineligible under section 29A(c) of the Code does not suffer from legal infirmity and the benefit of the first proviso to section 29A(c) of the Code cannot be made available to the Applicant. Accordingly, the Applicant is also ineligible to submit resolution plan by virtue of section 29A(c) read with section 29A(j) of the Code. The Issue I is answered in affirmative.

II. Whether the CoC and RP are justified in forfeiting the EMD of the Applicant?

35. With respect to the forfeiture of the EMD of the Applicant, the Applicant has made the following submissions:

(i) That the clauses of RFRP relied upon by the CoC and RP to forfeit the EMD is in contravention of the CIRP Regulations, and

(ii) By forfeiting the EMD of the Applicant, the CoC and RP have gained unjust enrichment at the cost of the Applicant.

36. ***Whether the clause 1.15.2.1(d) is in contravention of the CIRP Regulations?***

36.1 The RP, on instructions of the CoC, forfeited the EMD of the Applicant on the strength of clause 1.15.2.1(d) of the RFRP.

36.2 Ld. Counsel for the Applicant contended that the clause 1.15.2.1(d) of the RFRP is in contraventions of Regulations 36A (7)(f), 36B (4) and 39(1)(c) of the CIRP Regulations and therefore, cannot be given effect to. Reliance is placed on ***Rimjhim Ispat Ltd. vs Jindal Stainless Ltd. (2022 SCC Online NCLAT 4991)*** and it is submitted that if there is a conflict between Auction process document and the Code or Regulations, the provisions of the Code and Regulations will prevail.

36.3 Reliance is also placed on ***S. Hari Karthik versus Jayaram Chowdhary and Ors. (Company Appeal (AT)(Ins) No. 326 of 202***1 (para 6) to contend that the EMD cannot be forfeited merely on grounds of ineligibility in terms of Section 29A of the Code.

36.4 Per contra, it is submitted on behalf of the RP that there is no dichotomy between the RFRP and the CIRP Regulations. It is further submitted that Regulation 36A(7)(f) and Regulation 39(1) of CIRP Regulations in fact envisage that the EMD submitted by resolution applicants can be forfeited upon the discovery of false information submitted by a resolution applicant.

36.5 The RP also distinguished the judgment of ***Hari Karthik*** *(supra)* and submitted that in the said case, the Hon'ble NCLAT noticed that the RFRP did not provide for forfeiting the EMD amount on account of ineligibility of resolution applicant under Section 29A.

36.6 We shall first advert to Regulation 36B(4) of the CIRP Regulations which reads as follows:

> *"(4) The request for resolution plans shall not require any non-refundable deposit for submission of or along with resolution plan."*

36.7 Regulation 36B (4) provides that the RFRP shall not require any non-refundable deposit. At this juncture, it is relevant to look at the following clause contained in the RFRP issued by the RP in the present case:

> *1.15. **Earnest Money Deposit***
>
> ***1.15.1 <u>Submission of Earnest Money Deposit</u>***
>
> *... ..*
>
> *1.15.1.5 In case if a PRA is not included in the Final List of PRAs to be issued on 15th July 2023, the amount of plan participation fee paid will be refunded to such PRAs within 7 days of issuance of Final List of PRAs. In case if a PRA does not submit a Resolution Plan, the amount of plan participation fee will be refunded within 7 days of the last date of submission of Resolution Plan.*
>
> *... ..*
>
> *1.15.2.2 Unless forfeited/ invoked/encashed/appropriated, or except as decided otherwise by the CoC, the Earnest Money Deposit of the Resolution Applicant who has not been selected as the Successful Resolution Applicant, shall be returned within 90 (ninety) Business Days of the date of declaration of the Successful Resolution Applicant by the Resolution Professional or within 7 days of the date on which the certified true copy of the liquidation order passed by the Adjudicating Authority is received by the Resolution Professional, whichever is earlier."*

36.8 The aforesaid clauses clearly contemplate that the EMD was not altogether a non-refundable deposit to be made by the PRAs and the forfeiture of the EMD submitted by the Applicant was only due to the ineligibility of the Applicant under section 29A of the Code as per clause 1.15.2.1(d) of the RFRP. Therefore, we are of the view that the

Regulation 36B (4) of the CIRP Regulations would not be applicable in the present facts.

