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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 19th June, 2020

Decided on: 18th August, 2020

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CS(OS) 128/2020

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I.A. 3860/2020 (under Order XXXIX Rule 1 and 2 CPC),

I.A.3934/2020 (under Order VII Rule 14 CPC- by plaintiff)

JINDAL POWER LIMITED

..... Plaintiff

Represented by: Mr.Rajiv Nayar, Sr. Advocate with
Mr.Kartik Nayar, Mr.Saket Sikri,
Mr.Rishi Agarwala, Ms.Shruti Arora,
Mr.Ankit Banati, Ms.Priya Singh and
Mr.Manish Kharbanda, Advocate.

versus

ICRA LIMITED

..... Defendant

Represented by: Mr.H.S.Chandhoke, Mr.Prashant
Pakhiddey and Ms.Lakshmi Dwivedi,
Advocates.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. The hearing has been conducted through Video Conferencing.
2. Plaintiff Jindal Power Limited (in short 'JPL') has filed the present suit against ICRA Limited, defendant herein, a credit rating agency inter alia praying for a decree of declaration, declaring the Credit Rating Rationales dated 24th April, 2020 and 30th April, 2020 passed by the defendant or any other similar credit rating rationale downgrading the plaintiff's credit rating from BBB+ (stable outlook) to BBB (negative outlook) as null, void, unenforceable and ineffective and also seeks decree of mandatory injunction directing the defendant to withdraw the said credit rating rationales from the

physical as well as electronic records of the defendant including on the world wide web. By the application under Order XXXIX Rule 1 and 2 CPC the plaintiff seeks an interim injunction in terms of prayers made in the suit.

3. The present suit and the application came up before this Court on 13th May, 2020 when summons in the suit were issued returnable before the learned Joint Register for 15th July, 2020 and in the application notice was issued returnable for 19th May, 2020.

4. On 19th May, 2020 learned counsel for the defendant entered appearance and stated that he had already prepared the reply and filed the same and liberty was granted to the learned counsel for the plaintiff to file rejoinder and the application was listed on 22nd May, 2020. During the course of arguments learned counsels for the parties agreed that even in the suit the parties have to lead no further evidence except the documents filed and since the arguments in the suit would also be based on the documents filed by the parties, the arguments be heard for disposal of the suit. Thus, after hearing learned counsels for the parties on various dates the judgment in the suit and application was reserved on 19th June, 2020.

5. Case of the plaintiff is that the plaintiff and the defendant entered into an agreement dated 15th June, 2016 qua the credit rating of the plaintiff company. Thereafter the defendant was carrying out the credit rating of the plaintiff company and was bound to follow the SEBI (Credit Rating Agencies) Regulations, 1999 (in short the CRA Regulations). Despite the fact that all the parameters for the purposes of rating the plaintiff company, were same in the present year, as the preceding year, the defendant vide its communication dated 24th April, 2020 intimated to the plaintiff its proposal to downgrade the credit rating from BBB+ to BBB. Plaintiff objected to the

same and filed its objections on 26th April, 2020 whereafter the defendant vide its letter dated 30th April, 2020 communicated that it has reviewed the credit rating of the plaintiff company and is maintaining the same at BBB. The defendant also published the downgraded credit rating of the company on its website.

6. Challenging the two letters of the defendant dated 24th April and 30th April, 2020, learned counsel for the plaintiff contends that the same are ex-facie wrong and contrary to the agreement between the parties have been uploaded on the website of the defendant. The credit rating of a party does not address any other risk including liquidity risk, market value risk or price volatility. The credit rating is only for the purposes whether the company is in a position to clear its debts. A perusal of the parameters of the last financial year as compared to the present financial year would show that the long term fund based term loans for the financial year 2020 ending is the same as financial year 2019, that is, ₹6,863.94 crores. The long term fund based cash credit, long term non-fund based, short term fund based and unallocated instruments' value also remain the same. The total bank facilities of the plaintiff company along with the non-convertible debentures remain the same. As a matter of fact, the current rated amount has reduced from ₹6,863.94 Crores to ₹6,443.80 crores and the non-convertible debentures from ₹335.00 crores to ₹56.80 crores as is noted in the letter of the defendant dated 30th April, 2020. So the two changes are in favour of the plaintiff and there is no negative rationale permitting downgrading of the rating.

7. The main business of the plaintiff is with Tamil Nadu Generation and Distribution Corporation Limited (in short 'TANGEDCO'). The major

reason why the credit rating of the plaintiff company has been shown in the negative by the defendant in its letter dated 30th April, 2020 is that since TANGEDCO is stressed, the outstanding dues to be received by the plaintiff company are uncertain. Learned counsel for the plaintiff submits that TANGEDCO is a government concern and thus there can be no uncertainty to receive the outstanding dues. The plaintiff has a letter of credit in its against TANGEDCO for a sum of ₹120 crores and merely because the plaintiff has presently not invoked the letter of credit it cannot be held that the receiving of the outstanding dues by the plaintiff from TANGEDCO is uncertain.

8. Referring to Clause-G (i) and (ii) of the agreement dated 15th June, 2016 between the parties, learned counsel for the plaintiff stated that once the plaintiff protested to the downgrading of the credit rating, the defendant could not have published the same on its website. The plea of the defendant that sub-clause (i) of Clause-G of the agreement between the parties only related to the initial rating and not the subsequent ones is palpably incorrect and without any basis. A perusal of sub-clauses (i) and (ii) of Clause-G brings out a distinction between the right of publication and the right of disclosure.

9. Learned counsel for JPL further submits that ICRA has perversely and irrationally utilized the negative effect of the previous ratings and has added COVID-19 as a reason to downgrade the credit rating for this year ignoring the improvements and the positive aspects of JPL's situation such as even during the national lock down when no industry was functional JPL's industry was fully functional and that the financial exposure of JPL in the previous year has come down drastically for this year. While arriving at a

subjective satisfaction of JPL's rating, ICRA has not adopted an objective criteria nor was ICRA's action transparent. ICRA by citing COVID-19 which is irrelevant in the case of JPL as JPL is providing essential services, downgraded the rating. Reliance is placed on the decision reported as 2016 (7) SCC 703 Cellular Operators Association of India vs. TRAI and the decision of the Bombay High Court Standard Retail Pvt. Ltd. vs. M/s G.S. Global Corp. & Ors., Commercial Arbitration Petition (L) No.404/2017 decided on 8th April, 2020).

10. Learned counsel for the defendant/ICRA countering the arguments of learned counsel for the plaintiff contends that ICRA is a credit rating agency duly registered with the Securities and Exchange Board of India (SEBI) and accredited as external credit assessment institution by Reserve Bank of India (RBI). Thus even if the relationship between JPL and ICRA is based on a contract and ICRA may not be a statutory body however, it is governed by CRA Regulations and various circulars issued from time to time by SEBI and RBI.

11. It is further contended that a rating given by any rating agency is an independent opinion based on the likelihood of the issuer to reimburse the principal and pay the interest on its debt obligations on the due dates in the future. Though rating is in the form of standardized symbols but the same has to be read in conjunction with the rating rational that is correspondingly published. Further an outlook is provided with the rating symbol which indicates the potential/possible direction of the ratings over average time on the basis of foreseen development prospects. To formulate the opinion the analyst and the Rating Committee members are required to consider various factors, which include the credit strengths and credit challenges. The rating

process requires a balance of publishing timely ratings that are predictive of an issuer's credit profile while avoiding precipitous ratings that are prone to significant reversals and lead to volatile and erratic ratings. Only after balancing the conflicting factors, the rating committee members who are independent professionals render their opinion based on their wisdom, knowledge and past experience and expertise, as a result of which the element of prognosis is inherent in a rating. Even the highest rated instrument carries certain degree of credit risks. Thus, a credit rating is a predictive opinion, dependent on a subjective and discretionary weighing of complex factors within an established methodology. Though learned counsel for JPL argues that in terms of Regulation 21 read with Regulation 24(3) and (4) assignment of a rating is a decision of the Rating Committee, however, it is nothing more than an opinion as defined under CRA Regulation 2(q).

12. It is contended that ICRA has followed the rating process in compliance with the regulations and relevant circulars issued by SEBI from time to time and has not violated any of the rating methodologies or the CRA Regulations or the Master Circular. ICRA has been rating the instruments/debt facilities of JPL since 2008. Under the rating agreement entered into between JPL and ICRA in 2016 based on the initial rating JPL has already availed/raised funds and thus till the funds have been utilized and not repaid by JPL, ICRA would be bound to keep periodic watch/surveillance.

