

# Telangana State Trade Promotion ... vs A.P.Gems & Jewellery Park Private ... on 21 September, 2021

NATIONAL COMPANY LAW APPELLATE TRIBUNAL AT CHENNAI  
(APPELLATE JURISDICTION)  
Company Appeal (AT)(CH) (Ins.) No.54 of 2021

(Under Section 61 of the Insolvency and Bankruptcy Code, 2016)  
[Arising out of the impugned order dated 04.01.2021 passed by the  
Adjudicating Authority (National Company Law Tribunal, Hyderabad Bench)  
in I.A. No. 555 of 2020 in CP (IB) No.143/07/HDB/2019 filed by the Second  
Respondent/ Petitioner / CoC/ Applicant Financial Creditor]

In the matter of:

Telangana State Trade Promotion Corporation

....Appellant

Vs.

A.P. Gems & Jewellery Park Private Limited & Anr. ....Respondents

Present

Appellant:

Mr. Ravi, Senior Counsel For R.S. Associates, M.  
Naga Deepak, B. Lokeshwar Reddy, Rohan Aloor  
and Himangini Sanghi, Advocates.

Respondents:

Mr. Y. Suryanarayana, Respondent No. 1  
Mr. Satish Parasaran, Senior Advocate for M/s.  
R. Ravindra Bose & R. Saravanan, Respondent  
No.2

Coram:

Mr. Justice M. Venugopal Member (J)  
Mr. Kanthi Narahari Member (T)

## J U D G E M E N T

(Virtual Mode) M. Venugopal (J) Preface:

1. The Appellant/ Third Respondent has preferred the instant 'Appeal' being dissatisfied with the order dated 04.01.2021 in I.A. No. 555 of 2020 in CP (IB) No.143/7/HDB/2019 (Filed by the second Respondent/Applicant/ Company Appeal (AT)(CH) (Ins.) No.54 of 2021 P a g e 1 | 43 Financial Creditor) passed by the 'Adjudicating Authority' (National Company Law Tribunal Hyderabad Bench).

2. The 'Adjudicating Authority' (National Company Law Tribunal Hyderabad Bench) while passing the impugned order dated 04.01.2021 in I.A. 555 of 2020 in CP (IB) No.143/7/HDB/2019 at paragraph 57 to 61 had observed the following:

57 "It is the case of the applicant the respondent no.3 is having 11% voting share in

the Corporate Debtor and it is also the fact that balance amount of Rs.5,93,23,625/- is payable by Corporate Debtor to respondent no.3 vide loan agreement dated 09.05.2006.

It is a fact that respondent no.3 is a shareholder in the Corporate Debtor and having voting share of 11%. We have to examine whether respondent no.3 is a related party or not in the light of the above definition. We observe that respondent No.3 squarely fits into the definition of 'related party' under section 5(24) (a), (h),

(j), (l) and (m) of the Code. From the record submitted to the Tribunal it is observed that out of four directors of the Board of Directors, two directors are nominated by respondent no.3. We are of the view that the role and responsibility of the Directors is to protect the interests of the Corporate Debtor and not to merely sit in the Board meetings of the corporation. They have a fiduciary role to protect the interests of the Corporate Debtor and are responsible for shareholders of the Corporate Debtor at all times. The Board is responsible to the shareholders of the Corporation. Therefore, the Company Appeal (AT)(CH) (Ins.) No.54 of 2021 P a g e 2 | 43 claim of the Resolution Professional that they are only nominated members and they do not have much say in the functioning of the company is untenable. Every director has responsibility to protect the interests of shareholders. Accordingly, the Directors nominated by the corporation have to oversee the functioning of the Corporate Debtor. Besides they are also responsible to protect the interests of the shareholders, in this case, respondent no.3. We, therefore, cannot go by the submission made by the Resolution Professional as well as respondent no.3 that they are merely nominated members on the Board and they do not have much say in the functioning of the Corporate Debtor.

58. Therefore, we are not in agreement with the views of the Resolution Professional as well as respondent no.3 in this regard that they are only nominee-directors and that they do not have much say in the functioning of the Corporate Debtor. Further on a close perusal of the Companies Act, Listing Regulations, it is evident that disentitling of a shareholder, who is a related party from exercising his voting rights in respect of any resolution relating to any contract or arrangement to which such related party is a party. Therefore, we are not in a position to accept the contention of respondents no.1 and 3 that nominee-directors does not have significant influence on the functioning of the Corporate Debtor as untenable and not acceptable. Based on Article 62 of the Articles of Association, respondent no.3 clearly falls into the definition of 'related party' as defined clauses (a), (h),

(j) and (m) of section 5(24) of the Code. We, therefore, Company Appeal (AT)(CH) (Ins.) No.54 of 2021 P a g e 3 | 43 came to the conclusion that respondent no.3 falls under the definition as aforesaid.

59. When we juxtapose and read the Articles of Association as well as the definition of related party has given in the I&B Code it is evident that two nominee - directors of respondent no. 3 have significant influence in decision making process of the Corporate Debtor. The Articles of Association clearly mention that action on important matters should be taken only by affirmative vote 3(three) or more directors, but there must be included in the qualified majority at least one director nominee

by APTPCL.

60. Article 62 plays vital role in deciding the subject matter in this case. From reading of Article 62 it is clearly evident that nominee-directors of Corporate Debtor and they cannot now claim that they only nominee-directors and they do not have much role in the Corporate Debtor. Such claim is untenable.

61. We are, therefore, not in agreement with the decision taken by the Resolution Professional to include respondent no. 3 as a Member of the CoC. Accordingly, we are of the that TSTPCL falls within the meaning of 'related party' as given in the I&B Code and Articles of Association of the Corporate Debtor. Accordingly, we direct that the Resolution Professional shall reconstitute the CoC treating the TSTPCL as a 'related party'. Accordingly, the IA is disposed of with the above directions to the Resolution Professional.

Company Appeal (AT)(CH) (Ins.) No.54 of 2021 P a g e 4 | 43 and disposed of the interlocutory application with directions being issued to the 'Resolution Professional'.

## Background

3. Assailing the correctness, validity and legality of the impugned order dated 04.01.2021 in I.A. No.555 of 2020 in CP (IB) No.143/7/HDB/2019 passed by the 'Adjudicating Authority' (National Company Law Tribunal Hyderabad Bench), the Learned Counsel for the Appellant submits that the Appellant is a 'Telangana State Government Corporation' and was incorporated on 27.09.2014. Further, the 'AP State Trading Corporation' (referred to as APSTC) was established on 31.01.1972 to carry out the business of exports, imports and internal trade.

