

IN THE NATIONAL COMPANY LAW TRIBUNAL
INDORE SPECIAL BENCH
COURT NO. 1

ITEM No.202

IA/9(MP)2023

in

TP 258 of 2019 [CP(IB) 111 of 2018]

Proceedings under Section 60(5) r.w. Rule 11

IN THE MATTER OF:

Entegra Ltd

.....Applicant

V/s

Shree Maheshwar Hydel Power Corporation Ltd & Ors

.....Respondent

Order delivered on 21/09/2023

Coram:

Mahendra Khandelwal, Hon'ble Member(J)

Kaushalendra Kumar Singh, Hon'ble Member(T)

PRESENT:

For the Applicant :

For the Respondent :

ORDER

The case is fixed for pronouncement of order.

The order is pronounced in open Court vide separate sheet.

List the main matter **TP 258 of 2019 [CP(IB) 111 of 2018]** on **20.10.2023**.

-Sd/-

KAUSHALENDRA KUMAR SINGH
MEMBER (TECHNICAL)

Narendra S. Tomar/Stenographer

-Sd/-

MAHENDRA KHANDELWAL
MEMBER (JUDICIAL)

BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
BENCH AT INDORE

IA/9(MP)2023
in
TP 258 of 2019 [CP (IB)111 of 2018]

IA/9(MP)2023

[An application filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 r.w. Rule 11 of the National Company Law Tribunal Rules, 2016]

In the matter of:

Entegra Limited **Applicant**

Versus

Shree Maheshwar Hydel Power Corporation Limited

Through its Resolution Professional & Ors. **Respondent**

Memo of Parties

Entegra Limited

Niranjan 99 Marine Drive
Mumbai-400002

.....**Applicant**

Versus

Shree Maheshwar Hydel Power Corporation Limited

Through its Resolution Professional Mr. Apoorv Sarvaria Abhayanchal Parisar, Post Mandaleshwar Mandaleshwar-451221

.....**Respondent No.1**

Mr. Apoorv Sarvaria

Interim Resolution Professional/ Resolution Professional of Shree Maheshwar Hydel Power Corporation Limited
Suite No.1, 19 Park Area Karol Bagh Delhi, Central, National Capital Territory of Delhi -110005

.....**Respondent No.2**

Committee of Creditors

of Shree Maheshwar Hydel Power Corporation Limited Through Lead Member of CoC Power Finance Corporation Limited Urjanidhi, 1, Barakhamba Lane Connaught Place, New Delhi-110001

.....**Respondent No.3**

Power Finance Corporation Limited

Urjanidhi, 1, Barakhamba Lane
Connaught Place New Delhi-110001

.....**Respondent No.4**

Rural Electrification Corporation Limited

Core 4, 7 Lodhi Road
New Delhi- 110003

.....**Respondent No.5**

IFCI Limited

IFCI Tower, 61, Nehru Place
New Delhi-110019

.....**Respondent No.6**

Housing and Urban Development

Corporation Limited

HUDCO Bhawan, India Habitat Centre
Lodhi Road, New Delhi-110003

.....**Respondent No.7**

Coram: Mahendra Khandelwal, Hon'ble Member (J)

Kaushalendra Kumar Singh, Hon'ble Member (T)

Appearance:

For the Applicant : Ld. Adv. Mr. Abhishek Puri (**IA 9/2023**)
Ld. Adv. Ms. Kirti Patwardhan (**IA 41/2023**)

For the Ex-IRP/RP : Ld. Mr. Ashish Verma

For the Respondent : Ld. Sr. Adv. Mr. Ramji Srinivasan a.w.
Ld. Adv. Mr. Deepak Khurana (R-3 & 4) (**IA 9/2023**)

Order Reserved On 17.08.2023
Order Pronounced On 21.09.2023

ORDER

1. The present Interlocutory Application No. 9/2023 is filed under Section 60(5) of Insolvency and Bankruptcy Code, 2016 (**'Code'**) read with Rule 11 of NCLT Rules 2016 by Entegra Limited through its authorized representative Mr. Punit Jain seeking the direction to remove the respondent No. 2 Mr. Apoorv Sarvaria as Resolution Professional of respondent No. 1 Company Shri Maheshwar Hydrel Power Corporation Limited and to re-constitute the Committee of Creditors (CoC) of respondent No. 1 Company by inclusion of the claim of the applicant i.e. Entegra Limited and by removal of the

respondent Nos. 4 to 7 i.e. Power Finance Corporation Limited (PFC), Rural Electrification Corporation Limited (RECL), IFCI Limited (IFCI), Housing and Urban Corporation Development Limited (HUDCO) having voting share of 44.62%, 14.81%, 1.17% & 18.86% respectively from the CoC. The other prayers are for declaring that all resolutions passed by the illegally and wrongly constituted CoC stands non-est in law and also for issuing notices of meeting of CoC to all participants including the applicant etc.

