NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Interlocutory Application No. 5691 of 2024 in
Company Appeal (AT) (Insolvency) No.281 of 2024

IN THE MATTER OF:

Kanoria Energy & Infrastructure Ltd. … Appellant

Versus

Avishek Gupta & Ors. … Respondents

Interlocutory Application No. 5691 of 2024

IN THE MATTER OF:

Kanoria Energy & Infrastructure Ltd.
(Erstwhile a Infrastructure Ltd.)
Hamir Garh Bhilwara RJ 311025. … Applicant

Versus

1. Mr. Avishek Gupta,
Erstwhile Resolution Professional
Sarga Hotel Pvt. Ltd.
CK-104, Sector 2, Salt Lake Kolkata
West Bengal – 700091.

2. JC Flowers Asset Reconstruction Pvt. Ltd.
Representing the CoC for Sarga Hotel Pvt. Ltd.
12th Floor, Crompton Greaves House
Annie Desant Road, Worli Mumbai,
Maharashtra – 400030.

3. Shri Ram Multicom Pvt. Ltd.
61 /29/N3, N.S.B. Road,
Raniganj - 713347, Dist. - Burdwan … Respondents

Present:

For Applicant : Mr. Gaurav Mitra, Sr. Advocate with Ms. Monika Madaan, Ms. Lavanya, Advocates.

For Respondent	**:**	**Mr. Ramji Srinivasan, Sr. Advocate with Ms. Mahima Singh, Ms. Shruti Pandey, Ms. Shreya Mahdwan, Advocates for R1**
		Mr. Gopal Jain, Sr. Advocate with Mr. Raunak Dhillon, Ms. Madhavi Khanna, Mr. Nihaad Dewan, Ms. Suvarna Kashyap, Advocates for CoC
		Mr. Joy Saha, Sr. Advocate with Mr. Sidhartha Sharma, Mr. Arjun Asthana, Ms. Shalini Basu, Advocates for SRA.

J U D G M E N T

ASHOK BHUSHAN, J.

This Interlocutory Application by Applicant/ Appellant has been filed praying for following reliefs:

> "a. Allow the present Application, and/or; ..,.,
>
> b. Pass an Order thereby setting aside the Impugned Order dated 4th January 2024 as passed by the Hon'ble National Company Law Tribunal, Kolkata in I.A. (IBC) No. 1054/KB/2023 and remand all the resolution plans back to the Committee of Creditors for fresh consideration; and/or
>
> c. Pass any such order that this Hon'ble Appellate Authority may deems fit and appropriate and in the interest of justice.

2. Company Appeal (AT) (Insolvency) No.281 of 2024 was filed by the Appellant challenging the order passed by National Company Law Tribunal, Kolkata Bench, (Court-II), Kolkata in IA (IB) No.10541 (KB)/ 2023 in CP(IB) No.302/(KB)/2021 dated 04.01.2024, by which order, application filed by Resolution Professional ("**RP**") for approval of Resolution Plan was allowed and Resolution Plan submitted by Respondent No.3, Shriram Multicom Pvt. Ltd.

was approved. The Appellant, who was one of the Resolution Applicant. aggrieved by the order had filed the Appeal.

3. The Committee of Creditors ("**CoC**") in its 14th meeting of CoC held on 24.05.2023 has approved the Resolution Plan of Shriram Multicom Pvt. Ltd. The Resolution Plan of the Appellant was also considered in the said meeting, but was not approved. The Appeal came to be heard by this Tribunal and by judgment and order dated 29.02.2024 passed by this Tribunal, the Appeal filed by the Appellant was dismissed. Aggrieved by the order dated 29.02.2024 passed by this Tribunal, a Civil Appeal No.6166 of 2024 was filed by the Appellant before the Hon'ble Supreme Court. Before the Hon'ble Supreme Court, a submission was advanced by the Appellant that certain contentions were specifically urged, which were not found to have been recorded in the impugned judgment. The Appellant sought leave of the Hon'ble Supreme Court to withdraw the Appeal with liberty to file appropriate proceedings before the Appellate Tribunal. The Hon'ble Supreme Court disposed of the Appeal as withdrawn with liberty to the Appellant to file appropriate application before the NCLAT. The order of the Hon'ble Supreme Court dated 12.07.2024 is as follows:

> "The learned Senior Counsel appearing for the appellant submitted that in the written submissions filed before the National Company Law Appellate Tribunal (NCLAT) before the impugned judgment was delivered, certain contentions were specifically urged which are not found to have been recorded in the impugned judgment.

