

Citi Securities & Financial Services ... vs Sudip Bhattacharya Resolution ... on 16 September, 2022

Author: Ashok Bhushan

Bench: Ashok Bhushan

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 240 of 2022

(Arising out of Order dated 22.02.2022 passed by the Adjudicating Authority (National Company Law Tribunal), Ahmedabad Bench in C.P. No. (IB) 418 of 2018)

IN THE MATTER OF:

Citi Securities & Financial Services Pvt. Ltd.
Having address at:
Cama Building, 1st Floor,
Dalal Streer, Fort, Mumbai
MH-400001, India.

...Appellant

Versus

1. Sudip Bhattacharya
Resolution Professional of
Reliance Naval & Engineering Limited
Having registered address at:
903, Queensgate CHS, Hiranandani Estate,
Off Ghodbunder Road, Thane-West,
Mumbai, Maharashtra - 400607, India
Email: resolutionsudip@gmail.com

2. Committee of Creditors
Through IDBI Bank Ltd.
IDBI Tower, WTC Complex,
Cuffe Parade, Colaba,
Mumbai - 400 005.

...Respondents

Present:

For Appellant: Mr. Kumar Anurag Singh, Advocate.
For Respondents: Mr. Ramji Srinivasan, Sr. Advocate with Ms.
Prachi Johri and Ms. Shruti, Advocates for
Respondent No.1.
Mr. Manmeet Singh, Ms. Neha Lodha and Ms.

Shatakshi Tripathi, Advocates for Respondent
No.2.

Mr. Abhijeet Sinha, Mr. Amir Arsiwala and Mr.
Dayal Deshpande, Advocates for Intervenors.

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JUDGMENT

ASHOK BHUSHAN, J.

This Appeal has been filed challenging the order dated 22.02.2022 passed by the Adjudicating Authority (National Company Law Tribunal), Ahmedabad Bench Court No.2 rejecting Intervention Application I.A. No. 02 of 2021 filed by the Appellant in C.P. (IB) 418/AHD/2018. The brief facts of the case necessary to be noticed for deciding this Appeal are:

(i) The Corporate Debtor - Reliance Naval & Engineering Ltd. was declared NPA by IDBI Bank on 28.02.2018. Reliance Infrastructure Limited advanced a sum of Rs.2,500 Crores to the Corporate Debtor by way of interest bearing Inter-Corporate Deposits. The loan was secured by way of Deed of Hypothecation dated 07.03.2018 and indenture of Mortgage dated 07.03.2018.

(ii) IDBI Bank filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code') against the Corporate Debtor in September, 2018.

(iii) The Appellant - 'Citi Securities & Financial Services Pvt. Ltd' claimed to have obtained assignment of debt of Reliance Infrastructure Limited by documents dated 01.03.2019.

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(iv) Section 7 application filed by the IDBI Bank against the Corporate Debtor was admitted on 15.01.2020.

(v) The Appellant filed its claim as Financial Creditor before the Interim Resolution Professional (IRP) on 29.01.2020 on the strength of assignment documents dated 01.03.2019. The claim filed by the Appellant before the IRP was of Rs.25,38,20,01,492/-. There has been correspondence between the Resolution Professional and the Appellant regarding the claim of the Appellant. The Resolution Professional asked for certain documents from the Appellant to verify the claim of the Appellant. Appellant claim to have replied all queries raised by the Resolution Professional. The Resolution Professional having not admitted the claim of the Appellant as Financial Creditor, an application

was filed by the Appellant being Intervention Application I.A. No. 02 of 2021 seeking appropriate direction from the NCLT against the Resolution Professional to admit the claim of the Appellant. The Resolution Professional filed a reply to the I.A. filed by the Appellant.

(vi) The Adjudicating Authority vide its order dated 22.02.2022 rejected the application filed by the Appellant and held that the Appellant is disqualified as Financial Creditor as per the provisions of the first proviso to Section 21(2) of the I&B Code as a related party.

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(vii) The Appellant aggrieved by the order dated 22.02.2022 has filed this Appeal.

