NATIONAL COMPANY LAW TRIBUNAL
SPECIAL BENCH, KOLKATA

IA(IBC) NO. 1299/(KB)/2024
IN
Company Petition No. (IB)-1711/(KB)/2019

IN THE MATTER OF:
(Under Section 7 of IBC, 2016)

M/s Avani Towers Private Limited **... Applicant/ Financial Creditor**

Versus

M/s Energy Properties Private Limited **... Respondent/ Corporate Debtor**

AND IN THE MATTER OF I.A.(IB) NO. 1299/(KB)/2024:
(Under Section 60(5) of IBC, 2016 r/w Rule 11 of NCLT Rules, 2016)

Chintan Jhunjhunwala
Suspended Director of
Energy Properties Private Limited **... Applicant**

Versus

Mahesh Chand Gupta,
Resolution Professional
Regd. Off: FE-202, Salt Lake City,
1st Floor, Sector- III, Kolkata- 700106 **... Respondent No. 1**

Avani Towers Private Limited
Through its RP, Mr. Jitendra Lohia,
Regd Off: 59A, Chowringhee Road,
Kolkata – 700020 **... Respondent No. 2**

Order Delivered on: 21.11.2024

CORAM:
SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)

PRESENT:

For the Applicant **:** Mr. Joy Saha, Sr. Adv.
Mr. Kumarjit Banerjee, Adv.
Mr. Sanchari Chakraborty, Adv.
Mr. Aasil Naushad, Adv.
Mr. Snehasish Chakraborty, Adv.

For the Respondent No. 2 **:** Mr. Jishnu Saha, Sr. Adv.
Mr. Shaunak Mitra, Adv.
Mr. Orijit CHatterjee, Adv.
Ms. Swati Dalmia, Adv.
Mr. Shubham Raj, Adv.
Ms. Neha Sinha, Adv.
Mr. Jitendra Lohia, RP of Avani Towers Pvt. Ltd.

For the RP **:** Ms. Manju Bhuteria, Adv.
Mr. Ram Ratan Modi, Adv.
Ms. Arundhati Barman Roy, Adv.
Mr. Mahesh Chand Gupta, RP in person

ORDER

I.A.(IB) No. 1299/(KB)/2024:

The captioned issue could stem out of the petition bearing no. CP(IB) No. 1711/(KB)/2019 filed under Section 7 of IBC, 2016 by M/s Avani Towers Private Limited (hereinafter, "Financial Creditor") for initiating CIRP qua M/s Energy Properties Private Limited (hereinafter, "Corporate Debtor"). In terms of the order dated 20.03.2024, the concerned Division Bench admitted the company petition and CIRP qua the CD commenced. Mr. Mahesh Chand Gupta was appointed as the IRP and subsequently, he could be confirmed as RP.

2. The I.A. No. 1299/(KB)/2024 could be preferred by Mr. Chintan Jhunjhunwala (hereinafter referred to as the Applicant), a shareholder and one of the members of the suspended Board of Directors of the Corporate Debtor questioning the classification of M/s Avani Towers Private Limited as operational creditor of the CD and seeking declaration of constitution of CoC as patently illegal and in absolute derogation of the provisions of the IBC,

2016 and the regulations framed thereunder *inter alia*. The reliefs sought in the captioned I.A. reads thus: -

a. *"Declaration that the constitution of the CoC of the CD by classifying the purported FC/ Avani Towers Private Limited as an Operational Creditor of the CD is patently illegal and is in absolute derogation of the provisions of the Code and Regulations framed thereunder;*

b. *Permanent injunction restraining the purported FC, Avani Towers Private Limited being a related party of the CD, from being inducted as a member of the CoC of the CD;*

c. *Direction be passed granting stay on the constitution of the Committee of Creditors (CoC) of the Corporate Debtor i.e., Energy Properties Private Limited;*

d. *Such further or other order or orders as to this Hon'ble Tribunal may deem fit and proper;*

e. *Interim Orders in terms of prayer (a) (b) and (c);*

f. *Ad interim orders in terms of prayer (a), (b) and (c);*

g. *Receiver;*

h. *Cost."*

3. The brief facts of the matter as stated in the captioned application are summarized as under: -

(i) The Corporate Debtor is the absolute owner of land measuring 10.19 acres situated at Ramrajatalla, District Howrah, West Bengal (hereinafter referred to as the "subject premises") and that the said premises was acquired by the CD in the year 2008 under the provision of SARFAESI Act, 2002 in a sale conducted by UCO Bank. It has been stated that the said premises was acquired for valuable consideration free from all encumbrances.

(ii) The Corporate Debtor entered into an agreement with the Financial Creditor/ Avani Towers Private Limited for developing the subject

premises under the terms of the Development Agreement dated 16.06.2008.

(iii) As per clause 8.1 of the aforementioned Development Agreement, the Developer i.e., the Financial Creditor, had to make a security deposit of a sum of Rs. 12 crores with the owner of the land i.e., the Corporate Debtor and that the same was not to carry any interest. However, any further sum subject to a maximum of Rs. 3 crores, to be advanced by the FC to the CD was also to form part of the security deposit and was to carry an agreed interest rate of 18% p.a. compounded and payable quarterly. The said clause 8.1 of the Development Agreement reads thus: -

> *"8.1 Refundable Deposit: The Developer will keep in deposit with Owner a sum of Rs. 12,00,00,000/- (Rupees twelve crore) (hereinafter referred to as the Security Deposit) which will not carry interest and will be payable & refundable in the manner as would appear from the Part-I of the Third Schedule hereunder written. The Developer as on date has already paid Rs. 7,86,83,108/- (Rupees seven crores eighty-six lac eighty there thousand one hundred eight). The said sum of Rs. 12,00,00,000/- (Rupees Twelve crore) agreed to be paid by the Developer will be treated as the Security Deposit. However, any further sum, subject to a maximum of Rs. 3,00,00,000/- (Rupees three crore), if advanced by Developer to Owner, shall form part of Security Deposit and shall carry interest at agreed rate of 18% per annum compounded and payable quarterly."*

(iv) It is already an admitted position by the parties that no development work was carried on the subject premises by the FC/ Avani Towers Private Limited and the parties could subsequently enter into various disputes pertaining to non- performance of development work by FC/ Avani Towers Private Limited.

(v) In the year 2019, one Sesa International Limited in its capacity as the Financial Creditor filed an application bearing CP(IB) No. 372 /2019 under Section 7 of the Code against Avani Towers Private Limited and the said application was admitted *vide* order dated 15.10.2019 and CIRP qua Avani Towers Private Limited commenced, with Mr. Jitendra Lohia being appointed as the RP.

(vi) In September 2019, Avani Towers Private Limited filed the petition bearing CP(IB) No. 1711/(KB)/2019 qua the debt amounting to Rs. 10,90,72,565/-. The aforementioned debt consisted of the additional security deposit to the tune of Rs. 3.50 crores advanced by Avani Towers Private Limited to the CD with interest charged at 18% p.a. compounded and payable quarterly.

(vii) On 20.03.2024, this Adjudicating Authority admitted CP(IB) No. 1711/(KB)/2019 under Section 7 of the Code and CIRP qua CD commenced. An appeal was filed before the Hon'ble NCLAT bearing C.A. AT(INS) No. 769 of 2024, challenging the aforementioned order dated 20.03.2024 passed by NCLT, however, the same was dismissed *vide* order dated 30.05.2024.

(viii) The Applicant has stated that to the best of his knowledge, the alleged FC i.e. Avani Towers Private Limited is the only purported Financial Creditor of the CD and that the said FC is a related party of the CD in terms of Section 5(24) of the Code and Section 2(6) and 2(76) of the Companies Act, 2013. The first meeting of the CoC was held on 20.04.2024 comprising of only 3 purported operational

creditors the details of whom, as mentioned in the application, reads thus:

Name	Claimed Amount	Voting Percentage
Avani Towers Private Limited	Rs. 12 crores	99.97%
R. Kothari & Co. LLP	Rs. 29,500	00.025%
JBS & Co.	Rs. 7,080	00.005%

(ix) The Applicant has contended that the IRP proceeded to form a CoC by accepting the claim of Avani Towers Private Limited, as an operational creditor and that such classification of claim for refund of developer's security deposit of Rs. 12 crores are ex-facie erroneous and illegal and completely dehors the provisions of the Code.

(x) Since, in the first meeting of the CoC itself, the alleged FC was classified as a related party of the CD on account of the accrued interest on the security deposit and became disentitled to be part of the CoC as per Section 21(2) of the Code, the said FC is attempting to evade the tag of related party and the RP engineered an ingenious mechanism to induct the related party by classifying it as an operational creditor of the CD on account of its original security deposit of Rs. 12 crores.

(xi) Further, Regulation 16 of the IBBI (Insolvency Resolution Process for Corporate Persons), 2016 mandates that in the absence of a financial creditor, the CoC can be formed by the operational creditors and in the present case, the CoC has been constituted with merely three purported operational creditors. Further, it is an

undisputed position that the Respondent No. 2 herein i.e. Avani Towers Private Limited has 40% shareholding in the CD and has been classified as a related party of the CD by the RP. Therefore, in any event, Avani Towers Private Limited is disqualified from being a member of the CoC of the Corporate Debtor.

(xii) It has been contended that the claim of the purported FC/ Avani Towers Private Limited is absurd as it is impossible that the same debt can be both operational debt and the interest on the operational debt be a financial debt.

(xiii) The RP has been acting in collusion and conspiracy with purported FC/ Avani Towers Private Limited and has treated the sum of Rs. 12 crores as operational debt only for the purpose of avoiding the trappings of Section 21 of the Code and for constituting the CoC with Avani Towers Private Limited having overwhelming majority in the CoC.

(xiv) The claim made by Avani Towers Private Limited does not constitute a claim in respect of any "goods or services including employment or a debt in respect of payment of dues arising under any law for the time being in force and payable to the Central Government, State Government or any local authority". Reliance is placed on the decision of the Hon'ble NCLAT in the matter of ***Carestream Health India Private Limited vs. Seaview Mercantile LLP, Company Appeal AT (INS) No. 579 of 2023***.

(xv) Even if it is hypothetically assumed that Respondent No. 2/ Avani Towers Private Limited is both a financial creditor as well as an operational creditor, the bar of the proviso to Section 21(2) will apply equally to a financial creditor as also an operational creditor.

(xvi) The provisions of the Code must be read harmoniously with the intention of the legislature. It is obvious that the legislature intended to keep the related parties out of the CoC and thus, in the circumstances, the Respondent No. 2 cannot be given a backdoor entry in the CoC by classifying a portion of the alleged claim as an operational debt.

4. The submissions made on behalf of the Respondent No. 1/ RP has been recorded in the order dated 27.09.2024 and the same can be summarized thus: -

(i) As per the order dated 02.09.2022 passed by Hon'ble NCLAT in ***Harendra Singh Khokhar v Indarprashta Buildtech*** [Company Appeal (AT) (Ins) No. 171 of 2022], it has been held that the interest free security deposit extended pursuant to a development agreement is to be treated as an operational debt. The component of interest free Security Deposit of Rs. 12 crores extended by the Corporate Debtor is in the nature of Operational Debt.

(ii) As per the provisions of the GST Act, 2017, the development of property is to be considered as supply of goods or services.

(iii) Since the only Financial Creditor of the Corporate Debtor was a related party, the RP on 12.04.2024, had constituted the Committee

of Creditors of the Corporate Debtor comprising of Operational Creditors in terms of Regulation 16 of the CIRP Regulations, 2016.

(iv) Unlike Related Party Financial Creditors, there is no express bar on Related Party Operational Creditors being part of the Committee of Creditors either in the Code or in the Regulations.

5. Similarly, the submissions made by Respondent No. 2/ Avani Towers Private Limited has also been recorded in the order dated 27.09.2024 and the same can be summarized thus: -

(i) The proviso to section 21(1) of the Code speaks only of 'related party financial creditor.' Furthermore, Regulation 16 of CIRP Regulations, permits constitution of CoC by operational creditors, where the corporate debtor does not have any financial creditor. There is no such concept of 'related party operational creditor' in the Code.

(ii) While submitting a claim as a financial debt in Form C, a declaration is required to be given by the claimant confirming whether the same is a related party to the corporate debtor or not. However, no such declaration is required to be furnished while submitting claim of any other nature, including operational debt. Therefore, the status of an operational creditor, being a related party or not, is irrelevant.

(iii) When a provision is not available in the statue, the same cannot be read into it by way of interpretation only to meet the needs of an overzealous litigant. In this context, reliance was placed on the judgment of ***Jinia Keotin and Ors. v. Kumar Sitaram Manjhi and Ors.*** reported in (2003) 1 SCC 730.

(iv) Moreover, a reading of Section 21(4) of the Code would show that the law permits a creditor to wear two hats, i.e., he would be considered as a financial creditor to the extent of the financial debt owed by him, and also as an operational creditor to the extent of operational debt owed by him.

(v) It is a matter of fact that 99% of the debt of the CD is owed to Respondent No. 2. The entire resolution process is for the benefit of the said Respondent and the Applicant is attempting to scuttle the same.

(vi) Insofar as the Applicant's contention that Security Deposit does not amount to Operational Debt is concerned, it is submitted that the same is baseless. It is stated that the security deposit had been provided to secure the performance of obligations of Avani under the Development Agreement which is rendering of construction services.

