

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1065 of 2021

(Arising out of Order dated 02.11.2021 passed by the Adjudicating Authority (National Company Law Tribunal), Chandigarh Bench in I.A. No. 728/2020 in C.P. No. 515/CHD/2019)

IN THE MATTER OF:

One City Infrastructure Pvt. Ltd.

Registered Office at:
8-D, Hansalaya – 15,
Barakhamba Road,
New Delhi - 110001

...Appellant

Versus

1. Haryana Telecom Limited

Through Resolution Professional
Mr. Sanyam Goel
Having its registered office at:
SCO No. 175-176,
Sector 8-C, Madhya Marg,
Chandigarh – 160009.

2. Parivartan Investment and Finance Company

Having its registered office at:
SCO 21, ICL Road,
Madhuban Colony, Rajpura,
Patiala, Punjab – 140401.

...Respondents

Present:

For Appellant: **Mr. Krishnendu Datta, Sr. Advocate with Mr. Nitin Pandey, Mr. Adish Sharma, Advocates.**

For Respondents: **Mr. Abhishek Anand, Mr. Karan Kohli, Advocates for Respondent No.1 (RP).**

Mr. Abhijeet Sinha, Mr. Naman Joshi, Mr. Yuvraj Francis, Advocates for Respondent No.2 (CoC).

Cont'd.../

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal has been filed against the order dated 02.11.2021 passed in I.A. No. 728 of 2020 in C.P. No. 515/CHD/2019. By the impugned order, the Adjudicating Authority (National Company Law Tribunal), Chandigarh Bench has disposed of the I.A. No. 728 of 2020 in terms of an earlier order dated 05.06.2020 passed in I.A. No. 344 of 2020. Brief facts of the case necessary to be noted for deciding this Appeal are:-

- (i) Respondent No. 2 – Financial Creditor who held 5,50,000; 12% non-convertible debentures of Rs.100 each of the Corporate Debtor having interest @ 12% per annum with due date of redemption as 31.12.2015, which was extended till 31.12.2020.
- (ii) Insolvency proceedings under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code') were initiated against the Corporate Debtor vide Financial Creditor's application dated 25.09.2019.
- (iii) On 07.12.2020, the Adjudicating Authority admitted the Application under Section 7 and appointed one Shri Sanyam Goel as the Interim Resolution Professional (IRP) who was subsequently approved as Resolution Professional (RP).

- (iv) Resolution Professional invited claims. 15 claims from the creditors were received. The Committee of Creditors (CoC) was constituted by the Resolution Professional in terms of Section 21 of the I&B Code with Respondent No. 2 – the Financial Creditor as the only member of the CoC.
- (v) Resolution Professional prepared the Information Memorandum and issued Form-G inviting Prospective Resolution Applicants. Five Prospective Resolution Applicants submitted Expression of Interest including the Appellant. Appellant also submitted Resolution Plan. Two other Resolution Applicants submitted their Resolution Plan.
- (vi) In 7th CoC Meeting held on 19.09.2020, it was noted that Appellant is H-3 and CoC has noted that the negotiations will be done in the manner that first of all CoC will negotiate with H-1, if the negotiation does not fructify with H-1 then the CoC will negotiate with H-2, then if the negotiation again does not fructify with H-2 then negotiation will be done with H-3. On behalf of the Appellant it was stated that they should get an opportunity to negotiate with the CoC and match the H-1 offer.
- (vii) The offer given by H-3 was 50% of the offer given by other Resolution Applicants. In the 9th CoC meeting, one Resolution

Plan was approved. The Resolution Plan of the Appellant was not even put to vote.

(viii) The Appellant, on 19.10.2020, filed an application being I.A. No. 728 of 2020 before the Adjudicating Authority making various prayers. One of the prayer was to reconstitute the CoC of the Corporate Debtor. A reply was filed to the I.A. No. 728 of 2020 by the Corporate Debtor and before the Adjudicating Authority it was submitted by the Corporate Debtor that similar application I.A. No. 344 of 2020 was dismissed by the Adjudicating Authority vide its order dated 05.03.2021. Learned counsel for the Appellant thereafter submitted before the Adjudicating Authority that Application 728 of 2020 be disposed of with in terms of the order dated 05.03.2021. The Adjudicating Authority, thus, disposed of I.A. No. 728 of 2020 in terms of the order dated 05.03.2021. The Appellant aggrieved by the said order has come up in this Appeal.