2. The matter relates to the CIRP proceedings initiated on admission of Section 7 petition filed by the respondent No. 4 Power Finance Corporation Limited (PFC) against the respondent No. 1 Company Shri Maheshwar Hydel Power Corporation Limited (SMHPCL) which was admitted into CIRP by the Adjudicating Authority vide order dated 27.09.2022. The respondent No. 2 Mr. Apoorv Sarvaria was appointed then as Interim Resolution Professional (IRP) by this Adjudicating Authority vide order dated 30.09.2022.

3. On perusal of the record, it is noted that the issue raised in the application was considered by the Adjudicating Authority during the course of hearing on 03.03.2023 and following that vide order dated 17.03.2023 the matter was listed for further consideration on 11.05.2023 while directing the RP to keep on hold the CIRP of the Corporate Debtor till then. The relevant part of the said order is reproduced here as under:-

“From the order dated 17.03.2023

(4) We have heard the learned PCS for the applicant, IRP- Mr. Apoorv Sarvaria and learned counsel for the respondent-COC. On perusal of the records and proceedings, it is noted that PFC, HUDCO, REC etc. are the lenders of the Corporate Debtor i.e. respondent No.1 company. Out of them, PFC was actually controlling the affairs of the Corporate Debtor since 2005. Further, there is a report from ROC, Gwalior, suggesting that the affairs of the Corporate Debtor were being mismanaged by the PFC while in control. At this stage, we don't wish to enter into that controversy because the appeal against the admission of the Corporate Debtor in CIRP under Section 7 of the IBC is still pending before the Hon'ble NCLAT.

(5) *Meantime, the IRP constituted the CoC, making PFC, HUDCO REC etc. as the Members of the Committee of Creditors. The applicant alleged that they are related parties of the Corporate Debtor and hence cannot become CoC Members.*

As against this, the PFC and other creditors submitted that they cannot be termed to be the related parties of the Corporate Debtor in view of the first proviso of Section 21(2) of the Insolvency & Bankruptcy Code, 2016.

(6) *We sincerely feel that in view of the complex facts presented before us by both the sides, we have to decide whether provisions of first proviso to Section 21(2) of the Code would apply or second proviso to Section 21(2) of the Code would apply to the case in hand. It requires detailed analysis of facts and law.*

(7) *Hence, we fix the matter for further consideration on 11.05.2023 directing the RP to keep on hold the CIRP of the Corporate Debtor till then.”*

4. The said order dated 17.03.2023 was however, appealed by the CoC (through PFC) and others before the National Company Law Appellate Tribunal in Company Appeal (AT) (INS) No. 480 of 2023. The Hon'ble NCLAT vide its order dated 17.07.2023 quashed that order only to the extent the direction issued to RP to keep on hold the CIRP of the Corporate Debtor till next date and further directed the Adjudicating Authority to decide the application on 20.07.2023, the date on which the matter was already listed for hearing. It was also mentioned in that order, that in case it was found difficult to decide the same on that date due to some reasons, then it shall decide the same within a period of one week thereafter. For ready reference the content of the said order dated 17.07.2023 is reproduced hereunder:-

“From the order dated 17.07.2023

(1) *This appeal is directed against the order dated 17th March, 2023 passed by the ‘National Company Law Tribunal, Indore Bench’ (hereinafter referred as to ‘the Adjudicating Authority’) by which an application bearing IA No. 9 of 2023 filed in TP No. 258 of 2019 CP(IB)*

No. 111 of 2018 titled as 'Entegra Limited vs. Shree Maheshwar Hydel Power Corporation Limited and Ors' under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as to 'The Code') r/w Rule 11 of NCLT Rules, 2016 through the authorised representative of the Applicant Company, to remove Respondent No.2- Apoorv Sarvaria as Resolution Professional (RP) of the Corporate Debtor and to reconstitute the Committee of Creditors (CoC) of Respondent No.1 Company by including the claim of the Applicant and by removal of Respondent Nos. 4 to 7 from the CoC, has been kept for hearing on the issue to decide as to whether provisions of first proviso to Section 21(2) of the Code would apply or second proviso to Section 21(2) of the Code would apply to the case in hand and, thereafter, directed the RP to keep on hold the CIRP of the Corporate Debtor till then.