6. On 27.09.2024, the Division Bench passed an order with respect to the present application wherein the Ld. Members of the Bench had a difference of opinion on the issue of inclusion of Avani Towers Private Limited in the CoC of the Corporate Debtor. At the outset, it is apt to refer to the analysis made by both the Ld. Members in the order dated 27.09.2024 on the said issue.

7. *Firstly*, the Brother Member (Technical) in the aforementioned order has expressed his view that the security deposit made by Respondent No. 2/ Avani Towers Private Limited constituted an operational debt and that it has been rightly included in the CoC as an Operational Creditor since there is no bar in the statutory framework on disqualification of an Operational Creditor from

being included in the CoC on the grounds of being a related party. Relevant excerpt of the order passed by the Ld. Member (Technical) reads thus: -

> *"**55.** The two main issues that arise for consideration are as follows: -*
>
> *i. Whether a security in a Development Agreement as given under the circumstances of the case can be termed as an Operational debt?*
>
> *ii. Whether the bar of related party attached to a person or to the nature of the debt?"*
>
> *[…]*
>
> ***57.** Issue No.1 – Security deposit as Operational debt ?*
>
> ***58.** Elaborate submissions were made by Ld. Sr. Adv. Mr. Joy Saha on the matter (supra). It has been inter-alia contended that the ratio of the judgement of Hon'ble NCLAT in Harendra Singh Khokhar is not applicable to the present case on the plea that in the instant case the Development agreement was signed and therefore the issue is that of an unadjudicated contractual claim, as against the cited case where the development agreement was not even signed.*
>
> ***59.** In this regard reference need to be made to Para 14 of the said judgment that was placed by Ld. Sr. Counsel for the applicant which records that the payment which was made by the Operational Creditor was in contemplation of Development Agreement. It is therefore simple to deduce that when such a transaction is made towards even a Contemplated Development Agreement, is construed as an operational debt, then how a different treatment can be meted out to an identical transaction which is made in pursuance of an already concluded Developmental Agreement. Since the payment of 12 crores has been made in terms of a development agreement which is for the developing a real estate project thus entailing a plethora of various goods and services, the nexus with the supply of goods and services as held in M/s Hitro Energy is clearly inferred herein. It is useful to cite following parts of the said judgment by Hon'ble Supreme Court of India.*
>
> > *43 First, Section 5(21) defines 'operational debt' as a "claim in respect of the provision of goods or services". The operative requirement is that the claim must bear some nexus with a provision of goods or services, without specifying who is to be the supplier or receiver. Such an interpretation is also supported by the observations in the BLRC Report, which specifies that operational debt is in relation to operational requirements of an entity. Second, Section 8(1) of the IBC read with Rule 5(1) and Form 3 of the 2016 Application Rules makes it abundantly clear that an operational creditor can issue a notice in relation to an operational debt either*

*through a demand notice or an invoice. As such, the presence of an invoice (for having supplied goods or services) is not a sine qua non, since a demand notice can also be issued on the basis of other documents which prove the existence of the debt. This is made even more clear by Regulation 7(2)(b)(i) and (ii) of the CIRP Regulations 2016 which provides an operational creditor, seeking to claim an operational debt in a CIRP, an option between relying on a contract for the supply of goods and services with the corporate debtor or an invoice demanding payment for the goods and services supplied to the corporate debtor. While the latter indicates that the operational creditor should have supplied goods or services to the corporate debtor, the former is broad enough to include all forms of contracts for the supply of goods and services between the operational creditor and corporate debtor, including ones where the operational creditor may have been the receiver of goods or services from the corporate debtor. Finally, the judgment of this Court in Pioneer Urban (supra), in comparing allottees in real estate projects to operational creditors, has noted that the latter do not receive any time value for their money as consideration but only provide it in exchange for goods or services. Indeed, the decision notes that "[e]xamples given of advance payments being made for turnkey projects and capital goods, where customisation and uniqueness of such goods are important by reason of which advance payments are made, are wholly inapposite as examples vis-à-vis advance payments made by allottees". **Hence, this leaves no doubt that a debt which arises out of advance payment made to a corporate debtor for supply of goods or services would be considered as an operational debt**.*

(Emphasis added)

***60.** It is useful to cite here the relevant provision of the Developmental agreement*

8.2 Refund of Refundable Deposit: The Security Deposit shall be refunded by the Owner to the Developer in the manner provided in the Part-II of the Third Schedule. The Owner agrees to ensure timely repayment of the said Refundable Deposit in the manner as hereinbefore stated and in the event of failure to refund an interest @ 18% p.a. compounded quarterly shall become payable calculated from the due date of refund.

8.3 Recovery of Security Deposit: In event the Owner fails to refund the said Security Deposit within 7 (seven) days of the same becoming due then and in that event Developer shall be entitled to acquire and/or buy back such portion of the Owner's Allocation for repayment of the said Security Deposit at a agreed rate of Rs.1,400/- (Rupees fourteen hundred) per sq.ft. The Owner's Allocation shall stand reduced by such square feet as may be derived by dividing the outstanding refund amount with the rate of Rs.1,400/- (Rupees fourteen hundred) per square feet.

The remedy envisaged in the event of non-refunding of the Security deposit is that the same shall be adjusted against the buy back of the share of the Corporate Debtor in the developed project, which supports our contention that the provision of the said security deposit has a direct co-relation with the Goods and services involved in the agreement.

61. *From the above, it is clear that the said security deposit has been paid to the corporate debtor in terms of a contract which is the development agreement, which allows Avani to develop the project and in exchange of this permission the Corporate Debtor stands to receive constructed space, which is a culmination of many a goods and services to be rendered by Avani and hence we have no hesitation is terming the same as Operational debt.*

62. Issue No.2 - Whether Avani which is categorized as a related party can now be included in the CoC as an Operational Creditor? *Having demonstrated per similia that the Security deposit is an Operational debt, we are left to consider whether a related party Operational Creditor is proscribed from its inclusion in the CoC.*

63. *The contention raised by the suspended director and the applicant herein now is that M/s Avani Towers has been included in the CoC in violation of the statute. The crux of the applicant's objections, being that since Avani has been disallowed to sit on the CoC as a Financial Creditor by virtue of the fact that it was termed as a related party of the Corporate Debtor, therefore, they cannot be allowed to sit in the CoC by wearing a different hat , this time of an Operational Creditor thus circumventing the statute. In this regard the contention has been sought to be supported by judgment of Hon'ble Supreme Court in the cases of Periasamy (Para 86) and Phoenix (para 103)*

To start with, we focus on the ratio of Periasamyand, extract Para 86 of the judgement, which is as follows:

> *86. As regards the question of discrimination between the claims of related party and unrelated party, the Appellate Tribunal, while placing reliance on the decision of this Court in Phoenix ARC (P) Ltd. v. Spade Financial Services Ltd. [Phoenix ARC (P) Ltd. v. Spade Financial Services Ltd., (2021) 3 SCC 475 : (2021) 2 SCC (Civ) 1] observed that "related party" was specifically treated as a class unto itself and was restricted from any involvement in the CIRP in any capacity (under Section 21 IBC) and disqualified from being a resolution applicant (under Section 29-A IBC),* ***the underlying object being that involvement of a related party in the CIRP is seen as giving unfair benefit to the corporate debtor*** *and in fact, the related party is treated in the same class as the corporate debtor itself. Therefore, according to the Appellate Tribunal, a "related party" could be treated as a separate class*

independent of an unrelated party and ought to be equated with the promoters as equity shareholders or as partners.

(Emphasis applied)

64. *As can be seen from the highlighted portion, the reason for proscribing the inclusion of a related party in the CoC is resoundingly clear that it is only to fulfill the underlying object that the involvement of a related party in the CIRP is seen as giving unfair benefit to the Corporate Debtor, as the related party is to be treated as a same class as the Corporate Debtor itself. However, in the present case the very fact that this inclusion is being challenged by one of the Directors of the Suspended board of the Corporate Debtor, is proof enough that the corporate debtor is not getting any benefit due to inclusion of Avani in the CoC. As such the ratio and logic of this judgement does not come to the aid of the applicant.*

65. *In order to bolster his assertion, Ld. Sr. Counsel relied on the judgement of Hon'ble Supreme court in Pheonix matter wherein it has been held in para 103 that the exclusion under the first provision 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" The para ibid is extracted below:*

> *"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 in 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."*

66*. Thus clearly, the concern is that a related party by acquiring a seat in the CoC with the sole intention to dilute the share of the other creditors shall be kept out of CoC. If we keep the differentiation of Operational and Financial debt aside for the sake of understanding, here we have a case where the financial creditor-cum-Operational Creditor- cum developer and one of the parties to the litigation, has a voting share of 99.97% on the basis of claims received, and therefore, it is in its own interest not to sabotage the CIRP, particularly when the CIRP has been initiated at its own instance. As such the fact of the case at hand do not support the contention of the applicant.*

***67**. Much reliance has been placed by R-2 that Regulation 16 while envisaging a situation where there might be only the Operational Creditors eligible to form the Committee of Creditors, there is no mention of their exclusion as a related party. So to say that the Code does not foresee a situation where the Operational Creditors should also be excluded from being on the CoC for the reason of their being related parties […]*

***68.** The regulation essentially clears the path to be followed in formation of the CoC when there is no eligible Financial Creditor and it aids the cause of the R2 that there is no condition envisaged like in the case in hand.*

***69.** Further Ld. Counsel for R2 has sought to differentiate between the Form B and Form C of the CIRP Regulations9 to buttress its logic that as per the scheme of the code the concept of 'related party' does not include an Operational Creditor. It is submitted that the following certificate at S.no. 7 of the Form C, i.e. the form for lodging of the claim by a Financial Creditor reads as under :*

> *"I am eligible to join committee of creditors by virtue of proviso to section 21 (2) of the Code even though I am a related party of the corporate debtor."*

It is contended that this certificate is conspicuous by its absence in Form B, which is for lodging of the claim by Operational Creditors. Ld. Counsel for Avani has submitted that this omission in Form B is not accidental, but is a conscious decision by the legislature, for if it was not so, there would not be any entity left that could drive the CIRP.

***70.** Though both these assertions are not very convincing, but in view of the judgement cited by Ld. Counsel in the matter of Jinia Keotin and Ors. v. Kumar Sitaram Manjhi and Ors.(Supra) that the law has to be followed as existing and any effort to interpret the law would be re-writing the same, we also tend to agree with the submissions made by Ld. Counsel for Avani that the law as enacted does not envisage a situation where an Operational Creditor would be a related party.*

***71.** No documents in regard to the procedure adopted for categorizing Avani as a related party, save a minute of meeting of the First CoC have been given in the application and/or reply, however that does not restrain us from analyzing the situation in regard to Avani being categorised as a related party by the RP in regard to the Financial debt. Having said so, it is essential to examine the case in relation to the provisions of the code in regard to the related party. The same is defined in Section 5(24) of the code and is set out in the table hereunder for the ease of examination:*

Section 5(24)	Applicability to the instant case
(*24*) "related party", in relation to a corporate debtor, means—	
(*a*) a director or partner of the corporate debtor or a relative of a director or partner of the corporate debtor;	Avani not being a Director or partner is not a related party
(*b*) a key managerial personnel of the corporate debtor or a relative of a key managerial personnel of the corporate debtor;	No official of Avani is key managerial personnel of the Corporate Debtor
(*c*) 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;	Avani is not an LLP and hence not a related party
(*d*) 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;	No Director, partner or manager of Corporate Debtor is a Director in Avani – hence this is not applicable
(*e*) 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;	No Director, partner or manager of the Corporate Debtor is a director.
(*f*) anybody corporate whose board of directors, managing director 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;	The board of Avani is not required to act as per the advice, directions or instructions of a director, partner or manager of the Corporate Debtor. The limitations of its working if any have already been set out in the Development agreement and no further directions and modifications envisaged therein.

(*g*) 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;	Avani is not an LLP – hence this subsection is not applicable.
(*h*) any person on whose advice, directions or instructions, a director, partner or manager of the corporate debtor is accustomed to act;	This is clearly not applicable as all the directions are already given in the development agreement
(*i*) 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;	Avani is neither holding , subsidiary or an associate company Corporate Debtor – hence this sub section is inapplicable
(*j*) any person who controls more than twenty per cent. of voting rights in the corporate debtor on account of ownership or a voting agreement;	**Avani holds 40% shares of the Corporate Debtor as a security hence it has been categorized as a related party**
(*k*) any person in whom the corporate debtor controls more than twenty per cent. of voting rights on account of ownership or a voting agreement;	Corporate Debtor does not control anything in Avani
(*l*) any person who can control the composition of the board of directors or corresponding governing body of the corporate debtor;	Avani cannot control the composition of the board of directors or governing body of the Corporate Debtor
(*m*) any person who is associated with the corporate debtor on account of— (*i*) participation in policy making processes of the corporate debtor; or (*ii*) having more than two directors in common between the corporate debtor and such person; or (*iii*) interchange of managerial personnel between the corporate debtor and such person; or **(*iv*) provision of essential technical information to, or from, the corporate debtor;**	The binding relationship between AVANI and the Corporate Debtor is the developmental agreement as per which : (i) No person from Avani can participate in policy making of the Corporate Debtor (ii) No directors are common between Corporate Debtor and Avani (iii) No interchange of managerial persons is envisaged in the Developmental agreement **(iv) Treatment of a varying technical information to be given by the developer is pre-decided in the development agreement and is therefore not an " unknown" .**

72. *From the above table it is seen that Section 5(24)(j) & 5(24)(m)(iv) are the only plausible sections that hinder the inclusion of Avani in to the CoC.*

73. *Let us have a closer look at the wording and intent of the provision for a purposive interpretation thereof. In this regard it is noted that the Shareholders Agreement Clause 5.2 stipulates as follows:-*

> *"MOU and Shareholders Agreement: The Owner in order to develop the said Land executed a Memorandum of Undertaking dated 24th January 2008 (MOU) with the Developer where in the broad terms and conditions of Development are provided therein and also executed a Shareholders Agreement of even date whereby 60% of the Shares of the Owner were transferred by the Board of which the Developer holds 40% of the Transferred Shares and 20% of the Transferred Shares are held by Shri R.L.Gaggar of 6,Old Post Office Street Kolkata as security till the completion of the Project."*

which shows that the shareholding as envisaged in this agreement is only to be reckoned as a security and by virtue of Avani as well as R.L.Gaggar holding a particular percentage of the shares of the Corporate Debtor does not entitle in any manner to have a control on the Board of Energy Property i.e. CD. Thus the postulate 5(24)(j), which might on the first look appear to be proscribing section in the instant case, is in effect no bar for inclusion of Avani into the CoC, as Avani can not exercise any control in the affairs of Corporate Debtor by virtue of this shareholding as the same is held only as a Security and not for any Operational purpose.