2. We have heard Shri Krishnendu Datta, learned senior counsel appearing for the Appellant, Shri Abhishek Anand, learned counsel for Respondent No. 1 and Shri Abhijeet Sinha, learned counsel appearing for Respondent No.2.

3. Shri Krishnendu Datta, learned senior counsel appearing for the Appellant submits that Financial Creditor being related to Corporate Debtor could not have been included in the CoC. It is submitted that

Sunaina Singh, who was Director in the Corporate Debtor as well as Financial Creditor had resigned from Board of Corporate Debtor on 25.03.2019 and she being Director at the time the request for redemption of non-convertible debentures, is related party and ought to be ousted from the CoC. Smt. Sunaina Singh is grand-daughter of Smt. Sita Chaudhary, who is Director of the Corporate Debtor. Both Smt. Sunaina Singh and Smt. Sita Chaudhary being related to each other Smt. Sunaina Singh being the grand-daughter, the Financial Creditor being a related party of the Corporate Debtor in terms of Section 5(24) of the Code cannot be Member of the CoC. The Application filed by the Appellant being I.A. No. 728 of 2020 has wrongly been rejected by the Adjudicating Authority. The earlier order dated 05.03.2021 was passed on an application of an Operational Creditor- one Rajiv Babbar, which order does not operate as res-judicata nor the said order can come in the way of the Appellant in pressing his Application I.A. No. 728 of 2020. Learned counsel for the Appellant has referred to detailed chart showing the relation of Smt. Sunaina Singh and Smt. Sita Chaudhary and different shareholdings of the entities controlled by them.

4. Learned counsel appearing for the Corporate Debtor as well as Resolution Professional has opposed the submissions of the learned counsel for the Appellant. It is submitted that Appellant who was only Prospective Resolution Applicant has no locus to challenge the constitution of CoC. It is submitted that Prospective Resolution Applicant after looking

into the Information Memorandum and all other relevant materials on the record submitted an Expression of Interest and filed a Resolution Plan. It was in the 7th Meeting of the CoC held on 19.09.2020, when the Appellant was informed that he is H-3, only thereafter Appellant choose to file I.A. No. 728 of 2020 praying for reconstitution of the CoC. The Appellant was not a stakeholder in the CIRP process as his plan was not even put to vote and the Resolution Plan by one of the Resolution Applicant was approved by the CoC. It is submitted that Smt. Sunaina Singh cannot be said to be related party to the Corporate Debtor. Smt. Sunaina Singh has resigned from the Board of Corporate Debtor on 25.03.2019 whereas Application under Section 7 was filed six months thereafter and was admitted on 07.02.2020 only. Smt. Sunaina Singh being not related party there was no error in the constitution of the CoC with Financial Creditor as the only member of the CoC. The same issues were raised by Rajiv Babbar – Operational Creditor of the Corporate Debtor, which was considered by the Adjudicating Authority, after hearing all the parties, by order dated 05.03.2021, I.A. No. 344 of 2020 filed by Rajiv Babbar was dismissed. The Appellant cannot be allowed to agitate same issues when the order dated 05.03.2021 rejected such plea, which was never challenged. It is submitted that Smt. Sunaina Singh cannot be held to be related party on plea of an unsuccessful Resolution Applicant, who is neither a stakeholder nor a creditor.

5. We have heard submissions of learned counsel for the parties and perused the record.

6. Learned counsel for both the parties have placed reliance on the judgment of Hon'ble Supreme Court in '*Phoenix ARC Private Limited vs. Spade Financial Services Limited & Ors.*', (2021) 3 SCC 475. In the above case Section 5(24) and Section 21(2) of the I&B Code came for consideration of the Hon'ble Apex Court. The Adjudicating Authority had held that Spade Financial Services Ltd. ("Spade") and AAA Landmark Pvt. Ltd. ("AAA") have to be excluded from the Committee of Creditors formed in relation to the CIRP initiated against the Corporate Debtor - AKME Projects Ltd. The NCLAT dismissed the Appeal preferred by AAA and Spade. Appeal was filed before the Hon'ble Supreme Court challenging the impugned orders passed by NCLAT. The Appeal was filed by 'Phoenix ARC Pvt. Ltd.' confined to the finding that Spade and AAA are Financial Creditors. Spade and AAA have independently filed an appeal under Section 62 assailing the decision of NCLAT affirming their exclusion from participating in the CoC on the ground that they are related parties of the Corporate Debtor in terms of Section 5(24) and the first proviso to Section 21(2) of the I&B Code. The Hon'ble Apex Court come to consider the concept of related parties. The issues which came for consideration have been noted in Para 88, Paras 88, 89 and 90 are to the following effect:-

