NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI

(APPELLATE JURISDICTION)

Company Appeal (AT) (CH) (INS.) No. 331 of 2022

(Under Section 61 of the Insolvency and Bankruptcy Code, 2016)

(Arising out of the `Order' dated 22.08.2022 in IA(IBC) No. 53 of 2022 in CP(IB) No. 204/7/AMR/2019, passed by the `Adjudicating Authority', (`National Company Law Tribunal', Amaravati Bench, Mangalagiri)

In the matter of:

P.P. Bafna Ventures Private Limited
Having Registered Office at
No.111, World Trade Centre Tower,
A.S. No. 1, Kharadi,
Hs No. 1b / 2 B, Pune
Maharashtra – 411014 ….. Appellant / 1st Respondent

v.

1. Punjab National Bank
Stressed Assets Targeted
Resolution Action Division,
Zonal Sastra, 6-3-865,
My Home Jupally,
Greenland, Ameerpet,
Hyderabad – 500016 ….. 1st Respondent / 3rd Respondent

2. Purusottam Behera
Insolvency Resolution Professional
Registration No. IBBI/IPA-002/
IP-N00940/2019-2020/12993
Headway Resolution and Insolvency
Services Pvt. Ltd.
708, Raheja Center, 7th Floor,
Free Press Marg, Nariman Point
Mumbai, Maharashtra – 400021 ….. 2nd Respondent / 2nd Respondent

3. KVR Industries Private Limited
Represented by Mr. Kotha Venkata Rao,
Former Director cum Shareholder,

15-171/1, Cheepurupalli Road,
Rajam, Srikakulam District,
AP – 532127
(Included as per Order dated 09.09.2022
of the Hon'ble NCLAT) ….. 3rd Respondent / Petitioner

4. Maligi Madhusudhana Reddy
Resolution Professional,
KVR Industries Pvt. Ltd.
MM REDDY AND CO.,
4th Floor, HSR Eden, Road No.2,
Banjarahills, Hyderabad,
Telangana – 500 034
(Included as per Order dated 09.09.2022
and 12.09.2022 of the Hon'ble
NCLAT) ….. Respondent No.4

Present:

For Appellant : Mr. M.S. Krishnan, Senior Advocate
For Mr. Sivanandaraaj and
Mr. Kaushik Ramaswamy, Advocates

For Respondent No. 1 : Mr. Y. Suryanarayana, and
Mr. Sachin Sarma, Advocates

For Respondent No. 3 : Mr. P.H. Arvindh Pandian, Senior Advocate
For Mr. Avinash Krishnan Ravi, Advocate

For Respondent No. 4 / CoC : Mr. Narasimha Sarma, Advocate

With

Company Appeal (AT) (CH) (INS.) No. 332 of 2022

(Under Section 61 of the Insolvency and Bankruptcy Code, 2016)

(Arising out of the `Order' dated 22.08.2022 in IA(IBC) No. 54 of 2022 in CP(IB) No. 204/7/AMR/2019, passed by the `Adjudicating Authority', (`National Company Law Tribunal', Amaravati Bench, Mangalagiri)

In the matter of:

P.P. Bafna Ventures Private Limited
Having Registered Office at
No.111, World Trade Centre Tower,

A.S. No. 1, Kharadi,
Hs No. 1b / 2B, Pune
Maharashtra – 411014 ….. Appellant / 3rd Respondent

v.

1. KVR Industries Private Limited
Represented by Mr. Kotha Venkata Rao,
Former Director cum Shareholder,
15-171/1, Cheepurupalli Road,
Rajam, Srikakulam District,
AP – 532127 ….. 1st Respondent / 1st Respondent

2. Purusottam Behera
Insolvency Resolution Professional
Registration No. IBBI/IPA-002/
IP-N00940/2019-2020/12993
Headway Resolution and Insolvency
Services Pvt. Ltd.
708, Raheja Center, 7th Floor,
Free Press Marg, Nariman Point
Mumbai, Maharashtra – 400021 ….. 2nd Respondent/2nd Respondent

3. Punjab National Bank
9-13-45/2/9/1, 8th Floor,
MVR Vinayagar Plaza,
CBM Compound,
Vishakapatnam – 532020
(Included as per Order dated
09.09.2022 of the Hon'ble
NCLAT) ….. 3rd Respondent / Petitioner

4. Maligi Madhusudhana Reddy
Resolution Professional,
KVR Industries Pvt. Ltd.
MM REDDY AND CO.,
4th Floor, HSR Eden, Road No.2,
Banjarahills, Hyderabad,
Telangana – 500 034
(Included as per Order dated 09.09.2022
and 12.09.2022 of the Hon'ble
NCLAT) ….. 4th Respondent

Present:

For Appellant : Mr. M.S. Krishnan, Senior Advocate
For Mr. Sivanandaraaj and
Mr. Kaushik Ramaswamy, Advocates

For Respondent No. 1 : Mr. P.H. Arvindh Pandian, Senior Advocate
For Mr. Avinash Krishnan Ravi, Advocate

For Respondent No. 3 : Mr. Y. Suryanarayana, and
Mr. Sachin Sarma, Advocates

For Respondent No. 4 /: Mr. Narasimha Sarma, Advocate
CoC

J U D G M E N T
(Virtual Mode)

Justice M. Venugopal, Member (Judicial):

Comp. App (AT) (CH) (INS.) No. 331 of 2022:

Introduction:

The `Appellant / Financial Creditor / 1st Respondent (in IA(IBC) No. 53 of 2022) / 3rd Respondent (in (IBC) No. 54 of 2022), has preferred the instant `Company Appeals (AT) (CH) (INS.) No. 331 & 332 of 2022', being dissatisfied with the `impugned order' dated 22.08.2022 in IA(IBC) Nos. 53 & 54 of 2022 (Petitioner) in CP(IB) No. 204/7/AMR/2019, passed by the `Adjudicating Authority', (`National Company Law Tribunal', Amaravati Bench, Mangalagiri).

2. The `Adjudicating Authority', (`National Company Law Tribunal', Amaravati Bench, Mangalagiri) in IA(IBC) Nos. 53 & 54 of 2022 (Petitioner)

in CP(IB) No. 204/7/AMR/2019, while passing the `impugned order' dated 22.08.2022, inter alia at Paragraphs 10 to 16, had observed the following:

> *10. ``The issue before this Tribunal now in the case is whether the resignation of ``Bafna'' came into effect and whether the said resignation would exclude them from the category of related party and whether they can be members of CoC. The counsel for Bafna relies on a judgment of NCLAT in Sai prosperity Apartments vs. ASK investments services limited which held that the Insolvency Law Committee of 2020 has clarified that under the 1st proviso to Section 21(2) under the code is related not to the debt itself but the relationship between a related party and financial creditor and the corporate debtor. As such, the financial creditor who is in praesenti not a related party, would not be debarred from being a member of CoC. There is absolutely no quarrel with the above proposition. The quarrel is on the service of the Resignation letter on the Company as mandated by section 168 of the Companies Act, until which time the resignation does not come into effect. The counsel for the Applicant contends that the resignation allegedly tendered by ``Bafna'' i.e., Mr. Praful Prakash Bafna and Mr. Yogesh Prakash Bafna did not come into effect since it was not sent to the Company in accordance with Section 168 of the Companies Act, 2013. The contention of ``Bafna'' is that the resignation letter was sent through courier on 11.02.2022 and hence it has come into effect from the date on which it is served on the Company. The track record of the courier service was placed before this Tribunal, according to which the information pertaining to this particular courier could not be furnished to the Applicant. ``Bafna'' however furnished the information which unfortunately shows that the consignment which was booked on 11.02.2022 by ``Bafna'' could not be delivered due to door being locked. The Senior Counsel appearing for ``Bafna'', prior to placing this document, on record has relied on Section 20 of the Companies Act, 2013 and Section 27 of the General Clauses Act, in support of the contention that the*

notice served on the CD with regard his resignation has to be deemed as served, once it is sent to the registered office of the Company by registered post or by speed post or by courier service or by leaving the register office of the Company and other mode. In this case, the resignation was sent by courier service. But it was not served on the CD even as per memo filed by the Counsel for ``Bafna'' himself. The contention of the counsel for Bafna, is based on the fact that the resignation letter was sent to the company prior to the CD going in CIRP and hence Bafna ceases to be a related Party. There is no material placed by the FC to deny the fact that the letter was sent to the Company. But whether it is served as per section 168 is the contentious issue. Apart from that the Counsel for the FC by relying on the judgment of the High Court of Allahabad in the matter of Deepak Kumar & Others vs. State of U.P. & 6 others, contends that Section 27 of the General Clauses Act, 1897 does not take within its purview a service by private courier. It is also stated that in the above cited judgment it was held that the two conditions precedent for applicability of Section 27 are that firstly, the service must be as provided by the General Clauses Act, 1897 itself and secondly, that such service shall be deemed to be effected by properly addressing, prepaying and posting by registered post. It is held that unless the two conditions are satisfied, Section 27 of the General Clauses Act, 1897 will not apply. In this case the mode of service is through courier. For better appreciation of the facts Section 27 of the General Clauses Act, 1897 is extracted here under:

> *``27. Meaning of service by post.- Where any (Central Act) or Regulation made after the commencement of this Act authorizes of requires any document to be served by post, where the expression ``serve'' or either of the expressions ``give'' or ``send'' or any other expression in used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing pre-paying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been*

effected at the time at which the letter would be delivered in the ordinary course of post.''

Hence, Section 27 of the General Clauses Act, 1897 under which the notice has to be served by post cannot be applied to a service by courier. Apart from that, the Counsel for the FC submits that the pin code number mentioned in the track record and the one mentioned in the address shown in the application are different. The resignation notice was sent to an address with pin code number 53016 as reflected in the track record of the courier service, whereas the pin code pertaining to the registered address of the FC is 532016 as per the application. Obviously notice is served in the application, which shows that the pincode in the application is the correct one. Hence, in view of the above lapses on the part of ``Bafna'' in not serving the notice of resignation to the CD, it cannot be said that the notice of resignation was served on the Company as required under the Companies Act.

11. By Virtue of the notice of the resignation not reaching the Company, ``Bafna' continues to be nominee director in the CD and hence his status as related party does not cease. Apart from the above, the counsel for the FC contends that even if it is accepted that the notice of the resignation is served on the Company as per Section 168 of the Companies Act, 2013, the same has to be ignored in the light of the judgment of the Apex Court in the matter of Phoenix ARC Private Limited vs. Spade Financial Services Limited and others wherein it was held that in case related party FC ceases to become a related party with the sole intention of participating in the CoC, then it should be considered as a related party for the purpose of Section 21 (2) of the Code and shall not be entitled to participate in the CoC. As the facts of this case reveal, the order admitting the CD in to CIRP is on 18.02.2022 and the resignation letter was sent through courier on 11.02.2022 which is 7 days prior to the CD being taken into CIRP. Inspite of the differences, disputes and the breaches which took place much prior to the moving of the Application under Section 7 of IBC by the

``Bafna'' they continued as nominee directors till 11.02.2022. Though may not be with a malafide intention, in their own interest ``Bafna'' appears to have considered it appropriate to tender their resignation in order to safeguard their financial interest by taking part in the CoC. Hence the intention for resignation apparently seems to be to become part of CoC. Hence by virtue of the judgment in Phoenix ARC Private Limited vs. Spade Financial Services Limited and others ``Bafna'' will not be entitled to participate in the CoC.

