

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

I.A. (IB) No. 1841/KB/2023

And

I.A. (IB) No. 1964(KB)2023

And

I.A. (IB) No. 680/KB/2023

In

C.P. (IB) No. 600/KB/2019

IN THE MATTER OF:

UCO Bank

... Financial Creditor.

Versus

GIT Textiles Manufacturing Limited

... Corporate Debtor.

And

I.A. (IB) No. 1841/KB/2023

***An application under Section 60(5) of the Insolvency and
Bankruptcy Code, 2016 read with Rule 11 of the National
Company Law Tribunal Rule 2016.***

IN THE MATTER OF:

H. R. Brothers Limited

... Applicant.

Versus

**Ramachandra Dallaram Choudhary, Resolution Professional of GIT
Textiles Manufacturing Limited (Corporate Debtor)**

... Respondent.

And

IA(I.B.C.)/1964(KB)2023

***An application under Section 60(5) of the Insolvency and
Bankruptcy Code, 2016 read with Rule 11 of the National
Company Law Tribunal Rules, 2016 and Regulation 12 of the
Insolvency and Bankruptcy Board of India (Insolvency Resolution
Process for Corporate Persons) Regulations, 2016.***

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I.A. (IB) No. 1964/KB/2023
I.A. (IB) No. 680/KB/2023
In
C.P. (IB) No. 600/KB/2019

IN THE MATTER OF:

The Assistant Provident Fund Commissioner (Legal), the Employees' Provident Fund Organisation, Ministry of Labour and Employment, Government of India, Regional Office, Ahmedabad, Bhavishyanidhi Bhawan, Near Income Tax Circle, Ashram Road, Ahmedabad – 380014.

... Applicant

Versus

GIT Textiles Manufacturing Limited

... Corporate Debtor.

And

Ramachandra Dallaram Choudhary, Resolution Professional of GIT Textiles Manufacturing Limited (Corporate Debtor)

... Respondents.

And

I.A. (IB) No. 680/KB/2023

IN THE MATTER OF:

Ramachandra Dallaram Choudhary, Resolution Professional of GIT Textiles Manufacturing Limited (Corporate Debtor)

... Applicant.

Date of Pronouncement: June 05, 2024.

CORAM:

SMT. BIDISHA BANERJEE, HON'BLE MEMBER (JUDICIAL)

SHRI. D. ARVIND, HON'BLE MEMBER (TECHNICAL)

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APPEARANCE:

Mr. Kanishk Kejriwal, Adv.	] For the Suspended Board
Mr. Patita Paban Bishwal, Adv.	of Directors
Mr. Shaunak Mitra, Adv.	] For the Applicant in
Mr. Dripto Majumdar, Adv.	I.A. (I.B.C)/1841(KB)2023
Ms. Madhusmita Senapati, Adv.	
Ms. Suranjana Chatterjee, Adv.	] For H.S. Mercantile
Mr. Dhananjaya Sud, Adv.	] For the Liquidator
Mr. Lokesh Malik, Adv.	]
Mr. Akhand Pratap Singh, Adv.	]
Mr. Deepika Bhugra Prasad	] Liq.-in-Person
Mr. Shaunak Mitra, Adv.	] For the Applicant
Mr. Dripto Majumdar, Adv.	] in I.A. (I.B.C)/1841(KB)2023
Ms. Madhusmita Senapati, Adv.	]
Mr. Rishav Banerjee, Adv.	] For H.S. Mercantile,
	] the Applicant in
Ms. Suranjana Chatterjee, Adv.	] I.A. (I.B.C)/849(KB)2023
	and I.A. (IB) 632(KB)2023
Mr. Mainak Bose, Adv.	] For the Resolution Professional
Mr. Arnab Dutta, Adv.	]
Ms. Prerna Choudhury, Adv.	]
Ms. Somasrita Kar, Adv.	]
Mr. Kanishk Kejriwal, Adv.	] For the Suspended Board of
Mr. Patita Paban Bishwal, Adv.	] Directors
Mr. Avijit Tewary, Adv.	] For PF Authority
Mr. Mainak Bose, Adv.	] For the Resolution Professional
Mr. Arnab Dutta, Adv.	]
Ms. Prerna Choudhury, Adv.	]
Ms. Mosarat Reyaz, Adv.	]

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ORDER

Per: D. Arvind, Member (Technical):

1. The Court congregated through a hybrid mode.

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2. We have heard the Learned Counsels for both the parties.
3. This is an application filed by **H. R. Brothers Limited** (hereinafter referred to as "**Applicant**") against **Mr. Ramachandra Dallaram Choudhary**, the Resolution Professional of the Corporate Debtor **GIT Textiles Manufacturing Limited** (hereinafter referred to as

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“Respondent / RP”) under Section 60(5) of the Insolvency and Bankruptcy Code, 2016, for brevity “I&B Code” read with Rule I 1 of the National Company Law Tribunal Rule 2016, for brevity “NCLT Rules” seeking directions to the respondents to admit the claim of the applicant as unsecured financial creditor and induct the applicant into the Committee of Creditors.