> We find that in paragraph 5 of the impugned judgment, the submissions of the counsel appearing for the appellant have been specifically recorded in eight lines. Learned counsel appearing for the appellant states that appellant may be permitted to withdraw the appeal with liberty to file appropriate proceedings before the NCLAT for pointing out to the NCLAT, his contention that several contentions raised at the time of hearing have not been referred to and not considered by it. The judgment as it stands, records submissions which were made by the appellant in paragraph 5 of the impugned judgment.
>
> Accordingly, we dispose of the appeal as withdrawn with liberty to the appellant to file appropriate application before the NCLAT. If the order passed on the proceedings which may be filed by the appellant be adverse to the appellant, it will always be open for the appellant to challenge the adverse order and to prefer an appeal against the same impugned order.
>
> It is submitted by learned counsel appearing for the respondent that the contention raised in the written submission made were never actually argued. This contention will remain open."

4. After the aforesaid order dated 12.07.2024, the present Application being IA No.5691 of 2024 has been filed where the Applicant has prayed for relief as extracted above.

5. In the judgment of this Tribunal dated 29.02.2024, the submissions advanced by the learned Counsel for the Appellant have been noted in paragraph 3 of the judgment. Paragraph 3 of the judgment is as follows:

> "3. Learned Counsel for the Appellant challenging the Impugned Order submits that the resolution plan approved by the CoC is not in accordance with law. It is submitted that resolution plan submitted by the Appellant as revised through email sent on 23rd May, 2023 had

> offered higher offer of Rs. 310 Crores as compared to the resolution plan of Respondent No. 3 but the CoC did not consider the higher value offered by the Appellant and approved the Resolution Plan of Respondent No. 3. It is submitted that constitution of CoC is also under challenge as RARE Asset Reconstruction Limited filed an application challenging the action of the Resolution Professional ousting the RARE Asset Reconstruction Limited from the CoC. An I.A. No. 822 of 2022 was filed which I.A. was rejected by the Adjudicating Authority against which C.A.(AT) Ins. No. 1304 of 2023 has been filed which is pending consideration. It is submitted that COC itself being not properly constituted, approval of the resolution plan cannot be valid. The Appellant has also filed an I.A. No. 1470 of 2023 seeking a direction to RP to place the resolution plan before the CoC to consider the revised resolution plan dated 23rd May, 2023 which application was illegally rejected by the Adjudicating Authority against which C.A.(AT) Ins. No. 1689 of 2023 has been filed by the Appellant."

6. Before the Hon'ble Supreme Court, however, the Appellant contended that certain contentions, which were specifically urged, not found to have been recorded in the judgment. At the very outset, learned Counsel appearing for the Respondent, who was also the Counsel, who appeared in Company Appeal (AT) (Ins.) No. 281 of 2024 decided on 29.02.2024 submitted that the submission, which is now sought to be urged by the Appellant was never advanced at the time of hearing of this Appeal and the submissions, which were made by the Appellant were recorded in paragraph 3 of the judgment. The learned Counsel for the Respondent submits that before the Hon'ble Supreme Court also at the time of hearing of the Civil Appeal, it was pointed

out by the Counsel for the Respondent that no such submission was pressed as sought to be canvased before the Hon'ble Supreme Court.

7. The learned Counsel, who has addressed the submission in the present Application, admittedly was not the Counsel who appeared in the Company Appeal (AT) (Ins.) No. 281 of 2024, nor he had advanced the submissions before this Appellate Tribunal. We, thus, do not find any reason to disbelieve the submission of learned Counsel for the Respondent that arguments, which is sought to be now raised in this Application, were never addressed at the time of hearing of the Appeal.