74. *Further 5(24)(m)(iv) states that a related party in relation to an agreement means any person who is associated with the Corporate Debtor on account of provision of essential technical information be or from the Corporate Debtor. Treatment of a varying technical information to be given by the developer is predecided in the development agreement and is therefore not an " unknown" that may affect the working of the Corporate Debtor as an agreed discretion is given to the Developer in the matters relating to the technical content of the agreement and a due and proper remedy already exists and as such the developer could not spring any surprises or generate a dilemma that may impede the working of the Corporate Debtor as a corporate person.*

75. *These two postulations when seen through the prism of a Development Agreement, we find that both the entities are tide to each other only to the extent of development of the land owned by the Owner and resulting fruits of the developmental project within the four corners of the Development Agreement. Thus, this is a purely project-based arrangement, with the rights and obligation of each constituent properly defined and lawful remedies included in the frame work of the agreement and as such this per se does not affect the rights, management and*

working of these individual entities when seen as corporate person in the backdrop of Section 5(24) of IBC 2016. Thus in our view, the RP has categorized Avani as a related party without application of mind on the aspect of the control of the Corporate debtor by Avani , which is an essential element of a party being labelled as a 'related party'. The fact that Avani stands to lose by sabotaging the CIRP with an intent and purpose of favoring the Corporate Debtor leaves us to be in no doubt that Avani should not have been labelled as a related party in the first place. This action of RP has led to a quaint situation wherein the 99.97% of CoC is being challenged to be replaced with remaining operational creditors honing 0.03%, due to differing inferences. The stipulations of the development agreement which clearly delineate the rights and obligations of the constituents, deny any control whatsoever of the Corporate Debtor to Avani. The said "Control" is the cornerstone for an entity being labelled as a related party and its absence causes us to believe that no violence is done to the spirit of the law and the process integrity is not jeopardized either, since Avani has found its rightful place in the CoC, even though as an operational creditor due to a mechanical interpretation of the statute on the part of the Resolution Professional.

***76.** In the light of the discussion above, we find no occasion to accept the reasonings of the applicant and consequently they are rejected.*

***77.** In result **I.A.(I.B.C)/1299(KB)2024** is hereby **rejected.**"*

8. The Sister Member (Judicial) in the aforementioned order dated 27.09.2024 expressed her view that a creditor who already stands classified as a 'related party Financial Creditor' under Section 5(24) of the Code cannot represent the CoC in any manner and that the first proviso of Section 21(2) of the Code shall squarely apply to an Operational Creditor. Relevant excerpt of the order dated 27.09.2024 reads thus: -

*"**2.** Admittedly, the Resolution Professional ("RP" in short) of the Corporate Debtor Energy Power Private Limited has classified Avani Towers Private Limited, the Respondent No. 2 as a "related party Financial Creditor" in the very 1st meeting of the Committee of Creditors ("CoC" in short). Therefore, Avani Towers should be debarred from having any right to representation, participation, or voting in a meeting of the CoC. Avani Towers Private Limited is disqualified from having a seat in the CoC as per the first proviso to Section 21(2) of the Code. The same related party Financial Creditor is now sought to be included in the CoC as an Operational Creditor allegedly holding 99.97% of the voting share*

of the CoC. Such classification to allow a disqualified related party Financial Creditor to have a seat in the CoC as an Operational Creditor allegedly holding a 99.97% voting share is indeed a subterfuge to evade the disqualification under Section 21(2) of the Code which has already accrued. Such conduct militates against the object and purpose of Section 21 of the Code.

3. *Admittedly and irrefutably, Avani Towers holds a 40% share in the Corporate Debtor as a security and hence, it has been categorised as a related party in terms of Section 5(24)(j) of the Code. So, Avani Towers as a related party creditor is disqualified from having a seat in the CoC.*

4. *It is manifest from the language that Section 21 of the Code employs that the legislature intends to exclude a 'related party Financial Creditor' from the CoC and a Financial Creditor, who qualifies as a 'related party', is disqualified from having any right of representation, participation or voting in a meeting of the CoC. Thus, a CoC cannot be constituted with a 'related party Financial Creditor'. It would be against the object, reason and spirit of the Code to constitute a CoC with the same related party, who stands already rejected by the RP as a 'related party Financial Creditor'. The objective enshrined in Section 21 of the Code to not include a 'related party Financial Creditor' in the CoC in any capacity whatsoever, is to exclude such person/ entity from exerting any control over the CIRP. Therefore, to allow the same related party who stands already disqualified as a related party financial creditor, to gain an entry in the CoC as an Operational Creditor would defeat the very purpose of the disability that Section 21 of the Code seeks to attract.*

5. *The language Section 21 of the Code is couched in, that provides a clear disqualification to the individual related party and not to the nature and character of debt such that such related party is kept out of CoC, and once such disqualification attaches to an entity; such entity cannot form a part of the CoC in any capacity, not even as an Operational Creditor. The disqualification that Section 21 of the Code attaches must be interpreted in its widest sense and a disqualified person cannot be permitted to gain entry indirectly by devising some other ingenious strategies.*

[…]

9. Thus, the gist culled out from the decisions supra would be as under:

> ***i.*** *A related party is expressly prohibited from participating in the CoC with voting rights.*
>
> ***ii.*** *Involvement of a 'related party' in CIRP* ***in any capacity*** *is seen as giving unfair benefit to the corporate debtor.*

iii. *The purpose of the non-inclusion of a related party of a corporate debtor from the CoC is to alleviate conflicts of interest that may arise by allowing a related party to represent the CoC.*

iv. *Section 21(2) of the Code aims to remove any conflict of interest within the CoC, to prevent any related parties of the corporate debtor from gaining control of the corporate debtor during the CIRP by virtue of any loan that may have been provided by them.*

v. *The expression 'related party' under Section 5(24) applies at the time when the debt was created, the exclusion in the first proviso to Section 21(2) would stand attracted.*

vi. *The statutory recognition of 'related party' as a* ***"different class"*** *would apply even to the resolution plan when CoC would decide whether in its commercial wisdom, it should pay to the related party at all because that would mean paying to the same persons who are behind the Corporate Debtor.*

The rationale of excluding any 'related party' from the CoC: Doctrine of 'Conflict of Interest':

10. *As observed in* ***Phoenix Arc (Supra),*** *the disability under the first proviso to Section 21(2) of the Code aims at removing any 'conflict of interest' within the CoC, to prevent any related parties of the corporate debtor from gaining control of the corporate debtor during the CIRP by virtue of any loan that may have been provided by them. To allow a disqualified creditor an entry in the CoC with voting rights would be equivalent to allow the statutory provision to be defeated by a 'related party' of a corporate debtor creating commercial contrivances which have the effect of denuding its status as a related party, by the time that the CIRP is initiated. The true test for determining whether the exclusion in the first proviso to Section 21(2) applies must be formulated in a manner which would advance the object and purpose of the statute and not lead to its provisions being defeated by disingenuous strategies.*

11. *It is further observed in Phoenix Arc (Supra), that to obviate any possibility of "conflict of interest" in the CoC which acts as a "trustee" for the interest of all the stakeholder of the corporate debtor in CIRP, a process that is in rem in nature, "related parties" are excluded from the CoC. The definition "related party" should be understood within the four corners of its definition in Section 5(24) of the I&B Code, and the same cannot be enlarged to exclude the parties, other than those falling strictly within the purview of Section 5(24) from the CoC. Conversely, the provisions cannot also be enlarged to include related parties falling strictly under the disability that Section 5(24) of the Code attaches by changing its nomenclature from a "related party Financial Creditor" to a "related party Operational Creditor" on the basis of an operational debt*

that co-exists along with the financial debt that the Corporate Debtor owes to it.

12. *Section 5(24) (f) of the Code, envisaged a bar that "anybody corporate whose board of directors, managing director 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." While Section 5(24) (j) of the Code debars "any person who controls more than twenty percent of voting rights in the corporate debtor on account of ownership or a voting agreement". Avani Towers admittedly owns 40% shares of the Corporate Debtor and as an 'Operational Creditor' would have a 99.97% of the voting rights in the CoC. The Code does not say that even if bar under Section 5(24) (j) gets attracted, only because bar under Section 5(24) (f) may not get attracted the related party can have a seat in the CoC. Thus, Avani Towers cannot have a place to represent and vote in the CoC of the Corporate Debtor.*

13. *Further, Regulation 16 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 envisages Committee with only operational creditors: (1) Where the corporate debtor has no financial debt or where all financial creditors are related parties of the corporate debtor, the committee shall be set up in accordance with this Regulation. Therefore, in all probability, Avani Towers, as an 'Operational Creditor' would exert the same influence or control over the CoC, as it would have as a 'Financial Creditor'.*

14. *If Avani Towers, albeit a related party could divest itself of the 'related party' status, as an operational creditor, it could very well have done so even as a financial creditor and then there was no need to debar it as such.*

18. *It would be fallacious to argue that a related party who has potential to impede the CIRP will not try to impede the CIRP only because it is included as an Operational Creditor.*

19. *My mind at this juncture, is redolent with the oft-quoted maxims:*

*i. "**A verbis legis non recedendum est**" which means "from the words of the law, there must be no departure";*

*ii. "**Expressio unius est exclusio alterius**" that means "whatever has not been included has by implication been excluded";*

*iii. "**Quando aliquid prohibetur ex directo, prohibetur et per obliquum**" having the literal meaning as "what cannot be done directly cannot also be done indirectly".*

20. *Avani Towers is expressly classified as a "related party Financial Creditor" in the very first meeting of the CoC on the ground that it holds 40% shares of the Corporate Debtor as a security and therefore, Avani*

*Towers is debarred under Section 5(24)(j) of the Code. As such, Avani Towers can never be allowed a seat in the CoC as an Operational Creditor, for a related party Creditor is proscribed from its inclusion in the CoC, lest the very objective as envisaged in the first proviso of Section 21(2) of the Code which is to prevent 'related parties' of the corporate debtor from gaining "**control**" of the corporate debtor during the CIRP and influence the entire process, would stand defeated and accordingly, the resolution process shall stand vitiated. If a related party operational creditor has not been expressly permitted, the necessary implication should be that the bar that applies to a related party financial creditor will also get attracted for a "related party operational creditor". In absence of any specific exclusion, what a related party Operational Creditor cannot do directly it cannot be permitted indirectly.*

***21.** At this juncture, I would refer to the observation made by the **Hon'ble Justice L. Nageswara Rao** in his book "Corporate Insolvency Resolution Process and Liquidation under the Insolvency and Bankruptcy Code, 2016" published by LexisNexis in the year 2023, at page 278 that:*

> *"**12.12 Section 5(24)(j) – Any Person Who Controls more than Twenty Percent of Voting Rights in the Corporate Debtor on Account of Ownership or a Voting Agreement***
>
> *As per section 5(24)(j) of the IBC, **any person**, who controls more than 20% of the voting rights in the corporate debtor is a related party. It is irrelevant as to whether such 20% voting rights are enjoyed on account of ownership or on account of any voting agreement, whereby, despite owning lesser shares, voting rights are exercised in respect of a greater number or degree. Often, creditors, especially those subscribing to debentures in addition to debt, also subscribe to a small number of equity shares with differential voting rights, which give them greater voting share in the corporate debtor. In such cases, creditors who enjoy such voting rights which constitute more than 20% of the total voting share in the corporate debtor, shall be considered "related parties" under this clause."*

***22.** Further, I would rely on the judgment rendered by the Hon'ble NCLAT in **Srei Infrastructure Finance Limited v. Shri Ashish Chhawchharia & Anr in Company Appeal (AT) (Ins.) No. 1407 of 2019**, wherein, the Hon'ble NCLAT, while considering the matter where one of the creditors indirectly controlled more than 20% of the shares in the corporate debtor, held such creditor to be a "related party" under Section 5(24)(j) of the Code. The Hon'ble NCLAT laid down that:*

> *"59. […] Therefore, it is crystal clear from the chart as stated in para 43 of this Judgment that Appellant is being an holding company of the SAIML and contributor of SMAIT IGOF who is a*

majority shareholder of the Corporate Debtor is a related party which falls under the above Provision of Law. Further it is also evident that as per the SEBI investigation it is also revealed that the Appellant directly invested a sum of Rs.60.49 Crores in IGOF who is a majority shareholder of the Corporate Debtor. ***Further, the SMAIT IGOF who is an irrevocable determinate established by SAIML is a majority shareholder more than 20% also attracts sub section (j) of Sub Section 24****. Further, sub clause (l) of Sub Section 24 of Section 5, states that any person who can control the composition of Board of Directors or corresponding governing body of the Corporate Debtor is a related party. In this regard, the word 'control' defined under sub section 27 of Section 2 of the Companies Act, 2013 defined as "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". This tribunal is of the view that the IGOF holding 69.81%, a majority shareholder of the Corporate Debtor can have the control includes the right to appoint a majority of Directors and can positively influence in any manner management or policy decisions of the Corporate Debtor.*

60. The Hon'ble Supreme Court in Arcelor Mittal India Pvt. Ltd. v Satish Kumar Gupta and Ors. Civil Appeal Nos.9402, 9405 of 2018 dated 04.10.2018 held at Paras 46, 47 as Under:

> *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.