Factual Conspectus:

4. The corporate debtor GIT Textiles Manufacturing Limited was put into Corporate Insolvency Resolution Process (CIR Process) vide an Order dated 22.06.2022 passed by this Adjudicating Authority. This Adjudicating Authority appointed Mr. Ramachandra Dallaram Choudhary as the Resolution Professional of the corporate debtor, to conduct the CIR Process.

5. Pursuant to the public announcement dated 26.08.2022 made by the RP, the applicant submitted its claim in Form –C in accordance with Rule 8 of IBBI (CIRP) Regulation 2016 on 22.09.2022. The applicant has claimed an amount of Rs. 27,29,45,675/- in terms of the loan agreement executed with the corporate debtor. The sum claimed includes interest till the date of filing this application.

6. That, the applicant has exchanged several emails with the respondent in connection with the claim made. The respondent had asked for several documents to consider the claim of the applicant. In the email dated 23.09.2022, the respondent asked for:

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- a)** Ledger account from loan disbursement date to CIRP date.
- b)** Interest calculation sheet.
- c)** Audited balance sheet of H. R. Brothers Limited as on 31.03.2021 and 31.03.2022 and bank statement reflecting receipts and payment of loan account.

7. In response to the above e-mail, the applicant had responded through an e-mail dated 09.11.2022, enclosing CA certificate and bank statement detailing disbursement and certificate indicating the amount of interest and the total sum due. Upon receipt of this email, the respondent observing huge discrepancy between the amount claimed in Form – C and amount appearing “as due” in the CA certificate asked for further documents through e-mail dated 09.11.2022 as under:

- a)** MOA and KYC documents of the directors of the H.R. Brothers Limited.
- b)** Audited balance sheet ITR filing of H.R. Brothers Limited of previous three years.
- c)** Shareholding pattern of H.R. Brothers Limited of the previous five years.
- d)** Original loan agreement made with GIT Textiles Manufacturing and
- e)** Original bank statements reflecting transaction with GIT Textile Manufacturing Limited from Financial Year 2017-2018 to till date.

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8. In response to this e-mail, the applicant has responded with the original copy of the loan agreement without attaching any other documents sought for. Upon receipt of the only original copy of the loan agreement, on 29.11.2022, the respondent again reiterated his requirement mentioned in his e-mail dated 09.11.2022. In the e-mail dated 29.11.2022, the respondent requested for an affidavit to be submitted stating whether the applicant is related to the corporate debtor in any way under Section 5(24) of I&B Code.

9. Since there was no response to this e-mail, the respondent once again sent an e-mail on 17.01.2023, requesting for the details with an ultimatum that details as called for in the e-mail dated 29.11.2022 and an e-mail dated 09.11.2022 must be submitted within 7 days or else the respondent would decide the claim on the basis of records available with him.

10. Since the applicant did not respond to the request of the Resolution Professional on the related party status of the applicant vis-à-vis the corporate debtor, during the course of the hearing, we directed both parties to provide the list of directors and shareholding of all the three companies i.e., the corporate debtor, H.R. Brothers Limited and H.S. Mercantile Limited on the next date of hearing and this order was passed on 07.05.2024.

11. On 10.05.2024 when the matter was listed for hearing, the matter was heard at length based on the documents produced by both the

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parties and was reserved for Order. The issues that need to be considered in this case are:

- a) Whether the applicant is a “related party” and consequently, needs to be excluded from the CoC or not.
- b) Whether the claim of the applicant as unsecured financial creditor is to be admitted or not in light of an application pending in I.A. No. 632/KB/2023 which deals with avoidance transaction of the very same loan claimed by the applicant herein.

Submissions made by the Applicant:

12. Ld. Counsel for the applicant submits that though there is variance between the CA certificate furnished and the claim made in Form – C, the total claim as per Form – C, is the amount including the interest as on the date of filing may be taken into consideration.

13. Ld. Counsel took us through the loan agreement made between the corporate debtor and the applicant on 11.12.2017, according to which the loan amount is to be repaid on or before 31.03.2022 along with interest on maturity to be calculated on monthly compounded interest till maturity i.e., 31.03.2022 at the rate 24% per annum.

14. The loan agreement also provides additional interest in case of default at the rate of 1.5% per month. Ld. Counsel for the applicant relies on clause 6.8.1 of the agreement to contend that the loan amount is Rs. 6.20 crores and Rs. 10,31,27,346/- is interest totalling to Rs. 16,51,27,346/- that needs to be repaid. Ld. Counsel took us through the

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applicant's claim filed in Form – C which provides details for the calculation of the debt defaulted. According to the applicant, the loan amount in default claimed in Form – C is Rs. 27,39,45,675/-, which includes interest up to the date of filing the application.

