

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI**

Company Appeal (AT) (Insolvency) No. 1304 of 2023

[Arising out of Order dated 13.09.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench (Court-II) in IA(IB) No. 822/(KB)/2022 in CP(IB) No. 302/(KB)/2021]

In the matter of:

M/s. Rare Asset Reconstruction Ltd.

....Appellant

Vs.

Sh. Avishek Gupta

...Respondents

For Appellant:

Mr. Krishnendu Datta, Sr. Advocate, Mr. Gaurav Mitra, Sr. Advocate and Mr. Anurag Singh, Sr. Advocate with Ms. Renuka Iyer, Mr. Atul Sharma, Ms. Varsha Himatsingka, Advocates.

For Respondents:

Mr. Ramji Srinivasan, Senior Advocate with Ms. Pooja Mahajan, Ms. Shruti Pandey, Ms. Shreya Mahalwan, Ms. Namrata Saraogi, Mr. Kartik Pandey, Advocates for R-1 (RP).

Dr. Abhishek Manu Singhvi, Sr. Advocate and Mr. Abhinav Vasisht, Sr. Advocate with Mr. Raunak Dhillon, Ms. Madhavi Khanna and Mr. Nihaad Dewan, Mr. Amit Bhandari, Ms. Priya Singh, Ms. Surabhi Parikh, Mr. Jayesh Kharnawat, Advocates for JC Flowers.

Mr. Joy Saha, Sr. Advocate and Mr. Abhijeet Sinha, Sr. Advocate with Mr. Sidhartha Sharma, Mr. Arjun Asthana, Ms. Namrata Basu, Ms. Shalini Basu, Ms. Smita Poddar, Advocates for Shri Ram Multicom Pvt. Ltd.

Mr. Nalin Kohli, Ms. Nimisha, Mr. Anupm Prakash, Ms. Kirti Taluja, Advocates for NARCL. (I.A. No. 5357 of 2023)

JUDGMENT
(29th February, 2024)

Ashok Bhushan, J.

This Appeal by a Financial Creditor of the Corporate Debtor namely— ‘Sarga Hotel Private Limited’ has been filed challenging the order dated 13.09.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench (Court-II) in IA(IB) No. 822/(KB)/2022 which was filed by the Appellant praying for setting aside the decision of the Resolution Professional dated 30.04.2022 ousting the Appellant from the Committee of Creditors. By the impugned order, the Adjudicating Authority dismissed the IA No. 822 of 2022, aggrieved by which order, this Appeal has been filed.

2. Before we notice the respective contentions of the parties with respect to the impugned order in this Appeal, it is relevant to notice certain background facts and sequence of the events giving rise to this Appeal.

2.1. On 29.08.2018, ‘Srei Infrastructure Finance Limited’ (SIFL) sanctioned a rupee term loan of Rs.300 Crores to ‘Sarga Hotel Private Limited’ (Corporate Debtor). In the year 2019, SIFL transferred its entire lending, interest bearing and leasing business including the loan dated 29.08.2018 to ‘Srei Equipment Finance Limited’ (SEFL) vide a Business Transfer Agreement. On 12.08.2020, the Adjudicating Authority admitted an application under Section 9 against the Corporate Debtor filed by one ‘Universal International Creation Limited’. On 09.09.2020, SEFL entered into an Assignment Agreement with ‘Rare ARC’ (Appellant herein) to assign the loan dated 29.08.2018. Cut-off date in the Assignment Agreement was

defined as 12.08.2020 i.e. the date on which the Corporate Insolvency Resolution Process (CIRP) commenced against the Corporate Debtor.

2.2. On 09.09.2020 itself, the Appellant filed its claim in the CIRP of the Corporate Debtor relying on the assignment. The order dated 12.08.2020 initiating CIRP against the Corporate Debtor was set aside by the order dated 27.08.2021 passed by this Appellate Tribunal observing that the initiation was due to collusion between the Corporate Debtor and the Operational Creditor.

2.3. Yes Bank filed an application under Section 7 against the Corporate Debtor on which an order dated 11.02.2022 was passed by the Adjudicating Authority initiating CIRP against the Corporate Debtor. Avishek Gupta (Respondent herein) was appointed as the IRP who was confirmed as Resolution Professional. In response to the publication issued by the IRP, Appellant vide e-mail dated 24.02.2022 submitted its claim in Form C totalling to Rs.393465200. The Resolution Professional sent several e-mails to the Appellant requiring various information and documents pertaining to claim submitted by the Appellant.

2.4. On 30.04.2022, Resolution Professional by e-mail informed the Appellant that while its claim has been admitted as a financial debt, it shall not have any right of representation, participation or voting in the CoC as it is a related party. Appellant filed an IA No. 822 of 2022 challenging the decision of the Resolution Professional to classify Appellant as a related party and further sought directions from the Adjudicating Authority to direct the Resolution Professional to allow 'Rare ARC' to participate, represent and

vote in the capacity of financial creditor within the CoC of the Corporate Debtor.

2.5. Resolution Professional filed its Affidavit in reply to IA No.822 of 2022. Resolution Professional filed its first supplementary affidavit on 19.02.2022 placing on record additional facts and documents. Appellant filed its reply affidavit to the first supplementary affidavit on behalf of the Resolution Professional. Resolution Professional on 04.02.2022 filed second supplementary affidavit to place on record certain other facts and documents to which reply was filed by the Appellant.

2.6. It is also relevant to notice that the Reserve Bank of India superseded the board of management of SIFL and SEFL by order dated 08.10.2021 on a petition filed by the RBI under Section 227 and 239 of the Code. Insolvency Process commenced and one Mr. Rajneesh Sharma was appointed as the Administrator for conducting the CIRP of SIFL and SEFL. On 24.07.2022, the Administrator of SIFL/SEFL filed an avoidance application where the loan dated 29.08.2018 by SIFL in favour of the Corporate Debtor was classified as transaction amounting to fraudulent and wrongful trading under Section 66 of the Code. Administrator filed another application being IA No.77 of 2023 in the CIRP of the SIFL and SEFL wherein it apprised the NCLAT that the majority of funds Rs.25 Crores used to pay upfront consideration to SEFL in relation to the purported assignment was indirectly provided by SEFL itself. The Adjudicating Authority vide impugned order dated 13.09.2023 upheld the decision of the Resolution Professional dated 30.04.2022 ousting the Appellant from the CoC. The Appellant aggrieved by the order dated 13.09.2023 has come up in this Appeal.