13. The Rating Committee after due deliberation accorded the rating on 24th April, 2020 and on the objection of JPL received, the same was put up before the Review Committee which comprises of different members/experts, who also decided to maintain the rating at BBB and

informed the decision to JPL on 30th April, 2020. Subsequent to the institution of the present suit JPL sought withdrawal of the ratings of the Non-convertible Debentures (NCDs) since they have been repaid. Consequently, ICRA withdrew the said ratings and shared the draft rational for withdrawal with JPL on 19th May, 2020. ICRA also observed that it did not have information to suggest that the credit risk has changed since the time the rating was last reviewed, since no protest was received from JPL subsequent to this withdrawal qua NCDs whereby the rating rational dated 30th April, 2020 was reiterated.

14. On the contentions of the parties, following issues arise for consideration before this Court:

- (i) Whether the defendant-ICRA has a right to publish the rating despite being objected to by the plaintiff/JPL?
- (ii) What are the factors required to be considered by ICRA while deciding the rating and whether those factors have been considered by ICRA or the finding of ICRA is based on erroneous considerations?
- (iii) In case, the finding of ICRA is based on erroneous factors, whether this Court can grant a mandatory injunction against ICRA directing it to review its ratings?

Findings:

15. Before proceeding with the matter it would be appropriate to note the relevant portions of the agreement dated 15th June, 2016 arrived at between the plaintiff and defendant qua the credit rating:

“TERMS OF RATING AGREEMENT

A. Definitions

- i. “Agreement” refers to the written terms and conditions of this agreement, rating requisition form and all schedules and annexures, each as may be amended,*

- supplemented or modified from time to time.*
- ii. *“Credit Rating” or “Rating” refers to evaluating the capabilities of a company to timely meets its debt obligations expressed in the form of standard symbols or in any other standardized manner, assigned by ICRA and used by your Company, to comply with a requirement specified by the SEBI (Credit Rating Agencies) Regulations, 1999 and relevant guidelines & circulars issued by Reserve Bank of India, from time to time. A Credit Rating does not address any other risk, including liquidity risk, market value risk, or price volatility. Any Rating must be construed solely as a statement of opinion and not a statement of fact. A Credit Rating is not an offer, invitation, inducement or recommendation to purchase, sell or hold any securities or otherwise deal or act in relation to any issue or Bank Facility(ies), to which this Agreement relates or otherwise in connection with any associated transaction, entity, or matter. References in this Agreement to “rating” or “credit rating” also encompass any revalidation of Rating and the terms of this Agreement will apply to any revalidation Rating.*
 - iii. *“Rating Fee” refers to the initial fee payable in advance by your Company to ICRA in consideration for the Rating to be assigned by ICRA to the Bank Facility and shall be exclusive of the applicable service tax payable thereon.*
 - iv. *“Surveillance Fee” refers to the fee payable in advance by your Company to ICRA for the continuous monitoring of the Rating by ICRA during the lifetime of the Bank Facility and shall be exclusive of the applicable service tax payable thereon.*
- B. Scope of Work and Rating Fee*
- I. ICRA shall, after due consideration, assign a Rating (accompanied, if necessary, by an outlook and/or other indicators) to the said Bank Facility of your Company.*
 - II. Upon acceptance of the Rating or notification of use of*

the Rating by your Company to ICRA in the manner set out in clause D (1) below, ICRA shall subject to clause F of this Agreement, keep the Rating under surveillance during the lifetime of the Bank Facility that is such time that any amount is outstanding against it or the sanction remains valid, whichever is earlier;

- III. The initial non-refundable fee payable by your Company to ICRA for the enhancement is Rs. 9,77,500. This amount represents the sum of the following: Rating Fee of Rs. 8,50,000; service tax of Rs. 1,27,500. The annual Surveillance Fee for the enhancement from the second year onwards will be Rs. 4,25,000, exclusive of applicable rates of service tax. The Surveillance Fee, which becomes chargeable after 12 (twelve) months from the date of assignment of the initial Rating, will be payable in advance. It is hereby clarified that notwithstanding your non-acceptance of the Rating or failure to notify ICRA of your acceptance/non-acceptance of the Rating, any use of the Rating by your Company, in any manner whatsoever, shall constitute acceptance of such Rating and your Company shall be obligated to pay Surveillance Fee after ICRA becomes aware of the use of the Rating. Your Company shall also reimburse ICRA all travel and out-of-pocket expenses that it incurs in connection with the Rating process, both initially and during surveillance. Rating Fee/Surveillance Fee shall be paid by your Company by way of cheque or demand draft (DD) or transfer through electronic medium in favour of ICRA Limited. All Fees as mentioned herein shall not be refundable under any circumstances. ICRA reserves the right to revise the Rating Fee/ Surveillance Fee payable by you under this Agreement subject to maximum of 0.05% of the Rating Fee/Surveillance Fee.

C. Disclaimer

- I. Disclaimer of advice: We are not: (a) providing an audit opinion any financial, legal, tax, advisory, consultative or business services; or (b) advising on structuring,

drafting or negotiating transaction documentation. You should take independent legal, tax, financial and other advice when structuring, negotiating and documenting transactions. You agree that neither a Rating nor any discussions with ICRA's analysts constitutes advice on business operations.

- II. Disclaimer of warranties: All information, including the Ratings and other communications, provided by ICRA relating to you, this Agreement, the facility or the Transaction is provided “as is” and without representation or warranty of any kind in particular, neither ICRA nor its agents make any representation or warranty, express or implied, as to the accuracy, timeliness, completeness, merchantability or fitness for any particular purpose of any such information or communication.*
- III. We are an independent rating agency and may determine, apply and amend our methodologies and Rating in our sole discretion from time to time.*
- D. Acceptance/non-acceptance and use of Rating*
 - I. After ICRA has informed your Company of the Rating it has assigned, your Company shall communicate its decision to ICRA regarding its acceptance of the Rating in writing, and intended use of the Rating, in any manner, within 7 (seven) days of the assignment of the Rating. In the event your Company fails to notify ICRA of its decision regarding its acceptance/non-acceptance of the Rating, such failure shall be treated by ICRA as non acceptance of the Rating. Notwithstanding the foregoing, any use by you of the Rating shall be deemed acceptance of the Rating.*
 - II. During such 7 (seven) days acceptance time period, and thereafter if the Rating is not accepted by your Company within the stipulated time, such Rating shall remain confidential subject to the terms of this Agreement, including without limitation, clause N (Applicant Confidentiality for Unpublished ratings). On request, an unaccepted Rating may be converted to an accepted*

Rating, provided such request is made by your Company within 2 (two) months from the date ICRA first communicated its Rating decision to you. However, before such conversion is made, the Rating initially assigned may have to undergo a revalidation process. No additional fee would be charged to your Company for the conversion, unless the Rating initially assigned needs to undergo a revalidation process. The Rating initially assigned needs to undergo a revalidation process if either (i) the size of the Bank Facility or structure of the Bank Facility has changed before the Rating has been accepted by your Company, or (ii) the request for conversion is received by ICRA after 2 (two) months from the date that ICRA first communicated its Rating decision to you.

III. In case a Rating is not accepted by your Company within the stipulated time, or in case of failure of your Company to notify its acceptance or non-acceptance or use of the Rating to ICRA as set out in clause D (I) or clause K III (iv), as the case may be, the assigned Rating shall not be subject to surveillance and ICRA shall not be responsible for the continuous monitoring/surveillance of the assigned Rating.

IV. You will only use each requested Rating for its intended purpose and will not, for example, represent an issuer rating as a securities rating.

E. Tenure of Agreement

I. This Agreement shall remain valid till the earlier of the date that the Rating assigned is withdrawn or the date that there are no longer any obligations outstanding under the Bank Facility. This Agreement cannot be terminated by your Company once it has accepted the Rating.

II. Notwithstanding the clause E (I) above, the provisions of clauses L (Warranty), M (Confidentiality); N (Applicant Confidentiality Unpublished ratings), O (Indemnification), P (Limitation of Liability), Q (Warranties with respect to information provided to

ICRA), R (Use of information) and U (IV) shall survive any termination of the Agreement.