(2) Shorn of unnecessary details, 'M/s. Power Finance Corporation Ltd' (Financial Creditor) filed an application on 16.02.2018 before the Adjudicating Authority, under Section 7 of the Code against the Corporate Debtor for resolution of a debt now allegedly running into more than Rs. 12000 Crore which was admitted to CIRP vide order dated 27.09.2022. The admission order has been challenged by Entegra Ltd by way of an appeal bearing Company Appeal (AT) (Ins) No. 1287 & 1291 of 2022. In the said appeal, on 21.10.2022, this Tribunal had passed the following order:

“Heard Learned Sr. Counsel-Mr. Mahesh Jethmalani appearing for the Appellant, Learned Sr. Counsel-Mr. Ramji Srinivasan appearing for Respondent No. 2 and Learned Counsel appearing for the IRP.

2. Issue notice. Respondents represented through Learned Counsels accept notice.

3. Let Reply-Affidavits be filed within two weeks. Rejoinder, if any, may be filed within two weeks, thereafter.

List this Appeal on 23rd November, 2022. Any action in pursuance of the Impugned Order dated 27.09.2022 shall abide by the result of the Appeal.

(3) While this appeal was pending, the Respondent (Entegra Ltd.) filed an application bearing IA No. 9 of 2023 before the Adjudicating Authority

in which the prayer was made already mentioned in the earlier part of this order. However, in the said application, the Applicant did not mention the pendency of the appeal against the order of admission i.e. Company Appeal (AT) (Ins) No. 1287 & 1291 of 2022 and also the order dated 21.10.2022 passed by this Tribunal by which this Tribunal had practically denied to grant any stay and rather observed that “Any action in pursuance of the Impugned Order dated 27.09.2022 shall abide by the result of the Appeal”.

(4) In the impugned order, the Adjudicating Authority, without referring to the order dated 21.10.2022, directed the RP to keep on hold the CIRP of the Corporate Debtor till then (next date of hearing). This Appeal, against the impugned order, was filed on 10.04.2023 and on 11.05.2023, the case was adjourned to 19.05.2023 by the Adjudicating Authority and on 19.05.2023, the Adjudicating Authority passed the following order:

“IA/9(MP)2023 & IA/47(MP)2023 IA/9(MP)2023

Learned counsel, Mr. Abhishek Puri appears for the applicant and the Learned counsel, Mr. Deepak Khurana appears for the CoC.

This is the matter in which vide order dated 17.03.2023 of this Adjudicating Authority, the RP was directed not to hold the CIRP till the next date of hearing. It is noted from the record that on 11.05.2023, another related IA 135 of 2023 had come up before us whereby the RP had submitted that on account of the order dated 17.03.2023, the CoC has stopped payment of security services. Therefore vide our order dated 11.05.2023 in that IA, we clarified that no such restrictions were imposed vide order dated 17.05.2023 as regards allowing any such expenses. We had accordingly directed the CoC to consider the proposal of the RP to ratify the expenses required for continuing the security.

The matter for IA 9/2023 was taken up today. In view of the fact that the CIRP has been kept on hold, this application as regards the objection on constitution of the CoC need to be heard at the earliest so that decision could be taken up for withdrawal of the Stay and CIRP could proceed ahead. However, when we wanted to hear the matter today, the learned counsel for the CoC raised objection saying that they have already appealed that order dated 17.03.2023 before the Hon'ble NCLAT whereby they have challenged certain observations as well as the directions of this Adjudicating Authority to RP not to hold the CIRP. We made it clear that direction to RP not to hold the CIRP was given till next date of hearing only; and as such now the matter need to be heard on merit so that a decision could be taken on the issue stated in that order dated 17.03.2023.

However, the Learned counsel of the CoC kept on insisting that the matter should not be taken up today. The learned counsel for the applicant objected for giving any adjournment. In the circumstances, the matter is finally adjourned.

The counsels to file synopsis for the convenience of the bench and upload the same on e-portal before the next date of hearing.

Interim relief shall continue till the next date of hearing. List both the applications i.e., IA/9 of 2023 and IA/47 of 2023 for hearing on 09.06.2023.”

(5) Thereafter, the case has been adjourned from time to time i.e., 19.05.2023 to 09.06.2023, 13.07.2023, 14.07.2023 and it is now fixed for hearing on 20th July, 2023 with interim order to continue.

(6) Counsel for the Appellant has vehemently argued that not only the Respondent/Applicant is guilty of concealment of facts before the Adjudicating Authority but also the Adjudicating Authority has committed a patent error in staying the CIRP proceedings despite the fact that the

proceedings were not stayed by this Tribunal at the time when the admission order was challenged. It is sought to be argued that it is not only the case of approaching the court with unclean hand but also the case of judicial indiscipline on the part of the Adjudicating Authority. In order to substantiate his arguments, he has referred to the case set up by the Respondent/Applicant in their appeal i.e. Appeal against the admission order, in para 8.6 it is averred that "Whether the Member (Judicial) of NCLT, Ahmedabad vide order dated 08.10.2021 and the Member (Judicial) of Special Bench of NCLT, Kolkata vide order dated 27.09.2022 ought to have rejected the Petition filed U/s 7 of the Code ought to have rejected the IBC petition filed by PFC on the ground that PFC is clearly not a "Financial Creditor" and rather was admittedly a "related party"/ Holding Company of Respondent No.1 at the time of filing the present Insolvency Petition and even thereafter?"