3. We have heard Shri Krishnendu Datta, Learned Senior Counsel for the Appellant. Shri Ramji Srinivasan, Learned Senior Counsel for the Respondent No.1. Dr. Abhishek Manu Singhvi and Shri Abhinav Vashisht, Learned Senior Counsel for the JC Flowers who has been permitted to intervene in the Appeal. Shri Joy Saha, Learned Senior Counsel appeared for SRA who has also been permitted to intervene in the Appeal and Shri Nalin Kohli, Learned Counsel has appeared for NARCL, intervenor in the Appeal.

4. Shri Krishnendu Datta, Learned Senior Counsel for the Appellant submits that the Appellant is a bonafide ARC who has acquired the debt of the Corporate Debtor as per Section 5 of the SARFAESI Act and the Appellant is not covered in any of the categories of Section 5(24) (h),(i),(j),(l),(m) of the IBC. The Appellant is an independent ARC has no connection with SEFL or Corporate Debtor. Appellant has no control on the board of the Corporate Debtor or any subsidiary of the Corporate Debtor. There is no relation in *praesenti* of the Appellant with the Corporate Debtor. Disqualification under Section 21(2) applies in *praesenti* and Counsel for the Appellant has referred to ILC Report 2020 which stated that when a related party Financial Creditor assigns their debt to a third party in good faith, such third party should not be disqualified from participating, voting or being represented in a meeting of the CoC. It is submitted that the Resolution Professional in subsequent affidavit filed before the Adjudicating Authority has placed reliance on the avoidance application filed by the Administrator in CIRP of the SIFL and SEFL whereas avoidance application

was filed subsequent to e-mail dated 30.04.2022 and are not relevant for the present case. It is submitted that the decision of the Resolution Professional dated 30.04.2022 has to be considered on the reasons given in the order which reasons cannot be allowed to be supplemented by new reason which were not there in the e-mail dated 30.04.2022. It is submitted that the allegations in the avoidance application are only allegations which application have not yet been adjudicated by the Adjudicating Authority. No reliance can be placed on the said allegations. It is submitted that at the time when CIRP commenced against the Corporate Debtor i.e. 11.02.2022, SIFL and SEFL were already in CIRP since 08.10.2021. In any view of the matter by Resolution Plan approved on 11.08.2023 in CIRP of SIFL and SEFL, NARCL has been taken over the SIFL and SEFL. Resolution Professional never asked for any information from the Appellant regarding funding with respect to assignment dated 09.09.2020. Averments regarding funding of Rs.25 Crores by SIFL for payment towards consideration of assignment by Appellant need no consideration nor were before the Resolution Professional when he decided to oust the Appellant from the CoC. The Appellant is a bonafide Financial Creditor and ought to be in the CoC. SIFL and SEFL being in the CIRP since 08.10.2021, Kanoria family who claimed to be promoter of SIFL and SEFL as well as the Corporate Debtor is no more in control or beneficiary. It is submitted that the Resolution Professional in its affidavit has clearly stated that the ingredients of Section 5(24)(h)(i)(j)(l)(m) &(n) of the IBC are not met. Resolution Professional having stated in the Affidavit ingredients are not met and still wrongly held Appellant as a related party.

5. Learned Counsel for the Resolution Professional refuting the submissions of the Counsel for the Appellant submits that the shareholding structure of the Corporate Debtor and SEFL makes it clear that both the Corporate Debtor and SEFL were eventually held by Kanoria Foundation. Corporate Debtor in various transactions admitted SIFL is a related and connected party. The deep relationship between SEFL and Corporate Debtor had not been disputed by the Appellant, during the course of arguments before the Adjudicating Authority. The entire case before the Adjudicating Authority by the Appellant was that while SEFL may be related party to the Corporate Debtor, SEFL assigned the loan to Rare Trust which is controlled by Rare ARC as the trustee and that Rare ARC itself is not related to Corporate Debtor under Section 5(24)(h),(i),(j),(l) and (m) since it has no common shareholders/directors etc. with the Corporate Debtor. It is submitted that it is the duty of the Resolution Professional to ensure that no related party, directly or indirectly, has a representation on the CoC. Counsel for the Resolution Professional relying on the judgment of the Hon'ble Supreme Court in **“Phoenix ARC Pvt. Ltd. vs. Spade Financial Services Ltd. & Anr.- (2021) 3 SCC 475”** submits that the Hon'ble Supreme Court has held that not only those Financial Creditors that are related parties in *praesenti* would be debarred from the CoC, but those related party financial creditors that cease to the 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. Where the

assignment has been undertaken in bad faith, with the intention of circumventing the disability under Section 21(2) of the Code, the assignee must be treated as akin to a related party. It is submitted that in the present case assignment was made on 09.09.2020 i.e. during the first CIRP of the Corporate Debtor. The filing of the claim on same day i.e. 09.09.2020 in the CIRP by the Appellant clearly indicate that the assignment was made by SEFL to get tag of related party transaction removed with regard to loan in question. The facts and circumstances under which the assignment was made by SEFL to the Appellant indicate that the assignment was in bad faith and to participate in the CoC of the Corporate Debtor indirectly through assignee which could not have been done by SEFL directly which being related party to the Corporate Debtor. The Resolution Professional asked for relevant details regarding assignment and other facts from the Appellant, on being satisfied that the Appellant is akin to a related party, declared that it is not entitled to any voting right in the CoC. It is submitted that the source of funds for acquisition of loan by the Appellant was also result of round-tripped by SIFL/SEFL. It is submitted that in the avoidance application filed by the Administrator in the CIRP of the SEFL/SIFL, it was pleaded by Administrator that Rs.25 Crores was received by Appellant through SIFL to pay for assignment which fact has been brought before the Adjudicating Authority. The amount of Rs.25 Crores was round tripped by SEFL/SIFL itself using two connected shell companies, namely 'Predicate Consultants' and 'Ambrelo Ventures Private Limited' which details were brought before the Adjudicating Authority. The Adjudicating Authority has

after considering entire facts and circumstances of the case has rightly rejected the application filed by the Appellant.