F. Changes in Rating

- I. Subject to the terms and conditions of this Agreement, ICRA will keep the Rating under surveillance until the earlier of the date that the Rating is withdrawn or the date that there are no longer any obligations outstanding under the Bank Facility. Following surveillance, ICRA may reaffirm, upgrade, downgrade, suspend, or withdraw the Rating; further, it may assign an outlook, or change or withdraw the outlook previously assigned; it may also place the Rating (previously assigned) on rating watch (with or without specified implications) or remove it from rating watch.*
- II. If at any stage during the lifetime of the Bank Facility, ICRA feels it is unable to carry out continuous monitoring of the Rating(s) assigned because of a lack of cooperation by your Company, ICRA will be entitled to carry out a review of the Rating(s) outstanding on the basis of the best available information. Further, ICRA shall also be entitled to disclose such Rating(s) or changes in the Rating(s) along with the rating rationale(s) in any manner and to anyone it may decide without any reference to your Company.*
- III. At any stage, failure on your part to furnish such information as ICRA may require from time to time, or failure to properly answer queries in a timely manner that may be raised by ICRA or failure on your part to pay Surveillance Fee as and when due, could result in ICRA suspending, withdrawing, or revising the Rating assigned.*
- IV. At any point, if ICRA is of the opinion that the circumstances then prevailing justify change, suspension, or withdrawal of the Rating, or warrant that the Rating be maintained at the existing level, it shall have the right to take the appropriate rating action, and such a decision shall be final and binding on your Company.*

- V. The Rating is specific to the terms and conditions of the Bank Facility to be rated as indicated to ICRA by you and any change in the terms or size of the same would require revalidation of the Ratings which could result in a change in the Ratings previously assigned.
- G. Dissemination of rating
 - I. ICRA shall communicate its rating decision in terms of assignment or change in the Rating to you in writing. The right to accept and use the initial Rating will rest with your Company. However, once you have accepted and/or used the Rating assigned, ICRA shall have the right to publish the Rating or any change or suspension or withdrawal of the Rating, the rating rationale, and such other relevant information employing its regular methods of dissemination.
 - II. ICRA reserves the right to disclose the Rating, whether accepted or not, as and when required by the appropriate government, statutory, regulatory, judicial and quasi-judicial authorities, auditors, bodies and/or stock exchanges where such disclosure is permitted or required by or under any law in force. In case of allegation of misstatement by your Company, ICRA shall have the right to disclose the assigned Rating in public documents and/or publicity material and/or other forum.
- H. Revalidation of the Rating
 - I. The rating assigned to the Bank Facility of your Company shall require revalidation if there is any change in the size or structure of the Bank Facility.
 - I. Suspension/withdrawal of rating
 - I. ICRA shall suspend/withdraw the assigned Rating in accordance with its suspension/withdrawal policy in force.
 - II. Suspension may be revoked on receipt of renewal request from your Company.
 - III. Subsequent revival of the suspended rating will not be subject to any acceptance.
- M. Confidentiality

- I. ICRA's confidentiality: "Confidential Information" means any information regarding your Company or the Bank Facility rated by ICRA under this Agreement that ICRA receives from you, or your respective group companies or authorized agents in connection with ICRA's services accompanied by a written notice specifying the confidential nature of such information. The term "Confidential Information" does not, however, include (i) information that is or becomes publicly known other than by an act of ICRA in contravention of this Agreement; (ii) information in our possession prior to the execution of this Agreement; (iii) information that becomes available to ICRA from a third party; (iv) information developed independently by ICRA; (v) information that has been aggregated or transformed in such a way that it is no longer identifiable as relating to any individual; or (vi) information that is approved in writing by you for public disclosure.

ICRA shall retain any Confidential Information and not disclose the same to third parties outside of ICRA, but such retained Confidential Information will remain subject to the confidentiality obligations contained in the Agreement.

We may, however: (i) disclose Confidential Information as required by law, regulation, judicial or governmental order, subpoena or other legal process or requested or required by any governmental or regulatory authority including any self-regulatory organization, securities market or exchange; (ii) publish or otherwise make publicly available (including by press release) any rating(s) or any other opinion regarding a particular Bank Facility, entity or transaction that incorporates Confidential Information; and (iii) disseminate aggregated or transformed information as permitted by the section titled "Use of information above. You confirm that, to the best of your knowledge, there are no third parties whose rights would be adversely affected by way of such publication or dissemination, ICRA reserves

the right to use, publish, disseminate, or license others to use, publish or disseminate any information provided by you or your agents or advisors not deemed Confidential Information.

II. *Applicant confidentiality:* *You agree to keep the provisions of this Agreement and any other non-public information with respect to the related rating(s) disclosed by ICRA to you confidential and not to disclose such provisions or information to any person or entity except:(i) to your group companies, officers, directors, employees and agents; and (ii) as required by applicable law, or at the request of any governmental authority having jurisdiction. You will be responsible for any failure by any of your group companies, officers, directors, employees, or agents to comply with these confidentiality restrictions. If ICRA provides a revalidation that has not been publicly disclosed by ICRA, such revalidation must be kept strictly confidential, and should not be disclosed to any person or entity without ICRA's prior written consent.*

N. *Applicant Confidentiality for Unpublished ratings*

The following additional confidentiality provisions are applicable to any unpublished rating or other opinion delivered by ICRA hereunder, i.e., any rating or other opinion not disclosed by ICRA to the general public at the time of delivery by ICRA, including, without limitation, any Rating during the 7 (seven) days acceptance period and thereafter in the event that the Company does not accept the Rating.

For the purpose of this Agreement, "ICRA's Confidential Information" means any non-public information that ICRA discloses to either of : (i) you or any of your agents; or (ii) if different, any relevant entity on which a rating is requested or whose issuances are requested to be rated under this Agreement (each, a "Rated Entity") or its agents. ICRA's Confidential Information includes any rating and/or other opinion we deliver in connection with this Agreement that we do not also disclose to the

general public at the time of delivery

You agree to keep ICRA's Confidential Information confidential and treat it accordingly. You must refrain from direct or indirect communication or disclosure of ICRA's Confidential Information to any persons(s) other than: (i) your employees, officers and directors and those of any entities that are wholly owned, directly or indirectly, by your ultimate parent, whose functions reasonably require them to have knowledge of ICRA's Confidential Information in order to fulfill their professional duties as agents of the Rated Entity; and (ii) your financial and legal advisors, in their capacity as such with a need to know, for information purposes only and to whom we owe no duty or responsibility. You will ensure that all above persons listed in sub clauses 9i) and 9ii) comply with all of the provisions in this Agreement and any breach of the same will be deemed to be a breach of this Agreement by you.

(Emphasis supplied)

Issue No.(i):

16. To canvass that ICRA could not have published the rating learned counsel for the JPL states that ICRA is not a statutory body and thus, not a regulator of the JPL. The relationship between JPL and ICRA is based on an agreement and thus, ICRA is required to abide by the terms of the agreement. Grievance of the JPL is that while carrying out the ratings, ICRA assumed the role of a forensic auditor, which it is not vested with. Despite JPL having objected to the proposed rating rationale of ICRA dated 24th April, 2020 by a detailed representation dated 26nd April, 2020, ICRA sent a mail on 30th April, 2020 informing that it was maintaining the rating 'BBB', thus downgrading the rating of JPL. Clause B(II) of the agreement between the parties provides that upon acceptance of the rating or notification of use of rating by JPL to ICRA in the manner set out in Clause

D(I), ICRA shall, subject to Clause F of the agreement, keep the rating under surveillance during the life time of bank facility.

17. Learned counsel for the JPL contends that JPL having not accepted the credit rating, ICRA was prohibited from publishing the same in view of Clause G of the Credit Rating Agreement. Clause G(I) of the agreement clearly stipulates that only on acceptance of the rating, the same can be published. Therefore, acceptance of the credit rating by JPL is a sine qua non for ICRA to publish the rating. Even on 30th April, 2020, JPL refused to accept the rating and hence, the same could not have been published. In case acceptance by JPL is not treated as a pre-condition for publishing the rating by ICRA, then Clause G(I) of the agreement between the parties would be rendered nugatory. Clause G(II) stipulates that ICRA has a right to publish the rating as and when required by government authorities or any other statutory authority. The impugned publication has not been done by ICRA pursuant to the requirement of any government or statutory authority. By publishing the credit rating, ICRA has violated Clauses M and N of the agreement providing for confidentiality. Reliance of ICRA upon Clause D to defend its action or to plead credit rating binding on JPL is totally misplaced as Clause D of the agreement is functioned upon ‘acceptance/non-acceptance of the credit rating’ and ‘use of the credit rating by the client’. On a harmonious reading of Clauses D and G of the agreement, the only conclusion that can be arrived at is that ICRA could conduct its rating exercise any time and upon declaring its credit rating, it was upon the JPL to accept or reject the same, which JPL specifically refused on 30th April, 2020. Consequently, ICRA was not bound to publish the rating after the same had been refused to be accepted by JPL on 30th

April, 2020. Reliance is placed on the decisions in (1973) 2 SCC 825 Delhi Development Authority Vs. Durga Chand Kaushish and (1991) 1 SCC 412, M.O.H.Udman and Ors. Vs. M.O.H. Aslam.