15. Ld. Counsel also relied on the confirmation of accounts provided by the corporate debtor from time to time. The corporate debtor has provided confirmation as on 16.09.2022 for a sum of Rs. 27,39,45,675/- as payable to the applicant and the same amount has been claimed in Form – C. The Ld. Counsel submits that the loan agreement and bank disbursement made in favour of the corporate debtor by the applicant would clearly establish that what was advanced is a financial loan which has not been disputed.

16. Ld. Counsel submits that the respondent's rejection of the claim on 28.03.2023 treating the applicant as a "related party" is without any basis. The applicant does not fall within any of the sub-clauses of Section 5(24) of the I&B Code. Moreover, the management of the corporate debtor and the applicant are different as evident from the master data of the applicant and corporate debtor appearing in the MCA site/portal.

17. Since there are no common directors between the applicant and the corporate debtor, the applicant cannot be treated as a related party. Ld. Counsel further submits that assuming but not admitting that the applicant is a related party, nothing prevented the respondent from admitting the claim of the applicant. It is the claim of the Ld. Counsel that the respondent ought not to have rejected the claim in total.

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18. Ld. Counsel further submits that the question as to whether the loan advanced by the applicant to the corporate debtor and subsequent payment by the corporate debtor to another company H.S. Mercantile Limited is a matter of dispute in I.A. No. 644/KB/2023 and the same has nothing to do with the claim made by the applicant based on valid loan agreement and disbursements. Ld. Counsel further submits that the applicant does not own any share in the corporate debtor, and consequently not a related party. It is his submission that the applicant is not covered by any of the clauses mentioned in Section 5(24) of IBC to be covered as a “related party”.

Per contra submissions made by the Respondent:

19. The Ld. Counsel for the respondent submits that agreement is a sham document devised to execute certain circular transactions. He brought to our attention to the report of the forensic auditor wherein on several days as provided in the table mentioned in the transaction audit report, the applicant has deposited certain sums to the credit of the corporate debtor and on the same day the corporate debtor has paid the same sum to another company called H.S. Mercantile Limited. The transaction auditor further reports that he was neither provided with any agreement between the corporate debtor and said H.S. Mercantile Limited with regard to such payments nor any other supporting documents / details to determine the nature of transactions.

20. The Ld. Counsel brought to our attention the shareholding pattern of GIT Textile Manufacturing Limited in the past five years and

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shareholding pattern of H.R. Brothers and contended that Rajiv Goenka and Hemant Goenka are sons of Manjula Goenka. Further Global International Trading is a firm of Rajiv Goenka and Manjula Creation is a firm of Manjula Goenka. Therefore, it can be seen that Manjula Goenka and Hemant Goenka are holding majority shareholders of the respondent company and holding directly or indirectly the share capital of the applicant company as well.

21. For the sake of convenience, the table detailing the shareholding pattern of the applicant company and respondent company have been extracted from the Reply / Written note.

Name	Related Party/ Non Related Party	FY 2016-2017	FY 2017-2018	FY 2018-2019	FY 2019 -20	FY 2020-21
GIT Proprietor Rajeev Goenka son of Mahendra Goenka	Related Party	38.67	38.67	38.67	0	-
Hemanta Goenka Son of Mahendra Goenka	Related Party	21.67	21.67	NA	34.32	34.32
Manjula wife of Mahendra Goenka	Related Party	-	-	-	37.34	37.32
Manjula's creation proprietor Manjula	Related Party	11.31	11.31	11.31	0	-

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Name	Related Party/ Non Related Party	FY 2016-2017	FY 2017-2018	FY 2018-2019	FY 2019-20	FY 2020-21
GIT Proprietor Rajeev Goenka son of Mahendra Goenka	Related Party	38.67	38.67	38.67	0	-
Hemanta Goenka Son of Mahendra Goenka	Related Party	21.67	21.67	NA	34.32	34.32
Manjula wife of Mahendra Goenka	Related Party	-	-	-	37.34	37.32
Manjula's creation proprietor Manjula	Related Party	11.31	11.31	11.31	0	-

1.	Name of the Party	Relationship	Name of Party	Share in GIT	Share in HS Merchantile
2.	Hemanta Goenka	Son	Mahendra Goenka	34.32	-
3.	Manjula Goenka	wife	Mahendra Goenka	37.34	3.55
4.	Rajeev Goenka	son	Mahendra Goenka	-	81.53
5.	Mahendra Goenka	father	Hemanta Goenka, Rajeev Goenka	-	3.55
6.	Vatsal Goenka	son	Rajeev Goenka	-	3.55

22. Ld. Counsel submits that in view of above, the applicant is covered by Section 5(24)(j) and 5(24)(i) of the I&B Code. Thus, it can be easily averred from the shareholding pattern of the applicant company as well

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as the corporate debtor that the applicant company is an associate company of the corporate debtor. The applicant company, as well as the corporate debtor, in view of the shareholding pattern mentioned above, is in a position to exercise significant influence and/or control over each other.