12. The contention with regard to the Shares in physical form never being provided to the financial creditor is not complete. The effect of the said lapse is not explained. Until the time the resignation comes into effect, Bafna continues to be nominee directors, which leads to a strong presumption and they are related parties and that they were playing the role as specified in the agreements between the CD and Bafna. Section 3 (24) does not exclude those directors who are not under the control of the promoter of the CD, from the purview of Related parties. Hence the contention in that regard is not merited. Bafna falls under Section 24 (a), hence whether they acted according to the other clauses, is not material. Judgment in ASK Investment Managers case is not relevant to the facts of this case. In Section 7 application filed by Bafna, the CD has alleged certain lapses on the part of Bafna, like failure to finalise Annual Business plan, wrongful stoppage of factory etc, which imply that Bafna has been in considerable control of the affairs of the CD. No finding in that regard is given by this tribunal or any other forum. One of the allegations made by Bafna in section 7 application is that the CD had withdrawn various amounts without the consent of Bafna. Withdrawals were upheld as having been done unilaterally and was considered as a breach. But at the same time, the said allegation and finding would show that the consent of Bafna is required for the withdrawals, which consequently shows that Bafna had control over the affairs of the CD. In ASK investments case, the intent behind the first proviso to section 21 (2) of the code, which disqualifies the

financial creditor or his representative is explained as to see that the related parties do not sabotage the CoC and to obviate conflicts of interest that are likely to arise if a Related party is allowed to be part of CoC. Though Bafna is an FC as held in Section 7 petition filed by it and though it became entitled to recall the ICD due to the breaches committed by the CD, the agreements nevertheless, show that Bafna had good control over the affairs of the CD and it continued to have the control. Hence it taking part in the CoC meetings would be against the intent of the above-mentioned provisions of IBC.

13. The next issue is with regard to bonafides of the Resolution Professional. The allegations against the Resolution Professional are that he has failed to diligently carry out his duties and is merely relying on a legal opinion furnished to him for determining whether Bafna is a related party of the CD or not. The IRP in his reply, has enclosed an email dated 28.02.2022 sent to M/s. Vaish and Associates seeking for an opinion on whether ``Bafna'' is a related party of the CD or not. The contention is that there was no need for the IRP to seek opinion when as on 28.02.2022, the names of the nominees of the ``Bafna'' were still being reflected as directors on the MCA Portal. It is argued that as per the own admission of the IRP in his additional affidavit dated 16.07.2022, he had called for meeting of suspended board of directors on 01.03.2022 for which he had also invited Mr. Yogesh Bafna and Mr. Praful Bafna who at the meeting held on 01.03.2022 informed the IRP that they had resigned from the Board of the CD, though on 01.03.2022 their names were being reflected on MCA as directors of the CD since the E-form DIR 11 was filed on the MCA portal only on 04.03.2022.

14. The contention of the IRP is that in the meeting held on 01.03.2022 with the suspended directors Mr. Praful Bafna and Mr. Yogesh Bafna informed in the meeting that they had resigned from the directorship of the CD and dropped from the meeting and thereafter the resignation letters dated 11.02.2022 were received

along with screen shots of MCA site reflecting 11.02.2022 as the end date of their tenure as directors in the CD. He also once again verified from the MCA site at their end at the time of constitution of CoC. The notice dated 11.02.2022, mentioned that the director is resigning with immediate effect and as per Section 168(2) of Companies Act, 2013, the resignation of director shall be effective from the date specified by the director in the said notice. Hence, the IRP treated the date of resignation of Mr. Praful Bafna and Mr. Yogesh Bafna as 11.02.2022. He further stated that as a matter of abundant precaution, he sought and obtained a detailed legal opinion dated 14.03.2022 from an independent and reputed law firm before constituting the CoC. His contention is that he has acted bonafide and that he is unnecessarily made a scapegoat. It is possible that Mr. Praful Bafna and Mr. Yogesh Bafna might have informed the IRP that they have tendered their resignation on 11.02.2022 and that the IRP might have believed the same, without proper verification. Since the date of resignation is being reflected as 11.02.2022 in the letter of resignation, there is a possibility of the IRP understanding the date of resignation as 11.02.2022. Though little due diligence might have revealed the truth, it cannot be said that the IRP, apart from being negligent, had conspired with Bafna and allowed them into the CoC. However, apart from the said mistaken understanding by the IRP, there is no material which would suggest that the IRP had done so with any malafide intention of helping Mr. Praful Bafna and Mr. Yogesh Bafna in becoming part of CoC. IRP is hereby cautioned to be vigilant hereafter. This would be a stricture when his performance comes into question in future.

15. The allegation that Bafna had purposefully misled the IRP does not receive much support. The affidavit of Shri Krishna Purohit, Management Executive of M/s. PP Bafna Ventures Private Limited, is on record which states that he personally gave the cover to the courier service. There is absolutely no reason to disbelieve the said fact and there is ample proof to show that the cover was given on 11th February. But it did not reach the Company is the

contention, which is supported by the track record of the courier filed on behalf of Bafna itself. The wrong pin code in all probability is a mistake, as there would not be any intention on the part of Bafna to see that wrong address is mentioned so as to see that the resignation notice is not served on the Company. When Bafna decides to become part of CoC, they would, by all means, endeavour to serve the notice in compliance of section 168. But however, due to non-service of the resignation letter on the Company, section 168 of the Companies Act stands un-compiled with and Mr. Praful and Yogesh Bafna continue to be nominee directors and become disentitled to be a part of the CoC.''

and resultantly, `allowed' the `Applications' in `Part', by declaring that Mr. Praful Prakash Bafna and Mr. Yogesh Prakash Bafna are `related parties', to the `Corporate Debtor', and shall not be continued in the `Committee of Creditors'. Also, the `Interim Resolution Professional', was required to `reconstitute' the `Committee of Creditors', as per `Law'.

Appellant's contentions in Comp. App (AT) (CH) (INS.) No. 331 / 2022:

3. According to the Learned Senior Counsel for the `Appellant', the `Adjudicating Authority', had committed an `Error', in holding that the `Resignation Notices', were not served upon the `Corporate Debtor', even though `Courier Receipt', indicating that the said `Resignation Notices', were placed on record of the `Adjudicating Authority' (`Tribunal').

4. The Learned Counsel for the Appellant, points out that the `Adjudicating Authority', had failed to consider the duty of the `Corporate Debtor`, to maintain facility at its `Registered Address', to acknowledge `Service of Notices', as per Section 12 (1) of the Companies Act, 2013.

5. According to the Appellant, the `Adjudicating Authority', had wrongly came to the conclusion that the `Appellant's Investor Nominee Director', was in considerable control of the `Affairs' of the `Corporate Debtor', in ignorance of facts placed on record. The categorical plea of the `Appellant' is that, the `Adjudicating Authority', had failed to consider that `Agreements', on virtue of which, `Investor Nominee Director' of the Appellant, `appointed', on the `Board' of `Corporate Debtor', was never included in the `Articles of Association' of the `Corporate Debtor'.

6. On behalf of the Appellant, a stand is taken that the `Adjudicating Authority', had failed to consider that the `Appellant', had recalled its `Shareholding' and `Terminated SSHA', as per Clause 15 (1) (b) and hence, `SSHA', cannot be said to be `in force', and cannot be said to evidence any control whatsoever.

7. The Learned Counsel for the Appellant proceeds to point out that the `Adjudicating Authority', had erred in holding non-delivery of said

`Resignation Notices', due to ``door being locked'', amounts to non-service of said `Resignation Notices', as per Section 168 of Companies Act, 2013.

8. The Learned Counsel for the Appellant projects an argument that, as the `Articles of Association' of the `Corporate Debtor', was not amended, the `Appellant', cannot be considered to be a `Related Party', to attract the provisions of Section 5 (24) of the I & B Code, 2016.

9. The Learned Counsel for the Appellant contends that the `Adjudicating Authority' (`Tribunal'), had not considered that as per `Section 20 of the Companies Act, 2013', a `Courier Service', is recognised form of `Service', and a `Notice', is also considered to be served, if it was left at the `Registered Address' of the `Company'. In this connection, the Learned Counsel for the Appellant, adverts to Section 12 (1) of the Companies Act, 2013, which enjoins that a `Company', is obligated to have a `Registered Office', capable of receiving and acknowledging all communications and notices which might have been addressed to it.

10. The Learned Counsel for the Appellant submits that the `Resignation Notices', were served upon the `Company', through a `Private Courier', which was recognised as per Section 20 of the

Companies Act, 2013, and that the `Corporate Debtor', is to ensure persons / facility to acknowledge Courier at its `Registered Address', to `receive / acknowledge' Notices.

11. The Learned Counsel for the Appellant points out that the `Adjudicating Authority', in the impugned order, had recorded, among other things, `Bafna however furnished information which unfortunately shows that the consignment which was booked on 11.02.2022 by `Bafna' could not be delivered due to door being locked'.

12. The Learned Counsel for the Appellant adverts to the observation made by the `Adjudicating Authority' in the `Impugned Order', that `The affidavit of Mr. Shrikrishna Purohit, Management Executive of M/s. P. P. Bafna Ventures Private Limited, is on record, which states that he personally gave the cover to the courier service. There is absolutely no reason to disbelieve the said fact and there is ample proof to show that the cover was given on `11th February'.

13. Advancing his argument, the Learned Counsel for the Appellant points out that the `Adjudicating Authority' (`Tribunal') should have taken into consideration of the fact that addressing the said `Resignation Notices', in terms of the ingredients of Section 168 of the Companies Act, 2013, was not `disproved'. In this connection, it is the stand of the `Appellant', that the `Impugned Order', was passed on an `erroneous

interpretation of Law', leading to an absurdity, causing `harm' and `loss' to the `Appellant'.

14. The Learned Counsel for the Appellant submits that on numerous occasions, Electronic Service of documents were attempted on the Email Address of the `Suspended Director' Mr. Anandrao Suramalla, and the said Email ID was `Defunct', and that the `Appellant' had received `Delivery Failure Report' for attempts of service to the said `Suspended Director'.

15. The other contention advanced on behalf of the Appellant is that, it is not a `Related Party', in `praesenti', and hence not to be construed as a `Related Party'.

16. The Learned Counsel for the Appellant contends that the `Appellant', is an `External Creditor' and was not a `Related Party', which was having serious disputes with the `Corporate Debtor', and had `Nominee Directors' in the `Corporate Debtor', only because it had invested huge amounts in the `Corporate Debtor'.

17. Further, the `Nominee Directors', had issued their Resignation Letter on 11.02.2022, and the same was informed to the Registrar of Companies, by filing DIR-11 forms on 03.03.2022 and hence the Nominee Directors had resigned on 11.02.2022. Furthermore, even if the Letter date Viz. 03.03.2022, is taken as the `Date of Resignation', as per

the `Company Law', the Appellant had no `Directors', in the `Corporate Debtor', from 03.03.2022.

18. The Learned Counsel for the Appellant points out that it is a settled `Law' on the `Statutory Interpretation', that the `Proviso', ought to be interpreted, to give life to the provision itself and cannot go beyond the main provision.