2. Learned counsel for the Appellant challenging the impugned order of the Adjudicating Authority submits that the Appellant was assigned debt by Reliance Infrastructure Ltd. by Assignment Deed dated 01.03.2019. The Appellant being not related party to the Corporate Debtor its claim has wrongly been rejected by the Adjudicating Authority. It is submitted that the lender Reliance Infrastructure Ltd. was fully competent to assign its debt to the Appellant. Appellant has filed its claim as Financial Creditor in Form C for an amount of Rs.25,38,20,01,492/- which ought to have been admitted by the Resolution Professional. The Resolution Professional unnecessarily delayed the verification of the claim due to which Appellant has to file an application before the Adjudicating Authority seeking direction to admit his claim. It is submitted that the mere fact that the Reliance Infrastructure Ltd. who had made Inter-Corporate Deposit with the Corporate Debtor being a related party does not lend to the conclusion that the Appellant is also a related party. An Assignee could not be held to be suffering from same deficiency by which the Assignor was suffering. The Assignment of debt in favour of the Appellant was a bonafide transaction, on payment of valuable consideration of Rs.114.93 Crore which was also paid by the Appellant to Reliance Infrastructure Limited. The Adjudicating Authority has also erred in observing that the Company Appeal (AT) (Insolvency) No. 240 of 2022 Assignment Deed is not appropriately stamped, could not be looked into whereas the Deed being not sufficiently stamped was a curable defect which could have been very well cured by the Appellant. It is submitted that Assignment Deed dated 01.03.2019 was 'assignment of actionable claim', hence, it did not require any registration. It is further submitted that in any view of the matter even if for arguments sake it is accepted that Appellant is a related party, the Appellant's claim as Financial Creditor ought to have been accepted whereas the Adjudicating Authority committed error in rejecting the claim of the Appellant altogether.

3. Learned counsel for the Respondent - Resolution Professional refuting the submissions of learned counsel for the Appellant submits that the Adjudicating Authority has rightly considered all the aspects of the matter and has rejected the claim. It is submitted that the Resolution Professional on the basis of materials which were provided by the Appellant could not have verified the claim of the Appellant and Resolution Professional has asked for relevant materials from the Appellant vide email dated 28.01.2021 as well as earlier emails. The Assignment Deed dated 01.03.2019 assigned the debt by Reliance Infrastructure Ltd. alongwith hypothecation and mortgage which was in favour of Reliance Infrastructure Ltd. by the Corporate Debtor. Assignment being alongwith the securities and all rights obtained by Reliance Infrastructure Ltd., the Assignment Deed was required to be

registered under Section 17 of the Registration Act, 1908. The Company Appeal (AT) (Insolvency) No. 240 of 2022 Assignment Deed being unregistered, it was rightly refused to be looked into by the Adjudicating Authority. It is submitted that the Assignment Deed dated 01.03.2019 was not sufficiently stamped as required by Maharashtra Stamp Act, hence, could not have been looked into by the Adjudicating Authority. It is submitted that the transaction of assignment dated 01.03.2019 was not bonafide transaction and the transaction was entered into by Reliance Infrastructure only to sabotage the CIRP of the Corporate Debtor and the whole purpose of assignment was to put the Appellant to control the CIRP of the Corporate Debtor. The fact that the assignment was made during the pendency of Section 7 application itself indicate the purpose and object of the Assignor. Assignment of debt of Rs.2538 Crore for a meager amount of Rs.114.93 Crores itself speaks that the Appellant has obtained assignment with ulterior motive. It is further submitted there is no bank entries filed by the Appellant to prove any bank transaction under which the Appellant has paid the amount of Rs.114.93 Crores to the Assignor. It is further submitted that Appellant is an entity which has no net-worth and amount claimed to be paid by it to Reliance Infrastructure Ltd. is outcome of a circuitous transaction with the Reliance group companies. It is submitted that after receiving the complaints regarding circuitous transactions by Reliance Home Financial Ltd. and other group entities, Security and Exchange Board of India (SEBI) has issued Interim Order cum Show Cause Notice to 28 entities. The Appellant is at serial number 10 of the notice issued by order dated 11.02.2022. It is submitted that Company Appeal (AT) (Insolvency) No. 240 of 2022 the SEBI after detailed investigation and obtaining materials has opined that the Appellant has no net-worth nor any revenue so as to be given a loan of Rs.220 Crores by Reliance Home Finance Ltd. After receiving Rs.220 crore from Reliance Home Finance Ltd., the same was also forwarded onward to other group company of Reliance, which proved the circuitous transaction between the different Reliance Group Companies and other entities. The Appellant has no net-worth to make any payment of Rs.114.93 Crores nor any securities has been shown except circuitous transaction by Reliance group. It is submitted that the Adjudicating Authority has rightly rejected the claim filed by the Appellant. The Assignment Deed dated 01.03.2019 itself being not admissible, the rejection of claim by the Adjudicating Authority is wholly justified.

