

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH: NEW DELHI

Company Appeal (AT) (Insolvency) No. 252 of 2020

[Arising out of Common Order dated 03 January 2020 passed by the Adjudicating Authority/National Company Law Tribunal, Division Bench, Chennai in MA/1360/2019 & MA/1263/2019 in CP/938/IB/2018]

IN THE MATTER OF:

**Sai Peace and Prosperity Apartment
Buyers Association
Represented by its Secretary
Mr Elamukil Tamil
M-104/9, 30th Cross Street,
Besant Nagar, Chennai – 600090**

Appellant

Versus

**1. ASK Investment Managers P Ltd
Birla Aurora, 16 Level, Office Floor 9
Dr Annie Besant Road
Worli, Mumbai – 400030**

**2. Anil Khichha
Resolution Professional
Representing Corporate Debtor
(Ambojini Property Developers
Private Limited)**

**3. Dr L Natrajan
Interim Resolution Professional
Representing Corporate Debtor
(Ambojini Property Developers
Private Limited)**

Respondents

Present:

For Appellant : Mr Nikhil Nayyar, Sr. Advocate with Mr Pawan Bhushan and Mr Divyanshu Rai, Advocates.

For Respondent : Mr Ramji Srinivasan, Sr. Advocate with Ms Shachi Udeshi, Mr Denzil Arambhan, Mr Abhishek Sharma, Ms Disha Shetty, Mr Rajshree Chaudhary, Ms Miloni Rathore and Mr Pranaya Goyal, Advocates for R-1. Dr MR Venkatesh, Advocate for R-2. Mr Anil Kumar Khicha, RP

With

Company Appeal (AT) (Insolvency) No. 315 of 2020

IN THE MATTER OF:

**V S Suresh
New No. 21, Old No. 6
Ramakrishnan Street, T. Nagar
Chennai – 600017**

Appellant

Versus

**1. ASK Investment Managers Ltd
Birla Aurora, 16 Level, Office Floor 9
Dr Annie Besant Road
Worli, Mumbai – 400030**

**2. Anil Khichha
Resolution Professional
6FF, First Floor, Golden Enclave
104 Poonamal High Road
Kilpauk, Chennai – 600010**

**3. Dr L Natarajan
21, Jambulingam Street
Nungambakkam, Chennai – 600034**

Respondents

Present:

**For Appellant : Mr Rana Mukherjee, Sr Advocate with
Mr Goutham Shivshankar, Advocate**

**For Respondent : Mr Ramji Srinivasan, Sr Advocate with
Ms Shachi Udeshi, Mr Denzil Arambhan,
Mr Abhishek Sharma, Ms Disha Shetty,
Mr Rajshree Chaudhary, Ms Miloni Rathore and
Mr Pranaya Goyal, Advocates for R-1.**

**Dr Mr Venkatesh, Advocate for R-2.
Mr Anil Kumar Khicha, RP**

GLOSSARY

ASK	Respondent No.1/Applicant/ASK Investment Managers Pvt Ltd (ASK), being portfolio manager of "ASK PMS Real Estate Special Opportunities Portfolio I"
SSA/SSHA	Subscription and Shareholders Agreement
AA	Adjudicating Authority
CoC	Committee of Creditors
NCLT	National Company Law Tribunal
NCLAT	National Company Law Appellate Tribunal
IBC	Insolvency and Bankruptcy Code 2016
FC	Financial Creditor
CD	The Corporate Debtor
OC	Operational Creditor
RP	Resolution Professional
IRP	Interim Resolution professional
Respondent No.1	Applicant/Claimant-Respondent No.1, i.e. ASK Investment Managers Ltd.
CD	Corporate Debtor 'Ambojini Property Developers Private Limited'
Appellant(in CA to 252 of 2020)	'Sai Peace and Prosperity Apartment Buyers Association'.
QUORUM:	Hon'ble Mr Justice A.I.S. Cheema V. P. Singh, Member (T)

J U D G M E N T

[Per; V. P. Singh, Member (T)]

These two Appeals emanate from the Common Order dated 03 January 2020 passed by the Adjudicating Authority/National Company Law Tribunal, Division Bench, Chennai in MA/1360/2019 & MA/1263/2019 in *Company Appeal (AT) (Insolvency) No. 252 & 315 of 2020*

CP/938/IB/2018, under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (in short '**I&B Code**'), whereby the Adjudicating Authority has directed the Resolution Professional to make the Applicant /Respondent No.1 (ASK Investment Managers Limited), a member of CoC with voting rights proportionate to its claim against the Corporate Debtor.

The original status of the Parties in the Company Petition represents them in these appeals for the sake of convenience.

Brief Facts

1. The Application MA/1360/2019 and MA/1263/2019 in CP/938/IB/2018 was filed u/s 60(5) IBC, 2016 by Respondent No. 1 assailing the decision of IRP/RP holding that the claimant/ Applicant is a Financial Creditor but is not eligible to be a part of CoC for the reason that the Respondent is a related party in terms of Sec. 5(24)(m) & 5(24) (i) of the Insolvency and Bankruptcy Code 2016. Accordingly, the Tribunal disposed of the Application & directed RP to make Respondent No. 1 a member of 'CoC' with voting rights.

2. All members of the Appellant Association in Appeal No 252 of 2020 are home buyers, and the Project which the Corporate Debtor floated was supposed to be completed and handed over by Dec. 2018. However, there were substantial delays, and the Corporate Debtor defaulted in making payment as per the terms of the Agreement. As a result, a member of the Appellate Association filed claims before RP, as Operational Creditor had triggered the CIRP and AA/NCLT, Chennai had admitted Application u/s 9 of IBC, 2016.

3. The members of the Appellant association filed their claims before the Resolution Professional. The object of the Homebuyers as claimants in the CIRP is for a Successful Resolution of the CD and completion of the Project. The third Respondent was appointed as IRP of the CD. Then, the Appellant made various representations to Respondent No. 3 to show that Respondent No. 1 is a related party of the CD. Accepting the contention of the Appellant, the RP communicated its decision, holding that Respondent No. 1 is a related party of the CD.