(7) *He has also referred to Ground GGG of the grounds of appeal, which read as under:*

"BECAUSE the NCLT failed to appreciate that it is an admitted position on the basis of the observations made by RoC, Gwalior, the NCLT and Hon'ble NCLAT in proceedings under Section 241, 242 and 243 that the Respondent No.2 was in control of the Respondent No. 1, the Respondent No. 2 becomes a corporate applicant as defined under Section 5(5)(d) of IBC 2016 as "a person who has the control, and supervision over the Financial affairs of the corporate debtor" and a 'related party' under Section 5(24) of IBC 2016 which defines it as "any person who controls more than 20% in the corporate debtor on account of ownership or a voting agreement". Section 2(23) of IBC, 2016 which defines 'person' includes 'a company' under Section 2(23)(c). Therefore, the only manner in which the Respondent No. 1 could have been to put to insolvency is by filing self-insolvency under Section 10' of the IBC and not under Section 7. This aspect has not been analysed by the Hon'ble NCLT. It is submitted that the time when Section 7 Petition

was filed, the Respondent No. 2 was a 'related party' and a 'corporate applicant' under the framework of IBC, hence no petition could have been filed by the Respondent No.2.”

(8) *He has then referred to the application for stay which is filed along with main appeal against the order of admission and has referred to para 8 (a) which read as under:*

“8. The present Application, if not allowed, will cause grave and irreparable loss to the Applicant as also to the Project in as much as;-

(a) Despite the Respondent No.2 having mismanaged the affairs including the financial affairs of the Respondent No.1 company, having usurped control of the Company from the Appellant illegally, and having led to the situation where on account of their own default in management of the Project and the Company, no impact would happen to the status of Respondent No.2 and they will call the shots and dominate the CIRP, and, the Appellants may become ineligible under Section 29A of the Code.”

(9) *He has also referred to prayer made in the application for stay which is contained in para 14(c). The said prayer is as under:*

“14(c) Pending of hearing and final disposal of the Appeal, constitution of the Committee of Creditors under Section 21 of the Insolvency and bankruptcy Code 2016 be stayed.”

(10) *Counsel for the Appellant has then referred to his reply filed to the Application bearing IA No. 9 of 2023 before the Adjudicating Authority, the averment made in para 5 of the said reply, which read as under:*

“5. It is submitted that by making the aforesaid allegations in the present Application, the Applicant is seeking to challenge the admission order passed by this Tribunal, which is not only impermissible in law, but also amounts to gross abuse of process & wastage of precious judicial time. It is pertinent to submit that

on these very grounds as raised in the present Application, the Applicant has in fact challenged the admission order passed by this Tribunal before the Hon'ble NCLAT, by filing an Appeal registered as Company Appeal (AT) (Insolvency) No. 1287 & 1291 of 2022. In the present Application, the Applicant has not only concealed filing of the said Appeal, but has also concealed that in the said Appeal, basis the very same grounds as the present Application, the Applicant had sought an interim stay on constitution of the CoC [Prayer (c) of the said Application]. It is an admitted position that the Hon'ble NCLAT has not granted any stay and vide order dated 21.10.2022 has ordered as follows: "Any action in pursuance of the Impugned Order dated 27.09.2022 shall abide by the result of the Appeal. " The present Application is thus filed on concealment of vital facts, without disclosing the fact that the Applicant has challenged the admission orders before the Hon'ble NCLAT. After failing to secure any interim order from the Hon'ble NCLAT, the Applicant has filed the present Application on the very same grounds as raised before the Hon'ble NCLAT. This is a classic case of defaulting promoters/ex-management seeking to embroil the lenders in litigation and to thwart the CIRP of the CD by filing frivolous Applications and delaying the resolution process. Such an attempt must be put to an end right at the inception."

(11) It is submitted by Counsel for the Appellant that despite the fact that this Tribunal is already seized of the issue involved in regard to applicability of Section 21 of the Code which has been highlighted in the grounds of appeal and in the reply to the application, the Appellant categorically averred that not only the appeal against the admission order is pending before this Tribunal but also stay prayed for with the application, has not been categorically granted rather it has been ordered that "Any action in pursuance of the Impugned Order dated 27.09.2022 shall abide by the result of the Appeal" but despite that the Adjudicating Authority did not refer to the said order in the impugned order and

decided to deliberate on the issue of the applicability of Section 21(1) & 21(2) of the Code and directed the RP to keep on hold the CIRP of the Corporate Debtor till then, which is stated to be against the tenets of judicial discipline on the part of the Adjudicating Authority. He has, thus, prayed that the impugned order much less the order by which the RP has been directed to keep on hold the CIRP proceedings may be set aside.