23. Ld. Counsel further claims that entire money advanced to the tune of Rs. 6.20 crore has been syphoned off through H.R. Mercantile Limited which is another associate company and the same is a subject matter in interlocutory application being IA No. 632/KB of 2023 pending adjudication and therefore no amount is payable to the applicant towards loan account.

24. Ld. Counsel further submits that the borrower has violated the provisions of Section 186(2) of the Companies Act, according to which, no company can give loan to any person or other body corporate exceeding 60% of its paid-up capital, free reserves and securities premium account or 100% of its free reserves and securities premium account whichever is more.

25. In this case, the applicant's reserves and surplus is negative and the share capital is meagre sum of Rs. 14.96 lacs as on 31.03.2021. When that being the case, the loan given by applicant in violation of 186(2) of the Companies Act 1956 is void ab initio and consequently, the debt is not enforceable. Therefore, Ld. Counsel submits that rejection of claim is in Order and the application filed by the applicant deserves to be dismissed.

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Analysis and Findings:

26. We have gone through the loan agreement, the bank statements evidencing disbursements, the confirmation given by the corporate debtor from time to time to the applicant, the last one being 17.09.2022 confirming liability of the corporate debtor to the applicant to the tune of Rs. 27,39,45,875/-, which is the amount that has been claimed in Form C filed with the resolution professional by the applicant.

27. We have also gone through the balance sheet of the corporate debtor and the applicant. In the books of accounts of H.R. Brothers as on 31.03.2013, the loan advanced to the corporate debtor is shown under current assets as “short term loans advances”. In the books of GIT Textiles, the corporate debtor herein, it is shown as liability as on 31.03.2019, in their financials. Therefore, the disbursement of loan by H.R. Brothers, the applicant herein to corporate debtor GIT Textiles has been clearly established.

28. However, we need to examine whether the applicant would be related party in terms of 5(24) of the IBC to the corporate debtor. We find that the sole proprietor of Global International Trading, Rajiv Goenka who is the son of Mahendra Goenka was holding 38.67% in the corporate debtor till Financial Year 2018-2019 and holds 21.15% till Financial Year 2021-2022 in the applicant’s company. Hemant Goenka who is another son of Mahendra Goenka holds 34.32% shares in GIT Textiles, corporate debtor and 0.33% in the applicant’s company. Manjula Goenka who is

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the wife Mahendra Goenka holds 37.32% shares in the corporate debtor and 20.68% shares in the applicant's company.

29. Further, Global International Trading is the sole proprietary firm of Rajiv Goenka and Manjula Creation is sole proprietary firm of Manjula Goenka. Therefore, Mahendra Goenka's family is holding majority shares in the corporate debtor as well as in the applicant company. Mahendra Goenka's family holds more than 90% shareholding in corporate debtor and 66% shares in the applicant company.

30. Section 5(24) (j) defines related party in relation to corporate debtor means any person who controls more than 20% of voting shares in the corporate debtor on account of ownership or voting agreement.

31. In the given case, Manjula Goenka (wife of Mahendra Goenka) holds 37.32% shares as at the end of Financial Year 2020-2021 in the corporate debtor and 20.68% in the applicant's company H.R. Brothers for the Financial Year ending 2021 as well as the financial year ending 2022. It may be relevant to state that the corporate debtor was put into insolvency in the year 2022.

32. While we note that the applicant is not holding any share in the corporate debtor. we find that majority of the shareholding in both entities are held by one family consisting of father, wife and two sons The respondent has relied on sub clause (j) and (i) to the Section 5(24) of IBC to treat the applicant as related party.

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33. For the sake of convenience, both the sub-clauses to Section 5(24) of I&B Code are reproduced verbatim hereunder:

Section 5(24) (j): Any person who controls more than 20% of voting rights in the corporate debtor on account of ownership or a voting arrangement.

Section 5(24) (i): Related party in relation to corporate debtor means 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.

34. In this case, H.R. Brothers the applicant herein does not hold more than 20% of voting rights in the corporate debtor on account of ownership or voting arrangement. In fact, the applicant herein does not own any shareholding in the corporate debtor. Therefore, Section 5(24)(j) of IBC clause would not be applicable and the applicant cannot be treated as “related party” in terms of the said section.

35. Now we proceed to examine 5(24)(i) of the I&B Code. As per this Clause the respondent needs to prove that H.R. Brothers the applicant herein is either a holding company or subsidiary company or an associate company of the corporate debtor or a subsidiary of a holding company to which the corporate debtor is a subsidiary.

36. Both the parties to the dispute have not produced any document to evidence that corporate debtor is a holding company or a subsidiary company of the applicant. However, details have been produced on the

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share holding pattern of both the entities which has been extracted from the application and appended in Para 18 above.

37. In light of the shareholding pattern, we need to examine whether applicant is an “associate company” of the corporate debtor; to fall under Section 5(24)(i) of the I&B Code.