Submission of Appellant in Civil Appeal No.315 of 2020

4. Appellant of Civil Appeal No. 315 of 2020 is Mr V S Suresh, the Corporate Debtor's Promoter and Shareholder. The Appellant, along with his Companies, i.e. **'Real Value Promoters Private Limited'** and certain landowners, were intending to promote a real estate project, in which certain investors, carrying the name and style of "ASK PMS Real Estate Special Opportunities Portfolio" through 1st Respondent, had agreed to invest.

5. The Appellant submits that after several rounds of detailed negotiations, the investor, through their investor representative, i.e. the 1st Respondent, entered into a **'Subscription and Shareholder's Agreement'** dated 23 March 2013. The investors were independent parties merely represented by a common individual, i.e. the 1st Respondent herein. 'ASK Investment Managers Private Limited' is registered under the Companies Act 1956, acting independently of the investors and the "investor representative".

6. The 1st Respondent was independent of the investors and was merely representing the said investors in the aforesaid transaction. Therefore, the 1st Respondent does not have any independent right with respect to the said transaction other than the right to act on behalf of the investors. Thus, the Appellant submits that the instant *lis*, i.e. concerning MA/1360/2019 and MA/1263/2019, pertains to the rights and the status of the said investors alone and do not relate to the investor representative, i.e. the 1st Respondent. Hence, the instant *lis* is against the 1st Respondent, in his capacity as the investors representative and not against it per se. Thus, it is evident that the 1st Respondent is the agent, and the investors are the principal.

7. The Appellant submits that as per the SSA, it was agreed between the investors represented by the 1st Respondent, the Appellant and the Corporate Debtor, that the investors, through the 1st Respondent, would invest a sum of ₹50 Lacs in the Corporate Debtor, in the form of equity by subscription to the share capital of the Corporate Debtor and the sum of ₹ 49.50 crores, would be invested, by way of debentures. As per the tenets of the 'SSHA', the investors were entitled to nominate three directors, constituting 50% of the Board of Directors, which right was duly exercised by the investors. It is admitted even during the arbitral proceedings by the investors through their investor representative. The investors herein were involved in the policy-making decisions of the Corporate Debtor and several other decisions arising in due course of business, such as decisions on key appointments like architects, civil / electricals /PHE subcontractors, etc., who would be involved in the

development of the Project. Further, it is submitted that the affirmative vote items include several matters about the underlying conduct of business itself, such as selling units in the real estate project, making budgets, marketing, etc. It is pertinent to note that the directors appointed by the investors were authorised to act on behalf of the Corporate Debtor and enjoyed cheque signing authority in the Corporate Debtor.

8. The Appellant submits that the investors, represented by the 1st Respondent, were participating in the policies and the effective management of the Corporate Debtor. As such, they had substantial control over the management of the Corporate Debtor. In other words, the investors represented by their investor representative were competent to control the Board's composition entirely and consequently would fall within the ambit of Section 5 (24) (I) of the Insolvency and Bankruptcy Code 2016. Further, Section 5 (24) (m) (iv) states that any person, who is entitled to obtain "essential technical information" to and from the company, shall be deemed a related party.

9. The Appellant submits that the affirmative vote items demonstrate substantial control over the technical matters, including the very choice of technical professionals such as architects, was within the investors' domain, for whom the investor representative was acting. Similarly, a mere perusal of Section 5 (24) (i) of the Code makes it clear that related party in relation to the corporate debtor, includes a body corporate which is holding, subsidiary or an associate company to which the corporate debtor is a subsidiary. The associate

Company is defined u/s 2(6) of the Companies Act, which means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence and includes a joint venture company. The explanation (b) to section 6 provides that 'joint venture' means a joint arrangement whereby the parties that have joint control of the arrangement have rights to the net assets of the arrangement.

10. In the instant case, the investors, having been treated as a separate entity, i.e. Association of Persons, the said clause would be attracted and deemed a joint developer concerning the said property. Accordingly, the Appellant submits that for the reasons above, the investors would squarely fall within the definition of the term related party, under Section 5 (24) of the Code.

11. MA/1360/2019 & MA/1263/2019 in CP/938/IB/2018 were filed by the Applicant/Respondent No.1 (M/s ASK Investment Managers Limited) before the Adjudicating Authority, on being aggrieved that despite its claim being accepted as Financial Creditor, it was not made part of the CoC. Accordingly, considering the Applicant/ Respondent No.1 as a related party to the Corporate Debtor, under Sec. 5(24)(h) & 5(24) (m)(i) of Insolvency and Bankruptcy Code, 2016 (the Code) being ineligible, not made part of CoC.

12. The Respondent No.1/Applicant's holds 8% shareholding in the Corporate Debtor, apart from 49.50 Crores funded to the Corporate Debtor through Debentures. By this stake, the Respondent No.1 Company had two nominee Directors on the Board of the Corporate Debtor with affirmative voting

rights in the Corporate Debtor proportionate to the equity plus debentures as per Schedule VII, Sub-Schedule 5 of the Subscription and Shareholders Agreement dated 23.03.2011. However, since some differences arose between the Promoter-Directors and the Respondent No.1/ Applicant, it initiated Arbitration Proceedings against the Promoters and the Corporate Debtor, wherein an award was passed on 31.01.2018 for an amount of Rs.143 Crores plus interest. Accordingly, based on the debentures issued to the Applicant/ Respondent No.1, the Arbitral Award was passed, which was to be paid jointly and severally by the Corporate Debtor and the Promoter-Directors.