8. Be that as it may, to satisfy ourselves, we have proceeded to consider the submissions advanced by the learned Counsel for the Applicant.

9. Shri Gaurav Mitra, learned Senior Counsel appearing for the Applicant submits that RP has not issued clarification with regard to certain commercial spaces in the Corporate Debtor's asset. It is submitted that the Applicant/ Appellant was not informed about the 4th to 9th floor also belong to the Corporate Debtor. Had the Appellant being made aware that 4th to 9th floor also belong to the Corporate Debtor, the Applicant/Appellant would have enhanced its financial offer. The learned Counsel for the Applicant/ Appellant has referred to paragraph 5 (n), (o) and (r) of the Application. It is useful to extract paragraph 5 (n), (o) and (r) of the Application, where following has been pleaded:

“n. That pertinently, the aforesaid had specifically been pleaded as Questions of Law, relevant extract whereof is reproduced hereunder:

“….

8. (b) QUESTION OF LAW:

ii. Whether the Resolution Plan submitted by the SRA was in accordance with the EOI issued by the Resolution Professional? ... "

o. That in addition to being pleaded as Questions of Law, the Applicant had further agitated the aforesaid as Grounds in the Appeal, relevant extract whereof is reproduced hereunder

9. GROUNDS RAISED:

"…

BECAUSE the Ld. Appellate Tribunal failed to acknowledge that the failure of the RP to divulge about the inclusion of certain floors with commercial spaces in the Corporate Debtor's assets, coupled with the absence of notifications regarding these crucial inclusions, indicates a procedural lapse and potential unfair advantage to Respondent No. 3, raising grounds for challenging the resolution process.

BECAUSE the Ld. Appellate Tribunal failed to acknowledge the ambiguity and vagueness in the Expression of Interest issued by the Resolution Professional/Respondent No. 1 that hindered potential resolution applicants from submitting an effective plans, thereby impeding the progress of the CJRP. The failure to provide clear and comprehensive descriptions of the concerned asset created uncertainty and deterred prospective bidders ... "

r. That upon the aforesaid matter being taken up on 13th February 2024, amongst other arguments it was argued that during the *entire CIRP, the Resolution Professional had deliberately not issued any clarification in so far as the number of floors of Hotel Westin, belonging to the Corporate Debtor was concerned. Similarly, the Expression of Interest as well as the Information Memorandum was devoid of any details qua certain commercial spaces in the Hotel. It is only when the Resolution Plan of the SRA was approved, the Appellant gained the knowledge that certain floors below Hotel Westin, having commercial spaces are also being considered an asset of the Corporate Debtor. The same was however, not mentioned in the Expression of Interest or the Information Memorandum which was limited to rooms and suites."*

10. In paragraph 5(r), it is pleaded that during the entire Corporate Insolvency Resolution Process ("**CIRP**"), the RP has deliberately not issued any clarification insofar as number of floors in Hotel Westin, belonging to the Corporate Debtor was concerned. It was further pleaded that "*Similarly, the Expression of Interest as well as the Information Memorandum was devoid of any details qua certain commercial spaces in the Hotel".*

11. The submission of the learned Counsel for the Applicant/Appellant was refuted by the learned Counsel for the RP as well as learned Counsel for the Successful Resolution Applicant ("**SRA**"). It is submitted by Shri Ramji Srinivasan, learned Senior Counsel for the RP that all necessary information regarding assets of the Corporate Debtor were contained in the Information Memorandum prepared by the RP. It is submitted that details of the assets are not contained in the Expression of Interest ("**EoI**"). EoI as issued under

Regulation 36A is only required to specify CoC approved eligibility criteria, ineligibility norms and basic information about the Corporate Debtor for submission of EOI. It is submitted that Information Memorandum clearly mentioned about the commercial spaces of 4^{th} to 9^{th} floor.