4. Learned counsel for both the parties have placed reliance on the judgment of the Hon'ble Supreme Court in "Phoenix ARC Private Limited vs. Spade Financial Services Limited & Ors., (2021) 3 SCC 475". Learned counsel for both the parties also relied on few judgments of this Appellate Tribunal which we shall notice hereinafter.

5. Before considering the submissions of learned counsel for the parties, it is relevant to notice the transactions entered between the Reliance Infrastructure Ltd. and the Corporate Debtor according to which the Inter-Corporate Deposit of Rs.2500 Crores was given to the Corporate Debtor by Reliance Infrastructure Ltd. The Hypothecation Deed dated 07.03.2018 was executed between the Corporate Debtor and the Reliance Company Appeal (AT) (Insolvency) No. 240 of 2022 Infrastructure Ltd. Borrower has availed from the Lender various financial assistance with regard to Master Restructuring Agreement which was entered earlier. At request of the Borrower, the Lender has agreed to give financial assistance in the form of Inter-Corporate Deposits of an aggregate amount not exceeding Rs.2500 Crores. Para (D), (E) and (F) of the Hypothecation Deed is as follows:-

"(D) At the request of the Borrower, the Lenders have provided / agreed to provide, from time to time, certain financial assistances in the form of inter-corporate deposits of an aggregate amount not exceeding Rs.2,500,00,00,000 (Rupees Two Thousand and Five Hundred Crore only) ("ICD Facility") to the Borrower and certain wholly owned subsidiaries of the Borrower, as more particularly specified in Schedule I hereof (collectively, the "Borrower Group"), in accordance with the terms and conditions specified or to be specified in loan agreements/ arrangements (collectively, the "Loan Agreements" and "Loan Agreement" shall mean any one of them) and other financing documents executed / to be executed in relation to the ICD Facility (collectively, the "ICD Documents").

(E) One of the conditions of the Loan Agreements is that the ICD Facility, together with all interest, liquidated

Company Appeal (AT) (Insolvency) No. 240 of 2022 damages, fees, premia on prepayment or on redemption, costs, expenses and all other fees, costs, charges, expenses and/or other monies whatsoever stipulated or payable to the Lenders and their trustees and agents under the Loan Agreements shall, subject to the Applicable Laws, be secured, inter alia, by Security Interest by way of hypothecation over the Hypothecated Assets, in the manner as set out herein.

(F) The security interest over the Hypothecated Assets shall be created for the benefit of the Lenders in favour of the Security Agent (acting for the benefit of Lenders), and shall be in a form and manner satisfactory to the Lenders. The security interest over the Hypothecated Assets shall, at all times, be subservient, subordinated and subject only to the interest, claim, rights and interest of the Existing Lenders in the Hypothecated Assets pursuant to the Existing Hypothecation thereon created pursuant to the Existing DOH."