6. Dr. Abhishek Manu Singhvi, Learned Senior Counsel appearing for JC Flowers Asset Reconstruction Pvt. Ltd., the member of the CoC supported the impugned order. It is submitted that the loan transaction between SIFL and the Corporate Debtor were transaction between entities controlled by Kanoria Foundation. Dr. Abhishek Manu Singhvi during his submission by producing a chart illustrated holding structure of the Corporate Debtor and related entities, he submits that both the SIFL and SEFL were ultimately controlled by Kanoria Foundation, a Private Trust whereas the Corporate Debtor- 'Sarga Hotel Private Limited' is also controlled by Shristi Infrastructure Development Corporation Limited which has 65% shareholding in 'Sarga Hotel Private Limited'. It is submitted that the loan dated 29.08.2018 was assigned by SEFL, a related party to the Corporate Debtor to Appellant- Rare ARC with fraudulent intent to vitiate proceedings under the Code. The Resolution Professional has rightly declared the assignee as related party. Assignment by SEFL to the Appellant was done after initiation of the first CIRP against the Corporate Debtor on 12.08.2020. It is further submitted that the acquisition of the loan dated 29.08.2018 by Appellant was indirectly funded by SIFL. Dr. A.M. Singhvi referring to materials on record indicate that in fact entire amount of Rs.45 Crore which was paid by the Appellant towards 15% security receipts in the Rare ARC 051 Trust was round tripped by SEFL through two connected entities namely— 'Predicate Consultants Pvt. Ltd.' and 'Ambrello Ventures Private

Limited'. It has referred to financial statements of Ambrello as available on the website of the Ministry of Corporate Affairs which indicate that the balance sheet for the F.Y. 2022 of Ambrello mentions 'Long Term Loan' and advances given to Rare ARC to the tune of Rs.44 Crores. It is further submitted that the source of funds used to fund the acquisition of the impugned loan have never been disclosed by Appellant- Rare ARC. In spite of it being pleaded before the Adjudicating Authority by the Resolution Professional that the assignment was also funded by SIFL and SEFL indirectly to the Appellant, no material was disclosed by the Appellant. Judgment of the Hon'ble Supreme Court in "**Phoenix ARC Pvt. Ltd.**" (supra) is fully attracted in the facts of the present case. The fact that the CIRP of SIFL/ SEFL commenced prior to the second CIRP on the Corporate Debtor would not affect the classification of Appellant- Rare ARC as a related party.

7. Shri Joy Saha, Learned Senior Counsel appeared for the Successful Resolution Applicant (SRA) has also refuted the submissions of the Counsel for the Appellant and submits that the SEFL/SIFL are related parties to the Corporate Debtor which fact cannot be disputed. The assignment of loan was made to the Appellant only by the related party, SEFL so that it may participate in the CIRP of the Corporate Debtor indirectly through the Appellant. It is submitted that the SIFL even after assignment fully control the Appellant by it being security receipt holder of 85%, Appellant being security receipt holder was only 15% in the ARC Trust. The provision of the Trust Deed indicates that even the Appellant can be replaced from the trust.

8. Shri Nalin Kohli, Learned Counsel appearing for the NARCL also supports the impugned order and submitted that the NARCL also contend that the SIFL and SEFL were related parties to the Corporate Debtor and assignment was made with intent to control the CIRP of the Corporate Debtor.

9. We have considered the submissions of the Counsel for the parties and perused the record.

10. The Appellant has filed its claim in the first CIRP of the Corporate Debtor on the strength of assignment dated 09.09.2020 which assignment was executed by SEFL assigning the Rupee Term Loan and other benefits to the Appellant. It is relevant to notice that the assignment dated 09.09.2020 was made during the pendency of the CIRP process against the Corporate Debtor which was initiated by order dated 12.08.2020 on an application under Section 9 filed by 'Universal International Creation Ltd.'. Agreement was entered between the SEFL and the Appellant as assignee on 09.09.2020 on which date CIRP against the Corporate Debtor was already commenced. Clause 1.1 of the assignment deals with 'definitions'. Sub-clause (g) of Clause 1.1 is as follows:-

*“(g) **Cut-off Date** means August 12, 2020, being the date with effect from which (including that day) all economic benefits pertaining to the loans including all realisations and recoveries, if any made on and after said date shall be for the benefit of the Assignee and shall be passed on * the Assignee.”*

11. Fixing cut-off date as 12.08.2020 is only with the intent to make assignment on the date when CIRP order was passed. It is further relevant to notice that on 09.09.2020 itself the claim was filed by the Appellant in the first CIRP of the Corporate Debtor. SEFL which was related party to the Corporate Debtor only for the purposes of filing of its claim in the CIRP of the Corporate Debtor gave assignment to the Appellant to participate in the CIRP of the Corporate Debtor. It is further relevant to notice that the SEFL received Rs.43.85 Crores as upfront payment from Appellant-Rare ARC in lieu of 15% security receipts in the Rare ARC 051 Trust and 15% security receipts were held by the Appellant. It is also relevant to notice that the first CIRP initiated against the Corporate Debtor set aside by this Appellate Tribunal vide its order dated 27.08.2021 in Company Appeal (AT) (Insolvency) No.800 of 2020. While setting aside the order of the Adjudicating Authority, allegation of collusion between the Operational Creditor and the Corporate Debtor was also taken note by this Appellate Tribunal. In paragraph 33 of the judgment, following was held:-

“33. In view of the submissions and arguments made by the Appellant and Respondents and a close perusal of documents submitted by the operational creditor and other parties lead us to the conclusion that the application u/s 9 was not submitted within limitation and it contained documents of doubtful origin which do not inspire confidence, and which formed the basis of admission order. The allegations of collusion between the Operational Creditor and the corporate debtor raise reasonable doubt. Documents filed to hold debt was due, or payable do

not raise confidence. Initiation of CIRP of a company which is a going concern, on the basis of a short defence note without a proper reply/defence called from the corporate debtor, and based on such documents attached with the admission application is certainly not proper and defeats the purpose and intent of the IBC in letter and spirit.”

12. Admittedly, the claim was filed by the Appellant in the second CIRP of the Corporate Debtor which claim was based on assignment dated 09.09.2020. After receipt of the claim by Appellant, there has been correspondences between Resolution Professional and the Appellant. After certain correspondences between the parties, the Resolution Professional issued an e-mail dated 30.04.2022 communicated to the Appellant i.e. assignee that the Appellant is akin to a related party and held that the Appellant shall have no voting of the CoC of the Corporate Debtor. It is useful to extract the sequence of the events and the reasons given by the Resolution Professional in its e-mail:-

“Dear Ma'am Sir,

This reference to the claim filed by Rare Asset Reconstruction Limited "Rare ARC) is in on Sarga Hotel Private Limited ("Corporate Debtor"/ "SHPL"), which is undergoing corporate insolvency resolution process under the provisions of the Insolvency and Bankruptcy Code, 2016 ("Code"/"IBC").

1. as the resolution professional ("RP") of the Corporate Debtor, have reviewed the claim form and supporting documents along with the clarifications/ additional information provided by Rare ARC. It is noted that Rare ARC has filed its claim in Form C, dated 24 February 2022, for a total amount of INR 393.46 Crores (as on 31 January 2022, together with further interest and charges at contractual rates), claiming as a financial creditor basis an assignment

agreement dated 9 September 2020 ("Assignment Agreement") entered between Rare ARC and SREI Equipment Finance Limited ("SEFL"), which is a wholly owned subsidiary of SREI Infrastructure Finance Limited.