13. The Adjudicating Authority disposed of the applications by allowing MA/1360/2019 & MA/1263/2019 in CP/938/IB/2018 with the following directions:-

"Therefore for the reasons aforementioned, we are of the view that this Applicant/Financial Creditor shall be permitted to become member of CoC so as to participate in considering the functioning of the Corporate Debtor and examining the Resolution Plan, if any, that may come up before the Committee of Creditors.

Accordingly, we hereby dispose of MA/1360/2019 & MA/1263/2019, directing the Resolution Professional to make this Applicant as member of the CoC with voting rights proportionate to its claim against the Corporate Debtor."

(verbatim copy)

The Statutory Provisions

Insolvency & Bankruptcy Code 2016

Company Appeal (AT) (Insolvency) No. 252 & 315 of 2020

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Sec 3(16) "financial service" includes any of the following services, namely—

- (a) accepting of deposits;
- (b) safeguarding and administering assets consisting of financial products, belonging to another person, or agreeing to do so;
- (c) effecting contracts of insurance;
- (d) offering, managing or agreeing to manage assets consisting of financial products belonging to another person;
- (e) rendering or agreeing, for consideration, to render advice on or soliciting for the purposes of—
 - (i) buying, selling, or subscribing to, a financial product;
 - (ii) availing a financial service; or
 - (iii) exercising any right associated with a financial product or financial service;
- (f) establishing or operating an investment scheme;
- (g) maintaining or transferring records of ownership of a financial product;
- (h) underwriting the issuance or subscription of a financial product; or
- (i) selling, providing, or issuing stored value or payment instruments or providing payment services;

(17) "financial service provider" means a person engaged in the business of providing financial services in terms of authorisation issued or registration granted by a financial sector regulator;

(18) "financial sector regulator" means an authority or body constituted under any law for the time being in force to regulate services or transactions of financial sector and includes the Reserve Bank of India, the Securities and Exchange Board of India, the Insurance Regulatory and Development Authority of India, the Pension Fund Regulatory Authority and such other regulatory authorities as may be notified by the Central Government;

Sec 5(24) of the I&B Code, 2016 provides that "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;**

Sec 21. Committee of Creditors.

(1) *The interim Resolution professional shall after collation of all claims received against the corporate Debtor and determination of the financial position of the corporate Debtor, constitute a committee of creditors.*

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

Provided that a [financial creditor or the authorised representative of the financial creditor referred to in sub-section (6) or sub-section (6-A) 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:

[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 [or completion of such transactions as may be prescribed,] prior to the insolvency commencement date.]

(3) *[Subject to sub-sections (6) and (6-A), where] the corporate Debtor owes financial debts to two or more financial creditors as part of a consortium or Agreement, each such financial creditor shall be part of the committee of creditors and their voting share shall be determined on the basis of the financial debts owed to them.*

(4) *Where any person is a financial creditor as well as an operational creditor,—*

(a) *such person shall be a financial creditor to the extent of the financial debt owed by the corporate Debtor, and shall be included in the committee of creditors, with voting share proportionate to the extent of financial debts owed to such creditor;*

(b) *such person shall be considered to be an operational creditor to the extent of the operational debt owed by the corporate Debtor to such creditor.*

(5) *Where an operational creditor has assigned or legally transferred any operational debt to a financial creditor, the assignee or transferee shall be considered as an operational creditor to the extent of such assignment or legal transfer.*

(6) *Where the terms of the financial debt extended as part of a consortium arrangement or syndicated facility [* * *] provide for a single trustee or agent to act for all financial creditors, each financial creditor may—*

(a) *authorise the trustee or agent to act on his behalf in the committee of creditors to the extent of his voting share;*

(b) *represent himself in the committee of creditors to the extent of his voting share;*

(c) *appoint an insolvency professional (other than the Resolution professional) at his own cost to represent himself in the committee of creditors to the extent of his voting share; or*

(d) *exercise his right to vote to the extent of his voting share with one or more financial creditors jointly or severally.*

[(6-A) Where a financial debt—

(a) is in the form of securities or deposits and the terms of the financial debt provide for appointment of a trustee or agent to act as authorised representative for all the financial creditors, such trustee or agent shall act on behalf of such financial creditors;

(b) is owed to a class of creditors exceeding the number as may be specified, other than the creditors covered under clause (a) or sub-section (6), the interim Resolution professional shall make an application to the Adjudicating Authority along with the list of all financial creditors, containing the name of an insolvency professional, other than the interim Resolution professional, to act as their authorised representative who shall be appointed by the Adjudicating Authority prior to the first meeting of the committee of creditors;

(c) is represented by a guardian, executor or administrator, such person shall act as authorised representative on behalf of such financial creditors, and such authorised representative under clause (a) or clause (b) or clause (c) shall attend the meetings of the committee of creditors, and vote on behalf of each financial creditor to the extent of his voting share.

(6-B) The remuneration payable to the authorised representative—

(i) under clauses (a) and (c) of sub-section (6-A), if any, shall be as per the terms of the financial debt or the relevant documentation; and

(ii) under clause (b) of sub-section (6-A) shall be as specified which shall form part of the insolvency resolution process costs.]

[(7) The Board may specify the manner of voting and the determining of the voting share in respect of financial debts covered under sub-sections (6) and (6-A).

(8) Save as otherwise provided in this Code, all decisions of the committee of creditors shall be taken by a vote of not less than fifty-one per cent of voting share of the financial creditors:

Provided that where a corporate debtor does not have any financial creditors, the committee of creditors shall be constituted and shall comprise of such persons to exercise such functions in such manner as may be specified.]

(9) The committee of creditors shall have the right to require the Resolution professional to furnish any financial information in relation to the corporate Debtor at any time during the corporate insolvency resolution process.

(10) The Resolution professional shall make available any financial information so required by the committee of creditors under sub-section (9) within a period of seven days of such requisition.

Discussion and Finding

Whether Applicant/Respondent No.1 (M/s ASK Investment Managers Limited) is a related party in terms of Section 5 (24) (h), 5 (24) (m) and (i) of the I&B Code, 2016?