"88. An issue of interpretation in relation to the first proviso of Section 21(2) is whether the

disqualification under the proviso would attach to a financial creditor only in praesenti, or if the disqualification also extends to those financial creditors who were related to the corporate debtor at the time of acquiring the debt.

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

“46. According to us, it is clear that the opening words of Section 29-A furnish a clue as to the time at which clause (c) is to operate. The opening words of Section 29-A state: “a person shall not be eligible to submit a resolution plan...”. It is clear therefore that the stage of ineligibility attaches when the resolution plan is submitted by a resolution applicant. The contrary view expressed by Shri Rohatgi is obviously incorrect, as the date of commencement of the corporate insolvency resolution process is only relevant for the purpose of calculating whether one year has lapsed from the date of classification of a person as a non-performing asset. Further, the expression used is “has”, which as Dr Singhvi has correctly argued, is in praesenti. This is to be contrasted with the expression “has been”, which is used in clauses (d) and (g), which refers to an

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

90. *Thus, facially, it would appear that the use of the simple present tense in the first proviso to Section 21(2) indicates that the disqualification applies in praesenti. Furthermore, this interpretation would also be supported by a reading of the first proviso to Section 21(2), in light of the definition of ‘related party’ under Section 5(24), which uses phrases such as ‘is accustomed to act’ or ‘is associated’ to define a related party in the present tense.”*

7. After considering rival submissions of the parties and noticing the rules of statutory interpretation, the Hon’ble Supreme Court ultimately laid down following ratio in Para 100:-

“100. Therefore, it could be stated that where a financial creditor seeks a position on the CoC on the basis of a debt which was created when it was a related party of the corporate debtor, the exclusion which is created by the first proviso to Section 21(2) must apply. For, it is on the strength of the financial debt as defined in Section 5(8) that an entity claiming as a financial creditor under Section 5(7) seeks a position on the CoC under Section 21(2). If the definition of the expression

‘related party’ under section 5(24) applies at the time when the debt was created, the exclusion in the first proviso to Section 21(2) would stand attracted.”

8. The Hon’ble Supreme Court also came to the conclusion that transactions alleged to be financial debt by Spade and AAA were collusive in nature, hence they cannot be treated to be Financial Creditors also. Conclusion has been recorded by Hon’ble Supreme Court in Para 105-106, which are as follows:-

“105. In the present case, there is a finding that AAA and Spade were related parties within the meaning of Section 5(24) at the time when the alleged financial debt on the basis of which they assert a claim to be a part of the CoC was created. This was due to the long-standing relationship between Mr Arun Anand and Mr Anil Nanda, and their respective corporations. Admittedly, such a relationship still existed even in 2017, since Mr Anil Nanda’s JIPL held shareholding in Mr Arun Anand’s Spade. Further, we have also concluded that the transactions between Spade and AAA on one hand, and the Corporate Debtor on the other hand, which gave rise to their alleged financial debts were collusive in nature. Therefore, it is evident that there existed a deeply entangled relationship between Spade, AAA and Corporate Debtor, when the alleged financial debt arose. While their status as related parties may no longer

stand, we are inclined to agree with Mr Kaul that this was due to commercial contrivances through which these entities seek to now enter the CoC. The pervasive influence of Mr Anil Nanda (the promoter/director of the Corporate Debtor) over these entities is clear, and allowing them in the CoC would definitely affect the other independent financial creditors.

106. In conclusion, we hold that:

106.1. The decision of the NCLAT, in as much as it referred to Spade and AAA as financial creditors, is set aside. Due to the collusive nature of their transactions alleged to be a financial debt under Section 5(8), Spade and AAA cannot be labelled as financial creditors under Section 5(7);

106.2. The decision of the NCLAT, in as much as it referred to Spade and AAA as related parties of the Corporate Debtor under Section 5(24), is affirmed; and

106.3. The decision of the NCLAT, in as much as it excluded Spade and AAA from the CoC in accordance with the first proviso of Section 21(2), is affirmed but for the reasons mentioned above.”