After reviewing/ verifying the information, documents and clarifications provided in support of the claim form, I find that the claim of INR 393.46 Crores filed by Rare ARC is admissible as a financial debt under the provisions of the IBC.

As you are aware, as per Section 21 (2) of the IBC, the committee of creditors ("CoC") of the Corporate Debtor shall comprise all financial creditors of the Corporate Debtor. However, the first proviso to Section 21(2) excludes a financial creditor from having any right of representation, participation or voting in a meeting of the CoC, if it is a related party of the Corporate Debtor.

It is the duty of the RP to ensure that the exclusion under the first proviso to Section 21(2) of the Code is not allowed to be circumvented by related party financial creditors including by way of an assignment to gain a backdoor entry into the CoC. If such is the case, then the third-party assignee must be treated akin to a related party financial creditor and ought to be excluded from the CoC under the first proviso to Section 21(2) of the Code. These observations have been made in the Insolvency Law Committee Report of 2020 ("ILC Report 2020") and have been quoted with approval by the Hon'ble Supreme Court in *Phoenix Arc Private Limited v Spade Financial Services Limited & Ors.*, (2021) 3 SCC 475.

In the above backdrop, I have examined the circumstances and documents relating to the assignment made from SEFL to Rare ARC and note as follows -

On 12 August 2020, the Adjudicating Authority had passed an order ("Earlier

CIRP Admission Order") admitting an application filed under Section 9 of IBC by one Universal International Creation Limited ("UICL").

Within a month of the Earlier CIRP Admission Order, on 9 September 2020, SEFL and Rare ARC entered into the Assignment Agreement under which SEFL assigned to Rare ARC, in its capacity as trustee of Rare ARC 051 Trust, the loans disbursed to the Corporate Debtor under the Financing

Documents along with all rights, title and interest in the Financing Documents and underlying security etc.

While the Assignment Agreement was entered into on 9 September 2020, Clause 1.1 (g) of the Assignment Agreement defined the 'Cut-off Date' as 12 August 2020. Thus, for all practical purposes, the effective date of the assignment from SEFL to Rare ARC came to be 12 August 2020, which is the same as the date of the Earlier CIRP Admission Order.

The Earlier CIRP Admission Order was challenged, inter alia, by Rishima SA Investments LLC ("Rishima") before the Hon'ble National Company Law Appellate Tribunal ("NCLAT") alleging, inter alia, that the Section 9 application was a collusive proceeding

By an order dated 27 August 2021 in CA(AT) (Ins) No. 800 of 2020, the Hon'ble NCLAT set aside the Earlier CIRP Admission Order, nhservng that the Section 9 application filed by UICL contained documents of doubtful origin which did not inspire confidence and the allegations of collusion between the operational creditor and the Corporate Debtor raised reasonable doubt. With the setting aside of the Earlier CIRP Admission Order, the Corporate Debtor came out of CIRP

It is further noted that while SEFL, assigned the loan, it holds 85% of the security receipts ("SRs") of Rare ARC 051 Trust, while the remaining 15% are held by Rare ARC. Hence, 85% of beneficial interest in the Trust is owned by SEFL.

Based on a holistic consideration of the above facts, I am of the view that the assignment from SEFL to Rare ARC appears to be made in suspicious circumstances with effect from 12 August 2020, being the date when the Corporate Debtor was earlier admitted into CIRP. I have also examined the relationship between SEFL and the Corporate Debtor at the time when the assignment was made and, based on available information and documents, I have arrived at the conclusion that SEFL was a related party of the Corporate Debtor under Clauses (h), (i), (j), (1) and (m) of Section 5(24) of the Code, including since both SEFL and the Corporate Debtor are eventually owned, directly or indirectly, by the Kanoria Foundation whose ultimate beneficiaries are understood to be members of the Kanoria family.

This being the case, the assignment by SEFL to Rare ARC, right when the earlier CIRP of Corporate Debtor had started, appears to have been devised as a mechanism by SEFL (a related party financial creditor) to remove its label of a 'related party' so as to circumvent the restriction/ disability under the first proviso to Section 21(2) of the IBC. It appears that apprehending exclusion from the CoC as a related party financial creditor of the Corporate Debtor, SEFL used the contrivance of assigning its loans to Rare ARC 051 Trust as a purported third-party assignee, with effect from 12 August 2020, in the hope that Rare ARC would get a seat in the CoC. However, SEFL continued to retain interest in the loan as the holder of 85% of security receipts of Rare ARC 051 Trust.

In light of the above, based on the principles observed in the ILC Report 2020 and Phoenix v Spade, the assignee i.e., Rare ARC, should be treated akin to a related party financial creditor under the first proviso to Section 21(2) of the Code and be accordingly excluded from the CoC of the Corporate Debtor.

Therefore, I would like to inform you that while the claim of Rare ARC is being admitted as financial debt, Rare ARC shall not have any right of representation, participation or voting in the CoC of the Corporate Debtor in light of the first proviso to Section 21(2) of the IBC”

13. It was subsequent to receipt of the email dated 30.04.2022, IA was filed by the Appellant before the Adjudicating Authority being IA No.822 of 2022. In IA No. 822 OF 2022, following prayers were made by the Appellant:-

“I. Allow the Instant Application and direct the Resolution Professional to allow the Applicant to participate, represent and vote in the capacity of a financial creditor within the committee of creditors constituted for the Corporate Debtor;

II. Post the re- constitution of the CoC, the RP to share with the applicant copies of agendas and minutes of

all previous CoC meetings conducted by the RP including all such important documents and information, as necessary for the applicants' standing as a CoC member and

III. Pass all such orders as may be necessary to protect the interest of the Applicant as the single largest financial creditor of the Corporate Debtor and as may be warranted in the interest of justice.”

14. On the date when e-mail dated 30.04.2022 was sent, the Administrator of SIFL and SEFL has not filed avoidance application which avoidance application came to be filed subsequent to 30.04.2022. The Resolution Professional vide in its reply brought the additional facts by means of Affidavit in IA No. 822 of 2022. It is true that the avoidance application filed by the Administrator are still pending and have not yet been decided. The Administrator who was Administrator in the CIRP of the SIFL/SEFL filed the avoidance application after obtaining transaction audit report. Administrator in the avoidance application has termed the loan transaction as fraudulent. Even though the avoidance application is still pending consideration before the Adjudicating Authority but the pleadings of Administrator in the avoidance application with respect to loan transaction and the pleading that amount of Rs.25 Crores used by the Appellant for paying 15% towards security receipt and the amount of Rs.25 Crores was utilised which was round tripped by SIFL are materials and circumstances which can be noticed and taken into consideration by the Adjudicating Authority.