61. The Learned Counsel for the Appellant vehemently contended that a shareholder is a completely different entity than that of the company. He submitted that the shareholder of the corporate Debtor hostile, namely IGOF which is a scheme of SMAIT trust controlled by M/s. Neelina Chatterjee "(earlier Mr. Raghunath Ghosh)", its sole trustee who is an independent practicing lawyer. The appellant had no direct control over IGOF who is a shareholder of the Corporate Debtor and in the absence thereof it is incorrect to contend that the Appellant or its subsidiary i.e. SAIML control's the Corporate Debtor.

62. We refuse to accept the contention of the Learned Counsel for the Appellant for the aforesaid reasons that in all the three criteria as envisaged above, i.e. Sub Clause (h), (j) and (l) of Sub Section 24 of Section 5 have met the requirement and having found the relation between the Appellant and the Corporate Debtor as per the chart at para 43 hereinabove, ***we unequivocally hold that the Appellant is a 'related party' to the Corporate Debtor."***

(Emphasis Added)

Further, Hon'ble NCLAT has observed that:

"69. Further, the Learned Counsel relied upon the Judgment of the Hon'ble Supreme Court in the matter of ***Phoenix ARC Pvt. Ltd. v Spade Financial Services Ltd. and Ors****. reported in 2021 SCC Online 51 at Paras 79, 80, 81, 82, 83, 85, 86, 89, 91, 92 and 95. Para 82 the Hon'ble Supreme Court held that* ***the COC is comprised*** *of Financial Creditor under Loan and Debt Contracts who have the right to vote on decisions and* ***operational creditors*** *such as employees, rental obligations, utilities, payments and trade credit,* ***who can participate in the COC, but do not have the right to vote****. The aim of the COC is to enable coordination between various creditors so as to ensure that the interest of all stakeholders is balanced and the value of the assets of the entity in financial distress is maximized.*

70. The Hon'ble Supreme Court held at para 55 to show that these objects under ***scope of the composition of COC guided by***

Section 21 of the IBC. The objects and purposes of the Code are best served when the CIRP is driven by external Creditors, so as to ensure that the COC is not sabotaged by related parties of the corporate Debtor*.*

71. At para 86 it is held that since the IBC attempts to balance the interest of all stakeholders, such that some stakeholders are not able to benefit at the expense of others, ***related party*** *financial creditors or* ***disqualified from being represented, participating or voting in the COC, so as to prevent them from controlling the COC to unfairly benefit the corporate Debtors*****.***

72. The Learned Counsel for the Appellant relied upon the Judgment of the Hon'ble Supreme Court in the matter of ***Bacha F Guzdar Bombay v Commissioner of Income Tax, Bombay*** *reported in* ***AIR 1955 SC 74*** *at Para 7. The Learned Counsel for the Appellant contended that mere shareholder of a company namely the SMAIT IGOF of the Corporate Debtor, cannot have any interest in the property of the Company except a right to participate in the profits if and when the company decides to divide them. The legal position is that "the company is a juristic person and is distinct from the shareholders. It is the company which owns the property and not the shareholders. The dividend is a share of the profits declared by the company as liable to be distributed among the shareholders.* ***Further it is well settled law that "the true position of a shareholder is that on buying shares an investor becomes entitled to participate in the profits of the company in which he holds the shares*** *if and when the company declares, subject to the Articles of Association, that the profits or any portion thereof should be distributed by way of dividends among the shareholders. He has undoubtedly a further right to participate in the assets of the company which would be left over after winding up but not in the assets as a whole as Lord Anderson puts it.*

73. By relying upon the Judgment of the Hon'ble Supreme Court, the Learned Counsel for the Appellant tried to convince this Tribunal that mere being a shareholder of the Company cannot have any powers in the business and management of the Company. Section 152 of the Companies Act, 2013 prescribes for appointment of Directors. As per Sub Section 2 of Section 152 of the Companies Act, every Director shall be appointed by the Company in general meeting. In view of the above provision of law, the members of the company (shareholders) only shall have the power to appoint Directors in its general meeting. As stated supra, the shareholders have only the power to elect the Directors on the

Board and to the Directors the company will function, meaning thereby and taking a perspective view, this Tribunal cannot accept the contention of the Learned Counsel for the Appellant that the shareholder cannot have any major role in the business and its administration. Apart from the above, this Tribunal intend to look into through the eyes of IBC, in view of the definitions and the Provisions of the I&B Code, 2016 which have over riding effect of all other Laws.

74. ***With reference to the "related party" as defined in the I&B Code, 2016 it is also paramount with respect to the word 'control' defined under the Companies Act, 2013 as clarified by the Hon'ble Supreme Court. Therefore, the Judgments cited by the Learned Counsel for the Appellant are not applicable to the facts of the present case."***

(Emphasis Added)

[…]

24. *In this present case, Avani Towers Pvt. Ltd. had entered into a developmental agreement with the Energy properties Ltd., the Corporate Debtor herein. The term of the developmental agreement includes the provision of payment of an interest free "security deposit" of Rs. 12 Crore along with an additional deposit of Rs. 3 Crore which was later upgraded to Rs. 3.5 Crore which carries a compound interest per annum compounded and payable quarterly. Thus, it is evident from the development agreement that Avani Towers has the* ***influence, control over****, and* ***substantial interest*** *in the corporate debtor in respect of the development programme catered to by the Energy Properties (Corporate Debtor) under the development agreement. Thus, under no stretch of imagination, Avani Towers who holds 99.97% voting rights in the CoC of the Corporate Debtor Energy Properties Ltd. shall be entitled as well as allowed to have a seat and voting rights in the CoC, for if allowed, that would vitiate and influence the entire CIRP which shall defeat the legislative intent and objectives of a successful resolution of a defaulter under the I&B Code along with its relevant Regulations. Further, it is pertinent to bring out the fact that Avani Towers, the developer of Energy Properties was admitted into CIRP on 15.10.2019 by this Adjudicating Authority and the Resolution Plan of the Avani Towers has been approved by the CoC at its 29th meeting convened on 31.10.2023, by 100% voting shares, which is pending adjudication before us, while, Energy Properties, the owner has also been was admitted into CIRP on 20.03.2024 and the Hon'ble NCLAT has dismissed the appeal challenging the order of admission on 30.05.2024. Thus, both the owner as well as the developer are in CIRP and the developer who is a related party, seeks a seat in the CoC of the owner.*

25. *Further, I find that in* ***Arcom Medical v. B&A Health care in CP (IB) No. 243/HDB/2021****, the Hyderabad Bench, NCLT has disallowed a related party operational creditor by directing the RP to reconstitute the CoC treating the Operational Creditor as a related party to the corporate debtor. The Bench would order that:*

> *"In the result, this Application is allowed, by declaring that the 2nd Respondent is a related party to the corporate debtor and the 2nd respondent as operational creditor of the corporate debtor, Consequently, it is further ordered that 1st Respondent shall reconstitute the Committee of Creditors by treating the 2nd Respondent as operational creditor to the corporate debtor and submit his report to this Tribunal within two weeks from today. With these directions IA.No.196/2023 is allowed and disposed of."*
>
> *(Emphasis Added)*

Conclusion:

26. *From the enumerations supra, I am of the considered opinion that:*

a) A creditor who stands already classified as a 'related party Financial Creditor' under Section 5(24) of the I&B Code, cannot represent the CoC, in any manner whatsoever.

b) The first proviso of Section 21(2) of the I&B Code shall also squarely apply to an Operational Creditor, and in the event, he is classified as a 'related party', he cannot get a seat in CoC on the ground that no other financial creditor of the corporate debtor is available.

c) To allow a 'Related Party' of the Corporate Debtor having 99.97% voting rights in the CoC, albeit an Operational Creditor, would mean having the Corporate Debtor itself in the CoC, which would violate the object of the Code.

27. *In view of the enumerations supra, I am of the considered opinion, that the Resolution Professional has committed a patent error in allotting a seat to Avani Towers Private Limited, having 40% shares in the Corporate Debtor Company, with 99.97% voting share in the CoC of the Corporate Debtor which is against the legislative intent as enshrined in Section 21(2) read with 5(24) of the Code. Hence, the prayer sought in this application, deserves to be allowed.*

28. *Accordingly,* ***I allow*** *this application being* ***I.A. (IB) No. 1299/KB/2024*** *and direct exclusion of Avani Towers Private Limited from the CoC and reconstitution of the CoC before proceeding any further with the CIRP."*

9. The point of issue of difference between the Hon'ble Members as recorded in the order dated 27.09.2024 reads thus:

> *"The point of issue on which the Members have differed is whether a related party Financial Creditor who is disqualified to be a member of CoC by virtue of his disqualification in terms of any of the clauses of Section 5(24) of the IBC, 2016 getting attracted, can be allowed to gain an entry in the CoC as an Operational Creditor if he also happens to be an Operational Creditor."*

In terms of the provisions of Section 419(5) of the Companies Act, 2013, Hon'ble President referred the aforementioned point for my opinion. Thus, I proceed to decide the reference.

SUBMISSIONS ADVANCED BY THE PARTIES: -

10. Mr. Joy Saha, Learned Senior Counsel, appearing on behalf of the Applicant commenced his arguments that the Applicant is a member of Suspended Board of Directors and submitted that the issue of the related party sought to be espoused by Mr. Jishnu Saha, Learned Senior Counsel appearing for the Respondent No. 2, cannot be examined by the Third Member, for the simple reason that the issue is not referred for its consideration. Mr. Jishnu Saha, Learned Senior Counsel appearing for Respondent No. 2, initially emphasized that in view of the judgment of Hon'ble NCLAT, New Delhi in ***Committee of Administrators Pendente Lite of the Estate of Late Priyamvada Devi Birla v. INSILCO AGENTS Limited & Ors***. [Company Appeal (AT) No. 67/2022], it is open to the Third Member to decide such issues/controversies as espoused before it and bring quietus to the entire controversy. He made reference to paras 6 and 7 and the disposition part of the judgment, which reads thus:

> *"**6.** According to the Appellants, the following points are required to be added in addition to and modification of the point of difference earlier*

framed by the Hon'ble Members of the Special Bench, `National Company Law Tribunal' Kolkata, dated 11.02.2022 and they run to the following effect:

(A) "Whether the Petition filed by Insilco Agents Limited & Ors. in C.P. No. 112/KB/2021, by August Agents Limited & Ors.in C.P.No. 113/KB/2021 and Laneseda Agents Limited in C.P.No. 114/KB/2021 in their alleged capacity as the Significant Beneficial Owners of the shares of the Respondent No.1 Company in each of the CPs, is at all maintainable before this Tribunal, in view of the fact that there is no registered shareholding of any of the Petitioner Companies in Respondent No.1 Company.

(B) When in a Petition under Sections 241, 242 and 244 of the Companies Act, 2013 in respect of a subsidiary company, a company with 10.90% shares in the holding company, is a co-petitioner, in light of the decision of the Hon'ble Supreme Court in the case of Shankar Sundaram vs. Amalgamations Ltd. & Ors. (dated 27.03.2017 – Civil Appeals o. 4574-4575/2017), whether such a Petition can be said to be not maintainable?

(C) When a Petition under Sections 241, 242 and 244 of the Companies Act, 2013 in respect of a subsidiary company is jointly filed by a company with 10.90% shares in the holding company with the Committee of Administrators Pendente Lite for the Estate of a deceased shareholder having control as a Significant Beneficial Owner under Section 90 of the Companies Act, 2013, read with SBO Rules 2018 (as amended in 2019) over 53.89% shareholding in the holding company and also over the shareholding in the subsidiary company, whether such a petition can be said to be not maintainable? (D) Whether or not interim reliefs sought in the aforesaid Company Petitions deserve to be granted?

7. *It is the stand of the Appellants that the point of difference arising out of the Judgment and Order dated 02.07.2021, passed by the `Tribunal', Kolkata Bench, ought not to have been confined only to the `question of maintainability' of the Company Petitions in question and in fact, other issues mentioned in the `Memo of Appeal' (including the aspect of whether `Interim Reliefs' ought to be granted or not in three Company Petitions) should also to be included."*

[…]

Disposition: In fine, the instant Company Appeal Nos. 67, 68 and 69 of 2022 are dismissed. No costs. The IA No.1253 of 2022 in Comp. App (AT) No. 67 of 2022, IA Nos.1254 and 1255 of 2022 in Comp. App (AT) No. 68 of 2022 and IA Nos.1256 and 1257 in Comp. App (AT) No. 69 of 2022 are closed.