18. Refuting the arguments of learned counsel for JPL, learned counsel for ICRA submits that on a plain reading of the rating agreement, in conjunction with CRA regime as also the RBI circular, the only unambiguous conclusion that can be arrived at is that the publication of the rating under surveillance is not subject to the acceptance of JPL. Contingent on the circumstances and consideration of the factors which involve annulment of prognosis, ICRA has a right to change the ratings and consequentially bound to publish irrespective of JPL's non-acceptance. It is contended that neither the CRA regime nor the circulars of SEBI/RBI mandate the consent of the issuer for publication of the rating action under surveillance. In the event, the initial rating is not accepted by issuer and not used to raise funds, the rating rationale cannot be disseminated to the beneficiaries, hence, there can be no requirement to disseminate any changes in the same as well. However, if the initial rating is accepted by the issuer, the same is disseminated to the beneficiaries and consequentially, if there is any change in the rating, the same would also be required to be disseminated. Thus, the contention of the learned counsel for ICRA is that only in the first/initial rating, no publication will follow subsequent to the objection of the issuer, however, once the rating is published, then, the issuer would have no say in the subsequent ratings as the same affects the rights of the beneficiaries who have invested pursuant to the credit ratings initially assigned by ICRA.

19. Learned counsel for defendant further refers to Regulation 15(2) in

this regard which mentions about changes in ratings. Additionally, Regulation 16 also mentions that all published ratings are subject to surveillance, meaning thereby “accepted” initial ratings which are published, have to be monitored’. The CRA regulations and the Master Circular provides for option of acceptance by the issuer at the time of initial rating but not during the course of surveillance. Even as per Clauses 3.3.6 and 3.3.9 of the Master Circular, surveillance of the rating is critical and dissemination of the rationale has to be completed within the specified time limit. Further, any delay in the time lines to disclose on the website affects the beneficiaries. Though time for acceptance by the issuer is provided in case of initial rating, however, no such time is provided in case of surveillance which mandates that the rating is to be disseminated within five working days of the decision of the rating committee. Thus, from the Master Circular of the SEBI itself, it is evident that the acceptance of the issuer is not required for dissemination of rationale for cases under surveillance. In the event of non-publication of the rating, the same may amount to an indicative rating which is barred by SEBI. The Master Circular of the SEBI further require publication of the rating irrespective of the non-cooperation of the issuer including non-payment of fee in terms of Regulation 16(3) read with Clauses 2.9, 3.3.3 and 3.3.7 of the Master Circular. Publication of the credit rating and rationale by the credit rating agency in a timely manner plays a critical role in protection of the interests of the investors in security markets. Reliance is placed on the decision of Bombay High Court in E.C.L. Finance Limited Vs. ICRA Ltd. and Another.

20. It is contended by learned counsel for the defendant that as per the CRA regulations and the circulars issued thereunder, ICRA as a responsible

institute, is expected to pro-actively track all important changes which make an independent assessment and promptly disseminate timely and accurate ratings. The primary role of a credit rating agency is to bridge the information and raise symmetry between the company and shareholders. While extending loans on credit facilities, banks heavily rely upon the credit ratings given by the agencies including ICRA and in case the revised ratings pursuant to the surveillance is not published, the user of the rating will erroneously be relying upon previous rating which may result in loss to the said party. Ratings once published cannot be withdrawn without a non objection certificate from the concerned bank and cannot be suspended. Reference is made to Clause 3.3 of the Master Circular. After following the procedures prescribed under the agreement and Master Circular of the SEBI, publication is carried out in terms of Clauses D, F and G of the rating agreement. The dissemination of the rating through ICRA's website has been prescribed by the SEBI under Clause 2.5 and 3.3.1 of the Master Circular. Reliance is placed on the decision of Madras High Court in (2001) 1 BC 52 First Leasing Company of India Vs. ICRA Ltd.

21. A perusal of the agreement between JPL and ICRA clearly indicates that a rating is sought by a party from the credit rating agency to avail a bank facility. Only on the credit rating being awarded the credit facility is granted and since the bank takes into consideration the opinion of the credit rating agency while granting the credit facility, the agency is duty bound to fairly continue to assess the credit rating of the party which is called "surveillance rating" during the lifetime of the credit facility. This fact is further clarified from clause-B sub-clause (iii) which states that notwithstanding JPL's non-acceptance of the rating or failure to notify

ICRA of its acceptance/non-acceptance, if JPL uses the rating for the purposes of availing a bank facility, the rating as awarded by ICRA would be deemed to have been accepted and JPL would be obligated to pay the surveillance fee.

22. Further, Clause–G (I) provides that ICRA is required to communicate to JPL its rating decisions in terms of the assignment or change in the rating in writing and whether to accept the same and use the initial rating will be upon the company. In case there is no protest and the rating is accepted, ICRA has a right to publish the rating or any change or suspension or withdrawal of the rating on its regular methods of dissemination. ICRA further reserves its right to disclose the rating, whether or not accepted by JPL as and when required by the government, statutory, regulatory or judicial or quasi judicial authorities etc.

23. Case of the ICRA is that it is only that only the initial rating can be accepted or objected to by JPL and subsequent rating cannot be objected to, once the initial rating is utilized to avail the credit facility. However, even then it has been reviewed by a Review Committee comprising of other persons pursuant to the representation of JPL dated 26th April, 2020 and only after the Review Committee decided to maintain the downgraded rating that the letter dated 30th April, 2020 was communicated to JPL and the rating put up on the website.

24. For the purposes of ascertaining whether defendant has followed the CRA Regulations, it would be relevant to note the relevant provisions thereof as under:

Monitoring of ratings

15. [(1) Every credit rating agency shall, during the lifetime of

securities rated by it continuously monitor the rating of such securities, unless the rating is withdrawn, subject to the provisions of regulation 16(3).]

(2) Every credit rating agency shall disseminate information regarding newly assigned ratings, and changes in earlier rating promptly through press releases and websites, and, in the case of securities issued by listed companies, such information shall also be provided simultaneously to the concerned regional stock exchange and to all the stock exchanges where the said securities are listed.

Procedure for review of rating

16 [(1) Every credit rating agency shall carry out periodic reviews of all published ratings during the lifetime of the securities, unless the rating is withdrawn, subject to the provisions of regulation 16(3).]

[(2) If the client does not co-operate with the credit rating agency so as to enable the credit rating agency to comply with its obligations under regulation 15 of these regulations, the credit rating agency shall carry out the review on the basis of the best available information or in the manner as specified by the Board from time to time.

Provided that if owing to such lack of co-operation, a rating has been based on the best available information, the credit rating agency shall disclose to the investors the fact that the rating is so based.]

[(3) A credit rating agency shall not withdraw a rating so long as the obligations under the security rated by it are outstanding, except where the company whose security is rated is wound up or merged or amalgamated with another company, or as may be specified by the Board from time to time.]

(Emphasis Supplied)

25. A perusal of Regulations 15 and 16 which relates to the monitoring of the ratings and not initial rating reveals that the Credit Rating Agency is mandated to continuously monitor the rating unless the same is withdrawn,

subject to the regulation 16(3) and the Agency is also mandated to disseminate the said information regarding newly assigned ratings through press releases and websites during the lifetime of securities related. Regulation 16 further mandates periodic reviews of all published ratings during the lifetime of the securities, unless the rating is withdrawn. Thus if the security subsists and is pending all published ratings are bound to be reviewed periodically even if the client does not cooperate with the Credit Rating Agency and complies with its regulation. Further the Credit Rating Agency cannot withdraw a rating as long as the obligations under the security rated are outstanding unless the company whose security is rated is wound up or merged or amalgamated with the another company or as may be specified by SEBI from time to time.

26. Further the Code of Conduct i.e. IOSCO Credit Rating Agency Code defines “Credit rating action” as ‘to determine an initial credit rating, an upgrade of an existing credit rating, a downgrade of an existing credit rating (including to a default category), an affirmation of an existing credit rating, or a withdrawal of a credit rating’. Thus after the initial credit rating is assigned, the action of the credit rating agency in the form of credit rating action continues by upgrading or downgrading or maintaining the existing credit rating or withdrawal of the credit rating.

27. In this regard it would also be relevant to note clauses 2.9, 3.3.3, 3.3.6, 3.3.7 and 3.3.9 of the Master Circular No.SEBI/ HO/ MIRSD/ DOP2/ CIR/P/2018/76 dated 2nd May, 2018 issued by SEBI which provide as under:

2.9 Policy in respect of non-co-operation by the issuer 22

2.9.1. In case of non-cooperation by the issuer (such as not providing information required for rating, non-payment of fees for conducting surveillance),

in line with the existing Regulations, the CRA shall continue to review the instrument, on an ongoing basis throughout the instrument's lifetime, on the basis of best available information, in accordance with the rating process and policies set forth in its Operations Manual/ Internal governing document.