19. The Learned Counsel for the Appellant falls back upon the decision of the Hon'ble Madras High Court in the matter of M. Vetri Selvan v High Court of Judicature at Madras 2015-1-L.W., and Tribhovandas Haribhai Tamboli v Gujarat Revenue Tribunal & Ors (1991) 3 SCC 442, to lend support to his contentions that the proviso to Section 21 of the I & B Code, 2016, should be interpreted, in the light of the main provision. Also that, Section 21 of the Code and the proviso to Section 21 of the Code are to be interpreted, to achieve the Object and Purpose of the Act, which is to have `External Creditors', and not `Related Parties', in the `Committee of Creditors'.

20. It is represented on behalf of the Appellant that the relevant date for deciding the `Relevant Party' status is the `date of Constitution of Committee of Creditors', and that, in the instant case, the `Nominee Directors' of the `Appellant' on the `Board' of `Corporate Debtor', had resigned on 11.02.2022, and further that the `Two Directors', also ceased

to be the `Directors' on the `Board' of the `Appellant / Company', on 16.02.2022. Hence, there were no common `Directors', between the `Appellant; and the `Corporate Debtor', on the `date of Constitution of Committee of Creditors' (on 15.03.2022) and even on the `ICD'. Even the details on the `Ministry of Corporate Affairs' website', clearly reflects the `End Date' of the `Directorship' of the `Two Nominee Directors' of the `Appellant', on the `Board' of `Corporate Debtor', as on 11.02.2022.

21. In short, it is the stand of the Appellant, that it ceased to be `Related Parties', before the `relevant date', as contemplated under the I & B Code, 2016.

22. On behalf of the Appellant, it is pointed out that the `Date of Appellant's MCA Website Screenshot is 12.03.2022', and the `Legal Firm's Opinion', is dated 14.03.2022 and in fact the documents could have even been shared, even a day, before the `date of submission' of the `Legal Opinion', on 14.03.2022. Even the `Learned Advocates', who issued the `Legal Opinion', could have accessed the `MCA' documents, which are a matter of `Public Record'.

23. The emphatic plea taken on behalf of the Appellant is that, the `Appellant', is only an `External Creditor', and the I & B Code, 2016, endeavours, to balance the interest of all `Stakeholders', as per Paragraph 82 of the Judgment in Phoenix Arc.

24. The Learned Counsel for the Appellant submits that the `Committee of Creditors', as on today is `monopolised', by a `Single Financial Creditor', which defeats the purpose of constituting a `Committee', and the Appellant', being the largest `Financial Creditor', is not on the `Committee of Creditors', because of the `wrong Application of fact and Law', by the `Adjudicating Authority' (`Tribunal').

25. Added further, according to the Appellant, the `Financial Creditor / Whistle Blower', is kept out of the `Committee of Creditors', by terming as a `Related Party', and not the `Punjab National Bank', by its conduct had manifested favouratism and had an understanding with the `Corporate Debtor'. Also that, the `Punjab National Bank', by permitting the `Corporate Debtor' of opening another `Bank Account', Viz. `Account with Axis Bank ',and routing through `Sales', through it, which is against the `Letter and Spirit of the Reserve Bank of India, mandate'.

26. The Learned Counsel for the Appellant points out that the `Punjab National Bank', had remained a `mute spectator', while `Promoter Group', through `Suspended Managing Director', had opened and operated the Account between 2017 and 2019. As a matter of fact, the `Punjab National Bank', had only addressed `Letters', and had not deemed the `action' of the `Corporate Debtor', as a `Wilful Default', under the `Income Recognition and Asset Classification Master Circular',

of the `Reserve Bank of India', which shows an understanding between the `Punjab National Bank' and the `Corporate Debtor', and further that the `Punjab National Bank' / being the `only Member' in the `Committee of Creditors', is against the aim and purpose of the I & B Code, 2016.

27. The Learned Counsel for the Appellant points out that the `Appellant', projected `Petitions' (under Section 9 & 17), of the `Arbitration and Conciliation Act, 1996', against the `Corporate Debtor', registered a `Complaint', against the `Corporate Debtor', before the `Economic Offences Wing', Pune, registered an `FIR', against the `Corporate Debtor' in Pune, for misappropriation of Rs.5.28 Crores, under Section 406, 409, 420, 424, r/w. Section 34 of the Indian Penal Code.

28. The Learned Counsel for the Appellant refers to the `Judgment of this Tribunal' in One City Infrastructure Pvt. Ltd. v Haryana Telecom Limited and Ors., reported in MANU/NL/0441/2022, which interpreted the position of `Related Party', through the decision of the Hon'ble Supreme Court in Phoenix Arc, by stating that the exclusion under the first proviso to Section 21 (2) of the IBC is related to the relationship `existing', between a related party Financial Creditor and the Corporate Debtor and that a Financial Creditor, who `in praesenti', is not a related party would not be debarred from being a member of the `CoC', except

when the related party Financial Creditor, ceases to become related party with the sole intention of participating in the `CoC', and sabotage the `CIR process' (Para 9 of the Judgment).

29. The Learned Counsel for the Appellant brings it to the notice of this `Tribunal' that the `Resolution Professional', was appointed by the `Punjab National Bank' (Solo `Committee of Creditor's Member), by removing the `Interim Resolution Professional', and that the `4th Respondent / Resolution Professional', has proceeded with undue haste, in conducting the `Corporate Insolvency Resolution Process', and had issued the `Request for `Resolutions Plans' (RFRP), in and by which, the last date for submission of binding `Resolution Plans', by the `Resolution Applicants' is 27.11.2022.

30. The Learned Counsel for the Appellant raises an argument that the `Adjudicating Authority', should have interpreted the ingredients of the I & B Code, 2016, with a view to achieve its object and to ensure that the `intention of the Legislation', is not `defeated', as per decision of the Hon'ble Supreme Court in Vijay Madanlal Choudhary & Ors. v Union of India, reported in 2022, SCC OnLine SC 929 (vide Paragraph 118).

31. Therefore, the Learned Counsel for the Appellant, prays for `allowing' of the instant Comp. App (AT) (CH) (INS) No. 331 of 2022, in the interest of Justice.

Appellant's Decisions (in Both Appeals):

32. The Learned Counsel for the Appellant refers to the decision of the Hon'ble Supreme Court of India in Phoenix Arc Pvt. Ltd. v Spade Financial Services Limited & Ors., reported in (2021) 3 SCC at page 475 at Spl. Pgs.516 and 517, wherein at Paragraph 76, it is observed as under:

> *76. ``In an instructive article published in the Yale Law Journal, titled 'Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain', Thomas H. Jackson, argues that creditors prefer a collective process as opposed to a race to grab as many assets, which often leads ultimately to the demise of the corporate debtor (Thomas H. Jackson, ``Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain'', 91 Yale Law Journal (1982), pp. 857, 859-71. The reason why a collective process is considered superior is because individual creditors, left to their own whims, are motivated to act solely in their own interests, even when their interests may directly conflict with the creditors' collective interests as a group. This self-interest creates a collective action problem, such that creditors eventually enter a grab race, operating under the belief that they would have recourse to fewer or no assets, if they delay their actions in the hope that creditors will be able to coordinate and agree to act collectively (Id, note 18, pp. 1855-1856). Bankruptcy law seeks to resolve this by preventing individual creditor action. The creditor's bargain theory therefore, operates to maximise group welfare through collectivization (Medha Shekar and Anuradha Guru, ``Theoretical Framework of Insolvency Law'', P. 52).''*

33. The Learned Counsel for the Appellant cites the decision of the Hon'ble Supreme Court of India in Tribhovandas Haribhai Tamboli v

Gujarat Revenue Tribunal & Ors. (1991) 3 SCC Page 442 at Spl. Pg.: 447, wherein at Paragraph 6, it is observed as under:

> *6. ``It is a cardinal rule of interpretation that a proviso to a particular provision of a statute only embraces the filed, which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted by the proviso and to no other. The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is to confine to that case. Where the language of the main enactment is explicit and unambiguous, the proviso can have no repercussion on the interpretation of the main enactment, so as to exclude from it, by implication what clearly falls within its express terms. The scope of the proviso, therefore, it to carve out an exception to the main enactment and it excludes something which otherwise would have been within the rule. It has to operate in the same field and it the language of the main enactment is clear, the proviso cannot be torn apart from the main enactment nor can it be used to nullify by implication what the enactment clearly says nor set at naught the real object of the main enactment, unless the words of the proviso are such that it is its necessary effect.''*

34. The Learned Counsel for the Appellant, relies on the Judgment of this `Tribunal' dated 21.09.2021, in Telangana State Trade Promotion Corporation v A.P. Gems & Jewellery Park Limited & Anr. (vide Comp. App (AT) (CH) (INS.) No. 54 of 2022), wherein at Paragraphs 57 and 66, it is observed as under:

> *57. ``The real test is whether a person controls either the steering or the accelerators, gears and brakes. If the answer is in the*

affirmative, then he would be in the `Control of Company' in the considered opinion of this Tribunal.

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

35. The Learned Counsel for the Appellant, refers to the Judgment of the Hon'ble Supreme Court in Arcelor Mittal India Pvt. Ltd. v Satish Kumar Gupta & Ors., reported in India Kanoon (vide Civil Appeal Nos.: 9402 – 9405 of 2018 dated 04.10.2018), wherein at Paragraphs 45 to 50, it is observed as under:

45. ``The expression "management" would refer to the de jure management of a corporate debtor. The de jure management of a corporate debtor would ordinarily vest in a Board of Directors, and would include, in accord with the definitions of "manager", "managing director" and "officer" in Sections 2(53), 2(54) and 2(59) respectively of the Companies Act, 2013, the persons mentioned therein.

46. The expression "control" is defined in Section 2(27) of the Companies Act, 2013 as follows:-

> *"(27) "control" shall include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or*

shareholders agreements or voting agreements or in any other manner;"

47. The expression "control" is therefore defined in two parts. The first part refers to de jure control, which includes the right to appoint a majority of the directors of a company. The second part refers to de facto control. So long as a person or persons acting in concert, directly or indirectly, can positively influence, in any manner, management or policy decisions, they could be said to be "in control". A management decision is a decision to be taken as to how the corporate body is to be run in its day to day affairs. A policy decision would be a decision that would be beyond running day to day affairs, i.e., long term decisions. So long as management or policy decisions can be, or are in fact, taken by virtue of shareholding, management rights, shareholders agreements, voting agreements or otherwise, control can be said to exist.