38. The definition of associate company has not been defined in the I&B Code. However, it has been defined in the Companies Act 2013 as under:

“An associate company in relation to another company means a company in which the other company has a significant influence but which is not a subsidiary of the company having such influence and includes a joint venture company. The expression significant influence means control of at least 20% of total voting power or control or participation in business decision under an agreement.”

39. The word “control” has been defined in Section 2(27) of the companies Act as under:

“control” shall include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders’ agreements or voting agreements or in any other manner;

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The expression “control” appearing in Section 2(27) of Companies Act, 2013, has been dealt extensively by the Hon’ble Supreme Court of India in the case of **ArcelorMittal India Private Limited Vs. Satish Kumar Gupta** reported at **(2019) 2 SCC 1**. In Para 50 of the Order, the Hon’ble Supreme Court held as under:

“The expression “control” is therefore defined in two parts. The first part refers to de jure control, which includes the right to appoint a majority of the Directors of a company. The second part refers to de facto control. So long as a person or persons acting in concert, directly or indirectly, can positively influence, in any manner, management or policy decisions, they could be said to be “in control”.”

(Emphasis added)

40. It is evident that both corporate debtor as well as the applicant are predominantly owned by Goenka family comprising of Mahendra Goenka, his wife Manjula Goenka, his sons Rajiv Goenka and Hemant Goenka. The shareholding of these entities includes proprietorship firm of Rajiv Goenka and Manjula Goenka.

41. Goenka family holds approximately 90% share in the corporate debtor and 66% shares in the applicant company. We do note that Hemant Goenka is one of the directors of the corporate debtor and Mahendra Goenka is a director in the applicant company.

42. Considering the shareholding pattern and the directorship of family members of Goenka family in corporate debtor as well as in the

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applicant company, the corporate debtor is in a position to significantly influence the Applicant and it is in a position to “control” as well as participate in business decisions. What has been contemplated in the definition of the word “control” as defined in the Companies Act is that the Corporate Debtor is in **position** to control the management of the applicant company. We find both the entities are in a position to control each other by virtue of shareholding in both the companies by one family and director in the board of the Corporate Debtor as well as the Applicant company from the same family.

43. In this case, it is Goenka family which controls both the businesses by virtue of shareholding and therefore, can be said that they have right to appoint directors or to control the management or policy decision of both the entities individually or in concert, directly or indirectly in any manner. Therefore, we find no fault in the respondent’s action of treating the applicant as a related party.

44. Coming to allegations of contraventions of Section 186(2) of Companies Act, we have already taken a view in **EDCL Infrastructure Ltd. Vs. Urban Infraprojects Pvt. Ltd.** in **I.A. (IB) No. 2105/KB/2023 in Company Petition (IB) No. 106/KB/2023** reported at **(2024) ibclaw.in 200 NCLT** that a borrower who got benefitted by the violation committed by the lender cannot refuse to pay the sums due on account of money borrowed. As the borrower is not an aggrieved party, rather he is a beneficiary of the violation of the applicant under Section 186(2) of the Companies Act, he cannot take this plea as his defence.

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45. However, there are consequences to which the applicant will have to face in terms of penalties and prosecutions under Companies Act for such a violation.

46. Coming to the allegation that the resolution professional in this case has adjudicated the claim for which he has no power as per the judgment of the Hon'ble Apex Court in the case of ***Swiss Ribbons (P) Ltd. v. Union of India***, reported at **(2019) 4 SCC 17: 2019 SCC OnLine SC 73 at page 89**, wherein it is held that *it is clear from a reading of the Code as well as the Regulations that the resolution professional has no adjudicatory powers*. We desist from deciding whether resolution professional collated and verified the claim as required under I&B Code and Regulation made thereunder or adjudicated the claim, as in any case we have taken up the matter and adjudicated on it. Therefore, at this stage, this argument requires no consideration.

47. Thus, we find that "financial debt" has been acknowledged by the corporate debtor as late as 17.09.2022 and the debt is supported by loan agreement and disbursements. We are aware that Section 66 of IBC application filed by the resolution professional on the very same transaction alleging syphoning of funds through the corporate debtor to another associate company namely, H.S. Mercantile is pending for adjudication.

48. We have not been provided with any document with reference to transactions between H.S. Mercantile and the corporate debtor with regard to the payments made by of the corporate debtor to H.S.

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Mercantile immediately upon receiving funds from the applicant. We will deal with that when we decide the relevant application filed under Section 66 of I&B Code by the Respondent.

49. Therefore, at this stage, what has been established is financial debt owed to the applicant by the corporate debtor who is a related party, and the claim has to be accepted, as unsecured financial debt from the related party.

50. Therefore, we direct the resolution professional to admit the claim of the applicant filed in Form – C without prejudice to the outcome of his application under Section 66 of I&B Code on this loan transaction which is pending for adjudication.