4. According to the Appellant in 2007, 'APSTC' was renamed as 'AP Trade Promotion Corporation Ltd.' (APTPC) to promote trade from the State and create logistics infrastructure in the state and to carry out its existing business of manufacture and sale of notebooks for students. 'APTPC' was bifurcated (on the division of erstwhile State of Andhra Pradesh) into Andhra Pradesh and Telangana units. The Telangana unit of 'APTPC' is incorporated as 'TSTPC' Ltd. (Appellant) and in the process of bifurcation 'AP Gems & Jewellery Park Private Limited', the First Respondent/ Company was apportioned to 'TSTPC' Ltd. (the Appellant) as per the terms of 'Andhra Pradesh Reorganisation Act', 2014.

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5. It is the version of the Appellant that during the year 2002, the Government of erstwhile 'State of Andhra Pradesh' (hereinafter referred to as 'GoAP') through 'APSTC' notified a tender for development of a show room/ market place for 'Gems and Jewellery' in the property bearing T.S. No.6/1 Part, Block-H, Ward No.11, Road No.10, Banjara Hills, Hyderabad, admeasuring Ac 2-12.5 cents (land). In fact, 'GoAP' transferred the property to 'APSTC' as per G.O. Ms. No.469 dated 14.05.2001 with certain conditions.

6. It comes to be known that the 'IOI Corporation Berhad of Malayasia' (IOIM) was the successful bidder for development of show room/ market place for Gems and Jewellery. 'APSTC' and IOIM entered into a 'Memorandum of Understanding' (MoU dated 12.06.2002). Indeed, it was mentioned in the 'MoU' among other things that it was proposed that the development of the show room/ market place shall be executed through a 'Special Purpose Vehicle' incorporated under the 'Companies Act', 1956.

7. It is represented on behalf of the Appellant in the MoU dated 12.06.2002, the cost of the land was determined to be INR 14,43,28,800 (calculated at INR 6,01,37,000/- per acre for Ac2-16 Guntas). The cost of land was reduced to INR 12,77,91,125/- (calculated as INR 6,01,37,000/- per acre) as the actual extent of land on physical verification was decided at Ac 2-05 Guntas etc. Company Appeal (AT)(CH) (Ins.) No.54 of 2021 P a g e 6 | 43

8. The Learned Counsel for the Appellant points out that pursuant to the Memorandum of Understanding dated 12.06.2002, the 1st Respondent/ Company was incorporated on 24.09.2002 for the development of show room/ market palace for Gems and Jewellery in the property by one Mr. Suresh Chukapalli and Mrs. Madhumati Chukapalli. Subsequently, 'APSTC' alienated the property to 1st Respondent/ Company with certain conditions GoAP as per Go Ms. NO.115 dated 28.05.2004 approved shareholding pattern of 11% and 89% of equity and preferential share to 'APSTC' and 'IOIM' respectively, and nominated 'Managing Director', 'APSTC' as one of the 'Directors' on the Board of 'SPC'.

9. It transpires that 'APSTC' was allotted 2,95,000 Equity Shares at INR 10 each amounting to INR 29,50,000 and 9,15,000 preferential shares at INR 10 (each) amount to INR amounting to INR 91,50,000 and the reminder amount of 11,56,91,125 (referred to as 'loan amount') was extended as loan to Respondent No.1/ Company with an interest of 11% per annum (on yearly rest basis). In reality the 1st Respondent paid Rs.5,65,67,500 to the Government as per 'GoMS' No.481 dated 12.05.2005 and the remaining sum of Rs.5,91,23,625/- is treated as loan from the Appellant to the First Respondent a per loan agreement dated 09.05.2006.

10. After securing the necessary permission(s) or order(s) from the 'GoAP', 'APSTC'/ Appellant transferred the property to the First Respondent/ Company (vide 'GoMS' No.115 dated 28.05.2004 and 'GoMS' No.48 dated Company Appeal (AT)(CH) (Ins.) No.54 of 2021 P a g e 7 | 43 12.05.2005). Moreover, 'IOIM' incorporated a subsidiary Company in Mauritius in the name and style of 'M/s. Project IOI Mauritius Limited' (referred to as 'PML') to invest into the First Respondent/ Company/ SPC. Later a 'Shareholder's Agreement' was entered into between 'APSTC' and 'PML' through which PML invested in 22,25,000 Equity Shares of INR 10 (each) amounting to INR 2,22,50,000 and 74,75,000 Preferential Shares of INR 10 (each) amounting to INR 7,47,50,000.

11. It is the stand of the Appellant that in the year 2005 to 2011 the Second Respondent/ Phoenix Tech Tower Pvt. Ltd. Telangana granted loan aggregating to INR 9,00,00,000 to the Respondent No.2 Company. Moreover, Second Respondent/ Company held 50.56% shares of equity shares of the Respondent No.1 Company before the execution of the Share Transfer Agreement dated 11.01.2011. By virtue of the advancement of INR 9,00,00,000 as 'loan' a Loan Agreement dated

29.01.2011 was executed between the First Respondent/ Company and Second Respondent/ Company for repayment of the amount.

12. The First Directors/ Shareholders (Majority) of the First Respondent/ Company were one Mr. Suresh Chukapalli and Mrs. Madhumati Chukapalli in fact, Mrs. Madhumati Chukapalli, is one of the First Directors and Shareholder (till date) of the Second Respondent/ Company. Subsequently, the Second Respondent/ Company together with Mr. Suresh Chukapalli and Company Appeal (AT)(CH) (Ins.) No.54 of 2021 Page 8 | 43 Mrs. Madhumati Chukapalli executed a share transfer agreement 11.01.2011 in favour of 'PML'.

13. Be it noted, that the Second Respondent/ Company initiated CP (IB) No.143/07/HDB/2019 claiming that a sum of INR 18,06,10,770 is due and payable by the First Respondent/ Company under Section 7 of the 'I&B' Code, 2016 falling from the loan agreement dated 29.01.2011. The 'Adjudicating Authority', admitted the Application as per order dated 04.06.2019 and appointed Dr. K.V. Srinivas as 'Interim Resolution Professional'.

14. The Appellant submitted its claim for INR 38, 64, 42,140 falling from the loan agreement dated 09.05.2006 before the 'Resolution Professional' as per the ingredients of 'I&B' Code, 2016. The 'Resolution Professional' included the Appellant as the Member of the 'Committee of Creditors' in the 7th meeting that took place on 15.06.2020 after due consideration of the documents submitted in respect of the claim amount and admitted the claim of INR 38,46,16,545. Before admitting the claim, the Appellant had revised its claim supported by relevant documents.

15. It is projected on the side of the Appellant that the Second Respondent/ Company filed an Interlocutory Application No. 555 of 2020 in CP (IB) No.143/07/HDB/2019 as per Section 65 (5) read with Section 21 (2) of the Code before the 'Adjudicating Authority' (National Company Law Tribunal Hyderabad Bench) seeking for removal of the Appellant (APSTC/TSTPC) from the 'CoC' based on the reason that 'Appellant' is a 'related party' and prayed for consequent action.