15. Counsel for the Appellant has submitted that the reasons which were given by the Resolution Professional in its e-mail dated 30.04.2022 are the only reason which can be looked into to support the decision that the Appellant is a related party. It is submitted that no new reasons can be supplemented by the Resolution Professional which did not find place in the e-mail dated 30.04.2022. It is well settled that the Resolution Professional does not exercise any adjudicatory function and his function is only to verify and collate the claim submitted by the creditors. The adjudicatory function is entrusted to the Adjudicating Authority under Section 60(5) of the Code and in the present case, issue of adjudication arose only when an application was filed by the Appellant before the Adjudicating Authority for setting aside the e-mail dated 30.04.2022. Resolution Professional to support the decision was not precluded from relying on any subsequent material which come into notice of the Resolution Professional after the email dated 30.04.2022, hence, the facts which were pleaded by the Administrator in the avoidance application cannot be said to be irrelevant.

16. Learned Counsel for the Appellant has placed reliance on the judgment of the Hon'ble Supreme Court in **"Mohinder Singh Gill and Anr. vs. Chief Election Commissioner- AIR 1981 SC"** to support his submission that the Resolution Professional could not have supplemented its decision by fresh reason in shape of Affidavit and otherwise. *Mohinder Singh Gill* was a case where challenge was to an order passed by the Election Commission of India. To support the order of the Election Commission of India, Affidavit was filed giving additional reasons. In the said background,

the Hon'ble Supreme Court held that the order passed by Election Commission have to be examined on the basis of reasons given in the order and no new reasons can be supplemented subsequently. The present is not a case where any adjudicatory order is under challenge which is sought to be supported by new reasons. Adjudication on the claim of the Appellant commenced only after filing of the application, hence, during the adjudication of the issue all relevant materials existing and the reasons can be placed before the Adjudicating Authority. We do not accept the submission of the Appellant that the Resolution Professional could not have filed additional affidavit before the Adjudicating Authority giving additional facts and reasons to support the decision that Appellant is a related party. Thus, the judgment of the Hon'ble Supreme Court in *Mohinder Singh Gill's* case relied by the Appellant is not applicable in the facts of the present case.

17. Learned Counsel for the Appellant submits that the Resolution Professional in its Affidavit filed before the Adjudicating Authority has taken the stand that the Appellant is not disqualified in any of the clauses of Section 5(24) and the Resolution Professional having himself taking the stand that the Appellant is not covered by any of the clauses by Section 5(24) cannot be allowed to contend that the Appellant is a related party. Shri Krishnendu Datta, Learned Senior Counsel has referred to pleadings in the Affidavit in reply filed by the Resolution Professional dated 08.09.2022 to contend that the Resolution Professional has admitted in its affidavit that the Appellant is not covered by any sub-clauses of Section 5(24). Shri Krishnendu Datta has placed reliance on paragraph 6 (viii) of the Affidavit of

Resolution Professional. It is useful to extract paragraph 6(viii) of the Affidavit in reply filed by the Resolution Professional, which is as follows:-

“(viii) It is pertinent to note that the claim has been filed by Rare ARC in Form C as an assignee of SEFL. Based on available information/ documents, even if Rare ARC does not appear to directly fall under any of the sub-clauses of Section 5(24) of the Code, however, in the facts of the present case, it would not suffice to only look at Rare ARC from the lens of related party. Rather, it is also essential to examine the circumstances of the assignment and the relationship between SEFL and the Corporate Debtor at the time of the assignment. This test is required to be carried out in view of the following observations contained in the ILC Report regarding the eligibility of third-party assignees under the first proviso to Section 21(2) of the Code -

*"11.10. However, the Committee discussed that in certain cases, a related party creditor may assign its debts with the intention of circumventing the disability imposed under the first proviso to Section 21(2) by indirectly participating in the CoC through the assignee. As a related party is expressly prohibited from participating in the CoC, it cannot do so indirectly by assigning its debt to a third-party assignee for the purposes of circumventing this restriction. **Therefore, in order to prevent any misuse, the Committee recommended that prior to including an assignee of a related party financial creditor within the CoC, the resolution professional should verify that the assignee is not a related party of the***

corporate debtor. In cases where it may be proved that a related party financial creditor had assigned or transferred its debts to a third party in bad faith or with a fraudulent intent to vitiate the proceedings under the Code, the assignee should be treated akin to a related party financial creditor under the first proviso to Section 21(2)."

18. Affidavit in reply filed by the Resolution Professional has to be read as a whole. Other averments in the affidavit clearly indicate that the Resolution Professional reiterated its stand that the Appellant is not entitled to have any voting share in the CIRP. In paragraph 5 while giving brief facts relevant for adjudication of the application in respect to the e-mail dated 30.04.2022 issued by the Resolution Professional following was stated in paragraph 5 (xii) and (xiv):-

“(xii) After due verification of the claim of the Applicant, by email dated 30 April 2022, I informed the Applicant that while its claim was being admitted as a financial debt, Rare ARC shall not have any right of representation, participation or voting in the CoC of the Corporate Debtor in light of the first proviso to Section 21(2) of the Code. In this regard, I also gave detailed reasons as to why the assignment from SEFL to Rare ARC appears to have been made in suspicious circumstances with effect from 12 August 2020, being the date of the Earlier CIRP Admission Order, while the Assignment Agreement between the Applicant and SEFL was entered into only on 9 September 2020. I

also explained the reasons for arriving at the finding that at the time when the assignment was made SEFL was a related party of the Corporate Debtor under Clauses (h), (i), (j), (I) and (m) of Section 5(24) of the Code, as both SEFL and the Corporate Debtor are eventual owned, directly or indirectly, by the Kanoria Foundation whose ultimate beneficiaries are understood to be the members of the kanoria family.

(xiv) It is also pertinent to add that after the present Application was filed, I was served with an application bearing IA (IB) No. 744 of 2022 in CP (IB) No. 294 of 2021 ("SEFL Avoidance Application") which has been filed under Section 60(5) and Section 66 of the Code by the Administrator of SEFL, seeking avoidance of certain fraudulent and wrongful trading transactions and contribution to the assets of SEFL by the Respondents, which includes the Corporate Debtor (as the Respondent No. 10). In the SEFL Avoidance Application, the Administrator has flagged the term loan from SIFL to the Corporate Debtor as fraudulent and unusual for various reasons. It has further been submitted in the SEFL Avoidance Application by the Administrator that the Corporate Debtor is connected/ linked to SIFL, SEFL and the Kanoria group of companies. A copy of the pleadings in the SEFL Avoidance Application is attached as Annexure- 2(Colly)."