6. On the same dated, 07.03.2018, an Indenture of Mortgage was also executed between the parties to secure the Inter-Corporate Deposit of Rs.2500 Crore. Schedule-III contains details of the property with regard to which mortgage was created. Para 5 of the Indenture of Mortgage provide:-

Company Appeal (AT) (Insolvency) No. 240 of 2022 "5. GRANT AND TRANSFERS For the consideration aforesaid and as continuing security for the payment and discharge of the outstandings and performance of all obligations by the Borrower hereby secured or intended to be hereby secured, the Borrower doth, hereby grant, assign, convey, assure charge and transfer unto Lenders by way of continuing security:-

(a) all the rights, title, interest and benefit in all and singular the beneficial right, title and interest of the Borrower, including the leasehold rights in respect of all its immovable properties in more particularly described in Schedule III of the Indenture together with all buildings, erections and construction of every description which are standing, erected or attached or shall at any time hereafter during the continuance of the Security, hereby, constituted be erected and standing or attached to the aforesaid lands and premises or any part thereof and all rights to use common areas and facilities and incidents attached thereto, together with all trees, fences, hedges, ditches, ways, sewers, drains, waters, watercourses liberties, privileges easements and appurtenances whatsoever in the said property, lands, hereditaments or premises or any part thereof whether presently in existence or in the future Company Appeal (AT) (Insolvency) No. 240 of 2022 belonging to or in any way appurtenant thereto or usually held, occupied or enjoyed therewith or expected to belong or be appurtenant thereto AND ALL the estate, right, title, interest, property, claim and demand whatsoever of the Borrower into and upon the same which description shall include all properties of the above description whether presently in existence, constructed or acquired hereafter, and all other assets of whatsoever nature, including plant and machinery attached to earth or permanently fastened with anything attached to the earth (collectively referred to as the "Mortgaged Properties"), TO HAVE AND TO HOLD all and singular the Mortgaged Properties unto and to the use of the Lenders and the Security agent in accordance with the terms hereof and subject to the terms of the Existing IOMs."

7. From the Deed of Hypothecation and Mortgage, it is clear that repayment of Inter-Corporate Deposit by the Lender was secured both by Hypothecation and Mortgage of the immovable properties.

8. Now, we need to notice Assignment Deed dated 01.03.2019 by which the Appellant claim to have assigned debt by Reliance Infrastructure Ltd. Deed of Assignment dated 01.03.2019 is on record at Annexure-3 of the Appeal which mentions that Assignor has to receive Company Appeal (AT) (Insolvency) No. 240 of 2022 from the Corporate Debtor an amount of Rs.2284,88,96,502/- against the outstanding debt. Term-sheet Para 2 of the Assignment Deed is as follows:-

"2. The assignor has requested and the assignee has agreed to take the above Loan of Rs. 2284,88,96,502/- (Rupees Two thousand Two Hundred Eighty Four Crore Eighty Eight Lakhs Ninety Six Thousand Five Hundred and Two Only) at a value of Rs.114,93,00,000/- (Rupees One Hundred and Fourteen Crore Ninety Three Lakhs Only) along with all its relevant rights and liabilities for the Assignor with the consent of the Confirming party ("hereinafter referred to as "Assignment")."

9. The assignment of debt was alongwith the relevant rights and liabilities of the Assignor with the consent of the Confirming Party (Corporate Debtor). The Assignment Deed which contains all rights and liabilities indicates that the assignment was not of only actionable claim.

10. The Adjudicating Authority by the impugned order has rejected the claim of the Appellant holding that the Assignment Deed dated 01.03.2019 was required to be registered under Section 17 of the Registration Act and further being insufficiently stamped could not be looked into for any claim of the Appellant. We need to, thus, consider as to whether registration as well as appropriate stamping of the Assignment Deed was necessary as held by the Adjudicating Authority or it was not Company Appeal (AT) (Insolvency) No. 240 of 2022 required to be registered and in so far as insufficient stamping is concerned it is a curable defect.

Whether Registration of Assignment Deed was necessary?

11. Section 17 of the Registration Act, 1908 provides for registration of certain documents. Section 17(1)(b) and (c) of the Registration act which are relevant are as follows:-

"17. Documents of which registration is compulsory.--(1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:--

(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;

(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment,

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12. We first need to notice whether the Assignment Deed is an actionable claim, as was contended by the Appellant before the Adjudicating Authority, not requiring registration. Actionable claim has been defined under Section 3 of the Transfer of Property Act, 1882 in following words:-

""actionable claim" means a claim to any debt, other than a debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property, or to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognise as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent;"