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16. According to the Learned Counsel for the Appellant the 'Adjudicating Authority' has committed an error in concluding that the Appellant represented through one nominee Director (i.e. Mr. Saida V) has significant influence over the First Respondent/ Company.

17. The Learned Counsel for the Appellant contends that the 'Adjudicating Authority' had failed to appreciate the term 'related party' as construed under Section 24(5) of the 'I&B' Code, 2016 in consideration of the 'Memorandum of Understanding' dated 12.06.2002, the 'Articles of Association' of the 1st Respondent/ Company, 'Loan Agreement' dated 09.06.2006, 'Shareholding Agreement' dated 12.01.2001 and 'Share Transfer Agreement' dated 11.01.2011

18. The Learned Counsel for the Appellant forcefully takes a plea that the 'Adjudicating Authority' should have appreciated that the 'Appellant' is a 'Financial Creditor' as prescribed under Section 5 (7) of the 'I&B' Code, 2016. Also that, the 'Adjudicating Authority' has wrongly determined that the

Appellant is a 'related party' as per Section 24(5)(a) of the 'I&B' Code. In this connection, the Learned Counsel for the Appellant points out that the Appellant is a Shareholder with a small percentage of 5.1 percent of 'equity shares' and 5.9% 'preference shares'. Added further, the 'Appellant' does not have any significant influence in the affairs of the First Respondent/ Company.

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19. The contention advanced on behalf of the Appellant is that the First Respondent/ Company is neither inclined nor accustomed to act on the advice of 'Directors' or instructions of the Appellant and one 'Nominee Director' on the Board of the First Respondent/ Company out of the minimum quorum of three and hence, it cannot be concluded that the 'Appellant' has 'Veto Power' in the Board.

20. It is represented on behalf of the Appellant that the Appellant holds 5.1% 'equity shares' 5.9% in 'Preference Shares' (with no voting right(s) and there is no voting agreement) in the First Respondent/ Company. In fact, the Appellant holds 11% voting right(s) on account of 'ownership' and hence Section 24(5)(j) of the 'I&B' Code, 2016 is not applicable.

21. The submission of the Learned Counsel for the Appellant is that there is no participation in policy making of the First Respondent/ Company nor there is interchange of managerial personnel between the Appellant and the First Respondent/ Company. There is no exchange of technical of information to or from, the First Respondent/ Company and the Appellant. As such, it is projected on the side of the Appellant that the 'Adjudicating Authority' had committed an error in making an observation that the 'Appellant' is a related party as per Section 24(m) of the 'I&B' Code.

22. Advancing his argument, the Learned Counsel for the Appellant submits that the 'Adjudicating Authority' had incorrectly observed that there are two nominee Directors of the Appellant and they have significant influence in the decisions making process of the First Respondent/ Company.

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23. It is the specific case of the Appellant that the 'Adjudicating Authority' had relied on 'Article 62 of the Articles of Association' of First Respondent/ Company to come to the conclusion that the Appellant is a 'related party' having significant influence on the First Respondent/ Company.

24. The Learned Counsel for the Appellant adverts to Article 62 of the 'Articles of Association' which provides that there must be at least one Director of the Appellant in the minimum 'quorum' of three and that such 'right of representation' cannot be construed to mean as a right of majority.

25. The Learned Counsel for the Appellant comes out with a plea that Clause 62 of the 'Articles of Association' of the 'Corporate Debtor' provides for an affirmative voting right to protect its investment and envisages no control to the Appellant over the 'Corporate Debtor' and these rights are negative rights, given to the Appellant also that the protective provision under the Article of Association was not in the nature of day-to-day operational control over the 'Corporate Debtor' business. Such provision merely enables the Appellant to oppose a proposal. In fact, it is

conventional for the financial investors to protect their investment from the whims and fancies of the 'promoters' that manage the 'Corporate Debtor'.

26. The Learned Counsel refers to Section 3(37) of the I&B Code, 2016 which provides, among other things, 'words' and 'expression' used but not defined in this Code but defined in the Companies Act, 2013 shall have the meanings respectively assigned to them in those Acts (Companies Act, 2013)'.

27. The Learned Counsel for the Appellant points out that the definition of Section 2(27) 'control' as per the Companies Act, 2013 shall include the right Company Appeal (AT)(CH) (Ins.) No.54 of 2021 P a g e 12 | 43 to appoint majority of the directors or to control the management or policy decisions exercisable by person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management right or shareholder's agreements or voting agreements or in any other manner.

28.. The primordial legal plea projected on the side of the Appellant is that the term 'control' employed under Section 5(24) of the 'I&B' Code is to be interpreted in accordance with the definition provided under the Companies Act, 2013 but not debtors. But the 'Adjudicating Authority' has traversed beyond the provisions of the Companies Act, 2013, to hold that the Appellant is a 'related party'.

#### Appellant's citation

29. The Learned Counsel for the Appellant relies on the decision of the Hon'ble Supreme Court (in regard to the examination of the meaning of the term/ word 'control' in the context of the I&B Code, 2016, in the matter of Arcelor Mittal India Private Limited V. Satish Kumar Gupta & Ors. reported in AIR 2018 at page 5646, wherein it is observed as under:

"The expression control .....

are in fact taken" and contends that by virtue of the aforesaid decision of the Hon'ble Supreme Court the reliance placed on Clause 62 of the 'Articles of Association' of the Corporate Debtor to declare the Appellant as a related party as per Section 5(24) of the I&B Code is an erroneous one, because of the fact that a mere power to block 'Resolution(s)' of a Company cannot amount to control. Also, it is the plea of the Appellant Company Appeal (AT)(CH) (Ins.) No.54 of 2021 P a g e 13 | 43 that it is to be appreciated and borne in mind that the purpose of appointing a 'Nominee Director' is to ensure that the nominator's interest and rights are not prejudiced.

30. The Learned Counsel for the Appellant refers to Section (24) of the Code, which provides that any person who can control the composition of the Board of Directors or corresponding governing body of the Corporate Debtor and submits that there is no manner such control on the composition of the board is attributable to the 'Appellant' with a meagre 11% shareholder.

31. The Learned Counsel for the Appellant adverts to the ingredients of definition of Section 5(24) (m) of the Code, which runs to the following effect:

- (m) any person who is associated with the corporate debtor on account of--
  - (i) participation in policy making processes of the corporate debtor; or
  - (ii) having more than two directors in common between the corporate debtor and such person; or
  - (iii) interchange of managerial personnel between the corporate debtor and such person; or Company Appeal (AT)(CH) (Ins.) No.54 of 2021 P a g e 14 | 43
  - (iv) provision of essential technical information to, or from, the corporate debtor;"

and submits that the 'Adjudicating Authority' had committed an error by stating that 'Appellant' is a 'related party' as per Section 5(24) (m) of the Code, considering the fact that there is no exchange of technical information to or from the 'Corporate Debtor' and the 'Appellant'. In short, the Learned Counsel for the Appellant prays for allowing the 'Appeal', in the interest of justice.