2.9.2. In such cases the credit rating symbol shall be accompanied by the suffix "ISSUER NOT COOPERATING" in the same font size. The suffix shall be explained below and shall read as 'Issuer did not cooperate; based on best available information'.²³

2.9.3. The rating action(s) in such cases shall be promptly disclosed through press release(s), which shall mention, at least, the following:

- a. Date of Press Release*
- b. Details of Instrument*
- c. Rating Action and Indicative/updated rating based on best available information*
- d. A brief write-up on the non-co-operation by the Issuer/ Borrower and the consistent follow-up done by the CRA for getting the information.*
- e. Hyperlink/ reference to the applicable "Criteria"*
- f. Limitations regarding information availability (shall have a suitable caveat cautioning the investors/lenders /public)*
- g. Rating History for last three years*
- h. Name and contact details of the Rating Analyst(s)*

2.9.4. In case an issuer, having not co-operated with a CRA in the past, approaches another CRA for rating, the new CRA shall, in its Press Release, disclose the aspect of non-co-operation.

3.3 Continuous Disclosures and Reporting

3.3.1 xxx xxx

3.3.2 xxx xxx

3.3.3. *The CRA shall also make a reference to SEBI regarding such suppression of information by the issuer/ non-cooperation of Issuer with CRA. Failure to make such reference shall be considered as aiding and abetting the Issuer in suppression of material information by the CRA which would be in contravention of Clause 12 of Code of Conduct of CRAs and may result in violation of the provisions of section 12A of the Securities and Exchange Board of India Act, 1992 and SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 by the CRA.*

3.3.6. *Timelines of review and Press Releases*

a. *In order to enable CRAs to disseminate information on ratings promptly through press releases as per requirements of Regulation 15 and 16 of SEBI (CRA) Regulations, following is clarified:*

i. *Initial Rating:*

<i>Scenario</i>	<i>Timelines – immediately but not later than</i>
<i>Acceptance of Rating/ Appeal for Review of Rating by the Issuer</i>	<i>5 working days of communication of rating by the CRA to the Issuer</i>
<i>Disclosure of rating as non-accepted Rating</i>	<i>In case rating is not accepted by the Issuer within a month of communication of rating by the CRA to the Issuer, the same shall be disclosed as Non-Accepted Rating on the CRA's website</i>
<i>Dissemination of Press Release on CRA's website and intimation of same to Stock</i>	<i>2 working days of acceptance of Rating by the Issuer</i>

<i>Exchange/ Debenture Trustee</i>	
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ii. Periodic Surveillance:

<i>Scenario</i>	<i>Timeline - immediately but not later than</i>
<i>Dissemination of Press Release on CRA's website and intimation of same to Stock Exchange/ Debenture Trustee</i>	<i>5 working days of Rating Committee Meeting</i>

iii. Dissemination of Press Release on CRA's website and intimation of same to Stock Exchange/ Debenture Trustee in case of event based review:

<i>Scenario</i>	<i>Timeline- immediately but not later than</i>
<i>Intimation from Issuer/ Debenture Trustee/ Bankers of the Issuer regarding delay in servicing debt obligation</i>	<i>2 working days of intimation</i>
<i>Material Events requiring review (as stated in paragraph 2.4.2)</i>	<i>7 working days of occurrence of the event.</i>

3.3.7. Disclosures in case of considerable delay in providing information by the Issuer:

- a. As per Regulation 18(2) of SEBI (CRA) Regulations, 1999, the CRA, while covering the analysis of the various factors justifying the assessment in press release, shall also disclose the factors constituting a risk.*
- b. Accordingly, it is further clarified that if the issuer does not share information sought by the CRA within 7 days of seeking such information from the Issuer, even after repeated reminders (within these 7 days) from the CRA, the CRA shall take appropriate rating action depending upon the severity of information risk of the issuer.*

- c. *The Press Release in such cases shall mention the efforts made by the CRA in seeking such information and limitations regarding such information availability.*

3.3.9. Disclosures in case of delay in periodic review

- a. *Each CRA shall promptly disclose on its website details of all such ratings where the review became due but was not completed by the due date, as per the timelines specified in the CRA's Operations Manual/ Internal governing document. Details disclosed shall include the name of the issuer, name/ type of instrument, size of the issue, date of last review, reasons for delay in periodic review, hyperlink to the last Press Release, etc.*

28. As noted above clause 3.3.6 refers to the requirement of CRA Regulations 15 and 16 and clarifies that the time for acceptance of rating/appeal for review of the rating by the issuer is five days of communication of the rating by CRA to the issuer and in case the rating is not accepted by the issuer within one month of communication of rating, the same shall be disclosed as non-accepted rating. However, on acceptance of the rating by the issuer, the same will be disseminated by press release on Credit Rating Agency's website and intimation to the Stock Exchange/Debenture Trustees within two days. However, in respect to periodic surveillance there is no provision of a period of one month from the date of communication wherein the issuer has to accept or not accept the rating and within five working days of the Rating Committee Meeting the rating has to be disseminated by press release on Credit Rating Agency's website and duly intimated to stock exchange/debenture trustees. Clause 3.3.9 also provides that despite delay where credit rating is reviewed but not completed within the due date on completion thereof the same will be promptly disclosed on the website.

29. Thus the combined reading of SEBI CRA Regulations and RBI Master Circular clearly depict that as far as the initial rating is concerned, if the same is not accepted, then the same will not be published by the Credit Rating Agency however, once an initial credit rating is accepted and published based whereon a party seeks financial facility, during the pendency of the said financial facility, the Credit Rating Agency is mandated to conduct periodic surveillance and even if subsequent rating opined by the Credit Rating Agency during the period of surveillance is not accepted by the party, the same will still be disseminated by press release on the website of the Credit Rating Agency as also intimated to the Stock Exchange/Debenture Trustees.

30. The Madras High Court in First Leasing Company of India vs. ICRA (supra) acknowledging the right of ICRA to publish the rating in case of change held:

18. The respondent is required to disseminate information relating to the ratings and changes to earlier ratings promptly through press releases and websites, etc.; in order to provide timely information to the investors as well as the prospective investors. According to the respondent, for this purpose of continuous surveillance throughout the life of the instrument and for regular modes of dissemination to the investors, the respondent receives a mandate from its clients requesting for carrying out a credit rating exercise. Through such mandate the applicant also acknowledged the right of the respondent to publish the rating and any changes in it. Consequently, the respondent is required to give a rationale for the rating assigned to the client who acknowledged that if at any time in the opinion of the respondent based on any event or change of event, the rating, assigned to the instrument warrants revision. It is open to the respondent to make such a revision and to publish such a review in rating in any manner.

31. Learned counsel for JPL relied upon the decision of the Bombay High Court in ECL Finance Limited vs. ICRA (supra) however, in the said decision the relief sought by the petitioner therein was that no rating action should take place for three months till Covid-19 pandemic subsides and Covid-19 pandemic be not used as a basis for downgrading. The only relief granted by the Bombay High Court was that the petitioners therein were permitted to present their case before the next meeting of the Rating Review Committee.

32. Reliance of learned counsel for JPL on clauses (M) and (N) of the Rating Agreement between the JPL and ICRA to contend that publication of the rational breaches the confidentiality provisions is misconceived. Under clause (M) ICRA is entitled to publish its opinion and if an information is used as a part of rating rational, ICRA would be bound to disclose the same. Also JPL has placed on record no material to show that which piece of information supplied by JPL was classified as 'confidential' which has been published by ICRA. Further clause (N) does not pertain to the rating actions under surveillance and applies to initial rating which if not accepted is unpublished and based thereon no financial facility is raised.

33. Learned counsel for JPL further relied upon the decisions reported as 1973 (2) SCC 825 Delhi Development Authority vs. Durga Chand Kaushish (supra) and 1991 (1) SCC 412 M.O.H Udman & Ors. vs. M.O.H Aslam (supra) to contend that if two constructions of the document are possible, the one which will not render a provision nugatory has to be adopted and that the intention of the parties must be gathered from the language used in the contract. As noted above, clause (B) of the agreement between JPL and

ICRA clearly defines the scope of work and that once the initial credit rating is assigned and accepted, ICRA shall subject to clause (F) keep the rating under surveillance during the lifetime of the bank facility, that is, such time that any amount is outstanding against it or the sanction remains valid whichever is earlier. Once based on the credit rating a party seeks a bank facility it cannot thereafter want the Credit Rating Agency to not conduct periodic surveillance thereof and in case of a change therein not intimate the same to the concerned agency and the parties duly affected by the said Credit Rating. The interpretation as sought to be given by JPL would be contrary to the public policy and hence cannot be accepted.