51. The resolution professional is directed to admit the claim in the category of unsecured financial creditors, from the related party. There is nothing in the Code that provides non-payment of debt to related party and therefore, our finding that the applicant is a related party to the corporate debtor should not deter the respondent herein to admit the claim from the applicant and deal with it as per section 30(2) of the Code read with Regulations made under I&B Code for the purpose of allocation or distribution. This view is supported by the Judgment of **M.K. Rajagopalan vs. Periasamy Palani Gounder and Ors.** reported at **MANU/SC/0517/2023: (2024) 1 SCC 42**, wherein, it was held that:

“52. Another factor taken into consideration by the Appellate Tribunal has been in relation to the so-called discrimination in the resolution plan in relation to a related party of the corporate debtor.

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53. *Learned Counsel for the Appellant in Civil Appeal No. 1827 of 2022 has referred to several decided cases to submit that therein, even when certain dues of related parties were admitted, the resolution plans not providing for any payment to such related parties were upheld by this Court; and that the principles of non-discrimination would not be applicable to the decision of CoC. It has been argued on behalf of the resolution professional that none of the statutory requirements are of any mandate that a provision has to be made in the resolution plan for payment to the related parties. According to the learned Counsel, the need is, essentially, to ensure that the plan provides for payment to financial creditors (including dissenting financial creditors) entitled to vote. Thus, the plan in question cannot be said to be standing in contravention of any mandatory requirements. Per contra, the learned Counsel appearing for the related party would submit that even when related party is to be treated as a separate class in terms of the principles laid down by this Court in Phoenix ARC (supra), so as to be excluded from CoC, there is no reason that they be treated as separate class when it comes to payment of dues under the resolution plan. It is submitted that failure to provide for discharge of debt of the related party is in violation of Section 30(2)(b), (e) and (f) of the Code. The submissions made on behalf of the related party and the observations of the Appellate Tribunal are difficult to be accepted.*

54. *The lengthy discussion of Appellate Tribunal in regard to the related party (the parts whereof have been reproduced in paragraph 19.7 hereinabove) depict rather unsure and irreconcilable observations of the Appellate Tribunal.*

54.1. *After taking note of the fact that related party is prohibited to be a part of CoC and is further prohibited to be a resolution applicant or an authorized representative etc., the Appellate*

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Tribunal has rightly observed that involvement of a related party in CIRP in any capacity was seen as giving unfair benefit to the corporate debtor; and that the statutory recognition of related party as a different class would apply even to resolution plan when CoC would decide whether in its commercial wisdom it should pay to related party at all because that would mean paying to the same persons who are behind the corporate debtor. However, thereafter the Appellate Tribunal proceeded to observe that related party was required to be equated with the promoters as equity share-holders and then, further made certain observations about discrimination between related party unsecured financial creditor and other unsecured financial creditors as also between related party operational creditor and other operational creditors. Such far-stretched observations of the Appellate Tribunal are difficult to be reconciled with the operation of the statutory provisions.

*54.2. It has rightly been argued on behalf of the Appellants and had rightly been observed by the Adjudicating Authority (vide extraction in paragraph 15.4.1 hereinabove) that **there was no provision in the Code which mandates that the related party should be paid in parity with the unrelated party. So long as the provisions of Code and CIRP Regulations are met, any proposition of differential payment to different class of creditors in the resolution plan is, ultimately, subject to the commercial wisdom of CoC and no fault can be attached to the resolution plan merely for not making the provisions for related party.***

*54.3. On the facts of the present case, we find no reason to discuss this matter any further when it is noticed that the promoter and erstwhile director, the contesting Respondent before us, has been holding the position of Chairman of the said related party. Suffice it would be to observe for the present purpose that the Appellate Tribunal has erred in **applying the principles of non-***

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**discrimination and thereby holding against the resolution
plan in question for want of provision for related party.”**

(Emphasis Added)

52. Accordingly, this **I.A. (IB) No. 1841/KB/2023** is disposed of, by partly allowing the Interlocutory Application.

53. Certified copy of this order, if applied for with the Registry be supplied to the parties in compliance with all requisite formalities.

I.A. (IB) No. 1964/KB/2023

54. The Learned Counsels/Authorised Representative were heard at length.

55. This application has been preferred by the Assistant Provident Fund Commissioner (Legal) Regional Office at Ahmedabad (hereinafter referred to as applicant) against Mr. Ramchandra Dallaram Choudhary, the Resolution Professional of the Corporate Debtor GIT Textiles Manufacturing Limited (hereinafter referred to as RP/respondent) seeking condonation of delay, if any, in submitting the application before the Hon'ble Tribunal and admit the present application and direct the respondent No. 2, the RP to accept the additional claim of the applicant for Provident Fund dues of workman/employees to the tune of Rs. 3,52,175/- without insisting on filing it in appropriate form along with the admitted claim of Rs. 488/-.

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Facts in a nutshell are as under:

56. That, the Corporate Debtor GIT Textiles Manufacturing Ltd. was admitted into Corporate Insolvency Resolution Process (in short “CIRP”) consequent to which the applicant filed its claim Provident Fund dues of the employees of the workman for Rs. 488/-.