48. Thus, the expression "control", in Section 29A(c), denotes only positive control, which means that the mere power to block special resolutions of a company cannot amount to control. "Control" here, as contrasted with "management", means de facto control of actual management or policy decisions that can be or are in fact taken. A judgment of the Securities Appellate Tribunal in M/s Subhkam Ventures (I) Private Limited v. The Securities and Exchange Board of India (Appeal No. 8 of 2009 decided on 15.1.2010), made the following observations qua "control" under the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1997, wherein "control" is defined in Regulation 2(1)(e) in similar terms as in Section 2(27) of the Companies Act, 2013. The Securities Appellate Tribunal held:

"6. ...The term control has been defined in Regulation 2(1)(c) of the takeover code to "include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting

individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner." This definition is an inclusive one and not exhaustive and it has two distinct and separate features:

i) the right to appoint majority of directors or,

ii) the ability to control the management or policy decisions by various means referred to in the definition. This control of management or policy decisions could be by virtue of shareholding or management rights or shareholders agreement or voting agreements or in any other manner. This definition appears to be similar to the one as given in Black's Law Dictionary (Eighth Edition) at page 353 where this term has been defined as under:

"Control - The direct or indirect power to direct the management and policies of a person or entity, whether through ownership of voting securities, by contract, or otherwise; the power or authority to manage, direct, or oversee." Control, according to the definition, is a proactive and not a reactive power. It is a power by which an acquirer can command the target company to do what he wants it to do. Control really means creating or controlling a situation by taking the initiative. Power by which an acquirer can only prevent a company from doing what the latter wants to do is by itself not control. In that event, the acquirer is only reacting rather than taking the initiative. It is a positive power and not a negative power. In a board managed company, it is the board of directors that is in control. If an acquirer were to have power to appoint majority of directors, it is obvious that he would be in control of the company but that is not the only way to be in control. If an acquirer were to control the management or policy decisions of a company, he would be in control. This could happen by virtue of his shareholding or management rights or by

reason of shareholders agreements or voting agreements or in any other manner. The test really is whether the acquirer is in the driving seat. To extend the metaphor further, the question would be whether he controls the steering, accelerator, the gears and the brakes. If the answer to these questions is in the affirmative, then alone would he be in control of the company. In other words, the question to be asked in each case would be whether the acquirer is the driving force behind the company and whether he is the one providing motion to the organization. If yes, he is in control but not otherwise. In short control means effective control."

49. We think that these observations are apposite, and apply to the expression "control" in Section 29A(c).

50. Section 29A(c) speaks of a corporate debtor "under the management or control of such person". The expression "under" would seem to suggest positive or proactive control, as opposed to mere negative or reactive control. This becomes even clearer when sub-clause (g) of Section 29A is read, wherein the expression used is "in the management or control of a corporate debtor". Under sub-clause (g), only a person who is in proactive or positive control of a corporate debtor can take the proactive decisions mentioned in sub-clause (g), such as, entering into preferential, undervalued, extortionate credit, or fraudulent transactions. It is thus clear that in the expression "management or control", the two words take colour from each other, in which case the principle of noscitur a sociis must also be held to apply. Thus viewed, what is referred to in sub-clauses (c) and (g) is de jure or de facto proactive or positive control, and not mere negative control which may flow from an expansive reading of the definition of the word "control" contained in Section 2(27) of the Companies Act, 2013, which is inclusive and not exhaustive in nature.''

Pleas of `1st Respondent & 3rd Respondent' / `Bank' (in Comp. App (AT) (CH) (INS.) Nos. 331 & 332 of 2022):

36. According to the Learned Counsel for the `1st Respondent' and `3rd Respondent' (`Punjab National Bank'), the `Appellant' and the `Corporate Debtor', had entered into three Agreements on 29.12.2018 (a) Inter Corporate Deposit Agreement (b) Business Management Agreement and (c) Share Subscription and Shareholders Agreement, pursuant to which, the `Appellant' has `Substantial Rights', in `Operations' and the `Management' of the `Corporate Debtor'.

37. The Learned Counsel for the `1st Respondent and 3rd Respondent' (`Bank'), adverts to the fact that in terms of the above `Agreements', the `Appellant', had appointed its `Nominees' Mr. Yogesh Prakash Bafna and Mr. Praful Prakash Bafna on the `Board' of the `Corporate Debtor', on 29.12.2018, who were also the `Directors' on the `Board' of the `Appellant' i.e. `P.P. Bafna Ventures Private Limited', since 28.11.2014. Also that, the `Nominee Directors' hold `33% of the Total Share Capital' of the `Appellant / Company', as per the `Annual Return' for the `Financial Year 31.03.2021, filed by the `Appellant', on the `Ministry of Corporate Affairs' Portal.

38. The Learned Counsel for the `1st Respondent and 3rd Respondent' (`Bank'), refers to the `Table', as under:

Sub Clause	*Sub Clause description (of Clause 24 of Section 5)*	*Question*	*Whether Related Party*	*Basis of Conclusion*
1	*a director or partner of the corporate debtor or a relative of a director or partner of the corporate debtor*	*Whether Respondent No.3 is a director or partner of the Corporate Debtor (CD)?*	*No*	*Respondent No.3 is shareholder of CD and being a Company it cannot be a director / KMP of other Company.*
2	*a key managerial personnel of the corporate debtor or a relative of a key managerial personnel of the corporate debtor*	*Whether Respondent No.3 is a KMP of the CD?*	*No*	
3	*a limited liability partnership or a partnership firm in which a director, partner or manager of the corporate debtor or his relative is a partner*	*NA*	*No*	*Respondent No.3 is not a LLP or Partnership*
4	*a private company in which a director, partner or manager of the corporate debtor is a director and holds along with his relatives, more than two per cent of its share capital*	*Whether the director, partner or manager of the corporate debtor is Director of Respondent No.3 and those directors along with their relative holds more than 2% of share capital of Respondent No.3*	*YES*	*As per MCA records, Mr. Praful Bafna and Mr. Yogesh Bafna the directors of the Corporate Debtor alongwith their relatives hold 100% of the share capital of the Respondent No.3 out of which Mr. Praful Bafna and Mr. Yogesh Bafna hold 33% of the total share capital. A copy of Annual Return (MGT-7) alongwith shareholding pattern of the Respondent No.3 for the financial year ended 31.03.2021 is*

				annexed hereto as Annexure-5. The aforesaid 2 (two) nominee directors i.e. Mr. Praful Bafna and Mr. Yogesh Bafna on the Board of the CD resigned on 11.02.2022 i.e. just 6 (six) days before the commencement of CIRP of the Corporate Debtor i.e. 18.02.2022.
5	*a public company in which a director, partner or manager of the corporate debtor is a director and holds along with relatives, more than two per cent of its paid-up share capital*	*NA*	*No*	*Respondent No.3 is a Private Company*
6	*Anybody corporate whose board of director, managing directors or manager, in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor*	*Whether Respondent No.3's Board acts on directions or instructions of a director, partner or manager of the corporate debtor?*	*Yes*	*As per the MCA records, Mr. Praful Bafna and Mr. Yogesh Bafna the directors of the Corporate Debtor were also on the board of the Respondent No.3 and have also signed the directors report and balance sheet of the Respondent No.3 for several years which clearly reflects that the Board of the Respondent No.3 was acting on the instructions of the directors of the Corporate Debtor. Copies of extracts of*

				details of signatories to the directors reports and balance sheets for the financial year 2017-18, 2018-19 & 2019-20 are annexed hereto as Annexure-6
7	*any limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor*	*NA*	*No*	*Respondent No.3 is not a LLP or partnership.*
8	*any person on whose advice, directions or instructions, a director, partner or manager of the corporate debtor is accustomed to act*	*Whether CD was operated on advice, directions or instructions of Respondent No.3?*	*Yes*	*Respondent No.3 had appointed 2 (two) nominee directors on the Bord of the CD who resigned on 11.02.2022 i.e. just 6 (six) days before the commencement of CIRP of the Corporate Debtor i.e.18.02.2022. Further, as per the SSHA, the Respondent No. 3 has substantial rights in the management and affairs of the Corporate Debtor including affirmative voting rights as stipulated under Clause 12 of the said SSHA. Hence, it is clear*

				that almost all the major business related decisions of the CD were subject to affirmative vote of the Respondent No.3 and therefore the CD was operating on the instruction of Respondent No.3.
9	*a body corporate which is a holding, subsidiary or an associate company of the corporate debtor, or a subsidiary of a holding company to which the corporate debtor is a subsidiary*	*Whether Respondent No.2 is a holding, subsidiary or an associate company of the corporate debtor?*	*No*	-
10	*any person who controls more than twenty per cent of voting rights in the corporate debtor on account of ownership or a voting agreement*	*Whether Respondent No.3 controls more than 20% of voting right in CD?*	*No*	*Respondent No.3 holds 10% of the total paid up share capital of the CD*
11	*any person in whom the corporate debtor controls more than twenty per cent of voting rights on account of ownership or a voting agreement*	*Whether CD controls more than 20% of voting right in Respondent No.3?*	*No*	-
12	*any person who can control the composition of the board of directors or corresponding governing body of the corporate debtor*	*Whether Respondent No.3 can control the composition of board of director in CD?*	*Yes*	*Respondent No.3 had two nominee directors on the board of CD. Further, as per Clause 9(II) of the SSHA, the Board of the CD shall comprise of maximum of 4 (four) directors out of which the Respondent No.3 has the right to*

				appoint 2 (two) directors on the Board of the CD. Therefore, the Respondent No.3 has control over the composition of the board of directors of the CD.
13	*any person who is associated with the corporate debtor on account of* *a) participation in policy making processes of the corporate debtor; or*	*Whether Respondent No.3 is associated with CD on account of* *a) participation in policy making processes of the corporate debtor; or*	*YES*	*By virtue of the Business Management Agreement (``BMA'') dated 29.12.2018 and the SSHA the participation of Respondent No.3 in policy making processes of the Corporate Debtor is mandatory. A perusal of clause 3 of the BMA would establish that the management of factory of the Corporate Debtor was the sole responsibility of the Respondent No.3 and several other decisions of the Corporate Debtor would jointly be decided by the Respondent No.3 and the other 2 (two) directors of the Corporate Debtor.*
	b) having more than two directors in common between the corporate debtor and such person; or	*Whether the Respondent No.3 and Corporate Debtor have two common directors*	*No.*	*However, Mr. Praful Bafna and Mr. Yogesh Bafna were on the Board of both the Respondent No.3 and the Corporate*

				Debtor and just before the CIRP commencement date i.e. 18.02.2022, they resigned from the Board of the Respondent No. 3 on 16.02.2022 and from the Board of the Corporate Debtor on 11.02.2022. Details of resignation are reflected on the MCA portal which is annexed hereto as Annexure-7.
	c) interchange of managerial personnel between the corporate debtor and such person; or	*c) interchange of managerial personnel between the corporate debtor and such person; or*	-	*Unable to ascertain on account of non-availability of records.*
	d) provision of essential technical information to, or from, the corporate debtor	*d) provision of essential technical information to, or from, the corporate debtor*	*NA*	*Unable to ascertain on account of non-availability of records.*

and points out that the `Appellant', squarely falls under the definition under `Related Party', under Section 5 (24) of the I & B Code, 2016.

39. The Learned Counsel for the 1st Respondent and 3rd Respondent (`Bank'), comes out with a plea that the aforesaid `Nominee Directors' Mr. Yogesh Prakash Bafna and Mr. Praful Prakash Bafna, had resigned from the `Board' of the `Appellant Company', on 16.02.2022, i.e. just two days, before the commencement of `Corporate Insolvency Resolution

Process' date i.e., 18.02.2022, and purportedly resigned from the Board of the Corporate Debtor, on 11.02.2022, just 6 days, before the commencement of the `Corporate Insolvency Resolution Process'.

40. The Learned Counsel for the 1st Respondent and 3rd Respondent (`Bank'), brings it to the notice of this `Tribunal', that the `Two Nominee Directors', who equally represent the `Board' of the `Corporate Debtor', along with the other `Two Promoter Directors', could have taken measures, to file the `Balance Sheets', in order to avoid disqualification, under the `Companies Act, 2013'. Furthermore, the `Appellant', had not cited any reason, for the resignation of the aforesaid `Nominee Directors', from the `Board' of the `Appellant / Company', on 16.02.2022, which proves that the purported `Resignation', from the `Corporate Debtor', and from the `Appellant / Company', was done, with an intent to circumvent the ingredients of Section 21 (2) of the I & B Code, 2016.