12. The learned Counsel for the Applicant/Appellant during the course of submission has handed over a comparative note, containing three columns. First column relate to 'EOI'. Second column – 'Information Memorandum & VDR' and third column – 'Resolution Plan'. It is useful to extract comparative note given by learned Counsel for the Appellant during the course of submission, which is as follows:

"EOI	**INFORMATION MEMORANDUM & VDR**	**RESOLUTION PLAN**
• Incorporated in 2004, Sarga Hotel Private Limited (SHPL) is operating a five-star hotel under the name of The Westin Kolkata Rajarhat at New Town, Kolkata. • With 304 rooms and 16 suits, it's the biggest Westin in Eastern India. • 50,000 sq. ft banqueting spaces, 22,000 sq. ft of dedicated wellness space, a dedicated floor with • 6 meeting rooms, 5 restaurants, Car	As a part of the Information Memorandum, a Discussion Paper prepared in May 2022 was placed before the PRA's, relevant extract whereof is reproduced hereinabove: *Investment Rationale* • *With 288 rooms and 16 suites, it's the biggest Westin in Eastern India;* • *50,000 sq. ft banqueting space, 22,000 sq. ft of dedicated wellness space, a dedicated floor with 6 meeting*	In terms of the information received from public domain, the SRA has included all floors, including 4^{th} to 9^{th} Floor of the Hotel. An Application had also been preferred by the SRA before NCLT, Kolkata being I.A. No.435 of 2024 stating that hindrances were being created in the server room situated at the 6^{th} Floor of the Hotel building; Further, vide Order dated 5^{th} March 2024 it was argued by the Promoter Group that "***floor 6^th^ to***

Parking facility for up to 700 cars	<u>*rooms, 5 restaurants, Car Parking facility for up to 700 cars*</u> ***<u>Assignment of 4th to 9th floor – SHPL have assigned commercial space of building from 4th to 9th floor (measuring 8099.366 sq. mtrs), 97 car parking space in two basements and common areas & facilities to Savyambhut Marketing Private Limited</u>***	***9th are in possession of one Swayamvut, where the share utility services and installation are located and, therefore, without impleading Swayamvut, the SRA cannot seek any order against the SIDCL."*** The aforesaid demonstrates how the SRA has taken over the aforesaid floors."

13. Learned Counsel for the Respondent submits that the comparative note, which is given to the Court by learned Counsel for the Applicant/Appellant itself makes it clear that details of 4th to 9th floor were mentioned in the Information Memorandum, which is clear from Column-2 of the comparative note itself. It was mentioned in the Information Memorandum that 4th to 9th Floor were assigned by SHPL; car parking spaces in two basements and common areas and facilities to Savyambhut Marketing Private Limited. It is submitted that the comparative note, which is placed by the Applicant/ Appellant itself makes it clear that all relevant information were contained in the Information Memorandum and submission of the Applicant/Appellant that had he been made aware about 4th to 9th Floor, he would have given his offer differently, needs no acceptance. It is submitted that the Applicant/ Appellant neither in Company Appeal (AT) (Ins.) No. 281 of 2024 nor in IA

No.5691 of 2024, i.e., present IA has brought on record the copy of the Information Memorandum, which may indicate as to what information regarding the Corporate Debtor was contained in the Information Memorandum. However, the comparative note given by the Appellant itself makes it clear that in Information Memorandum assignment of 4th to 9th floor and commercial space, car parking space in two basements, common areas and facilities were mentioned to be assigned to one entity – Svayambhut Marketing Pvt. Ltd.

14. The ground made in the Application as noted above that Appellate tribunal failed to acknowledge that failure of the RP to divulge about the inclusion of certain floors with commercial spaces in the Corporate Debtor's assets, coupled with the absence of clarification regarding these crucial inclusions, indicates a procedural lapse and potential unfair advantage to Respondent No.3.