57. After submission of proof of claim the applicant started enquiry in respect of the records of the Corporate Debtor upon visiting the establishment of Corporate Debtor and after verification with the available records and documents, it came to light that Provident Fund dues to the tune of Rs. 3,49,175/- has not been paid.

58. Thereafter by a letter dated 16.10.2022, the applicant submitted an additional claim before the respondent/RP for a sum of Rs. 3,52,175/- towards Provident Fund dues from December 2017 to April 2019 and May, 2019 to August, 2022 in respect of the Corporate Debtor, namely, M/s. GIT Textiles Manufacturing Limited.

59. On 01.12.2022, the applicant received an email from the respondent RP requesting the applicant to update the claim in Form ‘C’ with supporting documents.

60. After several exchange of emails, the applicant took up the matter again with the respondent RP on 28.02.2023 only to be informed that the claim is not in proper form again.

61. The applicant received another email from the respondent RP that Provident Fund dues in the nature of damages, penalties, other charges

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shall not have priority in the distribution of assets to the stakeholders as per the waterfall mechanisms defined under Section 53 of the I&B Code.

62. In the said letter dated 13.06.2023, the respondent RP stated that since the dues of the PF could not be verified under the provisions of the Code due to non-filing of claim with supporting documents, such as, list of employees, calculation of claim amount, assessment orders under the appropriate Section of the Provident Fund etc., he is unable to verify whether the amount claimed as to Provident Fund dues is in the nature of damages, penalties and other charges and thus the claim was rejected.

63. After receipt of the said letter dated 13.06.2023, the applicant after considerable delay filed this application on 12.10.2023, which is after 4 months from the date of rejection.

Applicant's contentions:

64. Ld. Counsel for the applicant submits that though the claim was not filed in the prescribed form in time, it is due to several administrative reasons at their end.

65. He submits that the dues claim made is not on account of any damages or penalties but non-payment of employees' share and employer's share of PF contribution in respect of one Provident Fund member/employee Mr. Hemant Goenka bearing PF No. GJ/AHD/57214/06. The Corporate Debtor has also not deposited minimum administrative charges of Rs. 75/- per month amounting to Rs. 3,000/- from May 2019 to August 2022. Thus, the total claim on account

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of dues of Provident Fund is Rs. 3,49,175/- and on account of administrative charges is Rs. 3,000/- totalling to Rs. 3,52,175/- has been claimed.

66. There is no dispute to the effect of non-remittances in respect of Provident Fund member mentioned above and, consequently, the delay in filing its claim not in proper form may be condoned as the delay in filing the claim or this appeal is unintentional.

67. The applicant was not sure whether the claim should be filed in Form 'C' and Form 'F' and, consequently, filed the claim as it is and, therefore, the same may also be condoned.

Per contra, submission by the Respondent:

68. Ld. Counsel for the respondent submits that the applicant initially claimed only Rs. 488/- which was duly accepted by the RP in accordance with the Act & Regulation framed thereunder.

69. The additional claim filed by the applicant is on the basis of the report of the Enforcement Officer of EPFO as per which except one non-enrolled employee the Provident Fund dues have been paid in full by the Corporate Debtor.

70. When the RP wanted complete details along with the calculation including bifurcation with regard to actual PF dues, interest, penalties, damages etc. the same was never received in spite of several reminders.

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71. It is submitted that as per Regulation 13 of CIRP Regulation, 2016 the RP has to verify each claim and, for that purpose, the Resolution Professional may call for such other evidence or clarifications as he deems fit for substantiating the whole part of its claim.

72. Thus, considering the Regulation framed under the Code, the RP could not verify and admit the claim on account of non-filing of claim in appropriate form with supporting documents including list of employees, calculation of claim, order, if any, passed under appropriate provision of Provident Fund, Act etc.

Analysis and Findings:

73. We find that Assistant Provident Fund Commissioner has filed additional claim of Rs. 3,52,175/- out of which to Rs. 3,49,175/- is towards Provident Fund dues not paid by the Corporate Debtor in respect of one employee Mr. Hemant Goenka, as per the visit/note/report of the Enforcement Officer of the Provident Fund Office.

74. The Provident Fund Office has given the details of the employee along with the Provident Fund No. and details of the employer contribution, employee contribution and the period for which it is due.

75. We find that the claim has not been filed in the appropriate form. We have seen exchange of emails between the applicant and the respondent with regard to form and come to the conclusion that the Provident Fund Office was not clear about the type of form to be used and

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consequently, in order to avoid further delay in submitting the claim have submitted their claim as it is and not in the appropriate form.

76. The reasons for delay in filing the additional claim is mainly due to confusion with regard to the form administrative delays.