34. In view of the discussion aforesaid this Court is of the considered opinion that as per the terms of the agreement between JPL and ICRA as also the CRA Regulations, Master Circular of RBI, the Credit Rating Agency, that is, ICRA was entitled to publish the initial rating once accepted, based whereon JPL took credit facility and thereafter ICRA is mandated to conduct periodic reviews/surveillance of the credit rating and publish the same in the best interest of the provider of the financial facility and the other parties.

Issue No.2

35. Learned counsel for JPL contends that rating awarded by ICRA is not a mere opinion but a decision of the credit rating agency after an objective exercise for assessing the credit worthiness of a party is conducted. There are well defined objective parameters required to be followed by all rating agencies including the defendant. By terming its deliberations as an opinion ICRA is avoiding scrutiny by this Court. The major rating drivers cited by ICRA for downgrading the rating of JPL can be classified in four broad

categories, that is, (i) elongated receivables cycle, which results in stretched liquidity position; (ii) modest debt-coverage metrics; (iii) elevated debt level; (iv) exposure to power off take and raw material availability. The decision of ICRA to downgrade the rating is not only perverse but arbitrary as ICRA has perversely relied upon non-signing of incremental Power Purchase Agreements (PPAs) and default in payment of TANGEDCO due to COVID-19 situation.

36. Learned counsel for JPL submits that though in the financial year 2020 there was no incremental signing of PPA by JPL however, its existing long term PPA of 810 MW continued to be in force. JPL has received timely payments for its invoices beyond August, 2019. Payments for February 2020 invoices were due on 8th April, 2020 and the payments for March, 2020 were due on 4th May, 2020 for a sum of ₹113 crores and ₹118 crores respectively. Due to COVID-19 situation TANGEDCO, resulting in reduced collection paid 50% of the February, 2020 invoice and verbally requested JPL not to enforce the letter of credit. While awarding the credit rating ICRA failed to note the rating drivers in favour of JPL, that is, (i) additional income of about 430 crores per year from JSPL by way of interest on loans, w.e.f. the 1st quarter of 2019-2020, which gives a quantum jump to the loan serviceability by JPL; (ii) new short term PPA of 200 MW with OPJ Industrial Park at 3.90/kwh; (iii) although repayments increased from ₹497 crores in F.Y.2019 to ₹695 crores in F.Y. 2020 and are increasing to more than ₹800 crores from F.Y.2021 onwards, plaintiff has already served repayments of ₹695 crores in F.Y. 2020 which amount would increase to ₹800 crores in F.Y. 2021. Although repayment of principal is getting

increased by ₹105 crores in F.Y. 2021 as compared with F.Y. 2020, however, due to repayment of ₹695 crores in F.Y. 2020, there will be reduced interest outgo by ₹75 crores in F.Y. 2021, thus the net increase on account of debt obligation is only by ₹30 crores; and (iv) out of ₹800 crores repayment in F.Y. 2021, and post the second moratorium provided by RBI now the revised repayment for F.Y. 2021 stands at ₹583 crores. The Plaintiff having already paid ₹56.8 crores to Templeton Mutual Fund towards NCD repayment, now the balance repayment for the F.Y. 2021 is ₹526.20 crores.

37. Learned counsel for JPL contends that a perusal of the rating drivers would indicate that JPL was in a better position in 2020, than in the year 2019 and despite being in a better position in the year 2020 the rating of BBB⁺ of the year 2019 has been downgraded to BBB, that is, from 'stable' to 'negative outlook'. Non-convertible debentures of JPL have been in the year 2020 fully paid up. Further ICRA failed to consider the letter of TANGEDCO written to JPL stating that it was approaching financial institutions with respect to payment of dues of JPL. Therefore, the opinion concerning delay in realization of receivables by JPL was also incorrect. Though ICRA published an article in Financial Express that there is bound to be 1% fall in power demand by financial year 2021 due to COVID-19 but still ICRA downgraded the rating on the ground that there is already a stress in power sector due to COVID-19. This is also contrary to the fact that consumption of power sector continued even during lockdown for the reason the same was an essential service. Reliance is placed by the learned counsel for JPL on the decisions reported as AIR 1967 SC 295 *Barium Chemicals Ltd. vs. Company Law Board*; 1974 (2) SCC 687 *M.A. Rasheed vs. State of*

Kerala, 1994 Supp (3) SCC 424 S.Ramachandra Raju vs. State of Orissa. and 2001 (2) SCC 305 Bishwanath Prasad Singh vs. State of Bihar.

38. Refuting the contentions of learned counsel for JPL, learned counsel for ICRA submits that the relevant factors to be considered to ascertain the credit worthiness of JPL were duly considered by ICRA. A credit rating agency is required to keep track of all important changes relating to the client companies and monitor closely all relevant factors that may affect the credit worthiness of the issuer and reliance is thus placed on the ICRA Regulations Code of Conduct-clause-8; Master Circular of SEBI-clause-2.3.1 and clause 2.3 of IOSCO CRA Code. ICRA's risk analysis framework for thermal power producers requires balancing of various complex factors such as (i) business risk drivers, which include operating risk such as fuel availability and pricing risk; demand and tariff risk which includes consideration of cost competitiveness; counter-party credit risk; competitive position; past track record; and force majeure risk; (ii) industry risk drivers, which includes regulatory risk; (iii) financial risk drivers, which includes: adequacy of future cash flows; profitability; leverage and coverage indicators; liquidity and financial flexibility; tenure mismatches and risks relating to interest rates and refinancing; foreign currency related risks; debt transaction structure; accounting quality and contingent liabilities/off-balance-sheet exposures in addition to management quality and corporate governance and parentage. The financial risk assessment is not done in isolation but in conjunction with the business and industry risks that the entity is exposed to. Since the prime objective of the rating exercise is to assess the adequacy of the issuer's debt servicing capability, the defendant draws up projection on the likely financial position of the issuer under

various scenarios. The extent of deterioration of credit profile on account of pandemic is being considered for all entities but the same is factored into depending upon their sector and their financial position. The limited exemption provided by SEBI under its circular dated 30th March, 2020 to the rating agencies on non-consideration of pandemic was that discretion was granted to the credit rating agency to determine whether any default had occurred on account of pandemic or independent of pandemic and in the case of default the credit rating of an entity slips down to 'D' rating.

39. Learned counsel for ICRA further states that the downgrading published on 30th April, 2020 was based on multiple reasons after balancing various competing factors, some which strengthened the credit profile, whereas some weakened the same. Undoubtedly, plaintiff's revenue from TANGEDCO accounted for over 45% of its overall revenues, however, given a high dependence of revenues and receivables from the state distribution utilities, JPL faced the risk of an elongated receivable cycle and due to delays in payments from TANGEDCO, the receivable turnover period of JPL increased from 121 days in financial year 2018 to 167 days in financial year 2019 and to 200 days in financial year 2020. Sizeable amount of funds blocked in the receivables continued to have a bearing on the Plaintiff's liquidity profile, which remained stretched as reflected in consistently high working capital limit utilization averaging at 93% in nine months of financial 2020 and over 95% in the third quarter of the financial year 2020 and 96% as on 1st April, 2020. Further repayments in the earlier years remained moderate however, increased substantially in the financial year 2020. Thus the liquidity position which was considered moderate while awarding the rating rational of July, 2019, was considered stretched in

the rational dated 30th April, 2020. It is the case of ICRA of that all reasonable factors were considered and no arbitrary factor was considered.

40. From the agreement between the parties, CRA Regulations of SEBI and master circulars, it is evident that the rating provided by any rating agency is an independent opinion of an expert body on the likelihood of the issuer to reimburse the principal and pay the interest on its debt obligations on the due dates in the future. As per Regulation 2(q) of the CRA Regulations, to formulate an opinion on the credit rating, the analyst and the Rating Committee are required to consider various factors, some of which represent credit strengths and other factors which represent credit challenges. Consequently, the analysts and the rating committee balance such conflicting factors and exercise their independent professional judgment, by relying on, amongst other things, their past experience, to apply these various factors to the available information, in the specific context of that point in time and consider likely outcomes.

41. As per ICRA, the rating methodology used for rating the facilities of JPL were; Corporate Credit Rating Methodology, Rating Methodology for Thermal Power Producers and Liquidity analysis of the entities in non-financial sector. The risk analysis framework used by ICRA for thermal power producers requires balancing of various factors and can be broadly divided into the following:

- (i) Business risk drivers which include operating risk; demand and tariff risk; counter party credit risk and force majeure risk.
- (ii) Industry risk drivers which includes regulatory risk
- (iii) Financial risk drivers, which includes adequacy of future cash flows; profitability; leverage and coverage indicators; liquidity and financial flexibility; tenure mismatches and risks relating to

interest rates and refinancing; foreign currency-related risks; debt transaction structure; accounting quality; and contingent liabilities/off-balance sheet exposures. Some of the other risks considered are management quality and corporate governance and parentage.