13. While noticing Assignment Deed dated 01.03.2019, we have noticed that the assignment by the Assignor to the Appellant was alongwith relevant rights and liabilities. We have noticed above that for securing the repayment of Inter-Corporate Deposit, Corporate Debtor and Reliance Infrastructure Ltd. entered into Hypothecation Deed as well as an Indenture of Mortgage dated 11.07.2018. The assignment in favour of the Appellant by the Assignor of entire debt was with relevant rights and liabilities of the Assignor, which has now been assigned to the Appellant. Company Appeal (AT) (Insolvency) No. 240 of 2022 When we look into the definition of 'actionable claim', as noticed above, there is clear exclusion "other than a debt secured by mortgage of immoveable property or by hypothecation or pledge". The debt have been secured by mortgage of immoveable property or by hypothecation of moveable property. Thus, in the present case, the debt which has been assigned to the Appellant is not covered by the definition of actionable claim being secured by the mortgage of immovable property as well as hypothecation of movable property. The Assignment Deed dated 01.03.2019 contains rights of the Assignor, hence, the Deed, as per Section 17(1) (b) and (c) required the registration. The consequences and benefits of registration have been reiterated time and again by the Hon'ble Supreme Court. In "Suraj Lamp & Industries (P) Ltd. vs. State of Haryana, (2009) 7 SCC 363", Hon'ble Supreme Court held that Registration Act, 1908 was enacted with intention of providing public notice in regard to transactions relating to immovable property and protection from fraud and forgery of documents of transfer, which is achieved by requiring compulsory registration of certain types of documents. In Paras 16, 17 and 18 following has been observed:-

".....

15. The Registration Act, 1908, was enacted with the intention of providing orderliness, discipline and public notice in regard to transactions relating to immovable property and protection from fraud and forgery of documents of transfer. This is achieved by requiring compulsory registration of certain types of documents and providing for consequences of non-registration.

16. Section 17 of the Registration Act clearly provides that any document (other than testamentary instruments) which purports or operates to create, declare, assign, limit or extinguish whether in present or in future "any right, title or interest" whether vested or contingent of the value of Rs. 100 and upwards to or in immovable property.

17. Section 49 of the said Act provides that no document required by Section 17 to be registered shall, affect any immovable property comprised therein or received as evidence of any transaction affected such property, unless it has been registered. Registration of a document gives notice to the world that such a document has been executed."

14. We, thus, are of the view that the Adjudicating Authority did not commit any error by coming to the conclusion that the Assignment Deed dated 01.03.2019 required registration.

Whether Assignment Deed was insufficiently stamped?

15. As per Schedule-I of the Maharashtra Stamp Act, a Deed of Assignment is liable to be stamped. Section 34 of the said Act provides that no instrument chargeable with duty shall be admitted in evidence for Company Appeal (AT) (Insolvency) No. 240 of 2022 any purpose by any person unless such instrument is duly stamped. There is no dispute between the parties that the Assignment Deed dated 01.03.2019 has not been stamped as per the requirement laid down by the Maharashtra Stamp Act.

16. Learned counsel for the Appellant in his submission submitted that the Assignment Deed having not containing the due stamps is a curable defect. Counsel for the Appellant has also placed reliance on the judgment of this Tribunal in "Company Appeal (AT) (Ins.) No. 713 of 2020, Praful Nanji Satra vs. Vistra ITCL (India) Ltd.", where this Tribunal has also observed that insufficiency of stamp is a curable defect. Even if insufficiency of stamp is a curable defect, the Appellant has not filed any documents to prove that requisite stamp duty has been paid by them. In this context, we may refer to the judgment of Hon'ble Supreme Court in "Committee of Creditors of Essar Steel India Ltd. vs. Satish Kumar Gupta & Ors.", where the Hon'ble Supreme Court had occasion to consider the provisions of I&B Code. Several Civil Appeals and Writ Petitions were decided by the judgment. One of the Civil Appeals which was decided by the Hon'ble Supreme Court was Civil Appeal No. 7266 of 2019 and 7260 of 2019, where claim was rejected by the Resolution Professional on the ground of non-availability of duly stamped agreement in support of the claim. The decision of the Resolution Professional was affirmed by the Hon'ble Supreme Court. In Para 152 of the judgment following has been laid down:-

Company Appeal (AT) (Insolvency) No. 240 of 2022 "152. So far as Civil Appeal No. 7266 of 2019 and Civil Appeal No. 7260 of 2019 are concerned, the resolution professional has rejected the claim of the Appellants on the ground of non-availability of duly stamped agreements in support of their claim and the failure to furnish proof of making payment of requisite stamp duty as per the Indian Stamp Act despite repeated reminders having been sent by the resolution professional.