77. Delay in filing the appeal against the rejection of the claim by the Resolution Professional has been explained in the application filed by the applicant are as under:

“After receiving the said letter dated 13.06.2023 the applicant Assistant Provident Fund Commissioner, Ahmedabad approach Ld. Advocate to prepare the draft application under Section 60(5) of the Code. While preparing the present application the said Ld. Advocate in Kolkata required some documents from the Applicant in Ahmedabad and after getting such document the draft application was prepared and sent for vetting by the applicant. After necessary corrections and modification, the application was sent back to the Ld. Advocate in Kolkata for filing the same. The said process of preparing, approval and signing the application took some time for which the unintentional delay, if any, in filing the present application occurred and such the delay may be condoned by this Hon’ble Tribunal for the interest of justice.”

78. In view of above, we feel appropriate to condone the delay in filing this application as well as the claim and examine the matter on merits.

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79. We find that the Hon'ble NCLAT in ***Jet Aircraft Maintenance Engineers Welfare Association v. Ashish Chhawchharia Resolution Professional of Jet Airways (India) Ltd.*** in **Company Appeal (AT) (Insolvency) No. 752 of 2021** reported in **2022 SCC OnLine NCLAT 418** has held that the employees are entitled to the payment of their full provident fund, unpaid up to the date of insolvency commencement date. The Hon'ble NCLAT made it very clear that full payment of provident fund would be of that unpaid part of provident fund, which is not deposited by the Corporate Debtor in the EPFO.

80. Respectfully relying on this judgment *ibid*, we allow the claim of the applicant and direct the Resolution Professional to verify whether the Provident Fund dues is on account of non-payment of employer and employee share of PF contribution of Mr. Hemant Goenka as claimed by the Provident Fund Office and make provision for an amount of Rs. 3,49,175/- in the plan if the claim is found to be in order.

81. We direct the Applicant to consult with Respondent RP and use the correct form and provide relevant documents / details along with copy of the report of the Enforcement officer of EPFO, which lead to this additional claim within 7 working days from the date of pronouncement of this order and within 7 working days thereafter, the respondent RP is directed to verify and admit the claim if it is in order.

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82. We have, however, find no reason to allow the amount of Rs. 3,000/- as administrative charges belatedly. Accordingly, this application is disposed of.

83. Hence, this application, being **I.A. (IB) No. 1964/KB/2023** is **allowed** and **disposed of** accordingly.

84. Certified copy of this order, if applied for with the Registry be supplied to the parties in compliance with all requisite formalities.

I.A. (IB) No. 680/KB/2023

85. Heard the Learned Counsel, Mr. Mainak Bose, appearing on behalf of the Resolution Professional of the Corporate Debtor GIT Textiles Manufacturing Limited.

86. This application has been preferred by Ramachandra Dallaram Choudhary, the Resolution Professional of the Corporate Debtor under Section 30(6) read with Section 31 of the I&B code along with Regulation 39(4) of the IBBI (CIRP) Regulations, 2016, seeking for the approval of the Resolution Plan dated 16.01.2023 along with Corrigendum as submitted by the Resolution Applicant which was approved by the CoC by 100% voting shares.

87. We have already directed the Resolution Professional to admit the claim of **H. R. Brothers Limited** in **I.A. (IB) No. 1841/KB/2023** in the category of unsecured financial creditors- related party and further

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directed the Resolution Professional to verify the Provident Fund dues on account of non-payment of employer and employee share of PF contribution of Mr. Hemant Goenka as claimed by the Provident Fund Office in **I.A. (IB) 1964/KB/2023**.

88. While as per our Order in I.A. No. 1964/KB/2023, the Provident Fund dues will have to be paid in full to the tune of Rs. 3,49,175/-subject to verification, with regard to the allocation to H.R. Brothers, it is left to the commercial wisdom of the Committee of Creditors (CoC) as long as the allocation is in line with Section 30(2)(b) of I&B Code. Accordingly, the plan value, if required, may be revised or distribution is reallocated within the plan value as may be decided between SRA and CoC.

89. Thus, for this purpose and to ensure that interest of the stakeholders impacted by the corporate insolvency resolution process of the corporate debtor in I.A. (IB) No. 1841/KB/2023 and I.A. (IB) No. 1964/KB/2023 are protected, we deem it appropriate to remit the Resolution Plan to CoC for action as per para 89 of this order.

90. Accordingly, the application being I.A. No. 680/KB/2023 seeking approval of resolution plan shall be put back on board to consider the revised distribution that may be proposed by CoC to meet the directions passed by this Adjudicating Authority in the I.A.s mentioned above.

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Summarization

- 91. I.A. (IB) No. 1841/KB/2023 is partly allowed and disposed of.**
- 92. I.A. (IB) No. 1964/KB/2023 is allowed and disposed of accordingly.**
- 93. I.A. (IB) No. 680/KB/2023 shall be put back on board. Post the matter on 03/07/2024 for hearing of the progress report.**
- 94. Certified copy of this order, if applied for with the Registry be supplied to the parties in compliance with all requisite formalities.**

**D. Arvind
Member (Technical)**

**Bidisha Banerjee
Member (Judicial)**

Signed this Order on 05th day of June, 2024.

PH(PS)/AR(Steno)/Bose, R. K. [LRA]