Before parting with these Appeals, this `Tribunal', makes it lucidly clear that the `Hon'ble Third Member of the `Tribunal' is completely free in resolving the `differences'/`controversies' between the `Parties' as he thinks fit (vide decision of Hon'ble Supreme Court AIR 1965 SC 1467), (of course, keeping in mind of the fact that if the `point of difference' is not stated), it will be for the Third Judge (or) Judges to whom the case is referred to ascertain the same and to give his/their opinion, as per decision AIR 1996 Allahabad, (Pages 135 and 164) in the subject matter in issue, as deems fit and proper. No wonder, it is the primordial duty of the `Hon'ble Third Member' / `Third Judge' to whom the matter is referred to consider `all points involved' revolving around the controversies, not confined to the point formulated by the `Hon'ble Members of the Tribunal' dated 11.02.2022, prior to the deliverance of his `opinion'/`decision', ofcourse with utmost `care', `caution', `circumspection', and with a view to prevent an `aberration of justice' and to secure the `ends of justice'.

(Emphasis Supplied)

11. Mr. Jishnu Saha, could be correct in his submission that in view of the aforementioned judgment of Hon'ble NCLAT, it could be open for this Bench (Third Member) to bring an end/quietus to the entire controversy in the matter and pass a culminating/conclusive order. But during the course of submission, Mr. Jishnu Saha, Ld. Senior Counsel for the Respondent himself gave up his plea and submitted that he would confine his argument only to the point referred to the opinion of Third Member in terms of the provisions of Section 419(5) of the Companies Act, 2013. He also made reference to para 19 of the order authored by the Ld. Technical Member to espouse that the difference of opinion occurred at stage when only an interim order was to be passed. Though in the separate orders which led to difference of opinion and the reference of point on which Members of the Bench differed for consideration of Hon'ble President to refer the same for opinion of this Bench (Third Member), but I cannot be oblivious of the fact that at the stage of reference of issue, the Respondents had not filed their reply to the application and the matter was being considered only with reference to the pleadings

contained in the captioned application. Mr. Jishnu Saha correctly pointed out that in Para 19 of the order, it could be mentioned that the application was being considered for ad interim direction.

12. In view of the stand taken by Mr. Jishnu Saha, Ld. Senior Counsel appearing for Respondent No. 2, several arguments raised on behalf of the Respondent No. 2 need not be dealt with. It goes without saying that it would be open to the parties to raise their respective arguments/plea before the Division Bench and this Bench (Third Member) would be expressing its opinion on the issue of reference. Referring to Page 506 to 523 of the application, Mr. Joy Saha, Ld. Senior Counsel, described the factual position that the application is filed by suspended/erstwhile promoter. He also emphasized that the RP rightly included the Respondent No. 2 as an Operational Creditor in the list of creditors. Making reference to the order dated 30.05.2024 passed by Hon'ble NCLAT, New Delhi in Comp. App. (AT) (Ins.) No. 769 of 2024, he submitted that the admission of the company petition bearing CP(IB) No. 1711/KB/2019 was challenged and that the Appellate Tribunal nixed the aforesaid appeal by holding that the advance of Rs. 3.5 crore which carried 18% interest was a transaction falling within the ambit of Section 5(8) of the Code which defines 'financial debt'.

13. Making reference to Section 21 of the Code as also Regulation 16 of IBBI (CIRP) Regulations, 2016, he submitted that the Code and the Regulation does not draw any distinction between the Operational Creditor and the Financial Creditor but intends that the control of the suspended promoter over the Corporate Debtor, either by way of a position in CoC or by being a resolution applicant, is deviated.

14. During the course of arguments, Mr. Joy Saha, Ld. Senior Counsel gave an introduction of parties to the application and indicated that the Respondent No. 2 is claimant as also 40% shareholder qua the Corporate Debtor and Respondent No. 1 is Resolution Professional of Corporate Debtor. He also pointed out that the Respondent No. 2 is also in insolvency and Mr. Jitendra Lohia is the Resolution Professional for it. To further amplify the factual position, he made reference to Page 524 (volume-4) of the I.A. and pointed out the amount of securities i.e. Rs. 3.5 crore and 12 Crore respectively. Making reference to Page 874 and 877 of the application he espoused that the Respondent No. 2 is treated by the CoC as a related party, when it was categorised as Financial Creditor qua part of the debt/claim.

15. Finally, Mr. Joy Saha, Ld. Sr. Counsel, made reference to certain judgments, starting from the judgment in ***Carestream Health India Pvt. Ltd. v. Seaview Mercantile LLP*** in **Company Appeal (AT) (Insolvency) No. 579 of 2023**. With reference to the judgment he submitted that the categorisation of the security amount depends upon circumstances and the securities furnished. With reference to the above judgment, he tried to espouse that the amount of security referred to hereinabove cannot be treated as operational debt. Paras 30 and 31 of the judgment reads as under: -

> *"**30.** The above-mentioned judgement is only an Authority for the proposition that a claim towards unpaid license fees for an immovable property would constitute an operational debt under the Insolvency and Bankruptcy Code, 2016 (Code). It doesn't support the cause of the Appellant that security deposit is a form of license fee available for adjustment on failure to meet the outstanding licence fee. In the present case, there is no outstanding licence fee and the security deposit, therefore, it cannot be termed as a form of license fee available for adjustment on failure to meet the outstanding licence fee. In any case, this judgement does not lay down any law that security deposit is a form of license fee. The said judgement proceeds on the basis that payment*

of GST was made on the license fee and as GST is only contemplated for goods and services, there were services rendered which would fall within the meaning of Section 5 subsection 21 of IBC. In the present case, no GST was payable or has been paid on the security deposit. In the present case, the security deposit was not an advance licence fee but deposit for ensuring that the Appellant entered into a license agreement. The same was not liable to be adjusted against any outstanding or future license fee. No services were rendered nor supplied either by the Appellant to the Respondent nor by the Respondent to the Appellant. On the contrary, the security deposit became liable to be forfeited on account of non performance of the obligation of the Appellant i.e. it's requirement to enter into a leave and licence agreement. Thus, this is not a case of supply of goods or services.

31. *We therefore come to* ***a conclusion that the scope of "operational debt" under the IBC does not encompass situations like security deposits unrelated to any immediate service rendered****"*

(Emphasis Added)

16. He also tried to distinguish the judgment in ***Mr. Harendra Singh Khokhar v. Indarprashta Buildtech Pvt. Ltd. & Anr.*** in **Company Appeal (AT) (Insolvency) No. 171 of 2022**, by espousing that in the said case, there was a joint venture between the parties. Paras 14 and 15 of the aforementioned judgment referred to by him to highlight the factual matter reads as under:

*"**14.** The payments as contemplated in paragraph 7 has been made by the Operational Creditor i.e. Rs. 3 Crores which was paid and four postdated cheques of Rs. 5.15 Crore each. Thus payment which was made by the Operational Creditor was in contemplation of Development Agreement dated 01.10.2016 which ultimately could not fructify since the Corporate Debtor refused to sign the Agreement. It is clear that the transaction which was made by the Operational Creditor was towards the joint venture development agreement between the parties under which the Operational Creditor offered to provide necessary infrastructure and man-power to construct and market the Residential Flats/Apartments as noted above.*

15. *When the Operational Creditor acted in pursuance of the Proposed Development Agreement between the parties, the amount paid by the Operational Creditor of Rs. 3 Crores plus Rs. 1 Crore was towards*

providing services by the Operational Creditor, the same is clearly an "Operational Debt". We do not find any substance in the submissions of Learned Counsel for the Appellant that Corporate Debtor did not owe any "Operational Debt". We thus reject the submissions of Learned Counsel for the Appellant that the Corporate Debtor did not owe any Operational Debt to the Operational Creditor. The submissions of Learned Counsel for the Appellant that Demand Notice issued under Section 8 of the Code was never served on the Appellant is also to be rejected. In the Application filed by the Operational Creditor under Section 9 of the Code, Demand Notice and evidence of service were brought on record. We thus do not find any error in the Order dated 12.01.2022 of the Adjudicating Authority admitting Section 9 Application under the Code. There is no merit in the Appeal, the Appeal is dismissed."

(Emphasis Supplied)

17. Mr. Joy Saha, Ld. Senior Counsel appearing for the Applicant, made reference to Hon'ble Supreme Court of India in ***Phoenix Arc Private Limited vs. Spade Financial Services Limited & Ors.*** [(2021) 3 SCC 475], to buttress that the exclusion referred to in first proviso to Section 21(2) of IBC, 2016 is related not to debts but relationship existing between the parties. Para 94 of the judgment reads as under: -

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

(Emphasis Supplied)

18. He also placed reliance on the judgment passed by the Hon'ble Supreme Court in ***M.K. Rajagopalan v. Dr. Periasamy Palani Gounder*** reported in

(2024) 1 SCC 42. With reference to the judgment, he submitted that the related party is specifically a class unto itself and its meaning and categorisation cannot be attached to the independent and separate classification of the creditors. Paras 86, 121.8 and 177 relied by him reads as under: -

> *"**86.** As regards the question of discrimination between the claims of related party and unrelated party, the Appellate Tribunal, while placing reliance on the decision of this Court in Phoenix ARC (P) Ltd. v. Spade Financial Services Ltd. [Phoenix ARC (P) Ltd. v. Spade Financial Services Ltd., (2021) 3 SCC 475 : (2021) 2 SCC (Civ) 1] observed that "related party" was specifically treated as a class unto itself and was restricted from any involvement in the CIRP in any capacity (under Section 21 IBC) and disqualified from being a resolution applicant (under Section 29-A IBC), the underlying object being that involvement of a related party in the CIRP is seen as giving unfair benefit to the corporate debtor and in fact, the related party is treated in the same class as the corporate debtor itself. Therefore, according to the Appellate Tribunal, a "related party" could be treated as a separate class independent of an unrelated party and ought to be equated with the promoters as equity shareholders or as partners."*
>
> *[…]*
>
> *"**121.8.** (E) Whether the Appellate Tribunal has erred in applying the principles of non-discrimination in relation to related party of corporate debtor and thereby holding against the resolution plan in question for want of provision for related party?"*
>
> *[…]*
>
> *"**177.** After taking note of the fact that related party is prohibited to be a part of CoC and is further prohibited to be a resolution applicant or an authorised representative, etc. the Appellate Tribunal has rightly observed that involvement of a related party in CIRP in any capacity was seen as giving unfair benefit to the corporate debtor; and that the statutory recognition of related party as a different class would apply even to resolution plan when CoC would decide whether in its commercial wisdom it should pay to related party at all because that would mean paying to the same persons who are behind the corporate debtor. However, thereafter the Appellate Tribunal proceeded to observe that related party was required to be equated with the promoters as equity shareholders and then, further made certain observations about discrimination between related party unsecured financial creditor and other unsecured financial creditors as also between related party operational creditor and other operational creditors. Such far-stretched*

observations of the Appellate Tribunal are difficult to be reconciled with the operation of the statutory provisions."

19. Mr. Joy Saha, Learned Senior Counsel also relied upon the judgment passed by the Hon'ble Supreme Court of India in ***State of Bihar v. Bihar Distillery Ltd.*** reported in (1997) 2 SCC 453. Referring to Para 20 of the judgment, wherein the decision of Lord Denning in ***Seaford Court Estates Ltd.* v. *Asher*** [(1949) 2 KB 481: (1949) 2 All ER 155] was referred he espoused that a judge should not lament the draftsman for any defect or ambiguity in the law but should undertake the constructive task of finding the legislative intent of the law. Paras 16, 17 & 20 of the judgment reads thus:

> *"**16.** We have already set out the substance of the minutes of the meeting held on 15-12-1989, the letter dated 19-2-1990 (which was issued on the basis of the discussions held at the said meeting) as well as to the letter of the Commissioner dated 20-2-1990. The minutes of the meeting dated 15-12-1989 speak of fixation of the cost price of country liquor. The letter dated 19-2-1990 speaks of "cost price of rectified spirit to be supplied as country spirit/liquor from the country spirit warehouses" while the letter dated 20-2-1990 speaks of "cost price of country liquor supplied from the warehouses". This mix-up of the expressions of "rectified spirit to be supplied as country spirit/liquor" and "country liquor" in the said proceedings/letters may perhaps be for the reason that all that it takes to convert the rectified spirit into country spirit, it is said, is adding of water to rectified spirit. May be or may not be. That is not material for our purposes. What is material is that the price of Rs 3.42 per LPL said to have been agreed upon at the meeting held on 15-12-1989, and referred to in the said letters and which cost price has now been legislatively validated, all give the break-up of the said price which includes the figure of 70 paise per LPL on account of "warehouse maintenance charges". Now, it is admitted — indeed, it is the positive case of Mr Y.V. Giri — that the distilleries have nothing to do with maintenance of warehouses and that they were being maintained by the Government itself during the said period. The preamble to the Amending Act and the amended provisions expressly speak of the said cost price and its break-up. The Amending Act further provides expressly for deduction of the said 70 paise per LPL component for being credited to the Government's account. In the face of all these facts, it is difficult to understand on what basis can the distilleries say that the said component of 70 paise should not be deducted. The Amending Act is not*

taking away anything from the distilleries; it is merely affirming and validating the acts and orders already issued in view of, and with a view to remove, the defect pointed out by the High Court in its first judgment. It cannot be disputed, at this stage, by the distilleries that they were not parties to the meeting held on 15-12-1989 or that they did not receive the letter of the Commissioner dated 19-2-1990. If this were so, it is ununderstandable on what basis and at whose request or order, they were supplying the spirit to the distilleries. It cannot but be held in the circumstances that the distilleries accepted the offer contained in the Commissioner's letter dated 19-2-1990 and were making supplies on the basis of the said letter and the orders placed pursuant to that letter and their acceptance of it.