41. The Learned Counsel for the 1st Respondent and 3rd Respondent (`Bank'), comes out with a Plea that in as much as the `appointment' of `Nominee Directors' of the `Appellant' on the `Board' of the `Corporate Debtor', all `Official Communications', between the `Officials' of the `Corporate Debtor' and the `Nominee Directors', were carried out through email and even payments made to the `Vendors', were being made by the `Corporate Debtor', only upon email confirmation from the

`Nominee Directors' of the `Appellant'. But, when the `Nominee Directors', intended to `resign', from the `Corporate Debtor', they had failed to address even a single email to the `Corporate Debtor', and this itself reflects the `ill motives' of the `Appellant.

42. The Learned Counsel for the `1st Respondent and 3rd Respondent' (`Bank'), points out that a mere perusal of the `Courier Receipts', to establish that the `Courier', was sent to the `wrong Pin Code', and that the `correct Pin Code' of the `Registered Office' of the `Corporate Debtor', is `530 016', but, the `Pin Code', mentioned in the `Courier Receipt', is `430 016', and therefore, the said Courier Receipts cannot be relied upon as they are not `genuine / authentic'. Also that, the `Resignation Letters', were never delivered to the `Corporate Debtor' and the `Website' of the `Professional Courier Services', does not reflect that the `Resignation Letters', were delivered.

43. The Learned Counsel for the 1st Respondent and 3rd Respondent (`Bank'), brings it to the notice of this `Tribunal', that the `Courier Consignment Bearing Nos. PNU8000000799 and PNU8000000800', through which the purported `Resignation Letters', were sent to the address of the `Corporate Debtor', were never received by the `Corporate Debtor', and that the `Tracking Status' of the said `Consignment', reflects

that `We are sorry your consignment status request could not be processed'.

44. According to the 1st Respondent and 3rd Respondent (`Bank'), it is unimaginable, as to how the Tracking No. assigned to a courier dispatched on 11.02.2022 is ``PNU800000799'' and ``PNU800000800'' when, the running Tracking Nos for the Couriers dispatched on 11.02.2022 was ranging from PNU800000924 to PNU800000945 and for the tracking numbers ranging around ``PNU800000799'' and ``PNU00000800'', the date of dispatch was around 21.02.2022 and so on.

45. Besides this, in fact, the `Tracking Numbers', are not assigned in the strict order of `Booking / Dispatch', and it is inconceivable as to how the `Tracking Number', could vary to an extent of more than 100 S.Nos. i.e. to ``799'' / ``800'', when the running Series for dispatch on 11.02.2022 is ``924 to 945'', in an ascending order.

46. The Learned Counsel for the 1st Respondent and 3rd Respondent (`Bank'), points out that as per Section 114 of the Indian Evidence Act, 1872, a `Court of Law' / `Tribunal', can safely presume that, what could have been normally sent by email was not sent and the story of resignation and sending the same through Courier (vide Tracking Nos. : PNU800000799 and PNU800000800) is an afterthought, considering the fact that the e-form DIR-11, was filed on 03.03.2022, and no form

DIR-12, to be filed by the `Company', was not filed by the `Corporate Debtor'.

47. The Learned Counsel for the 1st Respondent and 3rd Respondent (`Bank'), submits that even assuming, but not conceding that the `Resignation Letters', were received by the `Corporate Debtor', within 48 hours i.e., from 11.02.2022, the date of `Dispatch of Courier', by 13.02.2022, the `Corporate Debtor', had `30 days' time i.e., up to 12.03.2022, to file `Form DIR-12', with the `Registrar of Companies'. However, the `Nominee Directors', filed the `e-form', much before the `completion of 30 days', on 03.03.2022, and now contend that as the `Corporate Debtor', was not filing the e-forms, they were constrained to file the same. In fact, according to the `1st Respondent / Bank' e-form DIR11 was filed on 03.03.2022, by the `Nominee Directors', whereas the `CIRP' of the `Corporate Debtor', commenced on 18.02.2022, which proves that as an `afterthought', the said `e-form DIR 11', was filed by the `Nominee Directors', with an intent to circumvent the provisions of Section 21 (2) of the Code.

48. The Learned Counsel for the 1st Respondent and 3rd Respondent (`Bank'), projects an argument that the `Interim Resolution Professional', had invited the `Appellant's Nominee Directors' (a) Mr. Praful Bafna and (b) Mr. Yogesh Bafna vide email dated 28.02.2022, which clearly proves

that they had not resigned from the `Board' of the `Corporate Debtor' that there was `no document', in relation to the purported `Resignation' that were available in the `Office' of the `Corporate Debtor'. Also that, the `Interim Resolution Professional', should have checked the website of `Ministry of Corporate Affairs', on 01.03.2022, to see whether any documents reflecting the `Resignation' of the aforesaid `Directors', were filed or not. In fact, the `Interim Resolution Professional', had neither checked the `Website' of `Ministry of Corporate Affairs', nor enquired for the details of `Resignation', from the said `Directors' and merely believed the `Statements', obviously made by the `Nominee Directors' that they `resigned', from the `Board' of the `Corporate Debtor'.

49. The Learned Counsel for the 1st Respondent and 3rd Respondent (`Bank') points out that the `Interim Resolution Professional', is duty bound to examine and verify as to what date, the `resignation letters', as to `on what date the Resignation Letters', were received by the `Corporate Debtor', as it is on the `date of receipt of Notice', by the `Corporate Debtor', the `Resignation', will be an `effective' one.

50. According to the 1st Respondent and 3rd Respondent (`Bank'), the `Two Nominee Directors', of the `Appellant', were appointed in accordance with `SSHA' and they were equally representing the `Board' of the `Corporate Debtor', together with other `Two Promoter Directors'.

Also that, the `Nominee Directors', were operating the `Corporate Debtor's Bank Account', jointly with the `Promoter Director' of the `Corporate Debtor'.

51. The Learned Counsel for the 1st Respondent and 3rd Respondent (`Bank'), brings to the notice of the `Tribunal', even payments to `Vendors', were being made by the `Corporate Debtor', only upon by email confirmation from the `Nominee Directors' of the Appellant. That apart, the plea of the `Appellant' is that, because of the fact that the `Corporate Debtor', never amended the `Articles of Association' to incorporate the `Agreement's Terms', the `Investor Nominee Directors', remained merely on `Paper', is a `baseless' and a `misconceived' one. In this connection, the Learned Counsel for the `1st Respondent / Bank', refers to the decision of the Hon'ble Supreme Court of India in Vodafone International Holdings BV v. Union of India & Another, reported in (2012) 6 SCC, wherein, it is observed that only those Clauses of the `Shareholders Agreement', which are contrary to the provisions of `Articles of Association', which may not be enforceable.

52. The Learned Counsel for the 1st Respondent and 3rd Respondent (`Bank') points out that the `Appellant' has annexed the `Order' of the Hon'ble High Court of Bombay dated 11.12.2019 in COMM. Arbitration Petition (L) No. 1465 of 2019, between P P Bafna Ventures Pvt. Ltd. v.

KVR Industries Pvt. Ltd. and Ors., and as per the Orders, the `Appellant', had relied on the Clauses of the `SSHA', which provide for an `affirmative Voting Rights', to the `Nominees' of the `Appellant' and prayed for an `Injunction', on a `Board Meeting', proposed to be held by the `Corporate Debtor'.

53. In this connection, the Learned Counsel for the `1st Respondent and 3rd Respondent' (`Bank') submits that the `Appellant', in the instant `Appeal', takes a plea that the said `SSHA', is not even enforceable, as the `Articles of Association', were never amended by the `Corporate Debtor' and that the `Nominees' of the Appellant, had remained just `paper Tigers', and this will squarely indicate that the `Appellant', is `Approbating' and Reprobating'.

54. The Learned Counsel for the 1st Respondent and 3rd Respondent (`Bank'), takes a stand that as per the `Business Management Agreement' (`BMA') dated 29.12.2018, the factory premises of the `Corporate Debtor', was managed by the `Appellant' and its `Nominees' and the `Clause 3' of the said `Agreement', reflects the same, and in any event, this does not prevent the `Appellant', from falling in to the definition of a `Related Party'.

55. The Learned Counsel for the 1st Respondent and 3rd Respondent (`Bank'), refers to the Judgment of the Hon'ble Supreme Court of India in

Phoenix Arc Private Ltd. v. Spade Financial Services Ltd. (vide Civil Appeal No. 2842 of 2020 with Civil Appeal No. 3063 of 2020, dated 01.02.2021), reported in (2021) 3 SCC 475, wherein, it is held that, `in a case, where the related party `Financial Creditor', cease to become a `Related Party', with the sole intention of participating in the `Committee of Creditors', it should be considered as a `Related Party', for the purpose of Section 21(2) of the Code, and shall not be entitled to participate in the `Committee of Creditors'.

56. The Learned Counsel for the 1st Respondent and 3rd Respondent (`Bank'), refers to the Judgment of the Hon'ble Supreme Court of India in Phoenix Arc Private Ltd. v. Spade Financial Services Ltd. and Ors., reported in 2021, 3 SCC at Page 475 at Spl Pgs: 527 and 528, wherein at Paragraphs 103 to 105, it is observed as under:

> *103. ``Thus, it has been clarified that the exclusion under the first proviso to Section 21(2) is related not to the debt itself but to the relationship existing between a related party financial creditor and the corporate debtor. As such, the financial creditor who in praesenti is not a related party, would not be debarred from being a member of the CoC. However, in case where the related party financial creditor divests itself of its shareholding or ceases to become a related party in a business capacity with the sole intention of participating the CoC and sabotage the CIRP, by diluting the vote share of other creditors or otherwise, it would be in keeping with the object and purpose of the first proviso to Section 21(2), to consider the former related party creditor, as one debarred under the first proviso.*

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

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

Citations of 3rd Respondent and 1st Respondent (in both `Appeals'):

57. The Learned Counsel for the 3rd Respondent and 1st Respondent, refers to the Judgment of this `Tribunal' in Telangana State Trade Promotion Corporation v. AP Gems and Jewellery Park Private Limited and Ors., reported in MANU/NL/0409/2021 (where `Director', sought to be a `Part' of the `Committee of Creditors'), whereby and whereunder, it is observed at Paragraphs 67, 68, 70 and 71, as under:

> *67. ``As far as the present case is concerned, this Tribunal points out that, the Appellant's Managing Director was also a Director of the first Respondent Company. Moreover, the Director nominated by the Appellant, in fact, advises the Appellant / Company in matters relating to the first Respondent / Company. To put it precisely, the part played by the two nominee Directors clearly point out that the first Respondent / Company acts on the advice, direction and instructions of the Appellant in its normal business affairs relating to the first Respondent. As such, this Tribunal is of the earnest opinion that the Appellant 'squarely comes within the ambit of related party as per clause (f) of Sub Section 24 of section 5 of the Code.*
>
> *68. The other important fact that cannot be brushed aside is that that the First Respondent had reported the transactions between the Appellant and it, in their 'Annual Reports' and 'Audited Financial Statements'. Besides this, as perceived from the 'Articles of Association' and the requisite majority needed for taking important business decisions, the conduct of the business of the First Respondent, the establishment of First Respondent Company, all considered in an integral and cumulative manner will exhibit the noteworthy influence of the Appellant in issues concerning the First Respondent. In this manner also, the First Respondent is treating the Appellant as 'Related Party'.*

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

71. Be that as it may, in the light of the detailed upshot, and considering the facts and circumstances of the instant case in a conspectus fashion and keeping in mind the ingredients of the 'Articles of Association' to the effect that the nominee Directors have a vital influence in regard to the working of the 'Corporate Debtor', this Tribunal unhesitatingly comes to a consequent conclusion that the Appellant is a 'related party' and the view arrived at by the 'Resolution Professional' to include the Appellant/TSTPCL as member of the 'Committee of Creditors' is clearly unsustainable in the eye of law. In this regard, this Tribunal concurs with a view arrived at by the 'Adjudicating Authority' in the 'impugned order' that the Appellant is a 'related party'. Further, the direction issued by the 'Adjudicating Authority' in the impugned order that the 'Resolution Professional' shall reconstitute the 'Committee of Creditors' (CoC) treating the Appellant as 'related party' is free from legal errors. Viewed in that perspective, the instant 'Appeal' fails.''