14. Admittedly Applicant held an eight per cent shareholding in the Corporate Debtor, apart from ₹ 49.50 crores funded to the Corporate Debtor through debentures. Therefore, the RP stated that though the Applicant was the Financial Creditor, but not eligible to be made part of the COC as it was a related party to the Corporate Debtor.

15. The Adjudicating Authority held that the company's management and affirmative vote in the company might be used to protect their investment in the company and to have their say in the proper usage of funds. They may have become nominee directors or they may have their nominee directors on the Board. At times they may have an affirmative vote in the debtor company. These incidental rights protect their investment cannot be magnified to say that they are not entitled to become members of COC, where crucial decisions are taken to realise their share to their best out of the Resolution, i.e. scheduled to happen; in debtor company. Suppose these financial service providers, acting as trustees to some other funds, are eliminated from participating in COC. In that case, the very objective of bringing debtor companies under Financial Creditors will be put to nullification. That apart, valuable right of the Financial Creditor who has come into the company solely for the returns on the investment as per the agreements, will be unreasonably curtailed.

16. It is pertinent to mention that Hon'ble Supreme Court in (2021) 3 SCC 4754 Phoenix ARC Private Limited v Spade financial services Ltd has held that the objective and purpose of the Code are best served when the CIRP is driven by external creditors so as to ensure that related parties of the Corporate Debtor do not sabotage the COC. This is the intent behind the first proviso to Section 21 (2) of the Code, which disqualifies a Financial Creditor or the authorised representative of the Financial Creditor under Sub-section (6A) or Sub-section (5) of Section 24 of the Code, if it is a related party of the ***Company Appeal (AT) (Insolvency) No. 252 & 315 of 2020***

Corporate Debtor, from having any right of representation, participation or voting in a meeting of COC. The purpose of excluding a related party of the Corporate Debtor from the COC is to obviate conflicts of interests that are likely to arise if the Related Party is allowed to become a part of the COC. The Insolvency Law Committee Report of 2020 has clarified that the exclusion under the 1st proviso to Section 21 (2) under the Code is related not to the debt itself, but the relationship between a related party Financial Creditor and the Corporate Debtor. As such, the Financial Creditor, who in praesenti is not a related party, would not be debarred from being a member of the COC. While the default rule under the 1st proviso to Section 21 (2) of the Code is that only those Financial Creditors that are related parties in praesenti would be debarred from the COC, those related party Financial Creditors that cease to be related parties to circumvent the exclusion under the 1st proviso to Section 21 (2) of the Code, should also be considered as being covered by the exclusion thereunder. Suppose this interpretation is not given to the 1st proviso Section 21 (2) Code; in that case, a related party Financial Creditor can devise a mechanism to remove its level of a 'related party' before the Corporate Debtor undergoes CIRP to enable to enter the COC and influence his decision making at the cost of other Financial Creditors.

17. In the instant case, Corporate Insolvency Resolution Process (CIRP) is initiated against the Corporate Debtor, M/s Ambojini Property Developers Pvt Ltd, Company wide order passed in CP/938/18/2018 issued by National Company Law Tribunal (NCLT) under Insolvency and Bankruptcy Code, 2016.

18. Applicant/ASK Investment Managers Pvt Ltd (ASK), being portfolio manager of "ASK PMS Real Estate Special Opportunities Portfolio I", filed their claim with the IRP regarding the CIRP mentioned above and has approached the NCLT to seek participation in the meeting of the CoC.

19. The Financial Creditor ICICI bank informed the Resolution Professional that Mr Deepak Ishwardas Rathi, Mr Chatan Suresh Shah and Mr Raman Hariharan Iyer having DIN Nos. 02096135, 03255921 and 03271000 respectively were appointed as directors of the Corporate Debtor on 30 September 2013, 30 September 2011, and 30 September 2011 respectively. The said directors were appointed on behalf of ASK, being the investors, with sufficient right to influence the policy matters and operations of the Corporate Debtor.

20. The learned counsel for the Appellant submits that by appointing the directors as stated above, the Applicant had a significant influence on the operations of the Corporate Debtor.

21. As per the Insolvency and Bankruptcy Code, 2016, a related party is defined to be the following persons;

- I. Under Sec. 5(24) (m) & (i) of the Insolvency and Bankruptcy Code, 2016, "any person who is associated with the Corporate Debtor on account of participation in policy-making processes of the Corporate Debtor".

- II. Under Sec. 5(24) (h) of the Code, “any person on whose advice, directions or instructions, a director, partner or manager of the Corporate Debtor is accustomed to act”.

22. The Ld Counsel for the Appellants further submits that the Applicant has an ownership interest in the Corporate Debtor on the following grounds;

- I. As per Clause 2.3 of the Subscription and Shareholders Agreement entered into between ASK and its Authorised Representatives and Real Value Promoters Private Limited and its Authorised Representatives, an investment ratio of 51:49 was envisaged. In addition to the same, ASK also had the claim over residual surplus of the company in the ratio of 51:49.

- III. As per Schedule 7 of the Subscription and Shareholders Agreement, under sub-heading no.5 -' Voting rights', it is clearly stated that the company's voting rights are determined based on the share capital and debenture capital of the company and not merely by the share capital. As a consequence, ASK were de facto influencing the company's decision-making, operations, and management.

- IV. ASK had exercised its right to convert the 49,50,000 optionally convertible debentures into equity shares under notice dated 05 February 2016, issued to the Corporate Debtor.

IV. ASK had sought the Bombay High Court to rule in their favour by passing an order declaring ASK has the ownership of 49,500,000 equity shares of the Corporate Debtor, thereby effectively holding 89.9% of the company's equity shares.

23. The above contentions prove the claim of ASK as the owners of the company and not as Financial Creditors. They have a substantial interest in the day-to-day operations of the company and are insiders of the company.