The application filed by the Appellants before the NCLT came to be dismissed by an order dated 14.02.2019 on the ground of non-prosecution. The subsequent restoration application filed by the appellants then came to be rejected by the NCLT through judgment dated 08.03.2019 on two grounds: one, that the applications could not be entertained at such a belated stage; and two, that notwithstanding the aforementioned reason, the claim had no merit in view of the failure to produce duly stamped agreements. The impugned NCLAT judgment, at paragraphs 93 and 94, upheld the finding of the NCLT and the resolution professional. In view of these concurrent findings, the claim of the Appellants therefore requires no interference. Further, the submission of the Appellants that they have now paid the requisite stamp duty, after the impugned NCLAT judgment, would not assist the case of the Appellants at this belated stage. These appeals are therefore dismissed."

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17. In the case before the Hon'ble Supreme Court, as noticed above, stamp duty was paid subsequently after the judgment of Appellate Tribunal. Court said that payment of stamp duty subsequently will not assist the case of the Appellant of that case at such belated stage. We, thus, are of the view that the Adjudicating Authority has rightly observed that the Assignment Deed dated 01.03.2019 which has been insufficiently stamped cannot be looked into to support the claim of the Appellant as Financial Creditor.

18. Now, we come to the judgment of the Apex Court which has been relied both by the Appellant as well as by the Respondent. Hon'ble Supreme Court in "Phoenix ARC Private Limited" (Supra) had occasion to consider provision of Section 21(2) first proviso and had considered the meaning and signification of definition of 'related party'. In the above case before the Hon'ble Supreme Court, 'AAA Landmark Pvt. Ltd.' and 'Spade Financial Services Ltd.' had filed their claim as Financial Creditors which was rejected by the NCLT. The Appeal filed against the judgment of NCLT was also dismissed by NCLAT against which Appeals were filed by two Financial Creditors before the Hon'ble Supreme Court. 'Phoenix ARC Ltd.' another Financial Creditor aggrieved by part of the judgment of NCLT holding 'AAA Landmark Pvt. Ltd.' and 'Spade Financial Services Ltd.' as Financial Creditor had filed the Appeal. In the above reference, all the issues in the Appeals came to be considered. Section 21(2) first proviso which is relevant in the present case is as follows:-

Company Appeal (AT) (Insolvency) No. 240 of 2022 "21(2) The committee of creditors shall comprise all financial creditors of the corporate debtor:

Provided that a 1[financial creditor or the authorised representative of the financial creditor referred to in sub-section (6) or sub-section (6A) or sub-section (5) of section 24, if it is a related party of the corporate debtor,] shall not have any right of representation, participation or voting in a meeting of the committee of creditors:"

19. The Hon'ble Supreme Court deliberated on the meaning and object of Section 21(2) and laid down following in Para 98:-

"98. Hence, we would need to consider the meaning of the first proviso in the light of the context, object and purpose for which it was enacted. The purpose of excluding a related party of a corporate debtor from the CoC is to obviate conflicts of interest which are likely to arise in the event that a related party is allowed to become a part of the CoC. The logic underlying the exclusion has been summarised as follows:

"The Committee was of the view that the disability under the first proviso to Section 21(2) is aimed at removing any conflict of interest within the CoC, to prevent erstwhile promoters and other related parties of the corporate debtor from gaining control of the corporate debtor during the CIRP by virtue of any loan that may have been provided by them."