17. *Now coming to the reasoning in the impugned judgment, we must say with all respect that we have not been able to appreciate it. The approach of the court, while examining the challenge to the constitutionality of an enactment, is to start with the presumption of constitutionality. The court should try to sustain its validity to the extent possible. It should strike down the enactment only when it is not possible to sustain it. The court should not approach the enactment with a view to pick holes or to search for defects of drafting, much less inexactitude of language employed. Indeed, any such defects of drafting should be ironed out as part of the attempt to sustain the validity/constitutionality of the enactment. After all, an Act made by the legislature represents the will of the people and that cannot be lightly interfered with. The unconstitutionality must be plainly and clearly established before an enactment is declared as void. The same approach holds good while ascertaining the intent and purpose of an enactment or its scope and application. Now, the result of the impugned judgment is that the Amending Act has become an exercise in futility — a purposeless piece of legislation. And this result has been arrived at by pointing out some drafting errors and some imperfection in the language employed. If only the High Court had looked into the minutes of the meeting dated 15-12-1989 and the two letters of the Commissioner aforementioned, it would have become clear that the Amending Act was doing no more than repeating contents of the said letters and placing the legislative imprimatur on them. As the impugned judgment itself suggests, part of the imperfection of language is perhaps attributable to translation from Hindi to English. Indeed, it is surprising that the Court has not even referred to the long preamble to the Act which clearly sets out the context and purpose of the said enactment. It was put in at such length only with a view to aid the interpretation of its provisions. It was not done without a purpose. To call the entire exercise a mere waste is, to say the least, most unwarranted besides being uncharitable. The court must recognize the fundamental nature and importance of*

legislative process and accord due regard and deference to it, just as the legislature and the executive are expected to show due regard and deference to the judiciary. It cannot also be forgotten that our Constitution recognises and gives effect to the concept of equality between the three wings of the State and the concept of "checks and balances" inherent in such scheme.

***20.** We may also refer to the following perceptive observations in the decision of Lord Denning in Seaford Court Estates Ltd. v. Asher [(1949) 2 KB 481 : (1949) 2 All ER 155] :*

> *"Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticized. A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature. That was clearly laid down by the resolution of the judges in Heydon case [(1584) 3 Co Rep 7a] , and it is the safest guide today. Good practical advice on the subject was given about the same time by Plowden.... Put into homely metaphor it is this: A judge should ask himself the question: If the makers of the Act had themselves come across this ruck in the texture of it, how would they have straightened it out? He must then do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the creases."*

20. With reference to the said judgment, Mr. Joy Saha argued that the object and intention of the legislature to exclude the related party from CoC is not just to see that the Financial Creditor being related party are not in CoC but is to ensure that the related party or the parties related to those who

caused default and led the Corporate Debtor to insolvency are not to be in commanding position qua the affairs of the Corporate Debtor either as Members of CoC or being resolution applicant.

21. Mr. Joy Saha, also made reference to the judgment of Hon'ble Supreme Court of India in ***K.P. Varghese v. ITO, Ernakulam, and Anr.*** reported in (1981) 4 SCC 173 to argue that though it is true that the consequences of rule of construction cannot alter the meaning of the provision but certainly it helps to find its meaning. It is well recognized rule of construction that the statutory provision must be so construed if possible that the absurdity of mischief may be avoided. However, there may be situations where construction suggested would lead to wholly unreasonable result, which would never have been intended by the legislature. The relevant excerpt of the judgment referred to by Ld. Senior Counsel reads as under:

> *"We must not adopt a strictly literal interpretation of Section 52 sub-section (2) but we must construe its language having regard to the object and purpose which the legislature had in view in enacting that provision and in the context of the setting in which it occurs. We cannot ignore the context and the collocation of the provisions in which Section 52 sub-section (2) appears, because, as pointed out by Judge Learned Hand in most felicitous language:*
>
> *"... the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create."*
>
> *Keeping these observations in mind we may now approach the construction of Section 52 sub-section (2).*
>
> ***6.*** *The primary objection against the literal construction of Section 52 sub-section (2) is that it leads to manifestly unreasonable and absurd consequences. It is true that the consequences of a suggested construction cannot alter the meaning of a statutory provision but they can certainly help to fix its meaning. It is a well-recognised rule of construction that a statutory provision must be so construed, if possible, that absurdity and mischief may be avoided. There are many situations*

where the construction suggested on behalf of the Revenue would lead to a wholly unreasonable result which could never have been intended by the legislature."

(Emphasis Supplied)

22. He also made reference to the judgment of the Hon'ble Supreme Court in ***Ghanashyam Mishra & Sons (P) Ltd. v. Edelweiss Asset Reconstruction Co. Ltd.*, reported in (2021) 9 SCC 657** to buttress that the intention of statute must be understood. To buttress the plea, he placed reliance upon para 81, 82 and 84 of the judgment wherein the judgment of ***K.P. Varghese* v. *CIT* [*K.P. Varghese* v. *CIT*, (1981) 4 SCC 173 : 1981 SCC (Tax) 293]** has also been referred to. Paras 81, 82 and 84 reads as under: -

> ***81.*** *This Court in K.P. Varghese v. CIT [K.P. Varghese v. CIT, (1981) 4 SCC 173 : 1981 SCC (Tax) 293] had an occasion to consider the question as to whether the speech made by the Hon'ble Finance Minister explaining the reason for the introduction of the Bill could be referred for the purpose of ascertaining the mischief sought to be remedied by the legislation. This Court observed thus : (SCC p. 184, para 8)*
>
> > *"8. … Now it is true that the speeches made by the Members of the Legislature on the floor of the House when a Bill for enacting a statutory provision is being debated are inadmissible for the purpose of interpreting the statutory provision but the speech made by the Mover of the Bill explaining the reason for the introduction of the Bill can certainly be referred to for the purpose of ascertaining the mischief sought to be remedied by the legislation and the object and purpose for which the legislation is enacted. This is in accord with the recent trend in juristic thought not only in western countries but also in India that interpretation of a statute being an exercise in the ascertainment of meaning, everything which is logically relevant should be admissible. In fact there are at least three decisions of this Court, one in Lok Shikshana Trust v. CIT [Lok Shikshana Trust v. CIT, (1976) 1 SCC 254 : 1976 SCC (Tax) 14] , the other in Indian Chamber of Commerce v. CIT [Indian Chamber of Commerce v. CIT, (1976) 1 SCC 324 : 1976 SCC (Tax) 41] and the third in CIT v. Surat Art Silk Cloth Manufacturers' Assn. [CIT v. Surat Art Silk Cloth Manufacturers' Assn., (1980) 2 SCC 31 : 1980 SCC (Tax) 170] where the speech made by the Finance Minister while introducing the exclusionary clause in Section 2, clause (15) of the Act was relied upon by the Court for the purpose of ascertaining*

what was the reason for introducing that clause. The speech made by the Finance Minister while moving the amendment introducing sub-section (2) clearly states what were the circumstances in which sub-section (2) came to be passed, what was the mischief for which Section 52 as it then stood did not provide and which was sought to be remedied by the enactment of sub-section (2) and why the enactment of sub-section (2) was found necessary."

82. *This Court in Union of India v. Martin Lottery Agencies Ltd. [Union of India v. Martin Lottery Agencies Ltd., (2009) 12 SCC 209] , in para 38 has relied on the aforesaid observations made in the judgment of K.P. Varghese [K.P. Varghese v. CIT, (1981) 4 SCC 173 : 1981 SCC (Tax) 293].*

84. *It is clear that the mischief which was noticed prior to amendment of Section 31 of the I&B Code was that though the legislative intent was to extinguish all such debts owed to the Central Government, any State Government or any local authority, including the tax authorities once an approval was granted to the resolution plan by NCLT; on account of there being some ambiguity, the State/Central Government authorities continued with the proceedings in respect of the debts owed to them. In order to remedy the said mischief, the legislature thought it appropriate to clarify the position that once such a resolution plan was approved by the adjudicating authority, all such claims/dues owed to the State/Central Government or any local authority including tax authorities, which were not part of the resolution plan shall stand extinguished.*

23. When Mr. Jishnu Saha, was in the middle of his submission, Mr. Joy Saha, Ld. Senior Counsel interjected and submitted that in the instant case, since the RP has categorized Respondent No. 2 as related party financial creditor, in the absence of any other financial creditors, the RP has rightly constituted the CoC with all available Operational Creditors including Respondent No. 2.

24. Mr. Jishnu Saha, Ld. Senior Counsel appearing for Respondent No. 2, submitted that when the RP had taken a decision to include the Respondent No. 2 in CoC as operational creditor and the CoC comprised only of operational creditors, the Respondent No. 2 had no reason to have any

grievance and it rightly did not question the decision of the CoC to not include it in CoC being FC. According to him: -

(i) the Operational Creditor & Financial Creditor form separate classes;

(ii) only those who have direct interest to run business of a company can be called to be 'in control';

(iii) object of Section 21 of IBC, by not referring to operational creditor, is clear that only such related parties who are financial creditor need to be excluded from CoC;

(iv) the control of the Respondent No. 2 qua CD, if any, was only a preventive control and was not to run the business affairs thereof;

(v) The Corporate Debtor is a land-owning company;

(vi) the developer that is Respondent No. 2 is also in CIRP and while deciding the application, this Bench needs to keep in mind the interest of new management/SRA which may take control of the CD;

(vii) The object behind the application is to give an indication that the Respondent No. 2 may have no claim;

(viii) The factual backdrop behind the submissions referred by the Ld. Technical Member in paras 63 to 74 of the order is an MoU which is not placed on record as enclosure to captioned application;

(ix) As can be seen from para 19 of the order authored by Ld. Technical Member, the reference made to this Bench (Third Member) is only at an interim stage.

(x) making reference to Section 21 of IBC as also IBBI (CIRP) Regulations, 2016 and IBBI (Liquidation Process) Regulations, 2016, Mr. Jishnu Saha submitted that though Regulations were amended from time to time right from the year 2018 but it was never deemed proper to make amendments in the aforesaid Act and Regulations, thus, it remains the intent of the statute that only those who are Financial Creditors can be

excluded from CoC on grounds of being related party. Relying upon Regulation 31A of IBBI (Liquidation Process) Regulations, 2016, he submitted that in SCC, irrespective of classification/category of the creditor as Financial Creditor and Operational Creditor, the creditors are entitled to vote with reference to their vote share. According to him when till constitution of SCC, it is CoC which performs the function of SCC, only such FC who are part of CoC can exercise right to vote, thus in a way the FC who are related party do not have the right to vote, but as far as operational creditors are concerned, irrespective of being related party or not, they are entitled to vote.

25. It is also the contention raised by Mr. Jishnu Saha, that in terms of the MoU, 40% of the equity shares were held by the Respondent No. 2, only as a security and not in the capacity of owner qua the equity shares. He also submitted that in para 3 of the judgment authored by Ld. Judicial Member, it is indicated that the 40% shares were held by Respondent No.2 only as security. The Ld. Counsel, at the cost of repetition, emphasized that the preventive control by the directors who represented the Respondent No. 2 as 40% shareholder cannot be construed as control qua the management and affairs of the CD and when the shares held by Respondent No. 2 could be transferred back, it cannot be viewed that Respondent No. 2 would hold ownership qua the shares. Finally, Mr. Jishnu Saha, refers to para 98 of the judgment rendered by the Hon'ble Supreme Court in ***Phoenix ARC Private Limited v. Spade Financial Services Limited & Ors.*** reported in (2021) 3 SCC 475, and espoused that the meaning of the first proviso to Section 21(2) of IBC, 2016 is to exclude the related party of the Corporate Debtor from CoC to obviate conflict of interest in the event that the party is allowed to become part of CoC. Para 98 of the judgment reads as under: -

*"**98.** Hence, we would need to consider the meaning of the first proviso in the light of the context, object and purpose for which it was enacted. The purpose of excluding a related party of a corporate debtor from the CoC is to obviate conflicts of interest which are likely to arise in the event that a related party is allowed to become a part of the CoC. The logic underlying the exclusion has been summarised as follows [Insolvency Law Committee Report, 2020, pp. 47-48, para 11.9.] :*

> *"11.9. The Committee was of the view that the disability under the first proviso to Section 21(2) is aimed at removing any conflict of interest within the CoC, to prevent erstwhile promoters and other related parties of the corporate debtor from gaining control of the corporate debtor during the CIRP by virtue of any loan that may have been provided by them."*

(Emphasis Supplied)

26. It was also the submission of Mr. Joy Saha, Ld. Senior Counsel for the Applicant that Mr. Anirudh Daga and Mr. Vimal Kumar Goel are directors of the CD and not as nominee directors only, as they exercised all powers and authority and performed functions which are expected to be performed by them as directors. The relevant excerpt of the master data of Corporate Debtor placed on record reported at page 123 of the I.A. reads as under: -

C. *ATTENDANCE OF DIRECTORS (not applicable for OPC)

S. No.	DIN	Name of the Director	Board Meetings			Committee Meetings			Whether attended AGM held on 30/11/2021 (Y/N/NA)
			Number of Meetings which director was entitled to attend	Number of Meetings attended	% of attendance	Number of Meetings which director was entitled to attend	Number of Meetings attended	% of attendance	
1	00066068	RATANLAL GAGGAR	5	1	20	0	0	0	Yes
2	00092546	ANIRUDH DAGA	5	1	20	0	0	0	Yes
3	00228162	VIMAL KUMAR GOEL	5	1	20	0	0	0	Yes
4	00444544	PRABHA JHUNJHUNV	5	5	100	0	0	0	Yes
5	00754125	CHINTAN JHUNJHUN	5	5	100	0	0	0	Yes
6									
7									
8									
9									

27. Finally, the Ld. Senior Counsels submitted that they would not like this Bench to go beyond the terms of the reference, more so for the reasons that reference was made at the interim stage.