24. The Learned Counsel for the Appellant further proceeds to highlight that the Directors appointed by ASK have signed legally binding documents with ICICI Bank, which includes the following:

- I. Credit Arrangement Letter (CAL) dated 10 September 2013, having reference no.34/CRFCHN/59997 entered into between ICICI Bank Limited and signed by authorised signatories of the Corporate Debtor Mr Chetan Suresh Shah and Mr V.S Suresh.
- II. Facility Agreement dated 04 October 2013, concerning the above CAL entered between the Corporate Debtor and ICICI Bank Limited and signed by authorised signatories of the Corporate Debtor Mr Chetan Suresh Shah and Mr V.S Suresh.
- III. Declaration of mortgage executed by Corporate Debtor dated 18 October 2013, signed by authorised signatories of the Corporate Debtor Mr Chetan Suresh Shah and Mr V.S. Suresh.

- IV. Board Resolution dated 24 July 2013, authorising either one of
1. Mr V.S. Suresh (or)
 2. Ramaswamy Damodaran representing the Promoter Group - Real Value and either one of Mr Deepak Ishwardas Rathi (or) Mr Chetan Suresh Shah (or) Mr Raman Hariharan Iyer representing Investor Group - ASK, to be the authorised signatories for signing account opening documents and to instruct ICICI Bank to accept and credit to the account all monies deposited with or owing by ICICI Bank on any account or accounts at any time or times, kept or to be kept in the name of the company and the amount of all cheques, note, bills and other negotiable instruments, orders or receipt, provided they are endorsed/signed/issued by any one of the above investor directors and one of the above promoter directors. Therefore, it is evident that ASK was involved in the company's day-to-day operations by co-signatories of all cheques, notes, bills, and other negotiable instruments, orders, or receipts.
- V. Memorandum of Deposit of Title (MODT) deeds for the property mortgaged with ICICI Bank dated 18 October 2013, executed by Corporate Debtor and signed by authorised signatories of the Corporate Debtor Mr Chetan Suresh Shah (Investor Group) and Mr V.S Suresh (Promoter Group). The MODT has been registered via document no. 2941/2013 at the Adyar - Sub-registrar office.

VI. The Appellants counsel further contends that the ASK control in the management of the affairs of the Corporate Debtor is further proved by being signatory authorities in the following undertakings

- 'Non-Disposal undertaking dated 04 October 2013, signed on behalf of the Corporate Debtor by Mr Chetan Suresh Shah stating that the shares of the Corporate Debtor shall not be disposed of'.
- Shortfall undertaking dated 04 October 2013 and signed on behalf of the Corporate Debtor by Mr Chetan Suresh Shah.

25. The Ld Counsel for the Appellants argued that considering the above facts and circumstances, it is evident that ASK has a substantial interest in the operations of the Corporate Debtor. The same is clear from their stake to claim a considerable ownership interest in the company, i.e. 89.9%, and their significant involvement in the operations and day-to-day decision-making of the Corporate Debtor, as substantiated above. Therefore, given the above facts and statutory provisions, it can be stated that 'ASK' is, in effect, an insider of the Corporate Debtor having substantial interest in the ownership of the Corporate Debtor. Hence 'ASK' being a related party, and their claim with the IRP/RP concerning the above mentioned CIRP should be rejected, as they are not entitled to participate in the CoC.

26. In order to determine whether a party is a related party in terms of Section 5 (24) and Section 21 (2) of the Insolvency and Bankruptcy Code, 2016, it is imperative to know the nature of the transactions entered into between the said party and the Corporate Debtor, and examine the influence and inter-relationship between the parties. Undisputedly there was a 'Subscription and Shareholders Agreement' dated 23 March 2011 ("SSHA") entered into between ASK Investment Managers Private Limited (R1), Ambojini Property Developers Private Limited (Corporate Debtor), Real Value Promoters Private Limited, V S Suresh, (directed in real Value) and R. Damodaran (directed in Real Value) on 23 March 2011. The following clauses of the 'SSHA' are relevant to refer;

"8. The company shall have reconstituted the Board by appointing all the nominees of the Investor Representative on the Board such that half of the Board comprises of nominees of the Investor Representative.

12. The Company shall have constituted a monitoring committee ("Monitoring Committee") comprising of 4 (Four) members, 2 (Two) each to be appointed by the Promoters (acting collectively) and the Investor Representative to monitor the Project and advise and recommend to the company and its various consultants and contractors measures, to inter alia ensure timely completion of the Project.

16. The Company should have amended the operating instructions regarding its bank accounts such that persons nominated by the Investor Representative shall be concurred

signatories to all such bank accounts and that any issuance of a payment instruction, including **through issuance of cheque or demand draft shall be permitted from any of the bank account only if signed by/approved by at least one signatory of the Investor Representative** and another nominated by the Promoter.

BOARD CONSTITUTION, POWERS, MEETINGS, QUORUM

5.1(b) **The Board shall comprise of 6 (six) Directors. Investor Representative shall be entitled to nominate 3 (three) Director on the Board (the “Investor Representative”)** and the Promoter 1 shall be entitled to nominate the remaining 3 (three) Directors on the Board of the Company (the “Promoter Directors”) and which persons shall unless otherwise agreed to by the Investor Representative be the two Land Owners and Suresh. Subject to the aforesaid, each party entitled to nominate Directors shall be entitled, from time to time, to remove any or all of such Directors and to appoint another nominee or nominees instead and in the event of any vacancy being caused in the office of a Director nominated by any Party, such vacancy shall be filled by appointment thereto by the Board of a new nominee of such party. The investor Directors shall be non-retiring directors. Without prejudice to the aforesaid it is clarified that the Investor Representative shall always be entitled to nominate half of the directors on the Board.