19. Paragraph 6 which has been relied by the Appellant also contains several other averments. The Resolution Professional has also referred to

and relied Insolvency Law Commission Report 2020 in the Affidavit. It is relevant to notice that Shri Krishnendu Datta also has relied on Paragraphs 11.9 and 11.10 of the ILC Report 2020. In paragraph 6(vi), the Resolution Professional has referred to the judgment of the Hon'ble Supreme Court in **“Phoenix ARC Private Limited”** (*supra*) and made following averments:-

“(vi) Further, the Hon'ble Supreme Court in Phoenix Arc Private Limited v Spade Financial Services Limited & Ors., (2021) 3 SCC 475 ("Phoenix v Spade") has observed that "The aim of the CoC is to 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 maximized". In the context of related parties and CoC, referring to the Report of the Bankruptcy Law Reforms Committee (Volume I: Rationale and Design), the long title of the IBC and the UNCITRAL Legislative Guide on Insolvency Law, the Hon'ble Supreme Court observes as follows:-

“81...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. This is the intent behind the first proviso to Section 21(2) which disqualifies a financial creditor or the authorized 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.

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.”

(Emphasis Supplied)

20. Further in paragraph 6 (ix), Resolution Professional has clearly stated that the exclusion under the first proviso to Section 21(2) of the Code is not allowed to be circumvented by way of an assignment made by a related party financial creditor to a third party in bad faith or with a fraudulent intention to vitiate the proceedings under the Code. In paragraph 6 (ix), following has been pleaded:-

“(ix). Thus, as the RP, it is my duty to ensure that the exclusion under the first proviso to Section 21(2) of the Code is not allowed to be circumvented by way of an assignment made by a related party financial creditor to a third party in bad faith or with a fraudulent intention to vitiate the proceedings under the Code. If such is the case, then the third party assignee must be treated akin to a related party financial creditor and ought to be excluded from the CoC under the first proviso to Section 21 (2) of the Code.”

21. In paragraph 6(xiv) under the heading ‘relationship between the Corporate Debtor and SEFL’, following was pleaded by the Resolution Professional:-

“Relationship between the Corporate Debtor and SEFL

(xiv) I state that, at the time when the assignment was made, SEFL was a related party of the Corporate Debtor under Clauses (h) (i) (j), (l) and (m) of Section 5(24) of the Code for the following reasons-

a. The Corporate Debtor is a subsidiary of Shristi Infrastructure Development Corporation Limited ("**SIDCL**"). SIDCL is a subsidiary of Adishakti Commercial Private Limited ("**Adishakti**"). Adishakti is held by the Kanoria Foundation, a private discretionary trust whose trustee is Mr. Hari Prasad Kanoria. On the other hand, SEFL (which assigned its loan to Rare ARC) is a subsidiary of SIFL. SIFL is a subsidiary of Adisri Commercial Private Limited ("**Adisri**"). Adisri is also held by the Kanoria Foundation. As per MCA master data, Adishakti and Adisri were incorporated on the same date (i.e, 24 January 2014), have the same registered address and the same directors. The ownership structure of the Corporate Debtor is illustrated in **Annexure-4**.

A copy of documents reflecting the shareholding pattern are attached as **Annexure-5(Colly)**.

b. As per MCA filings relating to declaration of Significant Beneficial Owner ("**SBO**") under Section 90 of the Companies Act, 2013:

- SIDCL has reported itself as Holding Reporting Company' of the Corporate Debtor.
- Adishakti has reported itself as 'Holding Reporting Company' of SIDCL.
- Adishakti has reported Mr. Hari Prasad Kanoria (as) Trustee of the Kanoria Foundation) to be the SBO of Adishakti.

A copy of the SBO filings as available on MCA website are attached as **Annexure-6(Colly)**.

c. Further, as per information provided by Rare ARC, Mr. Hari Prasad Kanoria (as trustee of the Kanoria Foundation) is the SBO of shares held in SIFL by Adisri.

d. The Annual Reports of SIDCL for FY 2017-18, 2018-19, 2019-20 and 2020-21 show that Mr. Hari Prasad Kanoria has executed personal guarantee to secure working capital loan to SIDCL. A copy of relevant extracts of Annual Reports of SIDCL are enclosed as **Annexure-7(Colly)**.

e. In the Annual Reports of SIDCL for FY 2009-10 up to FY 2015-16, Mr. Hari Prasad Kanoria has been mentioned as a KMP in the capacity of mentor/chief mentor. Notably, this is mentioned under the head of Related Party Transactions. A copy of relevant extracts of Annual Reports of SIDCL are enclosed as **Annexure-8 (Colly)**.

f. Mr. Sujit Kanoria (son of Mr. Hari Prasad Kanoria) was the Managing Director of the Corporate Debtor during FY 2016-17 upto FY 2018-19 (till 31 October 2018). Mr. Sujit Kanoria was appointed as Chairman Emeritus of the Corporate Debtor for a period of 5 years from 15 November 2018. A copy of relevant extracts of Annual Reports of the Corporate Debtor are enclosed as **Annexure-9(colly)**. A copy of the agreement for appointment of Mr. Sujit Kanoria as Chairman Emeritus of the Corporate Debtor is enclosed as **Annexure-10**.

g SIFL extended corporate guarantee of INR 25 Crores for securing bank guarantee facility extended by Axis Bank Limited to various departments/ authorities on behalf of the Corporate Debtor. A copy of the corporate

guarantee executed by SIFL in favor of Axis Bank is enclosed as **Annexure-11**.

h. A Brickwork Ratings Report dated 1 July 2021 (available in the public domain) records that "Sarga Hotel Put. Ltd. (formerly known as Shristi Hotel Pvt. Ltd.) was incorporated in 2004. It was promoted by the Shristi group, which is a part of the Kanoria foundation, a trust founded by the Kanoria family, headquartered in Kolkata. Shristi Infrastructure Development Corporation Ltd. holds 65% stake in SHPL." Another Brickwork Ratings Report dated 2 December 2019 (also available in the public domain) not only records the above but further records that the Corporate Debtor "has implicit support from the Kanoria family and SREI group of companies." Brickwork Ratings is a SEBI registered Credit Rating Agency which has also been accredited by RBI and offers rating services on Bank Loans, NCD, Commercial Paper, Fixed deposits etc. A copy of the Brickwork Ratings Report dated 1 July 2021 and 2 December 2019 is attached herewith as **Annexure-12(Colly)**.

i. A Share Subscription and Shareholders' Agreement dated 7 August 2008 ("**SSHA**") and an Addendum to SSHA dated 31 August 2009 ("**Addendum**") was entered between the Corporate Debtor and its shareholders (including Rishima and SIDCL), A copy of relevant extracts of the SSHA and the Addendum is attached as **Annexure-13(Colly)**.

j. Schedule 2 to the SSHA deals with Warranties given by the CD to Rishima. Clause 7.3 of Schedule 2 deals

with agreements with connected parties. Sub-clause 7.3.1 provides as follows -

"Apart from the Lease Deed and the term sheet dated July 22, 2008 entered into with SREI Infrastructure Finance Limited, there are no existing Related Party contracts or arrangements or understandings between, on the one hand, the Company and, on the other hand, any Affiliates or any persons directly or indirectly in control of the Company or its Affiliates or any Related Parties."