58. The Learned Counsel for the 3rd Respondent and 1st Respondent refers to the Judgment of this `Tribunal' dated 03.01.2020, in Sai Peace and Prosperity Apartment v. ASK Investment Managers P Ltd. (vide Comp. App (AT) (INS.) 252 of 2020, wherein at Paragraph 16, it is observed as under:

16. ``It is pertinent to mention that Hon'ble Supreme Court in (2021) 3 SCC 4754 Phoenix ARC Private Limited v Spade Financial Services Ltd has held that the objective and purpose of

the Code are best served when the CIRP is driven by external creditors so as to ensure that related parties of the Corporate Debtor do not sabotage the CoC. This is the intent behind the first proviso to Section 21 (2) of the Code, which disqualifies a Financial Creditor or the authorized representative of the Financial Creditor under Sub-section (6A) or Sub-section (5) of Section 24 of the Code, if it is a related party of the Corporate Debtor, from having any right of representation, participation or voting in a meeting of CoC. The purpose of excluding a relating party of the Corporate Debtor from the CoC is to obviate conflicts of interests that are likely to arise if the Related Party is allowed to become a part of the CoC. The Insolvency Law Committee Report of 2020 has clarified that the exclusion under the 1st proviso to Section 21 (2) under the Code is related not to the debt itself, but the relationship 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. While the default rule under the 1st proviso to Section 21 (2) of the Code 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 to circumvent the exclusion under the 1st proviso to Section 21 (2) of the Code, should also be considered as being covered by the exclusion thereunder. Suppose this interpretation is not given to the 1st proviso Section 21 (2) Code; in that case, a related party Financial Creditor can devise a mechanism to remove its level of a `related party' before the Corporate Debtor undergoes CIRP to enable to enter the CoC and influence his decision making at the cost of other Financial Creditors.''

Status Report of Resolution Professional (4th Respondent - in Both `Appeals'):

59. According to the Respondent (4th Respondent), an `Application' in CP (No. 204/7/AMR/2019) for initiation of `Corporate Insolvency

Resolution Process', was filed by `M/s. P P Bafna Ventures Pvt. Ltd.' (`Financial Creditor), praying for the commencement of `CIR7P', against `M/s. KVR Industries Pvt. Ltd.' (`Corporate Debtor'). The said `Petition', was admitted by the `Adjudicating Authority' (`Tribunal', Amaravti Bench) in and by which, the `Corporate Insolvency Resolution Process' of `KVRIPL', had commenced and one Mr. Purusottam Behra, was appointed as an `Interim Resolution Professional'. Later, the `Committee of Creditors', had recommended Maligi Madhusudhana Reddy as `Resolution Professional', in its `3rd Committee of Creditors Meeting', and the same was approved by the `Adjudicating Authority', on 07.09.2022.

60. On behalf of the `Resolution Professional / 4th Respondent', it is brought to the notice of this `Tribunal' that, the `Interim Resolution Professional', after collating the materials, verified the same and in fact, submitted the `List of Creditors', and convened the `1st Meeting' of the `Committee of Creditors', on 21.03.2022, by the earlier `Interim Resolution Professional'.

61. According to the Resolution Professional / 4th Respondent, after the `Constitution' of the `Committee of Creditors', the `1st Respondent / Bank', had preferred a `Petition', before the `Adjudicating Authority', by seeking the `Appellant', as a `Related Party', and not to be a `Party', in

`Committee of Creditors'. The `Adjudicating Authority', had approved the `Petition' / `Application', and passed an `Order', observing that the `Appellant', is a `Related Party', and that, `the Committee of Creditors', was reconstituted as per Section 21 of the Insolvency and Bankruptcy Code, 2016, read with Regulation 17(1) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons, 2016).

62. According to the Resolution Professional / 4th Respondent, to place on 26.09.2022 with the Agenda Items were circulated. The `Expression of Interest', in `Form-G' for calling `EOI', was invited on 27.09.2022 in Financial Express (English) and Prajasakthi Telugu for an appointment of Transaction Auditor, the `EOI', was invited on 29.09.2022. On 29.09.2022, the `Expression of Interest', for the appointment of `Statutory Auditor', was invited by the `Resolution Professional'.

Appellant's Submissions in Comp. App (AT) (CH) (INS.) No. 332 / 2022:

63. The Learned Senior Counsel for the `Appellant' submits that the undermentioned Sums, were disbursed to the `Corporate Debtor' by `RTGS' dated 31.12.2019;

(i) INR 12,55,00,000 (Rupees Twelve Crore Fifty-Five Lakh Only) as Intercorporate Deposit under ICDA (in short);

(ii) INR 2,45,00,000/- (Rupees Two Crore Forty Five Lakh Only) as `Equity Investment' for 10% Share in the Company under the `SSSHA', (`Share investment Money'); and

(iii) A tranche of Working Capital Loan of INR 24,66,665 (Rupees Twenty Four Lakhs Sixty-six Thousand Six Hundred and Sixty Five only).

64. It is represented on behalf of the Appellant that, as per Agreements, the `Promoters' of the `Corporate Debtor', were obligated to follow several `Obligations' and `Covenants' and after executing the `Agreements', the `Promoters', had committed various `Violations', which was noticed by the `Appellant', etc.

65. According to the Appellant, the `Adjudicating Authority', had committed an `Error', in holding that the `Resignation Notices', were not served upon the `Corporate Debtor', even though, `Courier Receipt', indicating that the said `Resignation Notices', were placed on `Record', of the said `Authority'.

66. It is projected on the side of the Appellant that the `Adjudicating Authority', had failed to consider the duty of the `Corporate Debtor', to

maintain `Facility', at its `Registered Address', to acknowledge `Service of Notices', in terms of Section 12 (1) of the Companies Act, 2013.

67. The Learned Counsel for the Appellant points out that the `Adjudicating Authority', came to the wrong conclusion that Mr. Praful and Yogesh Bafna, continued to be `Nominee Directors', and become dis-entitled, to be a part of the `Committee of Creditors'.

68. The Learned Counsel for the Appellant submit that the `Adjudicating Authority', had failed to consider the `Agreements' on virtue of which, `Investor Nominee Directors' of the `Appellant', had appointed the `Board' of `Corporate Debtor', was never included in the `Articles of Association' of the `Corporate Debtor'.

69. The other contention advanced on behalf of the `Appellant' is that, the `Adjudicating Authority', had omitted to consider that the `Appellant', had recalled its `Shareholding', and terminated `SSHA', as per Clause 15 (1) (b), and therefore, `SSHA', Cannot be, said to be `inforce', and cannot be set to evidence any control whatsoever.

70. The Learned Counsel for the Appellant points out that as per the `Articles of Association' of the `Corporate Debtor', had not been amended and that the `Appellant', cannot be considered to be a `Related

Party', to attract the provisions of Section 5 (24) of the `Insolvency and Bankruptcy Code, 2016'.

71. According to the Appellant, the Companies Act, 2013, is a `Special Act', and as per Section 20 of the Companies Act, 2013, `Courier', is recognised as form of `Service'. Also that, a `Notice', is considered to be served, it was left at the `Registered Address' of the Company, as per Section 20 of the Companies Act, 2013. Furthermore, as per Section 12 (1) of the Companies Act, 2013, a `Company', is required to have a `Registered Office', to receive and acknowledge all `communications and notices', to be addressed to it.

72. The Learned Counsel for the Appellant takes a stand that the `Adjudicating Authority', should have considered the aspect of addressing the said `Resignation Notices', in terms of Section 168 of the Companies Act, 2013, is not disproven.

73. The Learned Counsel for the Appellant comes out with a plea that the `Corporate Debtor', had failed to ensure `availability' of Personnel / Facility, to acknowledge `Service of Notices', served upon the `Company'. Also that, the `Appellant', is not a `Related Party' in `Praesenti', and hence, it cannot be considered as a `Related Party'.

74. Advancing his argument, the Learned Counsel for the Appellant contends that, if inference of the `Adjudicating Authority'(`Tribunal'), is given effect, then, the `Corporate Debtors' or `Companies', intending to obligate `Liabilities' or `receipt of Notices', will simply keep the `Registered Address Lock', with no personnel, to acknowledge the service of `Documents'. That apart, on numerous occasions, `Electronic service of documents', were attempted on the email address of the suspended Director Mr. Anandrao Suramalla, but the said email ID was defunct and that the `Appellant', has received `Delivery Failure Report', for attempts of `Service', to the said suspended Director.

75. The Learned Counsel for the Appellant, prays for passing of an `Order', by this `Tribunal', to `Stay' the `Reconstitution' of the `Committee of Creditors', till final adjudication and disposal of the instant `Appeal', and to set aside the `impugned order', as an `illegal' one. Besides these, the `Appellant', had sought for an `issuance of a direction', for which, the `Committee of Creditors', be restrained from considering or voting of any `Agenda Item', pertaining to `Liquidation of Corporate Debtor', until `Final Adjudication' of the `Appeal'. Also that, the `Appellant', prays for permission being accorded to it, in respect of the

`Participatory Rights', in the `Committee of Creditors', till the final determination of the `Appeal'.

76. The Learned Counsel for the Appellant contends that the `Appellant', who had resigned from the `Board' of the `Corporate Debtor', before the relevant date of the `Constitution of Committee of Creditors' dated 15.03.2022, and who acted as a `Whistle-Blower', by exposing the `Mala fide' actions of the `Promoter Group' of the `Corporate Debtor', can in no way sabotage the `Corporate Insolvency Resolution Process', or the `Committee of Creditors', and seeks a position in the `Committee of Creditors', only to ensure that the collective process involving Financial Creditors, as contemplated by the `Code', and in the decision of the Hon'ble Supreme Court of India in Phoenix Arc Private Limited's case.

77. According to the Appellant, it claims a position in the `Committee of Creditors', that the `1st Respondent / Sole Member' of the `Committee of Creditors', who is acting in collusion with the `Promoter Group' of the `Corporate Debtor', does not `sabotage' the `CIRP' Process.