First Respondent's pleas

32. According to the Learned Counsel for the First Respondent that the Second Respondent / Applicant was initially the sole member of the 'Committee of Creditors' and later the 'Resolution Professional' had included the 'Telangana State Trade Promotion Corporation' (TSTPC) Appellant as a Member of the 'Committee of Creditors' in the 7th 'Committee of Creditors' meeting that took place on 15.06.2020 based on numerous documents and information furnished by the Appellant / TSTPC and in consonance with provisions of the Code.

33. It is represented on behalf of the First Respondent that the Appellant / TSTPC had filed original claim in Form C before the 'Resolution Professional' for sum of Rs. 29,12,24,880/- and later, on 09.12.2019 the 'Appellant' / TSTPC had submitted a revised claim Form for a sum of Rs. 27,94,26,148/- which was verified by the 'Resolution Professional' and the same was admitted.

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34. However, the 'Appellant', again filed a revised claim on 18.01.2020 for a sum of Rs. 38,62,42,140/- and the 'Resolution Professional' had admitted the claim of 'Appellant' to an extent of Rs. 38,46,16,545/-.

35. The stand of the First Respondent is that the 'Resolution Professional' had initially not included the 'Appellant' as part of their 'Committee of Creditors' (CoC) as it was being examined by the 'Resolution Professional' whether the 'Appellant' would fall within the meaning of 'related party' as



defined u/s 5(24) of the Code but, based on the documents provided by the 'Appellant' and on being satisfied that the 'Appellant' was not falling within the meaning of 'related party' as defined under the 'I&B' Code, 2016 the 'Resolution Professional' in the 7th CoC Meeting that took place on 15.06.2020 reconstituted the said Committee and included the 'Appellant' as a Member of the 'Committee of Creditors'.

36. The plea taken on behalf of the First Respondent is that in the 7th CoC meeting, the representative of the 'Financial Creditor' / Applicant was also present but he had not expressed any objection or concerned over the inclusion of the 'Appellant' as a Member of the Committee of Creditors. Even, in the 8th 'Committee of Creditors' meeting that took place on 09.07.2020, the Second Respondent / Applicant had not raised any concern and even approved the minutes of the earlier 7th 'Committee of Creditors' meeting.

37. The Learned Counsel for the First Respondent submits that by the time the order of 'admission' was passed by the 'Adjudicating Authority' on 04.06.2019, the 'Corporate Debtor' was under strike off' mode and later the 'Corporate Debtor' was restored on the rolls of the Registrar of Companies Company Appeal (AT)(CH) (Ins.) No.54 of 2021 P a g e 16 | 43 under the directions of the Tribunal. Furthermore, as on the date of the order, there were no Operations in the Company and there were no 'Employees'. As a matter of fact, the only asset of the 'Corporate Debtor' under development was attached by the Enforcement Directorate as per PAO dated 10.04.2019. That apart, there were no Books of Accounts nor any other statutory records present at the registered office.

38. The Learned Counsel for the First Respondent points out that only after obtaining necessary clarifications with regard to the applicability of the ingredients of Section 2(24) of the Code and pending clarifications and supporting documents, the 'Resolution Professional' had collated the claims and admitted the same as per Section 18(b) of the Code and finalise the list of creditors consisting of the second Respondent and the Appellant. Continuing further, the Resolution Professional in compliance to their ingredients of Section 18(c) of 'I&B' Code, 2016 constituted the 'Committee of Creditors' consisting of the 2nd Respondent / Applicant as the sole member treating the Appellant / TSTPC as a 'related party'.

39. An argument is advanced on behalf of the First Respondent is that having accepted the inclusion of the Appellant into the 'Committee of Creditors' and also not raising any objection in the Second 'Committee of Creditors' meetings attended by the second Respondent, it is estopped from projecting the IA No. 555/2020 before the 'Adjudicating Authority' at an inordinate stage of 'Corporate Insolvency Resolution Process'.

40. The Learned Counsel for the First Respondent submits that the definition of a 'related party' as per the Companies Act, 2013 and as per Company Appeal (AT)(CH) (Ins.) No.54 of 2021 P a g e 17 | 43 accounting standards cannot be relied upon to establish that a party is a 'relate party' under the provisions of the Code and that the provisions of the 'I&B' Code over ride other laws laid down under Section 238 of the Code.

41. The Learned Counsel for the First Respondent contends that the Second Respondent / Applicant is in no manner affected by the inclusion of the Appellant / TSTPC as a member of the 'Committee of Creditors', as the whole process of CIRP is to be carried out as per the ingredients of the 'I&B' Code. Besides this, all the meetings of the CoC were validly held. Second Respondent's submissions

42. The Learned Counsel for the Second Respondent contends that the First Respondent/ Company is joint venture company of the Appellant along with IOI Corporation Berhad as contemplated in 'Memorandum of Understanding' (MoU) dated 12.08.2002, with equity participation in the ratio of 11.89 as per the terms of MoU and the relevant Government orders passed by the then Government of Andhra Pradesh from time to time as to the relation, the Appellant is not a mere 'shareholder' but a controlling partner who has a 'definitive say' and control in the affairs of the First Respondent/ Company/ Corporate Debtor.

43. The Learned Counsel for the Second Respondent takes a plea that the Appellant/ Company has a representation of two Directors out of five Members in the Board of Directors of the First Respondent. In fact, the Directors nominated by/ representing the Appellant have been participated in the meeting of Board of Directors of the First Respondent and that 'Board Company Appeal (AT)(CH) (Ins.) No.54 of 2021 Page 18 | 43 of Directors' is the final policy making Body of any Company. Indeed, the 1st Respondent is having a thorough participation in Appellant's policy making process and that the Managing Director of the Appellant was a Director in the 1st Respondent/ Company along with one more Director. In short, the presence of two Directors in the Board of Directors of the First Respondent itself makes the Appellant Company a 'related party' as contemplated in the I&B Code.