Further, Clause 2 (ii) of the Addendum provides as follows -

"A new Clause 5.1.1 shall be inserted immediately after Clause 5.1 (e) in the Agreement as following:
5.1.1 **"Any loan/ financial assistance availed from SREI Infrastructure Finance Limited ("SREI") towards Total Debt of the Company shall be termed as the connected party transaction** and such loan documentation and the facility thereof shall be availed by the Company only with the prior written consent of the Investor. Further, the Investor shall be copied on all the correspondences/ notices from SREI to the Company as per the terms of its loan documentation with the Company.

(Emphasis Supplied)

Thus, the Corporate Debtor has itself admitted in the SSHA and the Addendum that SIFL is a related/ connected party of the Corporate Debtor."

22. When we look into the pleadings in the aforesaid Affidavit of the Resolution Professional, we cannot accept the submission of the Appellant that the Resolution Professional has admitted in its Affidavit that the Appellant is not covered by any sub-clauses of Section 5(24) of the Code.

23. As noticed above, Shri Krishnendu Datta has referred to and relied on Insolvency Law Committee Report 2020. Copy of the Report has been brought on the record as Annexure A-16. Paragraph 11 of the Report on which reliance is placed deals with 'issues related to related party financial creditors'. Report under the heading '*eligibility of assignees of related party financial creditors to participate in the CoC*' was dealt in paragraphs 11.7 to 11.10, which are as follows:-

“Eligibility of Assignees of Related Party Financial Creditors to Participate in the CoC

11.7. Although the first proviso to Section 21(2) prohibits a related party financial creditor from participating in the CoC, the Code is silent on the status of a third- party assignee of such a financial creditor. It was brought to the Committee that this was creating uncertainty regarding the right of a third-party assignee of a related party financial creditor to participate, vote or be represented in the CoC.

11.8. On a review of relevant judgements, the Committee noted that different Adjudicating Authorities have taken different approaches to determine the eligibility of assignees of related party financial creditors to participate in the CoC. One approach has been to look at the legal validity of the assignment deed and the underlying intention of the parties to the assignment to determine whether the assignee had a legitimate right to participate in the CoC. 70 The other approach has been to hold the assignees of related party financial creditors ineligible under the first proviso to Section 21(2), on

the ground that an assignee of a debt cannot have a better title than the assignor itself. The Appellate Authority has taken the latter approach in Pankaj Yadav v State Bank of India Ltd., where the promoter of the corporate debtor had assigned his debt in favour of the appellant, after an application for initiation of CIRP was filed under Section 10. The Appellate Authority held that as the assignee steps into the shoes of the assignor, the rights of the assignee cannot be better than those of the assignor. Therefore, the appellant, being an assignee of the promoter of the corporate debtor, was held to be ineligible under the first proviso to Section 21(2).

11.9. The Committee was of the view that the disability under the first proviso to Section 21(2) is aimed at removing any conflict of interest within the CoC, to prevent erstwhile promoters and other related parties of the corporate debtor from gaining control of the corporate debtor during the CIRP by virtue of any loan that may have been provided by them. As a third-party assignee, who by itself is not a related party, would not have any such conflict of interest, it should not be disabled from participating in the CoC. Further, the aforesaid disability is not related to the debt itself but is based on the relationship existing between a related party creditor and the corporate debtor. Therefore, as the disability imposed under the first proviso to Section 21(2) pertains to the related party financial creditor and not to the debt it is owed, the Committee agreed that it is clear that when a related party financial creditor assigns her debt to a third party in good faith, such third party should not be disqualified from participating, voting or being represented in a meeting of the CoC.

11.10. However, the Committee discussed that in certain cases, a related party creditor may assign its debts with the intention of circumventing the disability imposed under the first proviso to Section 21(2) by indirectly participating in the CoC through the assignee. As a related party is expressly prohibited from participating in the CoC, it cannot do so indirectly by assigning its debt to a third-party assignee for the purposes of circumventing this restriction. Therefore, in order to prevent any misuse, the Committee recommended that prior to including an assignee of a related party financial creditor

within the CoC, the resolution professional should verify that the assignee is not a related party of the corporate debtor. In cases where it may be proved that a related party financial creditor had assigned or transferred its debts to a third party in bad faith or with a fraudulent intent to vitiate the proceedings under the Code, the assignee should be treated akin to a related party financial creditor under the first proviso to Section 21(2).”

24. Learned Counsel for the Appellant has relied on paragraph 11.9 where the Committee has expressed its view that it is clear that when a related party financial creditor assigns her debt to a third party in good faith, such third party should not be disqualified from participating, voting or being represented in a meeting of the CoC. It is also relevant to notice that in the very next paragraph i.e. 11.10, Committee has also expressed its view that in cases where it may be proved that a related party financial creditor had assigned or transferred its debts to a third party in bad faith or with a fraudulent intent to vitiate the proceedings under the Code, the assignee should be treated akin to a related party financial creditor under the first proviso to Section 21(2). Reliance on the report is thus, relevant and the report clearly indicate that an assignee of a related party financial creditor is not *ipso facto* disqualified but it has to be examined and verified as to whether assignment is in good faith or bad faith or whether assignment is with a fraudulent intent to vitiate the proceeding under the Code. The Resolution Professional in its pleading has relied on paragraph 11.10 and has pleaded that what ILC Report as mentioned in paragraph 11.10 is fully attracted in the present case.

25. Both the Learned Counsel for the parties have relied on the judgment of the Hon'ble Supreme Court in **"Phoenix ARC Pvt. Ltd."** (supra). Counsel for the Appellant to support his submission has placed reliance on the judgment of the Hon'ble Supreme Court and submits that in view of the above judgment of the Hon'ble Supreme Court, the disqualification is to attach to the financial creditors who are related parties in *praesenti*. The Hon'ble Supreme Court in the above case had occasion to consider the provision of Section 21(2) and the question which came for consideration was as to whether AAA could be excluded from the CoC. Under the heading 'related parties'- interpretation in *praesenti*. The Hon'ble Supreme Court in paragraphs 94 and 95 following was held:-

"94. Thus, it has been clarified that the exclusion under the first proviso to Section 21(2) is related not to the debt itself but to the relationship existing between a related party financial creditor and the corporate debtor. As such, the financial creditor who in praesenti is not a related party, would not be debarred from being a member of the CoC. However, in case where the related party financial creditor divests itself of its shareholding or ceases to become a related party 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.