9. The ratio which can be culled out from the above judgment is that the Financial Creditor who is praesenti is not related party cannot be

debarred from being a member of the CoC. The exception to the above proposition is that 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. Following has been laid down in Para 103 of the judgment:-

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

10. We may also notice the provision of Section 5(24). Section 5(24) deals with ‘related party’, which is to the following effect:-

“5(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;*
- (b) *a key managerial personnel of the corporate debtor or a relative of a 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;*
- (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;*
- (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;*
- (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;*
- (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;*
 - (h) any person on whose advice, directions or instructions, a director, partner or manager of the corporate debtor is accustomed to act;*
 - (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;*
 - (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;*
 - (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;*
 - (l) any person who can control the composition of the board of directors or corresponding 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;*

*[(24A) “**related party**“, in relation to an individual, means—*

- (a) a person who is a relative of the individual or a relative of the spouse of the individual;*
- (b) a partner of a limited liability partnership, or a limited liability partnership or a partnership firm, in which the individual is a partner;*
- (c) a person who is a trustee of a trust in which the beneficiary of the trust includes the individual, or the terms of the trust confers a power on the*

trustee which may be exercised for the benefit of the individual;

- (d) a private company in which the individual is a director and holds along with his relatives, more than two per cent. of its share capital;*
- (e) a public company in which the individual is a director and holds along with relatives, more than two per cent. of its paid-up share capital;*
- (f) a body corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of the individual;*
- (g) a limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, act on the advice, directions or instructions of the individual;*
- (h) a person on whose advice, directions or instructions, the individual is accustomed to act;*
- (i) a company, where the individual or the individual along with its related party, own more than fifty per cent. of the share capital of the company or controls the appointment of the board of directors of the company.*

Explanation.—For the purposes of this clause,—

(a) “relative”, with reference to any person, means anyone who is related to another, in the following manner, namely:—

(i) members of a Hindu Undivided Family,

(ii) husband,

(iii) wife,

(iv) father,

(v) mother,

(vi) son,

(vii) daughter,

(viii) son’s daughter and son,

(ix) daughter’s daughter and son,

(x) grandson’s daughter and son,

(xi) granddaughter’s daughter and son,

(xii) brother,

(xiii) sister,

(xiv) brother’s son and daughter,

(xv) sister’s son and daughter,

(xvi) father’s father and mother,

(xvii) mother’s father and mother,

(xviii) father’s brother and sister,

(xix) mother’s brother and sister, and

(b) wherever the relation is that of a son, daughter, sister or brother, their spouses shall also be included;]

11. Section 21(2) is as follows:-

(2) The committee of creditors shall comprise all financial creditors of the corporate debtor:

Provided that a ¹[financial creditor or the authorised representative of the financial creditor referred to in sub-section (6) or sub-section (6A) or sub-section (5) of section 24, if it is a related party of the corporate debtor,] shall not have any right of representation, participation or voting in a meeting of the committee of creditors:

²[Provided further that the first proviso shall not apply to a financial creditor, regulated by a financial sector regulator, if it is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares ³[or completion of such transactions as may be prescribed], prior to the insolvency commencement date.]”

12. After noticing the relevant provisions of the I&B Code and law laid down by the Hon’ble Supreme Court in ‘Phoenix ARC Pvt. Ltd.’ (Supra), we need to apply the preposition of the law in the facts of the present case to find out whether Financial Creditor i.e. Respondent No. 2 to Appeal is a related party of the Corporate Debtor so as to be not part of the CoC.

13. We may first notice the facts and pleadings in I.A. No. 728 of 2020 filed by the Appellant. Para 6 and 7 of the Application gives the details and

grounds on which the Appellant claim that the Financial Creditor is related to the Corporate Debtor. The case of the Appellant was that Smt. Sunaina Singh, the grand-daughter and Smt. Sita Chaudhary, the grand-mother are related to each other. Smt. Sunaina Singh is Executive Director in the Financial Creditor and is erstwhile Director of the Corporate Debtor and Smt. Sita Chaudhary is Ex-Director of the Financial Creditor and active Director of the Corporate Debtor. In the Application, I.A. No. 728 of 2020, detail reply was filed by the Corporate Debtor challenging the locus of the Appellant to file I.A. and following preliminary objection was raised in Para A and B of the Reply:-