44. It is the fervent plea of the Second Respondent that many of the policy decision cannot be taken with the affirmative vote of at least one Director nominated by/representing the Appellant in the First Respondent (qualified majority) as laid down in Article 62 of the 'Articles of Association', which is runs as under:

"62. Action on the following matters should be taken only by affirmative vote of 3 (Three) or more directors ("qualified majority") but there must be included in the qualified majority at least one director nominated by APTPC:

i. Approval, modification or termination of the contract of employment of the Managing Director;

ii. A decision to recommend to the general meeting appointment or change of statutory auditors;

iii. All transactions regarding buildings, land and other fixed assets, including the lease, purchase, sale, transfer and mortgage or these assets;

iv. Providing loans, guarantees or other extensions of credit, other than in the ordinary course of business; v. Acquisition, creation, permitting to subsist, disposal

or winding up of any subsidiary companies of the company; vi. Doing of anything that would result in the company coming under the control of any other company or person; vii. Increase or reduction of the capital of the company; viii. Merger into, or acquisition of all, or a part of, the business of, or purchase or acquisition of shares, or any ownership interest in another legal person or entity;

Company Appeal (AT)(CH) (Ins.) No.54 of 2021 P a g e 19 | 43 ix. Entry into any partnership or Profit sharing agreement with any person or entity;

x. Dissolution or voluntary winding up of the company; xi. Transfer in anyone transaction or series of transactions of all or a substantial portion of the company's business or assets; xii. Failing, declining, or ceasing to insure, or to keep insures, with reputable insurers to their full replacement value all insurable assets of the company against all such risks as are usually insured by prudent companies carrying on business similar to the company;

xiii. Changing the structure, power or purpose of the company including changes in the Memorandum of Association and Articles of Association;

xiv. Acquiring or selling interest in/to other companies or business; xv. Merger or amalgamation of the company with any other company or amalgamation or any other company with the company or sale of the companies undertaking or substantial part of the undertaking;

xvi. Entry into any contract, agreement or transaction, other than in the ordinary course of business, or other than in arm's length basis, or granting favourable or concession terms to any of the Shareholders, their associates or private interests; xvii. The Board may from time to time raise or borrow any sums of money, for and on behalf of the company from the members or other persons, companies, banks or financial institutions or any of the Directors may himself/herself advance money to the company on such interest as may be approved by the Board of Directors;

xviii. All borrowing from banks, financial institutions and other agencies including issue of debentures and providing corporate guarantees."

(Emphasis supplied)

45. The Learned Counsel for the Second Respondent brings to the notice of this Tribunal that Article 70 and 71 of the Articles of Association of the First Respondent confers special power upon the Appellant as to auditing the First Respondent and also the appointment of statutory auditors of the First Respondent. Further, the Appellant can control their composition of Board of Directors of the First Respondent as per Clause (a) of Article 62 of the Articles of Association of the First Respondent. The affirmative action of at least one Company Appeal (AT)(CH) (Ins.) No.54 of 2021 P a g e 20 | 43 Director (qualified majority) nominated by/ representing the Appellant is required for

approval, modification or termination of the contract of employment of the Managing Director of the First Respondent.

46. The Learned Counsel for the Appellant points out that the Appellant is entitled to have two Directors on the Board of First Respondent and it can change its nominees at its own will and authority. Therefore, the 'Composition of Board of Directors' of the First Respondent is under the control of the Appellant which clearly points out towards the Appellant as a 'related party' as per Clause (l) of sub-Section (5)24 of the 'I&B' Code.

47. It is represented on behalf of the Second Respondent that the Appellant/ Company, whose advice or instruction is/ are binding on the Directors who are nominated by them to the Board of the First Respondent are accustomed to act and their directions/ instructions are binding on them. To put it precisely they are the 'custodians of interest' of the Appellant and bound to act accordingly on its instructions. In short, numerous Government orders issued in connection with the formation of the First Respondent/ Company to sale of the land to the First Respondent by the Appellant, which clearly shows that the role is to act in terms of the advice of the Appellant whom they represent. Thus, it is the contention of the Second Respondent that Appellant is a 'related party' as per Clause (h) of sub-section 24 of Section 5 of the 'I&B' Code.

48. It is the stand of the Second Respondent that the Appellant is a body corporate whose managing Director was also a Director of the First Respondent and the other Directors nominated by the Appellant also advises Company Appeal (AT)(CH) (Ins.) No.54 of 2021 P a g e 21 | 43 the Appellant/ Company in issues concerning with the First Respondent. The double role of the two nominee Directors clearly establishes that the First Respondent acts on the advice, direction and instructions of the Appellant in its ordinary course of business in issues relating to the First Respondent. As such, it is a 'related party' as per clause (f) of sub-section 24 of Section 5 of the 'I&B' Code, 2016.

49. The other contention raised on behalf of the Second Respondent is that the First Respondent has been treating the 'Appellant' as a 'related party' and has reported the transactions between them as 'related party' transactions in a statutory document such as annual reports and audited financial documents and the same is reported as per the definition of 'related party' in terms of the provisions of the Companies Act and mandatory accounting standards. Further, the definition of the 'related party' under IBC is adopted from the definition of the 'related party' under the 'Companies Act' after making modification to suit the context.

50. It is projected on the side of the Second Respondent that description of nature of 'related party' relationship is reported under the category 'enterprises which are owned or have significant influence of or are partners with key management personnel and their relatives' indeed the vital influence as reported is clearly visible in the formation of First Respondent/ Company and its conduct of the business, 'Articles of Association' and the 'Qualified Majority' required for key business decisions. Therefore, it is the stand of the Second Respondent that the Appellant is treated as 'related party' by the First Respondent through its existence.

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51. According to the Learned Counsel for the Second Respondent, the Appellant is falling unhesitatingly in many of the Clause within the definition of Section 5(24) of the I&B Code. Even fulfilling one of the Clauses is enough to treat the Appellant as 'related party' and hence, once the Appellant is treated as 'related party', the aspect of inclusion of the Appellant in the Committee of Creditors of the First Respondent does not arise. Hence, on behalf of the Appellant, a prayer is made before this Tribunal to dismiss the instant Company Appeal.

#### Vital Element

52. It is to be pointed out that for an essential element in regard to the exercise of control is the power to appoint majority Directors and power to influence to the policy decision of Company. In fact, the word 'control' in Section 2(27) in the Company Act, 2013 includes exercising the right to appoint majority of Directors on the Board of Companies or controlling the management or policy decisions of the Company by a person or persons acting individually or in concert, it is to be remembered that the power may be exercised by a person or persons either directly or indirectly. It may flow by virtue of their shareholding or their management rights or shareholders' agreements, voting agreements or in any other fashion.

53. It cannot be forgotten that power to control the composition of Board of subsidiary company could arise from the voting rights enjoyed by the holding Company by virtue of shares in the subsidiary held by it or its nominees or from the provisions contained in the Memorandum or Articles or from the terms of contract with the subsidiary which confers rights on the holding Company Appeal (AT)(CH) (Ins.) No.54 of 2021 P a g e 23 | 43 company to appoint the Directors on the Board of subsidiary Company (vide decision Oriental Industrial Investment Corporation Ltd. vs. Union of India reported in (1981) 51 COMP CAS 487 (DEL)).

54. Anyone who by exercise of voting power can control the decisions of a General Meeting can be said to 'control' the Company. A person can be said to be in control of Company when there was no matter or perhaps no substantial matter on which he could be outvoted at a General Meeting. Moreover, when Directors of a Company hold majority of shares which under Articles of Association carry voting right, then, they can be said to have controlling interest.