36.9 Ld. Counsel for the Applicant also referred to Regulations 36A (7)(f) and 39(1)(c) of the CIRP Regulations which are reproduced below:

Regulation 36A(7)(d):

36A. Invitation for expression of interest

(7) An expression of interest shall be unconditional and be accompanied by-

… ..

(f) an undertaking by the prospective resolution applicant that every information and records provided in expression of interest is true and correct and discovery of any false information or record at any time will render the applicant ineligible to submit resolution plan, forfeit any refundable deposit, and attract penal action under the Code.

Regulation 39(1)(c):

39. Approval of Resolution Plan

(1) A prospective resolution applicant in the final list may submit resolution plan or plans prepared in accordance with the Code and these regulations to the resolution professional electronically within the time given in the request for resolution plans under regulation 36B along with

…

(c) an undertaking by the prospective resolution applicant that every information and records provided in connection with or in the resolution plan is true and correct and discovery of false information and record at any time will render the applicant ineligible to continue in the corporate insolvency resolution process, forfeit any refundable deposit, and attract penal action under the Code.

36.10 It is the submission of the Applicant that the above-mentioned Regulations specify circumstances which can lead to forfeiture of EMD, however, the clauses in the RFRP which provides for forfeiture of EMD are in contravention of the aforesaid Regulations.

36.11 The relevant Clause 1.15.2 of the RFRP which provides for forfeiture of EMD is reproduced below:

1.15.2. <u>Invocation/Return of Earnest Money Deposit to the Resolution Applicant</u>

1.15.2.1 Beneficiary Bank (including assignee thereof) shall have the right to invoke/appropriate/encash the Earnest Money Deposit Bank Guarantee and the Resolution Professional (acting on instructions of the CoC) shall have the right to forfeit/ appropriate the EMD Direct Deposit by appropriating such deposit, at any time upon occurrence of any of the following circumstances:

a) if the Resolution Plan is withdrawn before CoC approval; or
b) if any of the conditions under this RFRP or requirements of this RFRP or terms of the LoI are breached or not met by the relevant Resolution Applicant or in case Resolution Applicant is found to have made or submitted any false or incorrect statement, record or information; or
c) if the Resolution Plan is found non-responsive; or
*d) **the Resolution Applicant is found to be ineligible to submit the Resolution Plan under Section 29 A of the IBC or the Resolution Applicant is found to have made a false or misleading declaration of eligibility under Section 29A of the IBC**; or*
e) if the Resolution Applicant is a Consortium, the Consortium or any members thereof fails to comply with the conditions set out in this RFRP; or
f) if the Resolution Applicant is the Successful Resolution Applicant and such Successful Resolution Applicant fails to submit the Performance Security or fails to accept the LoI within the time period prescribed herein; or
g) modifies or withdraws or revokes or abandons or terminates, or threatens to withdraw or revoke or abandon or terminate, the Resolution Plan, in each case, without the consent of RP and/ or CoC.; or
h) any non-compliance with the Resolution Plan Submission Process or unilateral change by the Resolution Applicant to the Resolution Plan submitted by it; or
i) if the Resolution Applicant fails to renew/extend the validity of the Earnest Money Deposit, if submitted in

the form of a Bank Guarantee, as may be required by the Resolution Professional (acting on the instructions of the CoC); or

j) if there has been any misrepresentation on the part of the Resolution Applicant in the Undertaking by the Resolution Applicant in terms of the Code, the format of which is provided under Format IIIA or found to have made a false or misleading representation or statement or certification.

36.12 Ld. Counsel for the RP submitted that at the time of submission of its resolution plan, the account of JITPL was already classified as NPA, however, the Applicant had not disclosed this fact. Thus, it is submitted that the Applicant has made false declaration in its affidavit regarding its eligibility under section 29A of the Code and therefore, the EMD was forfeited as per clause 1.15.2.1(d) of the RFRP.

36.13 The clause 1.15.2.1(d), relied upon by the RP to forfeit the EMD, states that if a Resolution Applicant is found to be ineligible under Section 29A of the Code or a Resolution Applicant is found to have made a false or misleading declaration of its eligibility under Section 29A, then the EMD submitted by such resolution applicant may be forfeited.