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20. The Hon'ble Supreme Court while explaining the meaning of the related party observed that although related party which is not related party in praesenti is not disqualified. However, in case where the related party divests itself of its shareholding or ceases to become a related party in a business capacity with the sole intention of participating the CoC and sabotage the CIRP has to be kept out of the CoC and has to be treated as debarred. Para 99 to 104 of the judgment of Hon'ble Supreme Court deals with the entire issue, which is to the following effect:

"99. Accepting the submission of Mr Viswanathan would allow the statutory provision to be defeated by a related party of a corporate debtor creating commercial contrivances which have the effect of denuding its status as a related party, by the time that the CIRP is initiated. The true test for determining whether the exclusion in the first proviso to Section 21(2) applies must be formulated in a manner which would advance the object and purpose of the statute and not lead to its provisions being defeated by disingenuous strategies.

100. Therefore, it could be stated that where a financial creditor seeks a position on the CoC on the basis of a debt which was created when it was a related party of the corporate debtor, the exclusion which is created by the first proviso to Section 21(2) must apply. For, it is on the strength of the financial debt as defined in Section 5(8) that an entity claiming as a financial creditor Company Appeal (AT) (Insolvency) No. 240 of 2022 under Section 5(7) seeks a position on the CoC under Section 21(2). If the definition of the expression 'related party' under section 5(24) applies at the time when the debt was created, the exclusion in the first proviso to Section 21(2) would stand attracted.

101. However, if such an interpretation is given to the first proviso of Section 21(2), all financial creditors would stand excluded if they were a 'related party' of the corporate debtor at the time when the financial debt was created. This may arguably lead to absurd conclusions for entities which have legitimately takenover the debt of related parties, or where the related party entity had stopped being a 'related party' long ago.

102. In this regard, it is relevant to note the observations in the Insolvency Law Committee Report of 2020 clarifying the eligibility of third- party assignees of the debt of a related party creditor, to be members of the CoC. It was observed:

"11.09 ... As a third-party assignee, who by itself is not a related party, would not have any such conflict of interest, it should not be disabled from participating in the CoC. Further, the aforesaid disability is not related to the debt itself but is based on the relationship existing between a related party creditor and the corporate debtor. Therefore, as the disability imposed under the first proviso to Section 21(2) pertains to the related party financial creditor and not to the debt it is owed, the Committee agreed that it is clear that when a related party financial creditor assigns her debt to a third party in Company Appeal (AT) (Insolvency) No. 240 of 2022 good faith, such

third party should not be disqualified from participating, voting or being represented in a meeting of the CoC.

11.10. However, the Committee discussed that in certain cases, a related party creditor may assign its debts with the intention of circumventing the disability imposed under the first proviso to Section 21(2) by indirectly participating in the CoC through the assignee. As a related party is expressly prohibited from participating in the CoC, it cannot do so indirectly by assigning its debt to a third-party assignee for the purposes of circumventing this restriction. Therefore, in order to prevent any misuse, the Committee recommended that prior to including an assignee of a related party financial creditor within the CoC, the resolution professional should verify that the assignee is not a related party of the corporate debtor. In cases where it may be proved that a related party financial creditor had assigned or transferred its debts to a third party in bad faith or with a fraudulent intent to vitiate the proceedings under the Code, the assignee should be treated akin to a related party financial creditor under the first proviso to Section 21(2)."

(emphasis supplied)

103. Thus, it has been clarified that the exclusion under the first proviso to Section 21(2) is related not to the debt itself but to the relationship existing between a related party financial creditor and the corporate debtor. As such, the financial creditor who in praesenti is not a related party, would not be debarred from being a member of the CoC. However, in case where the related party financial creditor divests itself of its shareholding or ceases to become a related party Company Appeal (AT) (Insolvency) No. 240 of 2022 in a business capacity with the sole intention of participating the CoC and sabotage the CIRP, by diluting the vote share of other creditors or otherwise, it would be in keeping with the object and purpose of the first proviso to Section 21(2), to consider the former related party creditor, as one debarred under the first proviso.

104. Hence, while the default rule under the first proviso to Section 21(2) is that only those financial creditors that are related parties in praesenti would be debarred from the CoC, those related party financial creditors that cease to be related parties in order to circumvent the exclusion under the first proviso to Section 21(2), should also be considered as being covered by the exclusion thereunder. Mr Kaul has argued, correctly in our opinion, that if this interpretation is not given to the first proviso of Section 21(2), then a related party financial creditor can devise a mechanism to remove its label of a 'related party' before the Corporate Debtor undergoes CIRP, so as to be able to enter the CoC and influence its decision making at the cost of other financial creditors."