78. The Learned Counsel for the Appellant, therefore, prays for allowing the instant `Comp. App (AT) (CH) (INS.) No. 332 of 2022', by this `Tribunal', in setting aside the `impugned order' dated 28.02.2022, in

IA(IBC) No. 54 of 2022 in CP(IB) No. 204/7/AMR/2019, passed by the `Adjudicating Authority', (`Tribunal').

Service of Notice:

79. Be it noted that, if a registered `Summons', is sent to `Defendant', at the correct / proper address, there arises a presumption of `Service', in the considered opinion of this `Tribunal'.

80. In fact, the `Onus', to prove `Service of Summons', is on a `Plaintiff'. Where a `question' of `Service of Notice', arises, the `Court', is duty bound to `Record' a `Finding', thereon, as per decision of the Hon'ble Supreme Court of India in AIR (2001) SC 1253.

81. The `Service of Summons', by a `Courier', at the instance of `Plaintiff', is permissible, as per decision of the Hon'ble Supreme Court of India (2005) 6 SCC 344. Other `Mode' of `Service' are such as (a) Courier (b) Facts and (c) Electronic Mail Service or Service by Litigant, directly.

82. Where the `Registered Office' of a `Company' is intact and working, it was held that the `Service' of `Statutory Notice', for payment of `Debt', a condition necessary for preserving a `Winding up Petition', should have been served at the `Registered Office', as per decision in Pearks, Gunston & Tee Ltd. v. Richardson (1902) 1 KB 91.

Section 168 of the Companies Act, 2013:

83. A `Resignation', will not `relieve' a `Director', from being `Accountable' or from `Liability', which he may have incurred, while in `Office', as per decision of the Hon'ble Telangana and Andhra Pradesh High Court in Dr. Renuka Datla & Ors. v. Biological E Limited, reported in (2015) 193 Comp.cas 356 (T & AP).

84. The Companies (Appointment and Qualification of Directors Rules, 2014) provides that, if a `Director', resigns from his `Office', the `Company', shall `within 30 days', from the `date of receipt of notice of Resignation', shall intimate the `Registrar', in Form No. DIR-12, and post the `information', on its `Website', if any.

85. It is pointed out that Form DIR-12 contains the particulars of `Appointment of Directors' and `Key Managerial Personnel', and changes among them. Where the change relates to the `Resignation' of `Office', by a `Director', the Form-12, should be accompanied by a `Notice' of `Resignation'.

Observation:

86. In Palmer's Company Law (21st Edition at Page 543), it is stated that, a `Director', can at any time, `Resign', from his `Office', and usually the `Articles', make `express' provision accordingly. If he communicates his `Resignation', to the `Company', for instance, by a `Notice', upon the

`Company', served in the manner, provided by `Section 437, his `Resignation', is effective. A `Resignation', once made, cannot be `Withdrawn', except with a `Consent' of a `Company'.

Relinquishment of Office:

87. At this juncture, this `Tribunal', worth recalls and recollects the decision in Glossop v. Glossop, reported in (1907), 2 Ch D 370, wherein, it is held that a `Director', is entitled to `Relinquish', his `Office', at any time, as he pleases by `proper Notice', to the `Company', and his `Resignation', depends upon his `Notice', and is `not dependent' on any `acceptance'.

Acceptance of Resignation:

88. In the decision of the Hon'ble High Court of Karnataka, in Mother Care (India) Ltd. v. Prof. Ramaswamy P Aiyar (ILR 2004) Kar. 1081, it is observed that there is no provision in the Companies Act, 2013, for the `Acceptance of Resignation', because of the fact that the `Appointment of a Director', is not `bilateral in character'.

Withdrawal of Resignation:

89. While a `Director', can unilaterally `Resign', his `Withdrawal of Resignation', cannot be `Unilateral', and unless and until, the `Board of

Directors', accept his `request', and permitted the `Director', to `Withdraw' his `Resignation'.

Agents:

90. A `Resignation' of a `Director' of a `Company', is an `Unilateral' act, which comes into an `operative play', as soon as the `Resignation', is tendered by a `Director', of a `Company'. After all, a `Director', is an `Agent', of a `Company', and the `Agent', is competent to determine the `Agency', at his own end.

Related Party, under I & B Code, 2016:

Section 5 (24) Accustomed to act:

91. Any `Person', on whose advice, directions or instructions, a `Director', `Partner' or `Manager' or `Corporate Debtor', is accustomed to act, is a `Related Party' (Sub-Clause h).

Section 5 (24) of the Code:

92. Any `person' who controls more than twenty per cent of voting rights in the `corporate debtor', on account of `ownership' or a `voting agreement' (Sub-Clause j).

Associated Persons:

93. Any `Person', who is associated with the `Corporate Debtor', on account of `Participation' in `Policy Making Processes' of a `Corporate

Debtor' or having more than `Two Directors', in common between the `Corporate Debtor' and such `Person' or inter-change of `Managerial Personnel', between a `Corporate Debtor' and such `Person' or `Provision of Essential Technical Information' to or from the `Corporate Debtor', are considered as `Related Parties' (vide Section 5 (24) (m)).

94. Sections 28 and 29 of the I & B Code, 2016 and Regulation 33 of Liquidation Regulations, use the term `Related Party', in a manner, which may also include a `Related Party', in the context of `Individuals', such as `Promoters' or `Directors' or `Liquidators', as the case may be.

Committee of Creditors:

95. In `Law', the `Committee of Creditors', is not a `Statutory Authority'. It is only a `Decision Taking Body' of `Company', in respect to a `Corporate Debtor', that is `owed to pay money to them'.

Assessment (in Comp. App (AT) (CH) (INS.) Nos. 331 & 332 of 2022):

96. The 3rd Respondent / 1st Respondent (`KVR Industries Private Limited'), before the `Adjudicating Authority' (`Tribunal') had preferred an IA No. 53 of 2022 in CP (IB) No. 204 / 7 / AMR / 2019, against the `Appellant' (`PP Bafna Ventures Private Limited', Maharashtra, India), among other things averring that the `Appellant' / `1st Respondent' (`P P Bafna Ventures Private Limited'), is a `Related Party', as per

Section 5(24) (d), 5(24) (f), 5(24) (h), 5(24)(l) and section 5(24)(m)(i) to 5(24)(m)(iv) of the Insolvency and Bankruptcy Code, 2016.

97. According to the 1st Respondent / Petitioner in (IA No. 53 of 2022 in main CP(IB) No. 204 / 7 / AMR / 2019), the `Factum' of the `Appellant' / `1st Respondent', being a `Related Party', was brought to the knowledge of the `2nd Respondent / IRP', by the Punjab National Bank (`1st Respondent / 3rd Respondent' in both `Appeals'), and objections were placed, by the `3rd Respondent / 1st Respondent' (`KVR Industries Private Limited'), in the `First Meeting' of the `Committee of Creditors'. However, no action was taken by the `Appellant' / `1st Respondent' (`PP Bafna Ventures Private Limited').

98. Being aggrieved, over the inaction of the `Interim Resolution Professional', in not removing the `Appellant / 1st Respondent' (`P P Bafna Ventures Private Limited'), from the `Committee of Creditors' of the `Corporate Debtor', the `3rd Respondent / 1st Respondent', had filed the present IA No. 53 of 2022 in CP (IB) No. 204/7/AMR/2019, assailing the Constitution of the `Committee of Creditors'.

99. The stand of the `3rd Respondent / 1st Respondent / Petitioner', in `IA No. 53 of 2022 in CP (IB) No. 204/7/AMR/2019', is that the `Resolution Professional', had not applied his mind to the opinion given by a `Law Firm', and took the opinion as Resolution Professional's

conclusion, without any determination being made based on the facts of the case. Hence, the `3rd Respondent / 1st Respondent / Petitioner', in `IA No. 53 of 2022 in CP (IB) No. 204 / 7 / AMR / 2019', had prayed for, the `Relief' of `Staying' the `Conduct of any further Meetings' of the `Committee of Creditors', pending `disposal of IA No. 53 of 2022', and for the `Relief' of `Declaration' that the `Appellant / 1st Respondent', as a `Related Party', in terms of 5(24)(d), 5(24)(f), 5(24)(h), 5(24)(l) and section 5(24)(m)(i) to 5(24)(m)(iv) of the Insolvency and Bankruptcy Code, 2016 and resultantly, in directing the `2nd Respondent', to `Reconstitute' the `Committee of Creditors' of the `Corporate Debtor', without the `Appellant / 1st Respondent' / `3rd Respondent'.

100. The `3rd Respondent / 1st Respondent / Petitioner' (`Bank'), had filed `IA No. 54 of 2022 in CP (IB) No. 204/7/AMR/2019', against the `Appellant' (`KVR Industries Pvt. Ltd.' & two Others (`1st Respondent' in both `Appeals'), before the `Adjudicating Authority' (`Tribunal'), in seeking for `Issuance of an Order', in directing the `Interim Resolution Professional', not to `convene' and `conduct', any `Meetings' of the `Committee of Creditors' of the `Corporate Debtor', till the disposal of the said `Application', and for passing of `Order in directing the `Insolvency Resolution Professional' (`2nd Respondent'), to remove the `Appellant' / `3rd Respondent', being a `Related Party', as per Section 5

(24) of the I & B Code, 2016, from the `Committee of Creditors', as being `violative' of Section 21 (2) of the I & B Code, 2016. Also, the `1st Respondent / 3rd Respondent / Petitioner / Bank', had prayed for the `Reconstitution' of the `Committee of Creditors', with the `Petitioner / Bank', being the `Sole Member' of the `Committee of Creditors', etc.

101. Also, it is averred by the `1st Respondent / 3rd Respondent / Petitioner / Bank', in IA No. 54 of 2022 that the Resolution Professional had arbitrarily reduced the Voting Percentage of the Financial Creditor from 100% to 46.13% and granted 53.87% Voting Rights to the Appellant / 3rd Respondent, thereby, negating Section 21 (2) of the I & B Code, 2016.

102. According to the Appellant in both the `Appeals', it is not a `Financial Creditor', regulated by a `Financial Sector Regulator', and the `relevant date', to be considered, while determining the `Related Party' status will be the `date of Constitution' of `Committee of Creditors', as specified in the `1st proviso' of the `Section 21 (2) of the I & B Code, 2016'.

103. The other plea taken on behalf of the Appellant is that, a reading of 1st proviso to section 21 (2) of the I & B Code, 2016, a `Financial Creditor', mentioned in Section 5 (24) of the Code, if it's a `Related Party', of the `Corporate Debtor', shall not have any right to represent,

participate or to vote in a Meeting of the `Committee of Creditors'. Also, a reading of the 1st proviso to Section 21 (2) of the Code, coupled with Section 21 (1) of the Code, will show that the `relevant date', contemplated by the `Code', for determining the question on the `Related Party Status', is the date of `Constitution of Committee of Creditors', as the said provision, relates to the specific event of `Committee of Creditors', being constituted.

104. The version of the Appellant is that the `Nominee Directors' of the `Appellant', on the `Board' of `Corporate Debtor', had resigned on 11.02.2022 and the `two Directors', also ceased to be `Directors' on the `Board' of the `Appellant / Company', on 16.02.2022. Hence, it is represented on behalf of the Appellant, that there were no `common Directors', between the `Appellant' and the `Corporate Debtor', on the `relevant date', i.e., on 15.03.2022, the `Date of Constitution of Committee of Creditors', and even on the `Inter Corporate Deposit'. Besides, this, the details of `MCA' Website clearly reflect the ``end date'' of the directorship of the `two Nominee Directors' of the Appellant on the `Board' of the Corporate Debtor as 11.02.2022.