(12) In response, Counsel for the Respondent No.1/Applicant has admitted that though it has not categorically mentioned in the application bearing IA No. 9 of 2023 filed before the Adjudicating Authority about the order passed by this Tribunal in respect of stay or even the pendency of the appeal against the admission order but that was not deliberate on the part of the Applicant because the application which has been filed is about the subsequently events in respect of the constitution of the CoC which is a step next to be taken by the RP after the order of admission. It is further submitted that the Applicant has not overreached the Court by filing the said application because that is the only Forum available to the Applicant for the purpose of redressal of his grievance in respect of the situation arising therein and all applications could not have been filed before this Tribunal.

(13) Counsel for Respondent No.1/Applicant has also argued that it is not an absolute order passed by the Adjudicating Authority on 17.03.2023 because the said order was further diluted on 19.05.2023 to the extent that the RP may make the payment of security of the Corporate Debtor. He has further argued that issue of Section 21 of the Code could not have been an issue in the Appeal which has been filed against the order of admission and could have been raised by way of separate application which has rightly been done by the Respondent. He has further argued that in any case, the main application is listed on 20.07.2023 before the Adjudicating Authority 'for argument' and therefore, instead of passing any order at this stage in respect of the impugned order, it can be deferred till the decision is taken by the Adjudicating Authority, who may be directed to decide the application on same day which has already been fixed for hearing.

(14) *We have heard counsel for the parties and perused the record with their able assistance.*

(15) *The issue involved in this case travels in a narrow compass (i) as to whether the Adjudicating Authority has committed an act of Judicial Indiscipline in not taking into consideration the order passed by this Tribunal while passing the order of stay in the impugned order? (ii) as to whether the Respondent/Applicant is guilty of concealment of facts in respect of pendency of appeal against the order of admission and the order passed by this Tribunal on 21.10.2022 by which the proceedings in respect of CIRP has specifically been not stayed and brought to the notice to the Tribunal while pursuing the application in question?*

(16) *Since both the issues are inter-connected, therefore, we will decide both the issues together. The facts narrated hereinabove are not in dispute because the facts are borne out from the record itself. Therefore, we are only required to look into the fact as to whether there is a concealment on the part of the Respondent/Applicant in not bringing to the notice of the Adjudicating Authority, in the application bearing IA No. 9 of 2023, about pendency of the appeal against the order of admission as well as the order passed therein by this Tribunal on 21.10.2022. In our considered opinion, keeping in view the decision of Hon'ble Supreme Court rendered in the case of 'Amar Singh Vs. Union of India' (2011) 7 SCC 69 decided on 11.05.2011, it is an act of concealment of fact on the part of the Respondent because the Hon'ble Supreme Court has time and again held that a Litigant, when comes to the court has to bring all the facts to the notice of the Court and if some facts which are relevant, are concealed then the Litigant is guilty of concealment of facts.*

(17) *Having said so, the next question is about the validity of the impugned order in respect of the stay granted by the Adjudicating Authority directing the RP to keep on hold the CIRP of the Corporate Debtor till the next date of hearing despite the fact that this Tribunal did not grant any stay in the appeal which has been filed against the order*

of admission and had passed categoric order that “Any action in pursuance of the Impugned Order dated 27.09.2022 shall abide by the result of the Appeal”.

(18) In our considered opinion, the word used by this Tribunal that “Any Action” has a wide connotation as it includes any order to be passed in future either by this Tribunal or by the Adjudicating Authority to take into consideration the order passed by this Tribunal otherwise the order dated 21.10.2022 would become otiose.

(19) In view of the aforesaid discussions, having observed that both the ‘Applicant’ and the ‘Adjudicating Authority’ have committed an error at the time when the impugned order was passed, firstly at the instance of the Respondent, concealment of the order passed by this Tribunal on 21.10.2022 and secondly on the part of the Adjudicating Authority while not referring to that order at all in its impugned order though it has been brought to its notice in the reply to the application and only mentioned that an appeal against the order of admission is pending in this Tribunal. Therefore, in such circumstances, the present appeal succeeds and the order passed by the Adjudicating Authority 17.03.2023 is hereby quashed only to the extent that “directed the RP to keep on hold the CIRP of the Corporate Debtor till then”. Since we have been told that the application bearing IA No. 9 of 2023 is now listed for hearing before the Adjudicating Authority on 20.07.2023, therefore, we direct the Adjudicating Authority to decide the same on the date already fixed and in case it is found difficult to decide the same on that date due to some reasons, it shall decide the same within a period of one week thereafter. No order as to costs.”