15. We have considered the submissions of learned Counsel for the parties and have perused the records.

16. The entire submission of the learned Counsel for the Applicant advanced as noted above, relates to, not divulging about the inclusion of certain floors with commercial spaces in the Corporate Debtor's assets. It is to be noted that neither in the Appeal, nor in the Application, the Applicant/ Appellant has brought on record the Information Memorandum. The Information Memorandum and virtual room was shared with the Appellant by

the RP, he being a Resolution Applicant. In any view of the matter, during the course of submission, the comparative note as handed over by the lc for the Applicant/Appellant, clearly mentions following:

> *"Investment Rationale*
>
> - *With 288 rooms and 16 suites, it's the biggest Westin in Eastern India;*
> - *50,000 sq. ft banqueting space, 22,000 sq. ft of dedicated wellness space, a dedicated floor with 6 meeting rooms, 5 restaurants, Car Parking facility for up to 700 cars*
>
> ***Assignment of 4th to 9th floor – SHPL have assigned commercial space of building from 4th to 9th floor (measuring 8099.366 sq. mtrs), 97 car parking space in two basements and common areas & facilities to Savyambhut Marketing Private Limited***"

17. Entire Westin Hotel belong to the Corporate Debtor. With regard to 4th to 9th Floor, it was clearly mentioned in the Information Memorandum that SHPL have assigned it to Savyambhut Marketing Pvt. Ltd. Whatever stated in the Information Memorandum, the conclusion on such assignment was the matter for consideration of the SRA, who had to submit the Resolution Plan. The Resolution Plan for the Corporate Debtor was invited on "as is where is basis" and information was provided to all Resolution Applicants. Learned Counsel for the RP is right in his submission that it was for the Applicant/Appellant to seek any clarification, which it may require regarding the commercial space in the course of its due diligence of the Corporate Debtor. All Resolution Applicants were required to make their own due diligence and submit the Resolution Plan.

18. Learned Counsel for the SRA has submitted that SRA has made its offer on the basis of materials on the record, including the Information Memorandum and due diligence was taken by it. No exception can be taken to the Resolution Plan submitted by SRA with regard to entire Westin Hotel, which was the asset of the Corporate Debtor.

19. The submission, which has been raised by the learned Counsel for the Applicant/Appellant that RP failed to divulge about the inclusion of certain floor with commercial spaces is incorrect on the submissions, which have been advanced by the Appellant itself before this Tribunal. According to own disclosure of the Applicant/Appellant, as disclosed in the comparative note, there was specific mention of 4^{th} to 9^{th} floor as noted above. The Applicant/ Appellant was one of the Resolution Applicant and the Resolution Plan having been invited on "as is where is basis", it was for the Appellant/Applicant to make its due diligence before submitting the Resolution Plan. The Applicant/ Appellant having never asked for any clarification from the RP regarding any assets of the Corporate Debtor, it is not open to the Appellant/ Applicant to contend that RP did not divulge about details of the commercial spaces of the Corporate Debtor.

20. The learned Counsel for the Applicant/Appellant has placed reliance on the judgment of this Tribunal dated 21.12.2023 in **Company Appeal (AT) (Insolvency) No.1688 of 2023 in Masatya Technologies Pvt. Ltd., Successful Resolution Applicant for Vistar Construction Pvt. Ltd. vs.**

Amit Agarwal, Resolution Professional for Vistar Construction Pvt. Ltd. & Anr. In the above case, this Tribunal has affirmed the order of Adjudicating Authority, by which while deciding an IA, the Adjudicating Authority directed for issuance of fresh Form-G in a case where after issuance of the Information Memorandum, the Delhi High Court has directed for replacement of properties on the 9th and 10th floors, which came to be added into the assets of the Corporate Debtor. Hence, the direction was issued for issuance of fresh Form-G. This Tribunal in paragraphs 6 and 8 has made following observations:

> "**6.** The Adjudicating Authority has taken in consideration the fact that properties shall come to the kitty of the Corporate Debtor, as noted above, whose value is much more than the entire plan value submitted by the Resolution Applicant, hence, order was issued for issuance of Form G. We fully agree with the observation of the Adjudicating Authority as made in Para 19, 20 and 21 of the impugned order, as extracted above, which was sufficient reason for issuance of fresh Form G. However, we are of the view that some time ought to have been fixed by the Adjudicating Authority for completion of the entire process. We, thus, while affirming order of the Adjudicating Authority issue further direction in following manner:
>
> (i) The entire process including consideration of Resolution Plan shall be completed within a period of three months from today.
>
> **8.** The present is not a case where the Adjudicating Authority has directed for any valuation of the assets of the Corporate Debtor. Present is a case where during the CIRP process under the orders of the High Court of Delhi properties worth value of approx. Rs.3 Crores have been added to the assets of the Corporate Debtor on

basis of which the Adjudicating Authority took the view that fresh Form G should be issued so that interested Resolution Applicants may know that the value of the Corporate Debtor has increased. Thus, the judgment relied by the learned counsel for the Committee of Creditor has no application in the present case."