42. According to ICRA, the reasons to downgrade the ratings of JPL were:

- (i) *The ratings downgrade and revision in outlook to Negative factored continued pressures on Plaintiff's debt coverage metrics and liquidity profile, owing to its inability to secure incremental long-term/medium-term power purchase agreements (hereinafter referred to as "PPAs"), as well as to correct its receivables position. The off take risks stand heightened as lockdowns due to Covid-19 have adversely impacted the all-India electricity demand, in turn affecting its sales in the short-term/power exchange market. While access to thermal coal at competitive rates is supporting the Plaintiff's profitability at present, ability to achieve a sustainable improvement in the plant load factor (hereinafter referred to as "PLF") remains crucial for an improvement in debt coverage metrics, considering the Plaintiff's sizeable repayment obligations in the near-medium term (annual repayments of more than ~Rs 800 crores from FY2021 onwards).*
- (ii) *Of the 810 MW capacity tied-up at present under medium/long-term PPAs for Plaintiff (out of total 3,400 MW installed capacity), Tamil Nadu Generation and Distribution Corporation Limited (hereinafter referred to as "TANGEDCO") accounts for nearly 50%. In FY2020E, Plaintiff's revenues from TANGEDCO accounted for over 45% of its overall revenues (including revenues from a medium-term PPA of 200 MW which expired in August-2019). Given the high dependence of revenues and receivables from the state distribution utilities, Plaintiff faces the risk of an elongated receivable cycle. More specifically, delays in payments*

from TANGEDCO resulted in an increase in receivable turnover period for the Plaintiff from 121 days in FY2018 to 167 days in FY2019 and further to 200 days in FY2020E. As per the latest position of receivables shared by the Plaintiff (month-wise dues and payments received during FY2020), defendant noted that realisation of energy bills had regularised after August 2019, on implementation of the Government of India's directives of LC-backed power purchases by Discoms. However, some lags in clearance of bills in the recent months together with significant amounts blocked towards past dues continue to constrain Plaintiff's overall receivables position. Sizeable amount of funds blocked in the receivables continue to have a bearing on the Plaintiff's liquidity profile, which remains stretched, as reflected in consistently high working capital limit utilisation averaging at 93% in 9M FY2020 (over 95% in Q3 FY2020 and 96% as on April 1, 2020).

- (iii) *In this context, even in the last rating rationale (dated July 29, 2019), it was duly highlighted that the Stable outlook on the ratings reflected an expected improvement in Plaintiff's receivables position by the end of FY2020. Additionally, Defendant had noted a revival in activity in medium/long-term PPAs in the industry and Plaintiff's favourable positioning in the tenders, which provided comfort on the Plaintiff's ability to secure incremental PPAs. Plaintiff's inability to achieve any of the above parameters was highlighted in July 2019 as a rating sensitivity.*
- (iv) Further, while Plaintiff's repayments remained moderate at Rs.367 crore and Rs.497 crore in FY2018 and FY2019, respectively, these repayments increased to Rs.830 crore in FY2020 (Rs.695 crore, excluding the March 2020 instalment which is under moratorium as per the RBI's Relief Package for Covid-19) and are estimated at Rs.818 crore in FY2021. Given the sub-optimal capacity utilisation, Plaintiff's debt coverage metrics have remained modest, as reflected in an interest

coverage ratio (operating profit before depreciation, interest and tax/interest) of 1.4 times in FY2020E. Although additional interest income from its parent company-Jindal Steel & Power Limited (JSPL) supplements JPL's operational cash flows, its sustained inability to secure additional long/medium-term PPAs for a major portion of its installed capacity, and persistent delay in correction of receivables from TANGEDCO, continues to constrain an improvement in its debt metrics.

- (v) Consequently, the liquidity position, while considered moderate in the rating rationale dated July, 2019, was considered as 'stretched' in the rationale dated April 30, 2020. As per the policy for analysis of liquidity, when liquidity profile is stretched, the same may counter balance other factors. The basis for the same is that, "In some situations, liquidity attains such primacy that it alone constrains an entity's credit rating, as other credit drivers, even if supportive, become secondary. This follows from the premise that to succeed in the long term, an entity first needs to survive the short term. Thus, if an entity has a precarious liquidity position, given the high probability of default, it would likely be rated in the low non-investment grade, regardless of other credit positives" (emphasis supplied)

43. As against the reasons for ICRA to downgrade the rating of JPL one of the contentions of JPL is that ICRA failed to consider the SEBI Circular dated 30th March, 2020 which provided relaxations for compliances under CRA Regulations, due to the COVID-19 pandemic and moratorium permitted by the RBI as under:

1. *In view of the developments arising due to COVID-19 pandemic and in light of the moratorium permitted by Reserve Bank of India (RBI) (vide notification no. RBI/2019-20/186, dated March 27, 2020) on loan servicing, working capital facilities etc. for three months,*

a need for temporary relaxations in compliance by CRAs is felt. Accordingly, it has been decided to grant relaxations from the requirements stipulated vide circulars as under:

2. *Recognition of Default*
 - A. *Currently, CRAs recognize default based on the guidance issued vide SEBI circular dated May 3, 2010 and November 1, 2016.*
 - B. *In view of the nationwide lockdown and the three month moratorium/deferment on payment permitted by RBI, a differentiation in treatment of default, on a case to case basis, needs to be made as to whether such default occurred solely due to the lockdown or loan moratorium.*
 - C. *Accordingly, based on its assessment, if the CRA is of the view that the delay in payment of interest/principle has arisen solely due to the lockdown conditions creating temporary operational challenges in servicing debt, including due to procedural delays in approval of moratorium on loans by the lending institutions, CRAs may not consider the same as a default event and/or recognize default. Appropriate disclosures in this regard shall be made in the Press Release.*
 - D. *The above shall also be applicable on any rescheduling in payment of debt obligation done by the issuer, prior to the due date, with the approval of the investors/lenders.*
 - E. *The above relaxation is extended till the period of moratorium by the RBI.*
3. *Extension in timelines for press release and disclosures on website*
 - A. *Considering that the CRAs are dependent on the issuers and third parties for information collection which is impaired due to current lockdown, relaxation from timelines for rating action/issue of press release by CRAs stipulated vide SEBI circular dated June 30, 2017 is being granted.*

However, CRAs should endeavour to finish the exercise on a best effort basis. Such cases shall be put up for ratification by the Rating Sub-Committee of the Board of CRA.

B. Further, an extension of 30 days is being granted for making annual and semi-annual disclosures by CRAs on its website for the period ended March 2020.

4. This circular is issued in exercise of the powers conferred by Section 11 (1) of Securities and Exchange Board of India Act, 1992 read with the provisions of Regulation 20 of SEBI (Credit Rating Agencies) Regulations, 1999, to protect the interest of investors in securities and to promote the development of, and to regulate, the securities market.

44. The present case is not where JPL is defaulting in repayment and that in terms of SEBI Circular dated 30th March, 2020 ICRA could have considered whether the default occurred solely due to the lockdown or loan moratorium. Further while assessing, ICRA was required to ascertain in terms of Clause-2(C) whether the delay in payment of interest/principal arose solely due to the lockdown condition creating temporary operational challenges in servicing debt including due to procedural delays in approval of the moratorium on the loans by the lending institutions. In the present case as per JPL itself, since it is in essential services the services or the consumption of the power of JPL continued and hence due to the lockdown there was no lockdown in the services of JPL. The delay of repayment of the dues by TANGEDCO, major service provider of JPL, was not on account of COVID-19 situation but that being a government agency, the payment by TANGEDCO due to the reduced collection was upto 50% by February, 2020. The said stretch situation was even prior to the lockdown and thus on

the said stretch situation of the liquidity, the lockdown had no bearing. Thus if the delay in payment received by JPL was solely on account of lockdown, JPL would have been entitled to the said relaxation however, the primary basis of the assessment was that even in the pre-lockdown situation payments being received by JPL were in stretched situation. Even in the rating awarded in the year 2019, ICRA clarified that if the receivables of JPL did not increase, the repayment would be stretched. Admittedly in this year there was no new agreement entered into by JPL to supply of further power. Further by clause (3) of the Circular dated 30th March, 2020 issued by SEBI the extension of time was granted to credit rating such as ICRA to complete the same in the extended period and issue a press release on the website thereafter. Hence JPL cannot derive any benefits from the Circular of SEBI dated 30th March, 2020. As against the plea of SEBI's Circular dated 30th March, 2020, the reasoning of ICRA to down grade as noted in para 42 above, inter alia being the inability to secure incremental PPAs and receivable position from TANGEDCO which a major client of JPL being uncertain; appear to be plausible and cannot be termed to be arbitrary or suffering from non-application of mind.