5. However, following that on 20.07.2023 and thereafter on 28.07.2023, the matter could not be taken up due to paucity of time. The Indore Bench runs for two days only in a week. Thereafter, detailed hearings were made for 4 days on 03.08.2023, 04.08.2023, 11.08.2023 and 17.08.2023. The learned Senior Counsel Mr. Ramji Srinivasan alongwith learned advocate Mr. Deepak

Khurana appeared for respondent No. 3 (CoC) and respondent No. 4 (RFC) whereas learned advocate Mr. Abhishek Puri appeared for the applicant (Entegra Limited). The learned Senior Counsel Mr. Ramji Srinivasan referred the order dated 17.07.2023 of the Hon'ble NCLAT and read the various paras in the order as a whole and took the plea that keeping in view the observation made by the Hon'ble NCLAT in that order, the Adjudicating Authority cannot proceed with in deciding the present application as the issues under challenge, particularly on removal of R-4 to R-7 from the CoC, based on the same ground on which an appeal is filed by the applicant before the Hon'ble NCLAT challenging the admission of Section 7 petition as well as seeking for interim relief for staying the constitution of the CoC on the ground of R-4 to R-7 being related party. The stay was not granted and the appeal is still pending for adjudication. The learned Senior Counsel also repeatedly emphasised the content of Para 15 to 19 of the said order wherein the Hon'ble NCLAT had observed that both the "Applicant" and "Adjudicating Authority" have committed an error at the time when the impugned order dated 17.03.2023 was passed, firstly at the instance of the respondent having concealed the order passed by the Hon'ble NCLAT on 21.10.2022 and secondly on the part of the Adjudicating Authority while not referring to that order at all in the said impugned order though that was brought to its notice in the reply to the application and thereby took the plea that any attempt to hear the mater on merit would mean that the "Adjudicating Authority" would be again violating the direction of the Hon'ble NCLAT.

The learned Senior Counsel Mr. Ramji Srinivasan repeatedly emphasised that the applicant has concealed vital facts while filing the present application. In the context, he submitted that the applicant has failed to disclose the fact of challenging the admission order dated 27.09.2022 wherein one of the ground taken (GGG) is based on the allegation that respondent No. 4 (PFC) is a related party. The learned Senior Counsel also emphasised that in the context of that appeal before the Hon'ble NCLAT, the applicant had also filed an application seeking for stay of the constitution of the CoC, however, no such stay has been given and this fact has also not been mentioned in the application. The

learned Senior Counsel has also pointed out that copy of appeal filed by applicant against the admission order alongwith the application for stay before the Hon'ble NCLAT and the order dated 21.10.2022 passed in the said appeal has been enclosed as Annexure A to the reply filed by the respondent No. 3 (CoC) and respondent No. 4 (PFC) to this present application. The learned Senior Counsel also referred to the decision of Hon'ble Supreme Court in the case of "Amar Singh Vs. Union of India & Others" (2011) 7 SCC 69 decided on 11.05.2011 in support of his plea that the application deserves to be dismissed for the reasons of concealment of vital facts alone.

6. The learned counsel for the applicant, however, submitted that vide aforesaid order dated 17.07.2023, the Hon'ble NCLAT had quashed the NCLT's order dated 17.03.2023 to the extent of direction given to RP to keep on hold the CIRP till next date only, and had further directed this Adjudicating Authority to decide the application on the date already fixed (20.07.2023) and thereby pleaded for hearing the entire matter on merit. In the context, he referred certain facts of the case. The relevant facts, as highlighted by the learned counsel and/or noted from the records are summarised hereunder:

(i) The applicant (Entegra Limited) is the original promotor of the respondent No. 1 company (SMHPCL) which was incorporated in the year 1993 as an SPV to implement Maheshwar Hydel Project on the river Narmada in the State of Madhya Pradesh.

(ii) Respondent No. 4 (PFC) is the lead lender of the consortium lenders of the respondent No. 1 company.

(iii) The respondent No. 1 company had taken the loan from various financial institutions and the consortium of lenders.

(iv) The respondent company nevertheless faced a deficit of funds and was in financial difficulty. At that stage in the year 2005 the respondent No. 4 alongwith other lenders took over the Management of the respondent company as a precondition for revalidating the earlier loan and to further bring in the required funds. This was done by carrying

out required amendments to the Articles of Associations whereby the control of the respondent No. 1 company was shifted to “Management Team” which consisted of the Chairman, Managing Director and Director (Finance), all of whom were appointed by the respondent No.4.

(vi) In the year of 2016, the respondent No. 4, in the capacity of security agent of all the lenders, had invoked the shares pledged by the applicant/promoter and also got a part of the debt converted into the equity.