55. In ordinary expression a person may acquire 'controlling interest' in a Company when such a person acquires 'by purchase' or 'otherwise' majority of votes carrying shares in that Company for the control of the Company rights in the voting power of its shares. At this stage, this Tribunal aptly points out that if few persons hold comparatively small proportion of total shares may enable actual control to be exercised by such persons as per decision Hindustan Motors Ltd. vs. MRTP Commission reported in AIR 1973 Cal 450, 459.

56. In this connection, this Tribunal worth recalls and recollects the decision in Inland Revenue Commissioners vs. Bibby and Sons Ltd. reported in (1946) 14 ITR (Suppl.) 7 wherein it is observed that the term 'controlling' interest does not refer to the Directors beneficial interest in the Company, but to the 'power of controlling' by votes in the decision binding of the Company in the shape of resolutions passed at a General Meeting. Company Appeal (AT)(CH) (Ins.) No.54 of 2021 P a g e 24

57. The real test is whether a person controls either the steering or the accelerators, gears and brakes. If the answer is in the affirmative, then he would be in the 'Control of Company' in the considered opinion of this Tribunal.

#### Evaluation

58. At the outset, this Tribunal points out that in I.A. No. 555/2021 in CP (IB) No.143/7/HDB/2019 the 2nd Respondent / Applicant (M/s Phoenix Tech Power Private Ltd.) had prayed before the 'Adjudicating Authority' (1) for removal of the Appellant / TSTPCL, a 'related party' from the 'Committee of Creditors' and restore voting percentage of the second Respondent / Applicant to 100% as formerly prevailed, (2) to remove resolutions passed in seventh, eighth and ninth 'Committee of Creditors' (CoC) meeting, (3) for a declaration that the Appellant as 'related party', (4) for declaration that the actions of the 'Resolution Professional' in permitting the unauthorised representative of the Appellant / TSTPCL to prefer the claim and participate in the 'Committee of Creditors' (CoC) meeting as illegal and (5) for an exemption of the time period lost in contesting this application for regaining its 67% voting right which was unduly removed by the 'Resolution Professional'.

59. The second Respondent / Applicant had prayed for an interim order before the 'Adjudicating Authority' in directing the 'Resolution Professional' not to open 'Resolution Applications' received by him from the prospective Resolution Applicants etc.

60. The grievance of the Appellant is that the Appellant / Telangana State Trade Promotion Corporation' had submitted its claim of INR 38, 64, 42, 140 Company Appeal (AT)(CH) (Ins.) No.54 of 2021 Page 25 | 43 resting upon the loan agreement dated 09.05.2006 before the 'Resolution Professional' which was admitted. However, in the impugned order dated 04.01.2021 in IA No. 555/2021 in CP (IB) No.143/7/HDB/2019 the Adjudicating Authority (National Company Law Tribunal, Hyderabad Bench) came to the conclusion that the Appellant is a 'related party' and that the Resolution Professional of the first Respondent / Company was directed to constitute a 'Committee of creditors' treating the Appellant' as a 'related party'.

61. According to the Learned Counsel for the Appellant that Article 62 of the 'Articles of Association' First Respondent / Company is a mere right or representation and right to majority and as such, the Appellant / TSTPC had significant influence in the affairs of the first Respondent / Company. Apart from that the first respondent/company is neither inclined nor accustomed to act at the advice, directions or instructions of the Appellant and neither did the Appellant have a 'Veto Power' in the Board and hence, the impugned order is to be set aside, because of the fact that the Appellant is a 'Financial Creditor'.

62. It is the stand of the First Respondent that only after due verification of the claim furnished by the Appellant / TSTPC and in compliance with the ingredients of the 'I&B' Code and Rules and Regulations applicable thereunder admitted the Appellant into the Committee of Creditors as a

Financial Creditor with 67% of voting rights in proportion to the claim admitted by him. Also that the second Respondent / Phoenix Tech Power Pvt. Ltd.(Applicant) had expressed his happiness at the Appellant joining the Company Appeal (AT)(CH) (Ins.) No.54 of 2021 P a g e 26 | 43 'Committee of Creditors' therefore, it is not open to the second Respondent / Phoenix Tech Power Pvt. Ltd. (Applicant in IA No. 555/2020) to file the said Interlocutory Application at a later stage of the 'Corporate Insolvency Resolution Process' (CIRP).

63. The clear cut stand of the Second Respondent is that the Appellant the Appellant is a body Corporate whose Managing Director was also a Director of the first Respondent and that the other Director nominated by the Appellant advises the Appellant / Company in matters related to the first Respondent. Therefore, the double role of the two nominee Directors clearly points out that the first Respondent acts on the advice and directions and instructions of the Appellant in its ordinary course of business in matters / issues pertaining to the first Respondent. Therefore, an emphatic plea is taken on behalf of the second Respondent that the Appellant 'is a related party as per clause of sub section 24 of section 5 of the Code'.

64. In this connection, this Tribunal amply points out the decision of the Hon'ble Supreme Court in Phoenix ARC Pvt. Ltd. V. Spade Financial Services Ltd. & Ors. reported in 2021 3 Supreme Court Cases at page 475 at spl. Page 517, 518 and 519 wherein at paragraph 77 to 83 it is observed as under: -

77. In India, the IBC adopts a CIRP operationalised through the CoC once the CIRP commences.(Douglas G. Baid, "A World Without Bankruptcy, 50 Law & Contemporary problems, Spring 1987. P. 184).

Company Appeal (AT)(CH) (Ins.) No.54 of 2021 P a g e 27 | 43 In addition to the creditor's bargain theory, the design of the IBC is also influenced by the value-based theory postulated by Korobkin(D.R. Korobkin. "Rehabilitating values: A jurisprudence of bankruptcy"9] Columbia Law Review(1991)p.717., in an influential piece of academic writing in the Columbia Law review, whereunder insolvency law considers the distributional impact of winding up on those who may not have formal legal rights to the assets of the business. The aim of bankruptcy law under this theory is to take into account the multidimensional but conflicting interests of various claimants, and provide for a solution whereunder each claimant derives optimal value( Supra at note 20).

78. The CoC is comprised of financial creditors, under loan and debt contracts, who have the right to vote on decisions and operational creditors such as employees, rental obligations, utilities payments and trade credit, who can participate in the CoC, but do not have the right to vote. The aim of the CoC is to Company Appeal (AT)(CH) (Ins.) No.54 of 2021 P a g e 28 | 43 enable coordination between various creditors so as to ensure that the interests of all stakeholders are balanced, and the value of the assets of the entity in financial distress is maximised.