28. Ms. Manju Bhuteria, appearing for RP, referred to certain dates viz. 20.03.2024 i.e. the date of commencement of CIRP. According to her the RP has committed no mistake in admitting the claim of Operational Creditor. It is made clear that in view of the rival submissions made by the Counsel for the parties, I am not going to decide whether the Respondent No. 2 is related party or not, as the only point referred to for my consideration is legal in nature viz whether a creditor who is debarred from being included in CoC as FC can be included in CoC while he is wearing different hat i.e. as OC. This Bench would confine answers only to the reference, not only for the reasons that the parties are still making their submissions before the Division Bench but also for the reason that the issue has been referred by the Hon'ble President for my opinion, in terms of Section 419 of Companies Act, 2013. Any view, if expressed by this Bench on any issue other than the point of reference would amount to assuming the role of Division Bench which may lead to weird situation. Assuming I pronounce on any issue beyond the point of reference, then if the members of Division Bench are ad idem on a view different from the one which I may take, the entire exercise to be undertaken by me would be futile exercise.

29. Though the tenor of the order with difference in opinion on the point of reference is such that the application was independently decided by both the Learned Members, but it is also a matter of fact that in para 19 of the order

(authored by Ld. Technical Member), it is noted that the application was being considered at an interim stage. Para 19 of the order reads as under:

> "***19.*** *The Ld. Counsel for RP submitted that the Application has been heard on the point of ad-interim reliefs and affidavits are yet to be filed by the Respondents and thus made the following submissions*:"

30. This Bench also refrains from going beyond the point of reference for the reason that the Learned Counsels for the Respondent Nos. 1 and 2 had not filed any reply to this application. Learned Counsel for the RP submitted that the Reply was not filed as there was no direction to do so. RP further submitted that when there is an express bar provided in Section 21 regarding the inclusion of FC in the CoC if they are related party, there is no statutory bar regarding operational creditors, when the CoC consists only operational creditors. To buttress the plea that unless there is an express bar in the code or regulation regarding the inclusion of the Operational Creditor being a related party in the CoC, the RP committed no mistake in including Respondent No. 2 in the CoC. She relied upon the judgment of Hon'ble Supreme Court in ***Rajendra Prasad Gupta vs. Prakash Chandra Mishra & Ors.*** reported in (2011) 2 SCC 705. Para 4 and 5 of the judgment, as relied upon by the Ld. Counsel, reads as under:

> *"**4.** We do not agree. Rules of procedure are handmaids of justice. Section 151 of the Code of Civil Procedure gives inherent powers to the court to do justice. That provision has to be interpreted to mean that every procedure is permitted to the court for doing justice unless expressly prohibited, and not that every procedure is prohibited unless expressly permitted. There is no express bar in filing an application for withdrawal of the withdrawal application.*
>
> ***5.** In Narsingh Das v. Mangal Dubey [ILR (1883) 5 All 163] , Mahmood, J. the celebrated Judge of the Allahabad High Court, observed:*
>
> > *"Courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the*

law. As a matter of general principle prohibition cannot be presumed."

31. She further submitted that as per the judgment of the Hon'ble Supreme Court in ***Ravi Ranjan Developers Pvt. Ltd. vs. Aditya Kumar Chatterjee*** [2022 SCC Online SC 568], the issue of law that is raised and decided has to be construed in the backdrop of the fact and circumstances of the case. Para 41 of the aforementioned judgment, as relied upon by her, reads as under: -

> *"**41.** It is well settled that a judgment is a precedent for the issue of law that is raised and decided. The judgment has to be construed in the backdrop of the facts and circumstances in which the judgment, cannot be read out of context. Nor is a judgment to be read and interpreted in the manner of a statute. It is only the law as interpreted by in an earlier judgment, which constitutes a binding precedent, and not everything that the judges say."*

32. I agree with the submission made on behalf of the Applicant i.e. we need to appreciate the object and intent of the statute and the intention of Section 21(2) proviso is not to exclude from CoC a particular class but the related but the related party as independent category.

33. The plea raised Mr. Joy Saha, is sufficiently supported by judicial precedent. The expression 'Financial Creditor' as used in proviso to Section 21(2) is only for the reason that the section provides for CoC consisting of Financial Creditors only. As far as reference to Regulation 31A of IBBI (Liquidation Process) Regulations, 2016 is concerned, it provides that the Financial Creditors if he is related party would have no voting right. A perusal of sub-regulation (2) and (3) would reveal that the voting right in SCC is also given to secured financial creditor who have relinquished their security interest, unsecured financial creditor, workmen and employees and government and not to operational creditors. The OC, Shareholders and

Partners are only entitled to nominate their representatives for participation in the SCC. The sub-regulation (2) to (4A) of Regulation 31A reads thus: -

> ***"31A. Stakeholders' consultation committee***
>
> *[…[*
>
> *(2) The voting share of a member of the consultation committee shall be in proportion to his admitted claim in the total admitted claim:*
>
> *Provided a secured creditor who has not relinquished his security interest under section 52 shall not be part of the consultation committee;*
>
> *Provided that the promoters, directors, partners or their representatives may attend the meeting of the consultation committee, but shall not have any right to vote.*
>
> *Provided further that a financial creditor or his representative, if he is a related party of the corporate debtor, shall not have right to vote"*
>
> *(3). The liquidator may facilitate the stakeholders of each class namely financial creditors in a class, workmen, employees, government departments, other operational creditors, shareholders, partners, to nominate their representative for participation in the consultation committee.*
>
> *(4) If the stakeholders of any class fail to nominate their representatives, under sub-regulation (3), such representatives shall be selected by a majority of voting share of the class, present and voting.*
>
> *(4A) the representative under sub-regulation (3) or (4) shall vote in proportion to the voting share of the stakeholders it represents."*

34. Here, we may note the obvious fact that the SCC is only having an advisory and consultative role and cannot be compared with CoC. As far as the plea of the Ld. Counsel appearing for the RP regarding the judicial precedent is concerned, it is noticed that the judgment relied upon by the Learned Counsel for the Applicant i.e. ***M.K. Rajagopalan v. Dr. Periasamy Palani Gounder*** reported in (2024) 1 SCC 42 takes note of Section 21 of IBC. Para 86 of the judgment reads as under: -

> *"**86.** As regards the question of discrimination between the claims of related party and unrelated party, the Appellate Tribunal, while placing reliance on the decision of this Court in Phoenix ARC (P) Ltd. v. Spade Financial Services Ltd. [Phoenix ARC (P) Ltd. v. Spade Financial Services*

Ltd., (2021) 3 SCC 475 : (2021) 2 SCC (Civ) 1] observed that "related party" was specifically treated as a class unto itself and was restricted from any involvement in the CIRP in any capacity (under Section 21 IBC) and disqualified from being a resolution applicant (under Section 29-A IBC), the underlying object being that involvement of a related party in the CIRP is seen as giving unfair benefit to the corporate debtor and in fact, the related party is treated in the same class as the corporate debtor itself. Therefore, according to the Appellate Tribunal, a "related party" could be treated as a separate class independent of an unrelated party and ought to be equated with the promoters as equity shareholders or as partners."

35. In the said para, the Hon'ble Supreme Court expressly ruled that the related party were specifically treated as a class unto itself and was restricted from any involvement in the CIRP. We are unable to comprehend how the aforesaid judgment is applicable to the question referred to for my consideration which is whether an operational creditor being related party can be part of the CoC or not.

ANALYSIS AND FINDINGS: -

36. At the outset, it is relevant to mention that in the minutes of the first meeting of the CoC of the CD, enclosed with the captioned IA, it has been categorically noted that Avani Towers Pvt. Ltd. i.e. the sole financial creditor of the CD and Respondent No. 2 in the present IA, was a related party of the CD. Relevant excerpt of the minutes of the first meeting of the CoC reads thus:

ITEM NO.:5

NOTING OF CONSTITUTION OF COMMITTEE OF CREDITORS

IRP informed the meeting that since the claims has been received from the sole financial creditor that as per the available information appears to be related party of the corporate debtor and as provided under Regulation 16 of the IBBI (CIRP) Regulations 2016 that where the corporate debtor has no financial debt or where all the financial creditors are related parties of the corporate debtor, the committee shall be set up in accordance with this Regulation. The committee formed under this regulation consists of eighteen largest operational creditors by value provided that if the number of operational creditors is less than eighteen, the committee shall include all such operational creditor. In this case where there is no financial creditor (unrelated) to the corporate debtor and three claims are received from the operational creditors (out of which one is related party), IRP has considered the claims filed by all the operational creditors for the purpose of constitution of Committee of Creditors under regulation 16 and he has duly verified the claims of the aforementioned creditors from the documents/clarifications submitted by the claimants and the records made available to him. Claims may be updated as &

when necessary, on receipt of additional information regarding such claims and reconciliation from the records of the Corporate Debtor. He further informs that the report on constitution of Committee has been submitted with the Hon'ble NCLT on 12-03-2024.

Following are the **Operational Creditors,** forming part of CoC as per Regulation 16 of IBBI (CIRP) Regulations and having voting rights as contained in the Section 21 of IBC, 2016:

Sl. No.	Name	Address	Amount of claim admitted (Rs.)	Voting Rights in CoC	Security Interest
1.	Avani Towers Private Limited-under CIRP. (Related Party to the CD)	Avani Heights 59A, Chowringhee Road,Kolkata, West Bengal, India, 700020 E.Mail :- jitulohia@knjainco.com	12,00,00,000/-	99.97%	The said refundable non-interest bearing security deposit of Rs 12 Crores alongwith Interest bearing additional deposit of Rs.3.50 crs along with Interest, are Secured through 40% shares of CD transferred in favour of FC and another 20% shares transferred in favour of one Mr R L Gaggar and development and possessory rights bestowed upon FC on the land owned by the CD (which was also confirmed by the Hon'ble Supreme Court in its order dated 14-03-2023), in terms of shareholders agreement dated 24-01-2008 and Development Agreement dated-16-06-2008.
2.	R. Kothari & Co. LLP	16A, Shakespeare Sarani, Kolkata-700071. E.Mail:- kcsoni1966@gmail.com	29,500/-	0.025%	Nil
3.	J.B.S. & Company	60, Bentinck Street, 4th Floor, Kolkata-700069 E.Mail:- sahadillip@gmail.com	7,080/-	0.005%	Nil
TOTAL			**12,00,36,580/-**	**100%**	

37. Although, it is not clear from the aforementioned minutes as to the provision under which the Respondent No. 2/ Avani Towers Private Limited has been classified as a 'related party' of the Corporate Debtor, a perusal of sub-clause (j) of Section 5(24) of the Code indicates that any person who controls more than 20% of voting rights in the CD on account of ownership or a voting agreement would fall in the definition of related party of the CD. The said provision reads thus: -

"(24) "related party", in relation to a corporate debtor, means—
[…]
(j) any person who controls more than twenty percent of voting rights in the corporate debtor on account of ownership or a voting agreement;"

38. Thus, Section 5(24)(j) of the Code, in clear terms, states that *"any person who controls more than twenty per cent of voting rights in the corporate debtor on account of ownership or a voting agreement"* is a related party in relation to the Corporate Debtor. The above provision does not provide that the expression 'control' would mean control over the management/ affairs of the company or control over the management of the board or being the promoter of the company. What the said provision stipulates is that the expression 'control' would mean control over the 'voting rights' in the CD on account of 'ownership' or 'voting agreement'. In the facts of the present case, the 40% voting rights of Avani Towers Private Limited in the CD has not been disputed. Therefore, Avani Towers Private Limited has been rightly categorized by the RP as a related party financial creditor of the CD and thus, excluded from the CoC in regard to its financial debt.

39. However, the point to be determined is whether a financial creditor who has been categorized as a related party under Section 5(24) of the Code can be included in the CoC in terms of Regulation 16 of the IBBI (Insolvency Resolution Process for Corporate Persons), 2016 on account of its operational debt.