(vii) The RoC Gwalior in its report dated 23.09.2016 under Section 206 of the Companies Act had held that the respondent No. 4 alongwith other lenders had taken control of the management in the year 2005 as evident from the changes in the Article of Associations.

(viii) Following that respondent No. 4 had filed a company petition under Section 241-242 of the Companies Act, 2013 and in that context the NCLT vide its order dated 15.06.2017 (CP No. 15 of 2007) had held that respondent No. 4 was in control of the respondent company. The finding was also confirmed by the Hon’ble NCLAT vide its judgment dated 12.03.2018 [In Company Appeal (AT) 237 of 2017]. The order of the NCLAT was also confirmed by the Hon’ble Supreme Court in its order dated 18.05.2018 (Civil Appeal No. 5028/2018).

(ix) The respondent company has been admitted under the CIRP on an application filed by the respondent No. 4 under Section 7 of IBC vide Adjudicating Authority’s order dated 27.09.2022.

On a query as to while filing of an appeal against the admission order, the applicant has directly or indirectly raised the issue of exclusion of R-4 to R-7 from the CoC on the ground of they being related party, the learned counsel for the applicant submitted that the appeal has been filed before the Hon’ble NCLAT primarily challenging the admission order for CIRP under Section 7 of IBC on various grounds including the ground of their being a related party. In the context he referred to the provisions of Section 5 (24), clause (h), (j) &

(l). He also fairly conceded that the fact of filing the appeal against the admission order, and stay petition thereon as well as the order dated 21.10.2022 was not mentioned in the present application while seeking for removal of R-4 to R-7 from the CoC, but nevertheless that was inadvertent and also under the *bona fide* belief that the issue has arisen after subsequent action when the IRP constituted the Committee of Creditors. He also submitted that the issue before the Hon'ble NCLAT was for quashing the admission order and the application for seeking ad-interim *ex-parte* stay was filed in that context only seeking stay of the operation of the admission order dated 27.09.2022 as well as stay of the constitution of the Committee of Creditors.

7. We have taken note of the submissions made by the learned counsel from both the sides we have also referred to the relevant records of the present application. We have also taken note of the order dated 21.10.2022 of the Hon'ble NCLAT in respect of the appeal filed by the applicant against the admission order whereby the Hon'ble NCLAT in that matter had ordered for issue of notice and directed to file the reply/affidavit and rejoinder thereon by the respondent parties. We have also taken note of the direction of the Hon'ble NCLAT in that order saying that "Any action in pursuance of the impugned order dated 27.09.2022 shall abide by the result of the appeal". We have also taken note that the Hon'ble NCLAT have not granted any stay of the admission order dated 27.09.2022 and have also not stayed the formation of CoC. We have also taken note that the stay of constitution of Committee of Creditors under Section 21 was sought on an anticipation that R-4 to R-7 may enter into the CoC. However, the fact remains that at the time of filing the appeal as well as the stay petition before Hon'ble NCLAT, the CoC was not constituted by the IRP. As per Section 21 of the IBC, the IRP is under obligation to collate all the claims received against the Corporate Debtor and to constitute the Committee of Creditors which comprise of all Financial Creditors of the Corporate Debtor. The RP is also expected to examine the applicability of first and second proviso of sub-section 2 of Section 21 as regards exclusion/inclusion of any related party of the Corporate Debtor. The second proviso

thereof spells out categorically that if a Financial Creditor regulated by a financial sector regulator is found to be a related party of the Corporate Debtor solely on account of conversion or substitution of debt into equity shares then such Financial Creditor shall not be excluded from the CoC. The CIRP is a time bound process. It cannot be kept on suspension on the ground that the applicant has filed any appeal against the admission order. The Hon'ble NCLAT, in any case has made it clear that any action in pursuance of the impugned order dated 27.09.2022 shall abide by the result of the appeal. This means that in a situation where the admission order is reversed then all actions in the CIRP process shall become null & void but if that does not happen then the CIRP is to be conducted in the manner as provided under the Code. The various actions such as collation of claims, constitution of CoC, calling for publication of Form-G calling for expression of interest, obtaining resolution plan, consideration and approval of the resolution plan by the CoC, submission of the application by the RP for approval of the Resolution Plan before the Adjudicating Authority etc. all has to happen as a consequence of initiation of the CIRP. In the process in case of any grievance, the concern party can also approach to the Adjudicating Authority under the provision of Section 60(5) of the IBC. In the present application, the applicant/promoter has filed the application against the decision of the RP as regards constitution of the Committee. The challenge is on the ground that some of the lenders/financial institutions i.e. R-4 to R-7 are related party of the Corporate Debtor and, therefore, cannot be the Member as per the first proviso to sub-section 2 of Section 21 of the IBC.