5.2 PROCEEDINGS OF THE BOARD; QUORUM

d. If at a Board Meeting, no Quorum is present (unless the requirement of Quorum has been waived by the Investor Representative for any particular meeting) then the meeting

shall stand adjourned to the same time or the day which is the 7th (seventh) Business Day following the date of the original meeting or such other date as agreed by at least one Investor Director (“Adjourned Meeting”). At such Adjourned Meeting, if the Quorum is not present within 30 (thirty) minutes of the time appointed for the meeting, then the Director present shall be deemed as quorum provided that no matter which is an Affirmative Vote Item shall be deemed to have been passed by any meeting of the Board, including any adjourned meeting, unless either the consent of the Investor Representative or in the absence of such consent, the consent of at least one of the Investor Directors for the particular matter has been obtained, in each case in writing.

e. The quorum for a Board Meeting shall be one-third of its total strength (any fraction contained in that one third being rounded off to the next higher number) of two Directors, whichever is higher, provided that no quorum shall be deemed to be present unless at least 1(one) Investor Director PROMOTER DIRECTOR is present at the start of and throughout the meeting (“Quorum”).

7. AFFIRMATIVE VOTE ITEMS

7.1 The Company shall not take any action in relation to an Affirmative Item. Unless such action has prior to being undertaken been consented to by the Investor Representative, or if the action has been presented for consideration of the Board, and the Investor Representative has not responded with as consent or rejection of such action prior to the Board Meeting and in such Board Meeting such matter has been consented to by one of the Investor Directors.

9.3 *The Promoters agree and undertaking be involved in the development of the Project and agree and undertake to devote such resources as is reasonably required for developing the Project, including by assuming its employees or its affiliates employees, of appropriate seniority, devote appropriate time and attention to the Company and the Project. The Promoters agree that they shall be responsible for the activities as more particularly set out in Schedule B hereof, and which shall be undertaken by the Promoters directly or through any of their respective affiliates and the Promoters generally agree and undertake to act in good faith towards the Company and the Project and ensure the time completion and sale of the Project.*

9.4 *The Promoters agree that the Project shall be branded under the name “Real value”. The Promoters hereby confirm and represent that “Real Value” is a registered and proprietary trademark and tradename of the Promoters and the Promoters are the sole owner and user of such mark and tradename and any other person using such mark or name uses it under authority of the Promoters. The Promoters further confirm that their ownership, rights and/or usage of aforesaid mark and tradename is not subject to any disputes and/or third-party claims. The Promoters hereby grant to the company a royalty-free, perpetual right to use the said mark and tradename in relation to the Project, the Project Land, the buildings in the Project, including without limitation in any marketing material and as part of the name of the company and the promoters agree to make such things with governmental authorities as are required in relation thereto. The Promoters further agree and undertake that in their general group and/or business advertisements and marketing, they shall prominently display the Project and its specifications and represent that the Project*

has been promoted by the Promoters. **The Promoters and the Company further agree that it shall prominently display the [“ASK”] name or logo (or any derivative thereof) in all advertisements, including hoardings, newspaper advertisements, other marketing material for the Project and indicate clearly that ASK as a Joint Venture partner. All such advertisements shall be issued only with the prior written consent of the Investor Representative.**

11. BUSINESS PLAN AND BUDGETS

11.1 The Company and the Promoters agree that they shall conduct the business and operations of the company and undertake development of the Project as per the Business Plan of the Company.

11.2 Without prejudice to the obligations of the Promoters and/or the Company under this Agreement, the Company and the Promoters agree to finalise budgets for such Financial Year and undertake its business and operations in accordance with such budgets (“Annual Budget”). **All such Annual Budgets shall require the consent of the Investor Representative prior to it being considered finalised and applicable to the company.** If the Company and the Investor Representative are unable to agree to any Annual Budget then in relation to the specific item on which disagreement exists, the company shall be bound to the Business Plan and operate accordingly.

Schedule 8 (Promoters Activities)

- a. Advising/ guiding/ assisting/ supervising/ monitoring/ managing the development of the Project.

- b. *Ensuring due and proper execution of all contracts, including registration and stamping thereof, by the company, including the contracts with the societies and the contracts with buyers of flats.*
- c. *Ensuring proper record keeping and providing office and storage space to the company.*
- d. *Ensuring that appropriate assistance is available to the company from amongst its and its affiliate's employees for undertaking the development of the Project and for all other business and operational activities of the company, including assistance from the Promoters' legal, accounting, secretarial taxation teams.*
- e. *Ensuring company obtains all approvals timely and makes all filings, including Tax returns, with all Governmental Authority in a timely manner.*
- f. *Ensure formation of societies for the buildings and cause the company to pay all such charges as is required by the company to be paid.*
- g. *Ensure maintenance of the Projects as per the contracts executed by it or by the company with the residents (including proposed residents) thereof*
- h. *Ensure compliance by the company of any covenants executed by the company with any lenders from which it has borrowed monies.*
- i. **Prepare periodic reports for the lenders and/or the investor Representative detailing the development of the Project and identifying any bottlenecks or**

concerns in such development and suggesting remedies for mitigating such bottlenecks and concerns.

- j. *Deputation of Promoters' Head Office staff for the aforesaid services*
- k. *Corporate marketing and branding*

3. **Warranties and Acknowledgements.**

3.6 *The Promoters and Company acknowledge and agree that this Exit Agreement is without prejudice to the rights and powers of the Investors and Investor Representative under the SSHA and other applicable Law and which rights and powers shall only terminate and be foregone upon due receipt of entire sums of the interest and the Sale Consideration by the investors as per the terms of this Exit Agreement read with the SSHA and that such rights and powers include the right and powers following the occurrence of an Event of Default, all of which shall continue and not be deemed as waived in any manner.*

4. **Miscellaneous**

4.1 *BENEFIT OF THE EXIT AGREEMENT AND SSHA*

*This Exit Agreement and the respective rights and obligations for the Parties under this Exit Agreement shall ensure to the benefit of and be binding on their respective successors, heirs, executors, administrators and permitted assigns, as the case may be. **The Promoters and the Company agree that the rights and benefits under the SSHA shall continue to apply for and be for the benefit of the investors and the investor Representative till such time that the entire***

sums of the interest and the Sale Consideration, has been, paid to the Investors.”