“A. The Applicant was a prospective resolution applicant who submitted a defective resolution plan which could not be voted upon by the CoC. Assuming the plan was not defective, the Applicant was still H3 and there were two better plans before the COC. Having lost out in a fair and transparent process, the Applicant has approached this Hon’ble Court having found the proverbial grapes to be sour inasmuch as everything the Applicant questions and assails in his Application was known to it when it filed its expression of interest on 7.7.2020, received the information memorandum on 24.07.2020, when it submitted his resolution plan on 02.09.2020, and when it was informed that it was H3 on 19.09.2020. The only thing that has changed is that the Applicant has become aware of its loss.

*B. The Applicant, an unsuccessful resolution Applicant, has no locus standi to prefer the Application under Reply let alone seek reconstitution of the COC or replacement of the Resolution Professional. The Applicant's alleged cause of action and grouse is that the resolution plan of another resolution applicant was approved. However, the Applicant cannot prefer the present Application as it does not have any vested right for consideration of its resolution plan and the same has been confirmed by the Hon'ble National Company Law Appellate Tribunal in multiple cases. The Hon'ble National Company Law Appellate Tribunal has in **Arcelor Mittal India Pvt. Ltd. v. Abhijit Guhatkahurta, Resolution Professional of EPC Constructions India Ltd. & Ors., Company Appeal (AT) (Insolvency) No. 524/2019** relying upon the Hon'ble Supreme Court's decision in **Arcelor Mittal India Pvt. Ltd. v. Satish Kumar Gupta & Ors, (2019) 2 SCC 1** held:"*

14. Financial Creditor has also filed Reply to the Application, where following facts with regard to Financial Creditor were mentioned in Para 33:-

"33. In this regard, Respondent 2 states the following facts:

A. Respondent 2 is a company incorporated under the Companies Act, 1956 on

04.02.1991, having its registered office at S.C.O. No.21 – ICL Road Madhuban Colony, Rajpura, Patiala, Punjab. The authorized capital of the Respondent 3 is Rs.31,200,000.00p and the paid-up capital is Rs.100,000.00p.

- B. Ms. Sunaina Singh and Mr. Rajeev Pandey are directors of Respondent 2.
- C. Sunaina Singh was a director in the Corporate Debtor and she resigned from the Corporate Debtor on 25/03/2019.
- D. The Shareholders of Respondent 2 are as under:
 - i. ICI. Enterprises LLP (50%)
 - ii. Rajpura Steel Tubes LLP (40%)
 - iii. Rama Packaging and Wire Industries LLP (10%)”

15. From the material on the record it is clear that Smt. Sunaina Singh, who is Director of the Financial Creditor at present was also Director of the Corporate Debtor but she resigned as Director of the Corporate Debtor on 25.03.2019 and w.e.f. 25.03.2019 Smt. Sunaina Singh has not been continuing as Director of the Corporate Debtor. Thus, there is no dispute that on the day when Section 7 Application was filed and the day when Section 7 Application was admitted Smt. Sunaina Singh was not Director of the Corporate Debtor, she having resigned six months prior to date of filing of the Section 7 Application. Appellant has filed a rejoinder where following was stated in Para 5:-

“5. I say that by a bare perusal of the letter dated 01.01.2019, which is a part of the said transaction documents, would make it evident that Ms. Sunaina Singh being a Director of the Financial Creditor had addressed the letter dated 01.01.2019 to the Corporate Debtor for redemption of the non-convertible debentures whereas she was admittedly resigned from the Board of the Corporate Debtor on 25.03.2019, thereby, directly being in control of both Corporate Debtor as well as Financial Creditor at the time of requesting for redemption of the non-convertible debentures to the Corporate Debtor, which was defaulted by the Corporate Debtor and the present proceedings under Section 7 of the Insolvency & Bankruptcy Code, 2016 had been initiated by the Financial Creditor.”