79. The report of the Bankruptcy Law Reforms Committee (Volume I: Rationale and Design) of November 2015, has underscored the need to meet the liabilities of all creditors, who are not part of the CIRP, and that of treating the rights of all creditors fairly, through the collective insolvency

resolution process, operationalised by the CoC(Bankruptcy Law Reforms Committee, Volume I:

Rationale and Design, of November 2015, page 29.) . The report recognised this in the following terms:

"[The] three core features that most well developed bankruptcy and insolvency resolution regimes share: a linear process that both creditors and debtors follow when insolvency is triggered; a collective mechanism for resolving insolvency within a framework of equity and fairness to all stakeholders to preserve economic value in the process; a time bound process either ends in keeping the firm as a going enterprise, or Company Appeal (AT)(CH) (Ins.) No.54 of 2021 P a g e 29 | 43 liquidates and distributes the assets to the various stakeholders. These features are common across widespread differences in structure and content, present either through statutory provisions or their implementation in practice ....

These features ensure certainty in the process, starting from what constitutes insolvency, and the processes to be followed to resolve the insolvency, or the process to resolve bankruptcy once it has been determined. Done correctly, such a framework can incentivise all stakeholders to behave rationally in negotiations towards determination of viability, or in bankruptcy resolution. In turn, this will lead to shorter times to recovery and better recovery under insolvency, and a greater certainty about creditors rights in developing a corporate debt market."

80. The long title of the IBC outlines the importance of a collective process aimed at value maximisation. The IBC has been enacted as:

"An Act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals Company Appeal (AT)(CH) (Ins.) No.54 of 2021 P a g e 30 | 43 in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto."

81. These objects underscore the composition of the CoC, guided by Section 21 of the IBC. The objects and purposes of the Code are best served when the CIRP is driven by external creditors, so as ensure that the CoC is not sabotaged by related parties of the corporate debtor(24 Report of the Insolvency Law Committee, March 2018, p 23, para 1.25.) This is the intent behind the first proviso to Section 21(2) which disqualifies a financial creditor or the authorised representative of the financial creditor under sub-section (6) or sub-section (6A) or sub-section (5) of section 24, if it is a related party of the corporate debtor, from having any right of representation, participation or voting in a meeting of the committee of creditors.



Company Appeal (AT)(CH) (Ins.) No.54 of 2021 Page 31 | 43 82 Since the IBC attempts to balance the interests of all stakeholders, such that some stakeholders are not able to benefit at the expense of others, related party financial creditors are disqualified from being represented, participating or voting in the CoC, so as to prevent them from controlling the CoC to unfairly benefit the corporate debtor( Vidhi Centre for Legal Policy, Understanding the Insolvency and Bankruptcy Code, 2016:

Analysing Developments in Jurisprudence, available at  
<<https://vidhilegalpolicy.in/research/understanding>

- the - insolvency - and - bankruptcy - code - 2016 -  
analysing-developments-in-jurisprudence/>, at page

34.)

83. It is pertinent to note that disqualification of related parties from being members of the CoC, has also been recommended in the UNCITRAL Legislative Guide on Insolvency law(26 UNCITRAL, Legislative Guide on Insolvency Law, 2005, available at  
<[https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722\\_ebook.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf)>, at page 204.)

65. Continuing further, in the aforesaid decision of the Hon'ble Supreme Court of India at spl. Page 520, 521, 524, 526, 527 and 528 wherein at 1.4 Company Appeal (AT)(CH) (Ins.) No.54 of 2021 Page 32 | 43 under the caption Related parties - Interpretation in praesenti paragraph 88, 89, 90, 97, 100, 101, 103, 104, 105 it is observed as under:-

88. "An issue of interpretation in relation to the first proviso of Section 21(2) is whether the disqualification under the proviso would attach to a financial creditor only in praesenti, or if the disqualification also extends to those financial creditors who were related to the corporate debtor at the time of acquiring the debt.

89. In Arcelor Mittal India Private Limited vs. Satish Kumar Gupta (2019) 2 SCC 1, the issue was whether ineligibility of the resolution applicant under Section 29-A(c) of the Code attached to an applicant at the date of commencement of the CIRP or at the time when the resolution plan is submitted by the resolution applicant. Speaking for this Court, Justice Rohinton F Nariman interpreted the pre-2018 amendment, framing of Section 29-

A(c), in the following terms:

"46. According to us, it is clear that the opening words of Section 29-A furnish a clue as to the time at which clause (c) is to operate. The opening words of Company Appeal (AT)(CH) (Ins.) No.54 of 2021 Page 33 | 43 Section 29-A state: "a person shall not be eligible to submit a resolution plan...". It is clear therefore that the stage of ineligibility attaches when the resolution plan is submitted by a resolution

applicant. The contrary view expressed by Shri Rohatgi is obviously incorrect, as the date of commencement of the corporate insolvency resolution process is only relevant for the purpose of calculating whether one year has lapsed from the date of classification of a person as a non-performing asset. Further, the expression used is "has", which as Dr Singhvi has correctly argued, is in praesenti. This is to be contrasted with the expression "has been", which is used in clauses (d) and

(g), which refers to an anterior point of time. Consequently, the amendment of 2018 introducing the words "at the time of submission of the resolution plan" is clarificatory, as this was always the correct interpretation as to the point of time at which the disqualification in clause (c) of Section 29-A will attach."

90 Thus, facially, it would appear that the use of the simple present tense in the first proviso to Section 21(2) indicates that the disqualification applies in praesenti. Furthermore, this Company Appeal (AT)(CH) (Ins.) No.54 of 2021 P a g e 34 | 43 interpretation would also be supported by a reading of the first proviso to Section 21(2), in light of the definition of 'related party' under Section 5(24), which uses phrases such as 'is accustomed to act' or 'is associated' to define a related party in the present tense.

97 This court has approved of a purposive interpretation of Section 29-A of the IBC in *Arcelor Mittal India Private Limited v. Satish Kumar Gupta* (2019) 2 SCC page 1, where it was observed that:

"29...In *Ms. Eera Through Dr. Manjula Krippendorf v. State* (Govt. of NCT of Delhi) and *Anr.*, (2017) 15 SCC 133, this Court, after referring to the golden Rule of literal construction, and its older counterpart the "object rule" in *Heydon's case*, referred to the theory of creative interpretation as follows:

122. Instances of creative interpretation are when the Court looks at both the literal language as well as the purpose or object of the statute in order to better determine what the words used by the draftsman of legislation mean. In *D.R. Venkatachalam v.*

*Transport Commr.* [*D.R. Venkatachalam v.*

*Transport Commr.*, (1977) 2 SCC 273, an early instance of this is found in the concurring judgment of *Beg, J.* The learned Company Appeal (AT)(CH) (Ins.) No.54 of 2021 P a g e 35 | 43 Judge put it rather well when he said: (SCC p. 287, para 28):

"28. It is, however, becoming increasingly fashionable to start with some theory of what is basic to a provision or a chapter or in a statute or even to our Constitution in order to interpret and determine the meaning of a particular provision or Rule made to subserve an assumed "basic" requirement. I think that this novel method of construction puts, if I may say so, the cart before the horse. It is apt to seriously mislead us unless the tendency to use such a mode of construction is checked or corrected by this Court. What is basic for a Section or a chapter in a statute is

provided: firstly, by the words used in the statute itself; secondly, by the context in which a provision occurs, or, in other words, by reading the statute as a whole; thirdly, by the Preamble which could supply the "key" to the meaning of the statute in cases of uncertainty or doubt; and, fourthly, where some further aid to construction may still be needed to resolve an uncertainty, by the legislative history which discloses the wider context or perspective in which a provision was made to meet a particular need or to satisfy a particular purpose. The last mentioned method consists of an application of the mischief Rule laid down in Heydon case Company Appeal (AT)(CH) (Ins.) No.54 of 2021 P a g e 36 | 43 [Heydon case, (1584) 3 Co Rep 7a: 76 ER 637] long ago."