36.14 Regulations 36(A)(7)(f) and 39(1)(c) of the CIRP Regulations also provide for forfeiture of EMD on discovery of false information.

36.15 Thus, we are of considered view that the clause 1.15.2.1(d) of the RFRP which provides for forfeiture of EMD on the ground of false or misleading declaration is not in contravention of the CIRP Regulations.

36.16 In view of our above observations, the judgment of ***Rimjhim Ispat Ltd. vs Jindal Stainless Ltd. (2022 SCC Online NCLAT 4991)*** which deals with inconsistencies between the RFRP and the Code/Regulations would not apply to the present case.

36.17 Ld. Counsel for the Applicant also relied upon ***S. Hari Karthik versus Jayaram Chowdhary and Ors. (Company Appeal (AT) (CH) (Ins) No. 326 of 2021]*** and submitted that the EMD cannot be forfeited merely on grounds of ineligibility in terms of Section 29A of the Code. In ***Hari Karthik*** *(supra),* the resolution applicants submitted EoI on 23.01.2020 along with EMD to the RP. Subsequently, the RP, on 27.02.2020, informed the resolution applicants that they were ineligible under section 29A of the Code. The Adjudicating Authority ordered for liquidation of the Corporate Debtor on 29.05.2020. The Liquidator requested the resolution applicants to make a claim for refund of EMD. It was contended on behalf of the Liquidator that instead of claiming for refund, the resolution applicants filed several applications to derail the CIRP process and the Liquidator decided to forfeit the EMD on account of wilful misuse of the Judicial process. The Adjudicating Authority directed the Liquidator to refund the EMD. On appeal, the Hon'ble NCLAT upheld the decision of the Adjudicating Authority for refund of EMD with following observations:

> *"6. The main point which arises for consideration in this Appeal is whether the Respondent is entitled to refund of the EMD Amount of Rs. 2,00,00,000/-, as he was considered to be 'disqualified' under Section 29A of the Code for 'Submission of the 'Plan'.*
> *...*
> *9. As regarding the forfeiture of BSBG, it is clearly stated in the terms that only when the Resolution Applicant is found to have made 'false or misleading representation', it can be forfeited. In the instant case, there is absolutely no material evidence on record to substantiate the contention of the Appellant that the 1st Respondent had deliberately or maliciously sought to derail the CIRP Process or given any misleading representation. It is not the case of the Appellant that the 1st Respondent had challenged his ineligibility under Section 29A of the I & B Code, 2016 by way of an Appeal. It is his case that the 1 st Respondent had made every effort to derail the CIRP Process. At the cost of repetition, there is no shred of evidence to establish this contention."*

36.18 It can be seen from the above that the Hon'ble NCLAT has recorded that the terms of RFRP provides that only when the Resolution Applicant is found to have made 'false or misleading representation', EMD can be forfeited and went ahead to observe that in the said case, the Liquidator's reason behind forfeiture was not ineligibility under section 29A but the attempt of resolution applicants to derail the CIRP process. However, it was further observed that there was no evidence to establish the same and that the resolution plan of the resolution applicants was not placed before the CoC for its consideration and therefore the question of delay in procedure does not arise. Under the aforesaid circumstances, it was held by Hon'ble NCLAT that the Liquidator was not right in holding back the EMD amount.

36.19 The Hon'ble NCLAT has not laid down any specific legal position that EMD cannot be forfeited on the ground of ineligibility under section 29A of the Code in all cases. Thus, the said judgment has to be considered based on the facts and circumstances of that case and cannot be taken as a precedence to hold that false declaration of eligibility under section 29A of the Code could not be a ground for forfeiture of EMD when the CIRP Regulations provide for it. The facts in the present case are distinguishable and therefore, the observations in ***Hari Karthik*** *(supra)* do not support the case of the Applicant.

36.20 Ld. Counsel for the Applicant also attempted to argue on the establishment of fraud and submitted that to prove fraud, it is important that the element of *mens rea* is satisfied which the RP had failed to do so in the present case. However, we note that the clause 1.15.2.1(d) of the RFRP does not provide for forfeiture of EMD on account of fraud but on the ground that of false affidavit regarding eligibility under section 29A of the Code. Thus, the submissions of the Applicant in this regard are rejected.