105. It is the stand of the Appellant that the `Committee of Creditors', was constituted on 15.03.2022, and that the `Appellant', ceased to be

`Related Parties', well before the `relevant date', as envisaged by the `Code'.

106. On behalf of the Appellant, it is pointed out that the `Consignment' was booked on 11.02.2022 and that the same could not be delivered due to `door locked', and that there is ample proof to show that the cover was given to the Courier on 11.02.2022.

107. The contention of the Appellant is that, the Courier Company, had checked and confirmed that the Courier containing the `Resignation Notices', were booked by the `Appellant' on 11.02.2022, and that the same could not be delivered due to `door locked', and as such, it is clear that the Appellant had sent the `Resignation Notices', to the address of the `Corporate Debtor'. through Courier on 11.02.2022.

108. The Appellant comes out with a stand that it could not intimate on the Resignation of these `Two Nominee Directors' on the `Board' of `Corporate Debtor', through mail because of the fact that the Corporate Debtor had either discreetly changed its Official Mail ID or blocked the Appellant. Also that, a mail sent by the Learned Counsel for the Appellant on 04.02.2022, will indicate where the email was bounced / undelivered.

109. According to the Appellant, in the present case, the `two Nominee Directors' of the `Appellant', had resigned from the `Board' of Directors',

on 11.02.2022, and intimated the `Registrar of Companies', about the same, on 04.03.2022. Also that, the `Two Nominee Directors' of the `Appellant', on the `Board' of the `Corporate Debtor', who resigned on 11.02.2022, had filed DIR-11 Form for `Resignation', with the `Registrar of Companies', mentioning the same date, as per proviso to Section 168 (1) of the Companies Act, 2013.

110. In reality, the `resignation date' of the `Two Nominee Directors' of the `Appellant' is 11.02.2022, before the date of `Constitution' of the `Committee of Creditors' (15.03.2022).

111. The plea of the `1st Respondent / 3rd Respondent / Bank' is that, the `Appellant', had appointed its `Nominees' Mr. Yogesh Prakash Bafna and Mr. Praful Prakash Bafna on the `Board' of the Corporate Debtor', on 29.12.2018, who were also the `Directors' on the `Board' of the `Appellant / Company', from 28.11.2014, and they `hold 33% of the Total Share Capital' of the `Appellant / Company', as per the `Annual Return' for the Financial Year ending 31.03.2021 (Filed by the `Appellant', on `Ministry of Corporate Affairs Portal').

112. As a matter of fact, the aforesaid `Two Nominee Directors', had resigned from the `Board' of the `Appellant / Company', on 16.02.2022, just two days before the `Corporate Insolvency Resolution Process' commencement date i.e. 18.02.2022 and purportedly resigned from the

Board of the Corporate Debtor on 11.02.2022, just six days before the commencement of the `CIRP'.

113. The plea of the Appellant is that, the `Resignation Letters', were correctly addressed to the `Corporate Debtor', is an `incorrect one', because of the fact that the `Courier Receipt' from the `Consignor' (Mr. Praful Bafna), addressed to the `Consignee' (KVR Industries Private Ltd.) dated 11.02.2022, shows the destination is Vishakapattinam and the Pin Code mentioned, under the head `Mobile No.', is `430016', but the fact of the matter is, the correct Pin Code of the place of `Registered Office' of the `Corporate Debtor' is `530016'.

114. Also that, the `Courier Consignment Nos. PNU800000799 and PNU800000800' (as seen from Vol. I of Paper Book in Comp. App (AT) (CH) (INS.) No. 332 of 2022 vide Diary No. 796 dated 25.08.2022), only goes to show that the purported `Resignation Letters', were sent to the address of the `Corporate Debtor', were not received by the `Corporate Debtor', and the `Tracking Status', points out that `we are sorry that your `Consignment Status Request', could not be processed', which in turn nullifies the stand that purported `Resignation Letters', were neither despatched on 11.02.2022 nor they could have been delivered to the `Corporate Debtor'.

115. Another aspect of looking into the matter is that, it is highly inconceivable, as to how the Tracking No. could vary to an extent of more than 100 Serial Nos. to `799' / `800', when the running Series (54 to 75), was despatched on 11.02.2022 is `924' to `945' (vide Pages 369 and 370 of the Appeal Paper Book in Vol. IV in Comp. App (AT) (CH) (INS.) No. 332 of 2022 – Diary No. 803 dated 26.08.2022). As such, it is safely and securely held by this `Tribunal' that the `Notice of Resignation', was not served on the `Company', as required under the `Companies Act, 2013'.

116. The `Adjudicating Authority', in the impugned order dated 22.08.2022, had mentioned in Paragraph 10 that `in this case, the resignation was sent by `Courier Service'. But it was not served on the CD even as per memo filed by the Counsel for ``Bafna'' himself. The contention of the Counsel for Bafna is based on the fact that the resignation letter was sent to the Company prior to the CD going into CIRP and hence Bafna ceases to be a related party. There is no material placed by the FC to deny the fact that the letter was sent to the Company, etc.'

117. It is pointed out that the `Resignation Notice', was sent to an address with Pin Code No. 53016, reflected in the `Track Record' of the `Courier Service', but the `Pin Code', relating to the `Registered Address' of the `FC', is `532016', as per the `Application'. In fact, the

`Adjudicating Authority' (`Tribunal'), in the impugned order at Paragraph 10, had pertinently observed that `obviously `Notice', is served in the Application, which shows that the `Pin Code', in the `Application', is the `correct one', etc'.

118. One cannot ignore the vital fact that the `Nominee Directors' filed the e-form DIR-11 only on 03.03.2022. But, the `Corporate Insolvency Resolution Process' of the `Corporate Debtor', had commenced on 18.02.2022, which indicates that only as an afterthought, the said e-form DIR-11, was filed by the `Nominee Directors'. Also that, no Form DIR-12, which is required to be filed by the `Company', Viz. the `Corporate Debtor', was ever filed. In effect, this `Tribunal', is of the considered view that, when the `Notice of Resignation', had not reached the `Company', `Bafna' remains as a `Director', in the `Corporate Debtor', and his position as `Related Party', may not get erased, in the `eye of Law'.

119. In the instant case, it cannot be brushed aside that the `Corporate Debtor' was admitted into `CIRP' on 18.02.2022 and the `Resignation Letter', was sent on 11.02.2022, one week before the `Corporate Debtor', being taken into the `Corporate Insolvency Resolution Process'. Also that, till the filing of Section 7 Petition, under the `Code', by Mr. Bafna, he continued as `Nominee Director', till 11.02.202, which is a stark reality.

Therefore, one can presume that they are `Related Parties', and they performed their role, as mentioned in the `Agreements', between the `Corporate Debtor' and `Bafna'.

120. It is to be remembered that the ingredients of Section 3 (24) of the Code, do not exclude those `Directors', who are not under the `Control' of the `Promoter' of the `Corporate Debtor', from the ambit of the `Related Parties'. Even otherwise, in a given case where a `Related Party' / `Financial Creditor', ceases to be a `Related Party', with the prime aim of taking part in the `Committee of Creditors', then he / it, ought to be considered as a `Related Party', for the purpose of Section 21(2) of the I & B Code, 2016, and not entitled to take part in the `Committee of Creditors' Meeting, as opined by this `Tribunal'.

121. In so far as the Notice dated 11.02.2022 is concerned, it transpires that the `Director', is resigning from with immediate effect, and taking note of Section 168(2) of the Companies Act, 2013, the `Interim Resolution Professional', obviously, had considered the `Resignation' of `Mr. Praful Bafna and Mr. Yogesh Bafna as 11.02.2022', based on his subjective opinion.

122. It is brought to the notice of this `Tribunal', in the Meeting that took place on 01.03.2022. with the Suspended Directors Mr. Praful Bafna and Mr. Yogesh Bafna, had informed that they resigned from the

`Directorship' of the `Corporate Debtor', and dropped from the `Meeting', and later the `Resignation Letters' dated 11.02.2022, were received with the `Screenshots' of `Ministry of Corporate Affairs' site, exhibiting 11.02.2022, as the `end date' of the `Tenure', as `Directors', in the `Corporate Debtor'.

123. It cannot be gainsaid that, in the case on hand, the `Interim Resolution Professional', ought to have exercised his due diligence and acted with meticulous care, caution and utmost circumspection.

124. In the instant case, the `Cover', given on 11.02.2022, had not reached the Company, as per the `Track Record of the Courier' (Filed on behalf of the `Bafna'), as rightly observed by the `Adjudicating Authority' (`Tribunal'), in the impugned order. Suffice it, for this `Tribunal', to unerringly point out that the `non-service' of `Resignation Letter', on the `Company', leads to an `inescapable conclusion' that the ingredients of Section 168 of the Companies Act, 2013, were not complied with, and therefore, Mr. Praful Bafna and Mr. Yogesh Bafna, remain to be the `Nominee Directors', and hence, they are not entitled to be a `part and parcel' of the `Committee of Creditors', as held by this `Tribunal'.

125. As regards the plea of the Appellant that as per the `Business Management Agreement' dated 29.12.2018, the factory premises of the

`Corporate Debtor', was managed by the `Appellant' and its `Nominees' (vide `Clause 3 of the said Agreement'), this `Tribunal', is of the cocksure opinion, that this will not anyway impede the `Appellant', from coming into the purview of the definition of the `Related Party'.

126. In the instant case, on behalf of the `1st Respondent / 3rd Respondent / Bank', it is brought to the notice of this `Tribunal', the `Two Nominee Directors' of the `Appellant', who were appointed on the `Corporate Debtor's Board', were representing the `Board' of the `Corporate Debtor', coupled with other `Two Promoter Directors'.

127. Indeed, the `Nominee Directors', had operated the `Bank Account' of the `Corporate Debtor', with the `Promoter Director' of the `Corporate Debtor'. Also, the payments to Vendors, were made by the `Corporate Debtor' only upon email confirmation from the `Nominee Directors' of the `Appellant'.

128. Be that as it may, in view of the foregoing detailed `qualitative' and `quantitative' discussions and reasons, this `Tribunal', taking note of the divergent contentions advanced on either side, keeping in mind the surrounding facts and circumstances in an `integral manner', and also on going through the `impugned order' dated 22.08.2022 in IA (IBC) Nos. 53 and 54 of 2022 in CP (IB) No. 204/7/AMR/2019, passed by the `Adjudicating Authority' (`NCLT', Amaravati Bench), comes to a

consequent conclusion that there is no `Irregularity' or `Illegality', in regard to the conclusion, arrived at in partly allowing the two `Applications / Petitions'. Viewed in that perspective, the `Appeals', are devoid of merits and fail.

Conclusion:

In fine, Comp. App (AT) (CH) (INS.) Nos. 331 and 332 of 2022, are `dismissed'. No Costs. The connected pending `Interlocutory Applications', if any, are `Closed'.

[Justice M. Venugopal]
Member (Judicial)

[Naresh Salecha]
Member (Technical)

20/02/2023

SR / TM