....

127. It is thus clear on a reading of English, US, Australian and our own Supreme Court judgments that the "Lakshman Rekha" has in fact been extended to move away from the strictly literal Rule of interpretation back to the Rule of the old English case of Heydon [Heydon case, (1584) 3 Co Rep 7a: 76 ER 637], where the Court must have recourse to the purpose, object, text and context of a particular provision before arriving at a judicial result. In fact, the wheel has turned full circle. It started out by the Rule as stated in 1584 in Heydon case [Heydon case, (1584) 3 Co Rep 7a : 76 ER 637], which was then waylaid by the literal interpretation Rule laid down by the Privy Council and the House of Lords in the mid-

1800s, and has come back to restate the Rule somewhat in terms of what was most felicitously put over 400 years ago in Heydon case [Heydon case, (1584) 3 Co Rep 7a : 76 ER 637].

30. A purposive interpretation of Section 29A, depending both on the text and the context in which the provision was enacted, must, therefore, inform our interpretation of the same."

(emphasis supplied) Company Appeal (AT)(CH) (Ins.) No.54 of 2021 P a g e 37 | 43

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 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 taken over the debt of related parties, or where the related party entity had stopped being a 'related party' long ago.

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 Company Appeal (AT)(CH) (Ins.) No.54 of 2021 P a g e 38 | 43 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 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 Company Appeal (AT)(CH) (Ins.) No.54 of 2021 P a g e 39 | 43 able to enter the CoC and influence its decision making at the cost of other financial creditors. 105 In the present case, there is a finding that AAA and Spade were related parties within the meaning of Section 5(24) at the time when the alleged financial debt on the basis of which they assert a claim to be a part of the CoC was created. This was due to the long-standing relationship between Mr Arun Anand and Mr Anil Nanda, and their respective corporations. Admittedly, such a relationship still existed even in 2017, since Mr Anil Nanda's JIPL held shareholding in Mr Arun Anand's Spade. Further, we have also concluded that the transactions between Spade and AAA on one hand, and the Corporate Debtor on the other hand, which gave rise to their alleged financial debts were collusive in nature. Therefore, it is evident that there existed a deeply entangled relationship between Spade, AAA and Corporate Debtor, when the alleged financial debt arose. While their status as related parties may no longer stand, we are inclined to agree with Mr Kaul that this was due to commercial contrivances through which these entities seek to now enter the CoC. The pervasive influence of Mr Anil Nanda (the promoter/director of the Corporate Debtor) over these entities is clear, and allowing them in the CoC would Company Appeal (AT)(CH) (Ins.) No.54 of 2021 P a g e 40 | 43 definitely affect the other independent financial creditors."

66. It must be borne in mind that the expression 'control' in Section 29A(c) of the 'I&B' Code symbolizes only the positive control i.e. that the mere power to block special resolutions of a Company cannot amount to control. In reality, the word 'control' juxtaposed with the term 'management' means 'De facto control of actual management or policy decisions that may be or are in reality taken.

67. As far as the present case is concerned, this Tribunal points out that, the Appellant's Managing Director was also a Director of the first Respondent Company. Moreover, the Director nominated by the Appellant, in fact, advises the Appellant / Company in matters relating to the first Respondent / Company. To put it precisely, the part played by the two nominee Directors clearly point out that the

first Respondent / Company acts on the advice, direction and instructions of the Appellant in its normal business affairs relating to the first Respondent. As such, this Tribunal is of the earnest opinion that the Appellant 'squarely comes within the ambit of related party as per clause (f) of Sub Section 24 of section 5 of the Code.

68. The other important fact that cannot be brushed aside is that that the First Respondent had reported the transactions between the Appellant and it, in their 'Annual Reports' and 'Audited Financial Statements'. Besides this, as perceived from the 'Articles of Association' and the requisite majority needed for taking important business decisions, the conduct of the business of the First Respondent, the establishment of First Respondent Company, Company Appeal (AT)(CH) (Ins.) No.54 of 2021 P a g e 41 | 43 all considered in an integral and cumulative manner will exhibit the noteworthy influence of the Appellant in issues concerning the First Respondent. In this manner also, the First Respondent is treating the Appellant as 'Related Party'.

69. The Appellant / Company has a control in regard to the arrangement of 'Board of Directors' of the First Respondent / Company and on this score also, the Appellant comes within the purview of 'related party' as per clause L of sub section 24 of 5 of the 'I&B' Code, as opined by this Tribunal.

70. It is to be pointed out that the 'Articles of Association' point out that action relating to significant matters ought to be taken only by affirmative vote of three or more Directors and in the qualified majority, minimum one Director is to be nominated for inclusion by the APTPCL.

71. Be that as it may, in the light of the detailed upshot, and considering the facts and circumstances of the instant case in a conspectus fashion and keeping in mind the ingredients of the 'Articles of Association' to the effect that the nominee Directors have a vital influence in regard to the working of the 'Corporate Debtor', this Tribunal unhesitatingly comes to a consequent conclusion that the Appellant is a 'related party' and the view arrived at by the 'Resolution Professional' to include the Appellant/TSTPCL as member of the 'Committee of Creditors' is clearly unsustainable in the eye of law. In this regard, this Tribunal concurs with a view arrived at by the 'Adjudicating Authority' in the 'impugned order' that the Appellant is a 'related party'. Further, the direction issued by the 'Adjudicating Authority' in the Company Appeal (AT)(CH) (Ins.) No.54 of 2021 P a g e 42 | 43 impugned order that the 'Resolution Professional' shall reconstitute the 'Committee of Creditors' (CoC) treating the Appellant as 'related party' is free from legal errors. Viewed in that perspective, the instant 'Appeal' fails. Result In fine, the Company Appeal (AT) (CH) (Insolvency) No.54 of 2021 is dismissed. No Costs. All connected Interlocutory Applications stand closed.

[Justice M. Venugopal] Acting Chairperson [Kanthi Narahari] Member (T) 21st September, 2021  
Shashi Company Appeal (AT)(CH) (Ins.) No.54 of 2021 P a g e 43 | 43