37. ***Whether by forfeiting the EMD, the CoC and RP have gained unjust enrichment?***

37.1 The Applicant has argued that irrespective of the ineligibility of the Applicant, the CoC and RP were unjustified in forfeiting the EMD when the CoC had already scrapped the resolution process on commercial grounds.

37.2 Ld. Counsel for the Applicant submitted that the CIRP process was scrapped by the CoC on account of the resolution plan being unsatisfactory and not due to the alleged ineligibility of the Applicant, and therefore, by forfeiting the EMD, the Respondents have sought to unjustly enrich themselves at the cost and expense of the Applicant. It is submitted that since no loss was suffered by the Respondents, the Respondents ought not have forfeited the EMD. Reliance is placed on ***Formations Textiles LLC and Ors. Vs. Bank of Baroda and Ors.*** and ***M/s Kailash Nath Associates vs. Delhi Development Authority and Anr. [(2015) 1 SCR 627]***.

37.3 Per contra, Ld. Counsel for RP submitted that the principle of the Contract Act cannot override a special legislation, such as the Code in the present case and that the concept of 'unjust enrichment' is based on equity which cannot supplant the law. Ld. Counsel for the RP has made a reference to the judgement of Hon'ble Supreme Court in ***Authorised Officer, Central Bank of India vs. Shanmugavvelu [(2024) 6 SCC 641]*** which deals with forfeiture of EMD under the SARFAESI Security Interest (Enforcement) Rules, 2002.

37.4 Under the context of IBC, there is no provision which explicitly states that loss has to be substantiated by the CoC and/RP to justify its decision of forfeiture of EMD. In fact, Regulations 36A(7)(f) and 39(1)(c) of the CIRP Regulations which provides for forfeiture of EMD on declaration of false information does not mandate that there has to be a loss suffered by CoC as a consequence of such false information.

37.5 The Applicant has relied upon the case of ***M/s Kailash Nath Associates vs. Delhi Development Authority and Anr. [(2015) 1 SCR 627].*** The said case is in the context of the Indian Contract Act and not the Code. Since the Code is a complete law in itself, the aforesaid judgment cannot be considered to decide the present case.

37.6 The Applicant has also relied upon the case of ***Formation Textile LLC & Ors vs Bank of Baroda [IA/443/2021 in CP(IB) No. 1399/2017]*** passed by Ld. NCLT to substantiate its arguments on unjust enrichment. In this case, the Ld. NCLT has held that the CoC cannot forfeit the EMD and performance security when the CoC has not suffered any loss or damage. It was observed that the CoC had subsequently approved another resolution plan and therefore, must not be allowed unjust enrichment by permitting forfeiture of EMD and performance guarantee.

37.7 It is pertinent here to note that the aforesaid findings of Ld. NCLT have been set aside by Hon'ble NCLAT in ***Bank Of Baroda vs Formation Textiles [Company Appeal (AT) (Ins) No. 983-984 of 2023],*** *decided on 22.04.2025,* with following observations:

> *"71. Observation of the adjudicating authority are that CoC be not allowed unjust enrichment by permitting forfeiture of not only the earnest money, but also PBG and other sum infused towards the corporate debtor. We fail to see that by invocation of PBG which is part of the RFRP and there being existing default on part of the SRA, how the CoC can be said to be unjustly enrich itself by invocation. The above findings of the adjudicating authority are wholly erroneous and contrary to the express provision of RFRP. Adjudicating Authority has wrongly concluded that CoC has no jurisdiction to forfeit the amount of 93.82 Crore infused by the applicant.*
>
> *72. Insofar as the forfeiture of PBG and earnest money, the same is fully covered by the RFRP as noted above, thus we uphold the invocation of PBG and earnest money deposit by the CoC, which is in accordance with the RFRP."*

37.8 We also refer to the observations of Hon'ble NCLAT in the matter of ***Deepika Bhugra Prasad vs. Lucky Holdings Private Limited [Company Appeal (AT) (Ins) No. 186 of 2023],*** *decided on 01.12.2025:*