27. The Learned Counsel for the Respondent No.1 submits that Respondent No. 1 does not fall under the ambit of Section 5 (24) (h) or Section 5 (24) (m) & (i) of the Code because Respondent No. 1 is registered with SEBI and is governed by the SEBI Portfolio Management Regulations, 1993 (Section 3, 3 A, 5 and 6). Further, Respondent No. 1 is regulated by the financial sector regulator, i.e. SEBI (as defined under Section 3 (18) of the Code and is a financial service provider in terms of Section 3 (17), read with Section 3 (16) of the Code. The same is rightly recorded in the impugned order dated 3 January 2020.

28. Respondent No.1 further contends that investment in Corporate Debtor under the SSHA is not taken in the right context. Respondent No. 1 invested a total sum of ₹ 50 crores by subscribing five lakhs class B equity shares of ₹ ten each aggregating to ₹ 50 Lacs and ₹ 49.50 crores in optionally convertible debentures rupees hundred each aggregating to ₹ 49.50 crores. Respondent No. 1 held a mere 8% shareholding in the Corporate Debtor.

29. It is argued that the Appellant has relied on several clauses of SSHA to allege that Respondent No. 1 is a related party. However, the said clauses are standard clauses of an investor agreement. Therefore, they cannot in any manner be construed to mean that Respondent No. 1 exercises “influence”/ “control” over the Corporate Debtor.

30. The Respondent further contends that under the SSHA, in order to protect their investments made by investors, ASK was accorded various protective rights inter alia affirmative votes, i.e. right to nominate equal directors on Board. Further, in the event of default, Respondent No. 1 was entitled to receive the total investment amount along with an IRR of 30% on the total investment amount. Respondent No. 1 does not have any share in the profits of the Corporate Debtor, and the debentures were to be redeemed. All the key managerial/policy-making decisions are to be taken by the promoters of the Corporate Debtor. Schedule 8 of the SSHA read with Clause 9.3 of the SSHA shows that the Corporate Debtor's promoters are, in fact, in charge of the day-to-day management and policy-making of the Corporate Debtor.

31. Further, with the passing of the arbitral award, the rights and obligations of the parties culminated and fructified. As a result, the SSHA has come to an end. Thus the rights of the nominee directors of Respondent No. 1 also ended in January 2018, much before the Corporate Insolvency commencement date, i.e. 10 September 2019.

32. Respondent No.1 contends that the impugned order recognises and correctly holds that Respondent No. 1 was an investor in the Corporate Debtor and had nothing to do with the day-to-day running of the corporate Debtor's business or policy-making or decision-making. Consequently, only in situations where it appeared that the investments made by the investors in the Corporate Debtor had not been utilised in the best interest as originally

envisaged, Respondent No. 1 could exercise its affirmative voting rights to prevent any harm to such investments.

33. Respondent No.1 further submits that the related party of the Corporate Debtor means any person who can control the composition of the Board of directors or corresponding governing body of the Corporate Debtor. Respondent No. 1 could not control the composition of the Board of Directors of the Corporate Debtor but was only entitled to nominate and appoint 50% of the Board so that the nominee Directors of Respondent No. 1 could protect the interest of Respondent No. 1 and its investors. Power to prevent the change in the composition of the Board can not, in any situation, be deemed to be in control of the composition of the Board. There is no material on record to show that all decisions of the Corporate Debtor were taken by the nominee directors of Respondent No.1. The Corporate Debtor's Suspended Directors, Mr V Suresh, drove the Project, including applying for and obtaining all sanctions and approvals. Admittedly, till 2015 the approvals of the Project were not obtained and since the Corporate Debtor was set up as the SPV. Therefore, the question of R1 being in control cannot and does not arise.

34. Respondent No. 1 further argued that Section 5 (24) (m) &(i) provides that any person who is associated with the Corporate Debtor on account of participation in the policy-making process of the Corporate Debtor or on account of provision of essential technical information to, or from the Corporate Debtor. The said provisions do not apply, in as much as Respondent No. 1 was never in charge of and could not regulate the policy-

making of the Corporate Debtor. In any event, no material has been brought on record to establish the contrary. Fortunately, the nominee directors of Respondent No.1 were not Executive Directors of the Corporate Debtor. Therefore, they were not in charge of the day-to-day affairs of the Corporate Debtor, as also confirmed by the arbitral award. Respondent No. 1 has failed to produce any document on record to show how, whether, and to what extent Respondent No. 1 has participated in any policy-making process.

35. Further, since Respondent No. 1 is a portfolio manager of the scheme and is regulated by SEBI, Respondent No. 1 is not a provider of technical information. Accordingly, this provision has no application. Any reliance on Clause 3.1.A.12 Monitoring Committee Meetings is misplaced since the role of Respondent No. 1 was limited to advise and recommend. Moreover, no meetings were held after 2014.

36. It is important to mention that the Adjudicating Authority has made observations in the impugned judgement in para 16 that;

“Since this was an unqualified elimination of Financial Service Providers from becoming members of CoC, this situation has been remedied by inserting Proviso 2 to Section 21 (2) of the Code through IBC (2nd Amendment) Act, 2018, and now the Government has come out with an Ordinance dated 28 December 2019 including the bold words in the proviso mentioned widening the scope of exemption of financial Service providers from elimination from participating in CoC.”

2. On closely reading this provision in the light of the Insolvency and Law Committee Report, it is evident that –

- 1) Elimination of financial creditors under first proviso to Section 21(2) of the Code is not applicable to a financial creditor (Financial Service Provider) regulated by Financial Sector Regulator.
- 2) This class of Creditors will become exempted provided they become related parties solely on the ground of conversion of debt into equity prior to insolvency commencement date.