21. Coming to the facts of the present case, Reliance Infrastructure Ltd. had given Inter-Corporate Deposit for which Deed of Hypothecation and Indenture of Mortgage was entered on 07.03.2018. Application under Section 7 by the IDBI Bank against the Corporate Debtor was filed in September, 2018 and after filing of the application within six months Company Appeal (AT) (Insolvency) No. 240 of 2022 Assignment Deed dated 01.03.2019 was executed by the Assignor in favour of the Assignee. The purpose and object was obvious that Reliance Infrastructure Ltd. being related party

could not have participated in the CoC of the Corporate Debtor, hence, Assignee has been brought into for the sole purpose of participating in the CoC which Assignee as per the case of the Appellant is not a related party. Further, the debt of Rs.2538 Crore has been assigned for amount of Rs.114.93 Crores speaks for itself. Further, the Reliance Infrastructure Ltd. had Hypothecation Deed and Mortgage. The time and manner in which assignment has been made clearly indicate that Assignment is not bonafide and was made only to put the Appellant in the CoC with ulterior motive to watch the interest of the related party. Para 103 of the judgment of Hon'ble Supreme Court in "Phoenix ARC Private Limited" (Supra) clearly lays down that 'where the related party financial creditor divests itself of its shareholding or ceases to become a related party in a business capacity with the sole intention of participating the CoC and sabotage the CIRP, by diluting the vote share of other creditors or otherwise. The expression 'otherwise' shall also include assigning the right to third party, which is for the same purpose and object.

22. We, thus, do not find any infirmity in the opinion of the Adjudicating Authority where it has held that the Assignment Deed dated 01.03.2019 was not in good faith and rather shows that the arrangement was made with a view to get backdoor entry into the COC through the Company Appeal (AT) (Insolvency) No. 240 of 2022 Applicant assignee to have a control over the process of the CIRP as the Reliance Infrastructure Ltd. being the related party to the Corporate Debtor could not be the member of the CoC. The Adjudicating Authority further held that an act of this kind done with malafide intention cannot give an equivalent right with that of the unrelated financial creditors. The above opinion expressed by the Adjudicating Authority is based on consideration of relevant materials with which opinion we also are in concurrence after considering the facts and circumstances of the present case.

23. Learned counsel for the Respondent has referred to and relied on the Interim Order cum Show Cause Notice dated 11.02.2022 issued by the Securities and Exchange Board of India (SEBI) where notice has also been issued to the Appellant alongwith other Reliance Entities including Reliance Home Finance Ltd. The Interim Order cum Show Cause Notice not being before the Adjudicating Authority, we do not find it necessary to look into the said Interim Order cum Show Cause Notice. The submission of the learned counsel for the Respondent was that said Interim Order cum Show Cause Notice was brought on record only to support the case of the Respondent that all transactions between the Reliance Infrastructure Ltd., Corporate Debtor and Appellant are under investigation and enquiry and prima facie opinion has been formed by SEBI that transaction was circuitous. Loans have been advanced to an entity like Appellant who has no net-worth. Although submission made Company Appeal (AT) (Insolvency) No. 240 of 2022 by counsel for the Respondent finds prima facie support by the said Interim Order cum Show Cause Notice but we do not find any necessity to look into the Interim Order cum Show Cause Notice for purpose of present case, especially when the said document was not before the Adjudicating Authority at the time of passing of the final order.

24. In view of the foregoing discussion, we do not find any error in the order of the Adjudicating Authority rejecting the application of the Appellant as a Financial Creditor. The submission of learned counsel for the Appellant that even if it may not participate in the CoC, claim of the Appellant should be admitted as Financial Creditor, also could not be accepted in view of the

reasons as noticed above. We, thus, do not find any merit in the Appeal. Appeal is dismissed.

[Justice Ashok Bhushan] Chairperson [Barun Mitra] Member (Technical) NEW DELHI 16th
September, 2022 Archana Company Appeal (AT) (Insolvency) No. 240 of 2022