> *"71. The third issue based on which Ld. AA allowed the appeal related to applicability of Section 74 of the Contract Act to the aforesaid auction proceeding. In this regard, it is to be noted that IBC, 2016 is a complete law in itself for corporate insolvency resolution process. Detailed procedure and process of liquidation has been laid down in the law; and rules and regulations framed thereunder. Any contractual obligation under the Code has to be dealt with in accordance with procedure laid down. We note that in this case, the liquidator has strictly followed the procedure laid down by the Code. The forfeiture of EMD in such auctions arises out of statutory terms, and not negotiated penalty clauses. Accordingly, in accordance with clauses of the E-Auction notice, E-auction process document and affidavit filed by the respondent, the liquidator has correctly forfeited the EMD.*
>
> *72. This legal position has been conclusively settled by the judgment of this Appellate Tribunal in Westcoast Infraprojects Private Limited (supra), which was affirmed by the Hon'ble Supreme Court in* ***Civil Appeal No. 4087 of 2023 (order dated 25.07.2023)*** *in the same matter. In these decisions, it has been held that forfeiture of EMD in liquidation auctions is a legitimate, contractual and statutory remedy for default, and Section 74 is wholly inapplicable.*
>
> *...*
>
> *74. In light of the foregoing, we are of the view that the Respondent did commit default under the binding auction terms, that the Liquidator's action of cancelling the sale and forfeiting the EMD was fully justified and in accordance with the provisions of the Code. We have already seen that the impugned order suffers from incorrect appreciation of facts and law like application of Indian Contract Act whereas the issue should have been examined through the lens of this Code only."*

37.9 Thus, it is clear from the above that the forfeiture of EMD is well within the rights of the CoC if the same is in accordance with the

RFRP and CIRP Regulations, and the principle of unjust enrichment cannot be applied to the forfeiture of EMD under the Code.

37.10 The Applicant also called into question the conduct of the CoC and contended that the due diligence of Applicant was already checked by the RP and it was only thereafter that the Applicant submitted its resolution plan on 16.10.2023, however, after the submission of the resolution plan, the CoC decided to recheck the compliance under section 29A of the Code and further, the decision to forfeit EMD was also taken by CoC after termination of the CIRP process and therefore, the forfeiture of EMD is unfair.

37.11 We observe that neither the Code nor the CIRP Regulations bars the CoC and/or RP to re-verify the eligibility of the resolution applicants after receipt of the resolution plans. In fact, Regulation 39(1)(c) of the CIRP Regulations clearly states that at the time of submission of resolution plan, a resolution applicant is required to give an undertaking that the information and records provided is true and correct and discovery of false information and record **at any time** will render the applicant ineligible to continue in the corporate insolvency resolution process, **forfeit any refundable deposit**, and attract penal action under the Code.

37.12 By unconditionally agreeing to the terms of the RFRP and by submitting the resolution plan along with the undertaking, the Applicant was well aware that discovery of false information would consequently lead to forfeiture of EMD. Therefore, the Applicant cannot now challenge the right exercised by the CoC through RP.

37.13 It is undisputed fact that the Applicant in its affidavit had confirmed its eligibility under section 29A of the Code. Based on the record before us, we have held that the Applicant is ineligible under section 29A of the Code. We also note that the Applicant has not brought on record to show that disclosure was made to the RP and CoC about the fact that JITPL's account was classified as NPA on the date of submission of affidavit under section 29A of the Code or on the date of submission of resolution plan. This fact was brought to the notice of the CoC only by a communication received from Axis Bank which is one of the CoC members. Thus, it is clear that the Applicant has given a false and misleading affidavit regarding its eligibility.

37.14 In light of the discussion above, we hold that the Respondents are justified in forfeiting the EMD paid by Applicant. Accordingly, Issue II is also answered in affirmative.

38. In view of the findings recorded above, we find no reasons to set aside the email communication dated 09.03.2024 sent by the RP to the Applicant and we are not inclined to grant any of the prayers sought in the present application.

39. In result, IA stands **dismissed**.

Sd/-	**Sd/-**
Hariharan Neelakanta Iyer	**Lakshmi Gurung**
Member (Technical)	**Member (Judicial)**

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