45. After the rating dated 24th April, 2020 was communicated to the JPL, JPL submitted its detailed representation dated 26nd April, 2020 relevant portion whereof is as under:

“The entire power sector has seen a lot of stress over the last few years. A large number of plants had to shut construction and about 10000MW of power plants have been abandoned. Another about 30000 MW of installed capacity is suffering due to lack of PPAs and / or lack of coal FSAs. JPL is one such plant but inspite of PPAs of only 1000 MW, the plant continues to perform well and has duly met all its debt obligations

without any single default. The debt levels have been continuously going down and the EBITDA improving over the years. The performance of JPL during the year ending March 2020 has been either better or comparable to the previous year ending on March 2019.

The recent lockdown on account of the covid has added fuel to fire for this sector and some DISCOMS have served Force Majeure notices and are not drawing power and not paying any fixed charges. Fortunately, JPL has not been affected and 100% power continues to be despatched to Tamil Nadu and Kerela and Chattisgarh. Though the lockdown lifting is uncertain, however, JPL continues to get full payments from Kerela and atleast 50% from TANGEDCO even during this difficult time.”

46. Thus in the representation/objection, the main plank of submission of JPL is that the entire power sector is in lot of stress however, as far as JPL is concerned it is one of the non-defaulting parties and despite lack of PPAs and/or coal FSAs it still has PPAs for 1000MW. The present assessment awarding the credit rating to JPL by ICRA is not a comparative rating between the various power sectors but an individual credit rating of JPL based whereon JPL took the loan and merely because the entire sector is stressed would not mean that JPL is not stressed and so the credit rating should not be downgraded.

47. Though learned counsel for JPL repeatedly stated that JPL is in possession of letter of credit for a sum of ₹140 crores, however, the fact remains that it is the case of the JPL itself that based on the oral request of TANGEDCO, JPL has not encashed the letter of credit.

48. Learned counsel for JPL has relied upon the table noted herein below to show that the criteria required to be considered remained unchanged or

had improved in the year 2020 however, still the credit rating was downgraded. The comparative chart of the criteria is as under:

<i>Positive Aspects in 2019</i>	<i>Negative Aspects in 2019</i>
(i) <i>Increased activity on tenders floated for the long/ medium-term power tie-ups in the country over the past one year. (JPL emerged as the L1 bidder for 515 MW)</i> (ii) <i>Favourable steps being taken by the Government of India to address the issue of delayed payments by various State Electricity DISCOMS.</i> (iii) <i>JPL's competitive capital as well as cost-efficient operations supported by the location of its plant in proximity to various coal blocks and linkage for part capacity, which enables it to compete effectively on tariffs.</i> (iv) <i>The Stable outlook reflects ICRA's expectation of comfortable credit metrics in the near-term, supported by PPAs in place for ~32% of its installed capacity, increased interest income from JSPL, which is supplementing the company's operational cash flows, and an expected improvement in receivables position by the end of FY2020.</i>	(i) <i><u>Inability</u> of Jindal Power Limited (JPL) to secure long/ medium-term power purchase agreements (PPAs) for two-thirds of its 3,400- MW installed capacity</i> (ii) <i><u>Delay in realisation of receivables</u> from Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO).</i>

<i>Positive Aspects in 2020</i>	<i>Negative Aspects in 2020</i>
(i) <i><u>Debt exposure reduced</u> from Rs. 7200 Crs approx. to Rs. 6500.</i>	<i>Same as 2019</i>

(ii) <i>The Plaintiff has <u>bid for 420 MW</u> and is placed at 2nd rank of preference, the PPAs for which are likely to be signed soon after the COVID lockdown is lifted. This would ensure that the power demand is restored back to normal.</i> (iii) <i>Receivables stand completely secured with the new scheme from government where State based distribution utilities have to provide <u>LC's</u>.</i> (iv) <i>The recent payment by TANGEDCO of Feb 2020 which was due by April 4th 2020 was delayed due to COVID-19 and the <u>Plaintiff has not encashed the LC only at the request of the government.</u> It is to be noted that the Plaintiff has received 50% of the receivables and the balance will be paid shortly.</i> (v) <i>The past dues from TANGEDCO have been received as per settlement of legal cases. The <u>Plaintiff will also be receiving the remaining dues after the APTEL reopens and the final hearing of the change in law is completed.</u></i>	(i) <i>COVID – 19: The off take risks stand heightened as lockdowns due to Covid-19 have adversely impacted the all-India electricity demand, in turn affecting its sales in the short-term/ power exchange market.</i>
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49. It is not disputed that as against the installed capacity of JPL of 3,400 MW, JPL has been able to tie up for utilization of the power only to the extent of 1/3rd nearly more than 1,000 MW and thus 2/3rd of its installed capacity remains unutilized, hence the two important factors that have weighed in the opinion of ICRA also to downgrade the rating i.e. there is no

incremental increase in PPAs of JPL and that the receivables from TANGENDCO which is JPL's major client are elongated resulting in a stretched liquidity, cannot be said to unfounded or irrelevant.

50. As regards the plea of JPL that favourable steps have been taken by the Government of India to address the issue of delayed payment by various State Electricity DISCOMS, the impugned order before this Court wherein the new credit rating was maintained at BBB was issued on 30th April, 2020 however, the declaration by the Finance Ministry in this regard to extend the loan of ₹90,000 crores to the power sector under the Atam Nirbhar Scheme was after the review order dated 30th April, 2020 and a subsequent event which cannot be utilized to hold the earlier declaration as illegal.

51. Though learned counsel for JPL has also vehemently argued that repayments have increased in the financial year 2019 from ₹497 crores to ₹690 crores in the financial year 2020 which is likely to be increased by ₹800 crores in the financial year 2021 however, the opinion cannot be faulted merely on the basis that JPL was able to manage substantial repayments, as the reason given by ICRA is that despite increase in repayment obligations of JPL there were still high debt levels and sub-optimal capacity utilization. As noted above, the credit rating of the company is based on the futuristic position of the company to clear its debt liability and the same is not dependent merely on the fact that in the preceding year, debts had been cleared. The opinion of ICRA is primarily based on the fact that though in the previous year there were increased repayments of debt, however, the debt liability was still high coupled with the fact that JPL could not procure contract to optimally utilize its power generation and was utilizing power generation only to the extent of 1/3rd

and that the primary client of JPL being TANGENDCO, the time for recovery of its dues was increasing as in the past thereby making the liquidity and debt paying capacity of JPL stretched.

52. Considering the fact that opinion of ICRA is rendered after taking into account all positive or negative factors and that it is an opinion rendered by experts in the field, this Court will not, unless the said opinion is perverse, arbitrary and mala fide, interfere in the same as a mathematical calculation of a credit rating is not possible. Therefore, as regards issue No.(ii) is concerned, this Court finds that the rating rationales depend from industry to industry and that ICRA has taken into account the relevant rating rationales, both positive and negative and based thereon rendered the opinion which is plausible on the facts and the said opinion being neither perverse nor arbitrary nor mala fide, this Court will not interfere therein by passing a decree declaring the same to be null and void.

53. Before concluding it would also be appropriate to note that ICRA had downgraded the credit rating of JPL in the previous year also from AAA to BBB+ when neither JPL filed no suit raising objection to the downgrading or to the publishing of the credit rating. Credit rating having been utilized by JPL for receiving the financial facility, till the subsistence of the financial facility, JPL can neither seek setting aside of the said rating unless the same is irrational, arbitrary or mala fide and also cannot seek a decree that the said rating be not disclosed/published. It is trite law that the evidentiary value of opinion of an expert has to be decided on the basis of the credibility of the expert and the relevant facts supporting the opinion. Therefore, the emphasis has to be on the data on the basis of which opinion is formed. Further, if the opinion is intelligible, convincing, and based on reasoning, no decree

declaring the said opinion as null and void, unenforceable and ineffective cannot be passed as is prayed by the plaintiff in prayer (a) of para 66 of the suit in respect of the Credit Rating Rationales dated 24th April, 2020 and 30th April, 2020 passed by the defendant. Further, as the impugned Credit Ratings are surveillance ratings even if JPL objects to the same, no mandatory injunction can be granted to the defendant to remove the Grade Rating Rationales from the physical as well as electronic record of the defendant on the worldwide web, much less permanent injunction.

54. Suit and applications are consequently dismissed.

(MUKTA GUPTA)
JUDGE

AUGUST 18, 2020
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