We also note that the admission order dated 27.09.2022 has been challenged on various grounds. On perusal of the appeal memo filed by the applicant, before the Hon'ble NCLAT (copies placed on record in the reply of the respondent in the present petition), it is noted that the admission order has been challenged on number of grounds as detailed in para 9 clauses A, B.....Z, AA, BB, CC.....ZZ, AAA, BBB.....WWW. In one of the grounds in clause GGG it has challenged the admission order saying that the Hon'ble NCLT and Hon'ble NCLAT in the proceedings under Section 241-242 & 243 of the

Companies Act, 2013, that was filed by the respondent No. 4(PFC), have observed that the respondent No. 4 (PFC) was in control of respondent No. 1 company and thereby would fall under the definition of the related party under Section 5(24) of the IBC and thereby, it has taken a plea that respondent No. 4 (PFC) being a related party of the Corporate Debtor was not eligible to file Section 7 petition. On the very same ground that they have also challenged that the respondent No. 4 (PFC) would rather be a corporate applicant within the meaning of Section 5 (5) (d) of the IBC and, therefore, the insolvency application could have been filed by them under the provision of Section 10 of the IBC only and not under Section 7.

Thus, it is the matter of fact that applicant has also challenged the admission order on the ground of R-4 (PFC) being a related party also but then there are a number of other grounds on which the admission order has been challenged. As regards filing of application under Section 7 by any related party Financial Creditor is concerned, we find that there is no such bar in IBC and a related Financial Creditor as well can file the section 7 application. While saying so, we are not deciding this issue in the context on the ground taken by the applicant in its appeal, rather we are simply making an observation on the provisions of law. Therefore, whether the respondent No. 4(PFC) is related party or not, that would have no impact onto the initiation of CIRP. However, if they are found to be related party then the Committee of Creditors as constituted by the RP would not be in accordance with the provisions of Section 21 and, therefore, when such an application has been filed by the applicant, the issue requires consideration. We also note that in the order dated 17.03.2023 this Adjudicating Authority in para 5&6 thereof have categorically mentioned that the applicant had alleged that R-4 to R-7 i.e. (PFC, HUDCO, RECL & IFCI) etc. are related parties of the Corporate Debtor and in view of the complex facts as was presented by both the sides, the Adjudicating Authority have to decide whether provisions of first proviso to Section 21 (2) of the Code would apply or second proviso to Section 21(2) of the Code would apply in the facts of the case. The relevant para-No. 6 is reproduced hereunder with ready reference:-

“We sincerely feel that in view of the complex facts presented before us by both the sides, we have to decide whether provisions of first proviso to Section 21(2) of the Code would apply or second proviso to Section 21(2) of the Code would apply to the case in hand. It requires detailed analysis of facts and law.

8. The order dated 17.03.2023 has been quashed by the Hon’ble NCLAT vide its order dated 17.07.2023 to the extent of the direction given in para 7 of the order dated 17.03.2023 to the RP to keep on hold the CIRP of the Corporate debtor till then (next date of hearing i.e. 11.05.2023). Moreover, while quashing that part of the order, the Hon’ble NCLAT has also directed the Adjudicating Authority to decide the application i.e. present *IA No. 9 of 2023* on the date that was already fixed for hearing and/or within a period of one week thereafter. As such it is very clear that the observation as given in para no 6 of the order dated 17.03.2023 has not been interfered/ quashed. Relevant part of the Hon’ble NCLAT Order is once again reproduced:

“Therefore, in such circumstances, the present appeal succeeds and the order passed by the Adjudicating Authority 17.03.2023 is hereby quashed only to the extent that “directed the RP to keep on hold the CIRP of the Corporate Debtor till then”.

Since we have been told that the application bearing IA No. 9 of 2023 is now listed for hearing before the Adjudicating Authority on 20.07.2023, therefore, we direct the Adjudicating Authority to decide the same on the date already fixed and in case it is found difficult to decide the same on that date due to some reasons, it shall decide the same within a period of one week thereafter.”

In view of the abovementioned direction of the Hon’ble NCLAT, we are not inclined to accept the submission made by the Learned Senior Counsel Mr. Ramji Srinivasan that this Adjudicating Authority should not proceed in the mater to decide the issue on merit.

9. In view of the aforesaid, the Registry is directed to list the matter for hearing on merit on earliest possible date after two weeks. Since the constitution of the Bench has changed, therefore the matter is now to be listed before the Regular Bench.

-Sd-
KAUSHALENDRA KUMAR SINGH
MEMBER (TECHNICAL)

-Sd-
MAHENDRA KHANDELWAL
MEMBER (JUDICIAL)

Narendra S. Tomar/Stenographer