Over this point, the Resolution Professional counsel has vehemently argued that it shall be exempted only in the cases where the debt of this class of Financial Creditors is converted into equity before the commencement of CIRP.”

(verbatim copy)

37. However, the relevant provision of Sec 21, along with its proviso, is reiterated below for ready reference.

Sec 21. Committee of Creditors.

- (1) The interim Resolution professional shall after collation of all claims received against the corporate Debtor and determination of the financial position of the corporate Debtor, constitute a committee of creditors.
- (2) The committee of creditors shall comprise all financial creditors of the corporate Debtor:

Provided that a [financial creditor or the authorised representative of the financial creditor referred to in sub-section (6) or sub-section (6-A) 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:

[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 [or completion of such transactions as may be prescribed,] prior to the insolvency commencement date.]

38. The 2nd provision was introduced and brought to its present by way of amendment to the IBC. The said amendments were explicitly discussed in Reports of the Insolvency Law Committee (March 2018 and February 2020). Reading the discussion in these reports makes it abundantly clear that the benefit of the said proviso was intended to be restricted only to those who would be “pure-play” Financial Creditors who are regulated by **‘financial sector regulator’**.

39. The plain words of the proviso also make it clear that only those financial creditors who will come related parties **“solely on account of”** **conversion or substitution of debt into equity shares** or instruments convertible into equity shares or completion of such transactions as may be prescribed.

40. Respondent No. 1 has sought to obfuscate the clear and plain meaning of the 2nd proviso by making much of the positioning of the commas in the proviso. The Respondent's interpretation seeks to completely dissociate the part of the proviso which reads “***provided further that the 1st the provision shall not apply to a financial creditor, regulated by a financial sector regulator***” from the part “***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 or completion of such transactions as may be prescribed, prior to the insolvency commencement date***”. Moreover, this reading is also contrary to the legislative intent discernible from the Reports of The Insolvency Law Committee.

41. It is also important to point out that the learned Adjudicating Authority's findings in the impugned order are that the Respondent has all the trappings of being a “related party” of the Corporate Debtor on account of the various provisions of the SSHA, which give its nominee directors on the Board and participatory role in the Corporate Debtor's policies. Hence, the Respondent's related party status arises not on account of any conversion of debt into equity or prescribed transaction. As the learned Adjudicating Authority has noted that this is a case where no conversion of debt into equity has happened. Therefore, there can be no question of the benefit of the 2nd proviso of section 21 (2) of the IBC accruing to the Respondent.

42. Considering the facts of the case, we find that Respondent No. 1 had a share in the profits of the Corporate Debtor Company and cannot be said to be a person acting solely on account of the conversion of debt. In the instant case, the Corporate Debtor had issued non-convertible debentures to Respondent No. 1, which SEBI does not regulate. The SEBI only regulates the issue of debentures relating to “convertible securities”. In the present case, it was not a case of a convertible security. Appellant has annexed the xerox copy of the debenture certificate, which states that **“debentures is not convertible but redeemable on maturity”**. Respondent No. 1 has pleaded that it is a financial service provider regulated by the financial regulator SEBI. It is also evident that 2nd proviso to Section 21 (2) of the Code applies where instruments convertible into equity shares were converted prior to the insolvency commencement date. Therefore, 2nd proviso to Section 21(2) is not applicable in the present case and does not enure the benefit to Respondent No 1 ‘ASK’.

43. Considering the above facts and circumstances, it is evident that ASK has a substantial interest in the operations of the Corporate Debtor. Moreover, the intent is to increase the same is clear from their stake to claim a considerable ownership interest in the Corporate Debtor Company, i.e. 89.9%. Their significant involvement in the operations and day-to-day decision-making of the Corporate Debtor is substantiated above.

44. Given the above facts and restrictions in the above statutory provisions, we would like to place on record that 'ASK' is, in effect, an insider of the ***Company Appeal (AT) (Insolvency) No. 252 & 315 of 2020***

Corporate Debtor having substantial interest in the ownership of the Corporate Debtor. Hence 'ASK' being a related party, and their claim with the IRP concerning the above mentioned CIRP should be rejected, and they are not entitled to participate in the CoC.

45. Respondent No. 1 has also tried to argue that this Appeal should not be entertained because, during the pendency of the Appeal, a Resolution Plan has received approval from the Committee of Creditors. This submission ignores the fact that by our order dated 5 January 2021 in the present Appeal, we had directed the Adjudicating Authority not to pass final orders with regard to approval of Resolution Plan under Section 31 of the IBC, placed before it till the next date. Moreover, the Resolution Plan that the improperly constituted Committee of Creditors approves (where the COC's composition is contrary to the provision of IBC) would have no force in Law. The Hon'ble Supreme Court, in *Municipal Corporation of Greater Mumbai v Abhilash Lal* (2020) 13 SCC 234 (paragraph 39 and 48), has affirmed the principles that "if any statute requires a thing to be done in a particular manner, it should be done in that in that manner or not at all" and that "there can be no estoppel against the express provisions of law." Therefore, the mere fact that the improperly constituted Committee of Creditors has approved a Resolution Plan during the pendency of the present Appeal can have no bearing on the merits of the Appeal.

46. Based on the above discussion, we are of the considered opinion that both the Appeals deserve to be allowed and the impugned order deserves to

be set aside. Accordingly, we find that Respondent No. 1 ASK Investment Managers Ltd is a related party to the Corporate Debtor; therefore, it cannot be made part of COC with voting rights.

ORDER

47. In fine Company Appeal (AT)(Ins) No. 252 of 2020 and Company Appeal (AT)(Ins) No. 315 of 2020 are allowed. We hold that Respondent No. 1 ASK Investment Managers Ltd is a related party to the Corporate Debtor; therefore, it cannot be made part of COC with voting rights.

[Justice A.I.S. Cheema]
The Officiating Chairperson

[V. P. Singh]
Member (Technical)

NEW DELHI
20TH SEPTEMBER, 2021

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