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

26. The Hon'ble Supreme Court, thus, held that the financial creditor who in *praesenti* is not a related party, could not be debarred. 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.

27. We have already noticed ILC Report 2020 which has already focused on the said question of assignee being disqualified to participate in the CoC and it was clearly stated in the report that if the assignment is with the intent to avoid the tag of related party and to participate in the CoC which

assignment is in bad faith with the intention of circumventing the disability under Section 21(2) of the Code, the assignee must be treated as akin to a related party. The judgment of the Hon'ble Supreme Court in **"Phoenix ARC Pvt. Ltd."** (supra) in paragraphs 94 and 95, as extracted above, clearly reiterate the same principle of law which have to be applied in the present case.

28. In facts of the case to find out whether Financial Creditor is to be excluded from CoC or not, Learned Counsel for the Respondent has also placed reliance another judgment of this Tribunal in **"Citi Securities & Financial Services Pvt. Ltd. vs. Sudip Bhattacharya- Company Appeal (AT) (Insolvency) No. 240 of 2022"**. In the above case, the debt was assigned in favour of the Appellant by Reliance Infrastructure Ltd. Claim of the Appellant was rejected which was questioned by the Appellant. In the above case also both the parties have placed reliance on the judgment of the Hon'ble Supreme Court in **"Phoenix ARC Pvt. Ltd."** (supra). This Tribunal after considering the submissions of the parties qua the assignment and after noticing the law laid down by **"Phoenix ARC Pvt. Ltd."** (supra) has held that when assignee has been brought into for the sole purpose of participating in the CoC which assignee as per the case is not a related party. The assignee is also disqualified. In paragraphs 21 and 22, following was held:-

"21. Coming to the facts of the present case, Reliance Infrastructure Ltd. had given Inter-Corporate Deposit for which Deed of Hypothecation and Indenture of Mortgage was entered on 07.03.2018. Application

under Section 7 by the IDBI Bank against the Corporate Debtor was filed in September, 2018 and after filing of the application within six months Assignment Deed dated 01.03.2019 was executed by the Assignor in favour of the Assignee. The purpose and object was obvious that Reliance Infrastructure Ltd. being related party could not have participated in the CoC of the Corporate Debtor, hence, Assignee has been brought into for the sole purpose of participating in the CoC which Assignee as per the case of the Appellant is not a related party. Further, the debt of Rs.2538 Crore has been assigned for amount of Rs.114.93 Crores speaks for itself. Further, the Reliance Infrastructure Ltd. had Hypothecation Deed and Mortgage. The time and manner in which assignment has been made clearly indicate that Assignment is not bonafide and was made only to put the Appellant in the CoC with ulterior motive to watch the interest of the related party. Para 103 of the judgment of Hon'ble Supreme Court in "Phoenix ARC Private Limited" (Supra) clearly lays down that 'where the related party financial creditor divests itself of its shareholding or ceases to become a related party in a business capacity with the sole intention of participating the CoC and sabotage the CIRP, by diluting the vote share of other creditors or otherwise. The expression 'otherwise' shall also include assigning the right to third party, which is for the same purpose and object.

22. We, thus, do not find any infirmity in the opinion of the Adjudicating Authority where it has held that the Assignment Deed dated 01.03.2019 was not in

good faith and rather shows that the arrangement was made with a view to get backdoor entry into the COC through the Applicant assignee to have a control over the process of the CIRP as the Reliance Infrastructure Ltd. being the related party to the Corporate Debtor could not be the member of the CoC. The Adjudicating Authority further held that an act of this kind done with mala fide intention cannot give an equivalent right with that of the unrelated financial creditors. The above opinion expressed by the Adjudicating Authority is based on consideration of relevant materials with which opinion we also are in concurrence after considering the facts and circumstances of the present case.”

29. Dr. Abhishek Manu Singhvi has laid much emphasis on the materials which has been brought on record in the Affidavit by ‘JC Flowers’, it is submitted that not only Rs.25 Crores as was noticed in the avoidance application filed by the Administrator but the entire amount of Rs.44 Crores was round tripped by SEFL and SIFL to the Rare ARC for funding the Assignment Agreement. It is not necessary for us to enter into the issue and record a finding as to whether entire amount of Rs.44 Crores which was paid by Rare ARC towards 15% security receipts consideration was indirectly funded by SEFL & SIFL. We only notice that in the avoidance application which was filed by the Administrator there was pleading that Rs.25 Crores was routed through SIFL and SEFL from its related entities to the Rare ARC for paying the consideration. The avoidance application still pending for consideration before the Adjudicating Authority, it is not necessary for us to return any finding on issue which is pending

consideration before the Adjudicating Authority in the avoidance application filed by the Administrator in the CIRP of SIFL and SEFL. It is relevant to notice that in spite of there being pleading on behalf of the Resolution Professional in its Affidavit filed before the Adjudicating Authority that the funding for obtaining assignment was through SEFL itself, no details have been given by the Appellant to indicate the source of funding especially when there are allegations that the assignment was a fraudulent transaction. It was incumbent on the Appellant to clear the doubt by bringing relevant materials to show that for taking assignment no fund was used through SIFL and SEFL. We, thus, although refrain from recording any conclusive finding with regard to funding to the Appellant for obtaining assignment but pleadings and allegations made with regard to funding for obtaining assignment raises a serious doubt with regard to entire assignment transaction. It is relevant to reiterate again that the fact that appellant filed its claim on 09.09.2020 in first CIRP on the same date on which it took assignment from SEFL, a date on which it took assignment from SEFL, a related party to Corporate Debtor makes it crystal clear that assignment in favour of appellant was made only for participating in CIRP of Corporate Debtor as assignee of SEFL, hence, appellant the assignee has rightly been held to be related party to the Corporate Debtor.

30. After considering the entire facts and circumstances of the present case and our discussion and conclusion, as noticed above, we are of the view that no grounds have been made out to interfere with the impugned

order of the Adjudicating Authority by which application IA No.822 of 2022 has been rejected. There is no merit in the Appeal. The Appeal is dismissed.

**[Justice Ashok Bhushan]
Chairperson**

**[Barun Mitra]
Member (Technical)**

New Delhi
Anjali