16. The fact that Smt. Sunaina Singh on 01.01.2019 requested the Corporate Debtor for redemption of non-convertible debentures and the fact that Smt. Sunaina Singh was a Director of the Corporate Debtor when non-convertible debentures were issued by the Corporate Debtor and held by Financial Creditor i.e. 13.01.2016, in view of the law laid down by the Hon’ble Supreme Court in ‘Phoenix ARC Pvt. Ltd.’ (supra) are not relevant criteria to hold Financial Creditor as related party to the Corporate Debtor. Only exception which has been laid down in Para 103 of the judgment of Hon’ble Supreme Court in ‘Phoenix ARC Pvt. Ltd.’, as extracted above and noted by us is that where the 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. When we look into the Application I.A. No. 728 of 2020 and even rejoinder filed in the said Application, there is no averment that one of the Director of the Financial Creditor, Smt. Sunaina Singh 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. There being no foundation in the I.A. No. 728 of 2020 making any averment which can be looked into to find out whether present is a case which can be said to be an exception to related party being in praesenti as laid down by the Hon'ble Supreme Court in Para 103 of the judgment in 'Phoenix ARC Pvt. Ltd.'.

17. At this stage, we may also refer to order dated 05.03.2021 passed by the Adjudicating Authority in I.A. No. 344 of 2020. One Mr. Rajiv Babbar, who was an Operational Creditor has also filed an Application being I.A. No. 344 of 2020 making same allegations against the Financial Creditor alleging that Smt. Sunaina Singh being Director who has resigned on 25.03.2019 is related party and Financial Creditor cannot be part of the CoC. Adjudicating Authority dealt the issue elaborately in Para 10, which is to the following effect:-

“10. From the above, it is clear that though Mrs. Sunaina Singh was a Director of the third respondent/financial creditor on an earlier point of time but either on the date of filing of Section 7 application or on the date of initiation of the CIR Proceedings i.e. the date of admission of CP, she was not the Director of the third respondent/financial creditor, since she had admittedly resigned as a Director from the corporate debtor on 25.03.2019. The financial creditor/third respondent is not a holding, subsidiary or associate company of the corporate debtor. The averments made or documents filed on behalf of the applicant do not show that any of the Directors of the corporate debtor have in any manner interfered in the working of the financial creditor/third respondent in the ordinary course of business of that the Directors of the corporate debtor in any way advise/instruct the Directors of the financial creditor/third respondent or vice versa. In the absence of the same, it cannot be stated that the third respondent/financial creditor is a related party to the corporate debtor. Mere relationship between Mrs. Sunaina Singh and Mrs. Sita Chaudhary i.e. granddaughter and grandmother without there being sufficient evidence to show that both of them are working conjointly on aid and advise of each other shall not disentitle the third respondent/financial creditor to be the COC Member either under Section 5(24) or/and Section 21(2). In view of our finding that

the applicant failed to show that the third respondent/financial creditor is a related party to the corporate debtor, there is no need of delving upon the various decisions cited by both sides.”

18. The Adjudicating Authority has also elaborately noticed the judgment of Hon’ble Supreme Court in ‘Phoenix ARC Pvt. Ltd.’ and made following observations in Para 14:-

“14. The Hon’ble Apex Court held that, in a given case, if it is established that 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 to sabotage the CIRP, by diluting the vote share of other creditors or otherwise, can be debarred from the COC, though the said financial creditor was not a related party as on the date of filing of the CP. But in the present case, since the applicant failed to establish any such intention on the part of the third respondent, the decision of the Hon’ble Apex Court is also not applicable.”

19. Although order dated 02.11.2021 rejecting the I.A. No. 728 of 2020 is not an elaborate order, the elaborate order having been passed earlier on 05.03.2021, the reasoning given in order dated 05.03.2021 can be looked into to find out the reason given by the Adjudicating Authority for rejecting application filed by the Appellant. We are, thus, satisfied that present is a case where Smt. Sunaina Singh in praesenti was not a related party having

resigned six months prior to filing of Section 7 Application. There is no averment or material on record to show that Smt. Sunaina Singh has resigned to cease to be Director of the Corporate Debtor with the sole intention of participating in the CoC and to sabotage the CIRP, by diluting the vote share of other creditors or otherwise. Present is not a case covered by exception as elaborated in Para 103 of judgment of Hon'ble Supreme Court in 'Phoenix ARC Pvt. Ltd.' (supra). We, thus, are satisfied that no error has been committed by the Adjudicating Authority in rejecting I.A. No. 728 of 2020 filed by the Appellant. In result, the Appeal is dismissed.

**[Justice Ashok Bhushan]
Chairperson**

**[Naresh Salecha]
Member (Technical)**

NEW DELHI

14th July, 2022

Archana