21. The above judgment of this Tribunal was in the facts of the said case, where certain properties were added in the assets of the Corporate Debtor during the CIRP, on account of which the Adjudicating Authority has directed for issuance of fresh Form-G and also issuing of Information Memorandum. The directions of the Adjudicating Authority were noted in paragraph 2 of the judgment, which is as follows:

2. Heard learned counsel for the parties. This Appeal has been filed against order dated 18.09.203 by which order the Adjudicating Authority while deciding I.A. No.363/ND/2023 has directed for issuance of fresh Form G, where the Appellant will also have liberty to submit EOI. The reason given by the Adjudicating Authority in the impugned order is that after issuance of Information Memorandum, under the orders of Delhi High Court dated 07.10.2021 and 01.06.2023 the amount of Rs.3,01,07,609/- along with 9% interest was replaced with properties (Unit Nos.901, 923 & 923A and 1022A on the 9th floor and 10th floor having covered area of 345 sq. ft.) located at Plot No.4, Dwarka City Centre, Sector-13, Dwarka, New Delhi, which shall be added in the assets of the Corporate Debtor. The Adjudicating Authority after noticing the aforesaid in Para 19, 20 and 21 has directed following:

"19. Needless to say, the Prospective Resolution Applicants (PRAs) furnish their Resolution Plans based on the Information Memorandum (IM) prepared by the Resolution Professional, where a list of all the Assets of the Corporate Debtor is given. Since the properties situated at Dwarka

(ibid) were a later discovery, they were not included in the Information Memorandum. Thus, the valuation of the newly inducted properties situated at Dwarka was not conducted by the RP, and the other PRAs were not given any chance to bid for the Corporate Debtor while keeping in mind the property situated at Dwarka being part of the asset pool of the Corporate Debtor. Had the properties at Dwarka been included/ added subsequently in the IM and valuation, the Fair Market Value and Liquidation Value of the Corporate Debtor would have changed significantly to attract more Prospective Resolution Applicants to submit the Resolution Plan with higher value.

20. Further, through the present Resolution Plan, the ownership rights of the newly-inducted Dwarka Properties (ibid), which were never part of the Information Memorandum notified by the RP, are proposed to be transferred to the SRA herein, who would be in an advantageous position vis-à-vis the prospective bidders in rem. In our considered view, this is a material irregularity in the exercise of the powers by the Resolution Professional during the CIR Process of the Corporate Debtor. 21. In the circumstances, we have no other option but (a) to reject the present Resolution Plan; (b) direct the Resolution Professional to conduct a fresh valuation of the Corporate Debtor's properties, inter alia, including the Unit no. 910, 923, 923A, and 1022A at 10th floor having covered area 345 Sq. Ft. forming part of the Hotel Building constructed at Plot No. 4, Dwarka City Centre, Sector-13, Dwarka, New Delhi and issue the Information Memorandum; (c) issue a fresh 'Form G' through a wide publication; and (d) complete the entire process of seeking approval of CoC, for the Resolution Plans if received, at the earliest. It is, however, made clear *that the SRA of the present resolution plan will have the liberty to submit its EOI if it so wishes."*

22. The above judgment of this Tribunal was on its own facts and order of this Tribunal of upholding the directions of Adjudicating Authority for issuance of fresh Information Memorandum and Form-G was in the facts of the said case, which in no manner helps the Applicant/Appellant in the present case.

23. We are, thus, satisfied that there is no substance in the submission advanced by the Applicant in the present Application praying for setting aside the order of the Adjudicating Authority dated 04.01.2024 and to remand the Plan back to the CoC for fresh consideration. There is no merit in the Application. The Application – IA No.5691 of 2024 is rejected.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

NEW DELHI

9th September, 2024

Ashwani