40. Before delving into the aforesaid issue, we deem it apt to refer to the judgment of the Hon'ble Supreme Court in ***Phoenix Arc Private Limited vs. Spade Financial Services Private Limited & Ors.*** [Civil Appeal No. 2842 of 2020] wherein the Hon'ble Court had observed that the term 'related party'

has been defined in IBC, 2016 to ensure that those entities which are related to the CD are identified clearly since their presence can often negatively affect the insolvency process. The Hon'ble Court further held that the object of the Code is best served when the CIRP is driven by external creditors so as to ensure that the CoC is not sabotaged by related parties of the CD. Relevant excerpts of the aforementioned judgment read thus: -

> *"**59.** The term 'related party' has also been defined by Parliament in the Companies Act, 2013 for all corporations. The definition of the expression has also been expanded for listed entities by the Securities Exchange Board of India by amendment to the Equity Listing Agreement to include elements mentioned under applicable accounting standards. However, in the present case, we are assessing its definition only under the IBC, which is exhaustive. The purpose of defining the term separately under different statutes is not to avoid inconsistency but because the purpose of each of them is different. Hence, while understanding the meaning of 'related party' in the context of the IBC, it is important to keep in mind that it was defined to ensure that those entities which are related to the Corporate Debtor can be identified clearly, since their presence can often negatively affect the insolvency process.*
>
> *[…]*
>
> ***72.** The CoC is comprised of financial creditors, under loan and debt contracts, who have the right to vote on decisions and operational creditors such as employees, rental obligations, utilities payments and trade credit, who can participate in the CoC, but do not have the right to vote. The aim of the CoC is to enable coordination between various creditors so as to ensure that the interests of all stakeholders are balanced, and the value of the assets of the entity in financial distress is maximised.*
>
> *[…]*
>
> ***75.** These objects underscore the composition of the CoC, guided by Section 21 of the IBC. The objects and purposes of the Code are best served when the CIRP is driven by external creditors, so as ensure that the CoC is not sabotaged by related parties of the corporate debtor. This is the intent behind the first proviso to Section 21(2) which disqualifies a financial creditor or the authorised representative of the financial creditor under sub-section (6) or sub-section (6A) or sub-section (5) of section 24, if it is a related party of the corporate debtor, from having any right of*

representation, participation or voting in a meeting of the committee of creditors.

76. *Since the IBC attempts to balance the interests of all stakeholders, such that some stakeholders are not able to benefit at the expense of others, related party financial creditors are disqualified from being represented, participating or voting in the CoC, so as to prevent them from controlling the CoC to unfairly benefit the corporate debtor."*

(Emphasis Supplied)

Therefore, this Adjudicating Authority has to ensure that the CIRP is driven by external creditors and prevent related parties from controlling the CIRP of the Corporate Debtor.

41. Another pertinent observation made by the Hon'ble Supreme Court in *Phoenix Arc (supra)* is that the exclusion from CoC under Section 21(2) of the Code relates to the relationship existing between the parties and not the debt itself. Relevant excerpt of the judgment reads thus: -

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

In my considered view, once the relationship between a person/ entity and the corporate debtor has been found to be falling within the definition of 'related party' under Section 5(24) of the Code, such person/ entity cannot be included in the CoC under Section 21 of the Code on account of its debt being an operational debt. As could be held by the Hon'ble Supreme Court(ibid), the

emphasis is on the relationship existing between the parties and not the debt itself.

42. At this juncture, it is also relevant to note that as per the framework of IBC, 2016, preference has been given to the financial creditors to run the Committee of Creditors and drive the CIRP process. As per Section 21(2) of the Code, the CoC shall comprise of all Financial Creditors of the CD. The Operational Creditors become part of the CoC, under Regulation 16 of IBBI (Insolvency Resolution Process for Corporate Persons), 2016, only when the CD has no financial debt or where all financial creditors are found to be related party of the CD. The said regulation reads thus: -

> *"**16. Committee with only operational creditors**-*
> *(1) Where the corporate debtor has no financial debt or where all financial creditors are related parties of the corporate debtor, the committee shall be set up in accordance with this Regulation.*
> *(2) The committee formed under this Regulation shall consist of members as under –*
> *(a) eighteen largest operational creditors by value:*
> *Provided that if the number of operational creditors is less than eighteen, the committee shall include all such operational creditors;*
> *(b) one representative elected by all workmen other than those workmen included under sub-clause (a); and*
> *(c) one representative elected by all employees other than those employees included under sub-clause (a).*
> *(3) A member of the committee formed under this Regulation shall have voting rights in proportion of the debt due to such creditor or debt represented by such representative, as the case may be, to the total debt.*
> *Explanation – For the purposes of this sub-regulation, 'total debt' is the sum of-*
> *(a) the amount of debt due to the creditors listed in sub-regulation 2(a);*
> *(b) the amount of the aggregate debt due to workmen under sub-regulation 2(b); and*
> *(c) the amount of the aggregate debt due to employees under sub-regulation 2(c).*

(4) A committee formed under this Regulation and its members shall have the same rights, powers, duties and obligations as a committee comprising financial creditors and its members, as the case may be."

Thus, even though a preference seems to have been given to the financial creditors in the CIRP process, particularly with respect to their representation in the CoC of the CD, the legislature has considered it apt to exclude them from the CoC if they fall within the definition of 'related party'. However, if such exclusion is not extended to the operational creditors when they have been found to be falling within the ambit of 'related party', the legislative intent would stand defeated.

43. Further, as per the Regulation 16 (ibid), the operational creditors become part of the CoC when the financial creditors are found to be related parties of the CD. Thus, allowing the same entity to become part of the CoC by donning the hat of an operational creditor would result in absurdity in the current statutory framework.

44. Furthermore, there cannot be any justification as to how a disqualification which keeps the financial creditor out of the CoC does not apply to an operational creditor as the basic objective of classifying an entity as a related party is to exclude it from the CoC and to enable the CIRP to be driven by external creditors. In the facts of the present case, it is difficult to imagine as to how the influence which would have been exerted by Avani Towers Private Limited in its capacity as a financial creditor would not be exerted when it dons the hat of an operational creditor.

45. Here, it is also pertinent to refer to the order dated 13.06.2023 passed by NCLT, Hyderabad Bench in I.A. No. 196 of 2023 in CP(IB) No. 243/7/HDB/2021 in the matter of ***Arcom Medical Devices Private Limited***

vs. B & A Health Care Private Limited where the Adjudicating Authority *inter alia* placed reliance on the judgment of *Phoenix Arc (supra)* to hold that the Respondent therein was a related party of the Corporate Debtor and was liable to be excluded from the CoC, even though the relationship between the Respondent and the Corporate Debtor was that of an operational debt. Relevant excerpt of the aforementioned order reads thus: -

> *"**Point. 1***
>
> *Whether the 2nd Respondent is a related party to the Corporate Debtor, if so, is it required that the Committee of Creditors constituted by the Resolution Professional be reconstituted?*
>
> *[…]*
>
> ***12.** From the above dates and events it is clear that, Respondent No. 2 has filed the captioned Company Petition on 17.09.2021 against the Corporate Debtor and just before the admission of the captioned Company Petition has sold its shareholding. According to the Ld. Counsel for the petitioner with full knowledge of filing the captioned Company Petition the 2nd respondent has sold its investment of Rs. 75,00,000/- for acquiring 7,50,000/- for a meagre value of Rs. 2,00,000/-shares and the same goes to show the mala fide, intention of the 2nd Respondent to circumvent the ineligibility under Section 24 of the Code to get a back-door entry into the CoC of the Corporate Debtor.*
>
> ***15.**(i). Having carefully examined the afore stated rival contentions, we are convinced that the ruling of Hon'ble Supreme Court of India, in Phoenix Arc Private Limited Vs. Spade Financial Services Limited and Ors in MANU/SC/0045/2021, squarely applies to the facts of the case, in as much as in the case on hand also a Memorandum of Understanding has been entered between the Corporate Debtor and the 2nd Respondent on 27.06.2017 facilitating the recording of loan amount purportedly advanced to the Corporate Debtor by the 2 nd Respondent to the tune of Rs.1,25,00,000/- besides investment of Rs.75,00,000/- in the form of 7,50,000 equity shares of Rs.10/- each. Without any board resolution been passed by the Corporate Debtor approving the grant of ICD and no charge is created on the said loan and registered with the Registrar of Companies. Therefore, in identical circumstances, Hon'ble Supreme Court has held that, the Memorandum of Understanding was an eye wash and collusive. We find no reason to take a difference view in this matter since the facts and circumstances are identical.*

(ii). That apart the impugned transfer of investment by the 2nd Respondent was admittedly after initiation of CIRP proceedings against the Corporate Debtor. Therefore, in the light of the undeniable factors, we find force in the submission of the Learned Counsel for the Petitioner. Thus the 2nd Respondent is a related party to the Corporate Debtor. So much so the 2nd Respondent is not qualified to be a voting member of the Committee of Creditors. As such the 2 nd respondent cannot continue the role which has been conferred on him by the Resolution Professional.

(iii). We therefore declare that the Committee of Creditors as constituted by 1 st Respondent is not in accordance with the provisions of the Code, and the same is here by set aside, and 1 st Respondent is hereby directed to forthwith reconstitute the Committee of Creditors of the Corporate Debtor by treating the 2 nd Respondent as related party to the corporate debtor.

The point is answered accordingly

16.Point. 2:

Whether the transaction of ICD from 2nd Respondent is a financial debt in terms of Section 5(8) of IBC?

[…]

18.Having carefully examined the afore stated rival contentions, more particularly the record as to disbursement of Rs.40,00,000/- on 27.06.2017 vide RTGS/ NEFT , to the account of the corporate debtor, as against the claim of investment of a sum of Rs. 1,00,00,000/-(Rupees One Crore only) as interest free advance to the Corporate Debtor, absence of any board resolution for the alleged investment, more particularly having regard to the condition that all the finished goods sales will be supplied by the Respondent No. 2 subject to the payment of 3% margin on the said amount. Later on, due to operational convenience, the Corporate Debtor has discontinued supply and billing by the Respondent No.2 and after adjusting credit note, commission etc., Respondent No.2 it was entitled to receive back a sum of Rs.89,12,338/- (Rupees Eighty Nine Lakhs Twelve Thousand Three Hundred and Thirty Eight only). We find force in the contention of the Applicant that the above arrangement between the Corporate Debtor and the 2 nd Respondent is in the nature of an operational debt and not a financial debt.

The Point is answered accordingly.

In the result, this Application is allowed, by declaring that the 2 nd Respondent is a related party to the corporate debtor and the 2nd respondent as operational creditor of the corporate debtor, Consequently, it is further ordered that 1st Respondent shall reconstitute the Committee of Creditors by treating the 2 nd Respondent as operational creditor to the corporate debtor and submit his report to this Tribunal within two

weeks from today. With these directions IA.No.196/2023 is allowed and disposed of."

46. Further, with regard to the contention raised on behalf of the RP that the Code does not explicitly states that the Operational Creditors, who are related parties to the CD, are to be debarred from the CoC, I am of the considered view that the Code does not even state that the such related parties are to be included in the CoC. But Section 5(24) of the Code provides for exclusion of related parties from the CoC. The provision draws no distinction between OC and FC.

47. In light of the aforesaid observations, I am of the view that the rationale for excluding related parties from the CoC is to ensure fairness, prevent conflicts of interest, and maintain the integrity of the decision-making process in the CIRP. The Committee of Creditors has a significant role, as it assesses and decides on the corporate debtor's resolution plan, which affects the future of the debtor and creditors. The exclusion of related parties supports a more transparent and objective assessment of the resolution plans. Moreover, uninfluenced by related parties, the CoC can better focus on the broader goal of maximizing recovery for all creditors and upholding the interests of the creditors as a whole. Therefore, by way of first proviso to Section 21(2) of the Code, the legislature has intended to exclude related parties from the CoC to enhance objectivity and fairness, fostering trust in the insolvency process.

48. In the wake, I opine that once a financial creditor has been classified as a related party of the CD in terms of Section 5(24)(j) of the Code and excluded from CoC in terms of the first proviso to Section 21(2) of the Code, it cannot be given representation in the CoC as an operational creditor as inclusion in the latter category would defeat the legislative intent of enacting the said law.

The intent and object of first proviso to Section 21(2) of IBC, 2016, is to keep the 'related party' away from its representation and participation in a meeting of Committee of Creditors. It does not draw any distinction between the members of the CoC on the basis of classification of their category as a creditor. From proviso to Section 21(8) of the Code, it is clear that where a Corporate Debtor does not have any financial creditor, the Committee of Creditors shall be constituted and shall comprise of such persons to exercise such functions in such manner as may be specified. The first proviso to Section 21(2) does not draw any distinction between the creditors referred to in Section 21(2) and proviso to Section 21(8). The proviso to Section 21(8) does not even talk of Operational Creditor and it just refer to such persons as may be specified. The persons are specified in Regulation 16 (ibid) and incidentally they include not the Operational Creditor alone but also one elected representative of all workmen and also one elected representative of all employees. If we look at a definition of 'related party' Section 5(24), though a key managerial person and a relative of key managerial persons are treated as 'related party' of the Corporate Debtor, but the workmen and the employees are not so treated. The position is amplified to clarify the doubt, as to when representative of employees can be member of CoC, then why not the Operational Creditors. To make the position further clear that it is noted that the KMPs (Manager) have greater authority and are responsible for taking the decision that affect the team or department whereas the employees follow instructions. Therefore, I respectfully agree with the findings of the Ld. Member (Judicial) in the order dated 27.09.2024 and hold that a related party even though operational creditor cannot be included in CoC with voting right. In the wake, the question referred to me is answered in negative. It is held

that an Operational Creditor who is related party cannot be included in CoC like Financial Creditors.

49. In terms of the aforementioned findings, let the matter be placed before Division Bench for disposal of the application as per majority view.

-Sd-
(ASHOK KUMAR BHARDWAJ)
MEMBER (J)

Signed this order on 21st Day of November, 2024.

BD (Steno)/ R. K. Bose, Atul Raj [LRA]