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

I.A. (I.B.) No. 1377/KB/2022
In
C.P. (I.B.) No. 302/KB/2021

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.

<u>IN THE MATTER OF</u>:

YES BANK LIMITED … Financial Creditor

Verses

SARGA HOTEL PRIVATE LIMITED … Corporate Debtor

And

<u>IN THE MATTER OF</u>:

J.C. Flower Asset Reconstruction Private Limited, Acting in its capacity as Trustee of JCF YES Trust 2022-23/8

… Applicant

Verses

Mr. Avisekh Gupta, Resolution Professional of Sarga Hotel Private Limited

… Respondent No. 1

Rare Asset Reconstruction Company Limited

… Respondent No. 2

Date of Hearing: June 16, 2023

Date of Pronouncement: October 18, 2023

<u>CORAM</u>:

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

SHRI BALRAJ JOSHI, HON'BLE MEMBER (TECHNICAL)

IN THE NATIONAL COMPANY LAW TRIBUNAL
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I.A. (I.B.) No. 1377/KB/2022
In
C.P. (I.B.) No. 302/KB/2021

Ld. Counsels on Record Appeared Physically/ through Video Conferencing:

For the Resolution Professional:

1. Ms. Manju Bhuteria, Adv.

2. Ms. Pooja Mahajan, Adv.

3. Ms. Mahima Singh, Adv.

4. Ms. Shreya Mahalwar, Adv.

5. Ms. Mehak Nayak, Adv.

6. Mr. S. Majumdar, Adv.

7. Mr. Sourojit Dasgupta, Adv.

8. Mr. Avishek Gupta, RP in person

For J. C. Flower ARC:

1. Mr. Abhinav Vasisht, Sr. Adv.

2. Mr. Saptarshi Saha, Adv.

3. Mr. Arindam Mrinal Pal, Adv.

For Rare Asset ARC:

1. Mr. Swatarup Banerjee, Adv.

2. Mr. Rahul Auddy, Adv.

3. Mr. Aditya Gooptu, Adv.

For SIDCL:

1. Mr. Abhrajit Mitra, Sr. Adv.

2. Mr. Sarvapriya Mukherjee, Adv.

3. Mr. Saruav Jain, Adv.

O R D E R

Per: Balraj Joshi, Member (Technical)

1. This Court is congregated through hybrid mode.

I.A. (I.B.) No. 1377/KB/2022

2. The instant Application is filed by **J. C. Flowers Asset Reconstruction Private Limited** (hereinafter referred as **"Applicant"/ "JCF")** under **Section 60 (5)** of the **Insolvency and Bankruptcy Code, 2016** (for brevity **"I&B Code, 2016"**) where the J. C. Flowers Asset Reconstruction Private Limited is acting in its capacity as trustee of the JCF YES Trust 2022-23/8. The instant petition was originally filed by **YES Bank Limited** as a **financial creditor** of **Sarga Hotel Private Limited** ("Corporate Debtor"). Thereafter, pursuant to the assignment of debt by YES Bank Limited to the Applicant (JCF) herein, the Applicant (JCF) has become a financial creditor in the CIRP of the Corporate debtor. Further, by filing an application vide I.A. (IBC) 564/KB/2023, YES Bank Limited sought to substitute the Applicant in its place and that I.A. was allowed by this bench vide an Order dated April 21, 2023.

3. This instant I.A. being No. **I.A. (IB)/1377/KB/2022**, has been preferred to seek the following reliefs:

a) Allow the present Application;

b) Direct the Resolution Professional to reject the claim filed by RARE ARC as a 'financial Creditor';

c) Pending hearing and final disposal of the present Application, stay further hearing of RARE ARC Application i.e., IA (IB) No. 822/KB/2022 in C.P. (IB) No. 302/KB/2021;

d) Pass such further or other order or orders as this Hon'ble tribunal may deem fit and proper in the facts and circumstances of the case and thus render justice.

4. Applicant's Contention:

(i) The Applicant has filed this Application seeking directions to the resolution professional (RP) to reject the claim filed by the RARE Asset Reconstruction Company Ltd. (for brevity "RARE ARC").

(ii) That on August 29, 2018, SREI Infrastructure Finance Limited **("SIFL")** sanctioned a Loan of Rs. 300 Crores approximately (hereinafter referred to as **"Impugned Loan"**). The said impugned loan was purportedly transferred to SREI Equipment Finance Limited **("SEFL")** vide a **Business Transfer Agreement** dated 16/08/2019 amended as on 14/11/2019 (**"Business Transfer Agreement"**).

(iii) On August 12, 2020, this Tribunal passed an order to initiate CIRP against the Corporate Debtor (***Sarga Hotel private Limited***) in CP (IB) No. 767 of 2020 filed by ***Universal International Creation Limited*** (**First CIRP**) under the provisions of Insolvency and Bankruptcy Code, 2016.

(iv) On September 09, 2020, SREI Equipment Finance Limited ("**SEFL**") entered into an assignment agreement with RARE ARC to assign the Impugned Loan (**"the Assignment Agreement"**), annexed as **Annexure "4"** at Page 33 of the **IA(IB) 822 of 2022**. In that Assignment Agreement the Borrower was **Sarga Hotel Private Limited** (CIN: U55101WB2004PTC098787) to whom a Financial Assistance of Rs. 293.92 Crores had been extended by the Assignor (SEFL) under any of the Financing Documents as listed in Schedule 1 and included any Person who has created any Security Interest and/ or pledge to secure, including but not limited to mortgage of immovable properties as collateral securities and/or a guarantee in respect of the repayment of any Financial Assistance granted by the Assignor to a Borrower. The Cut-off date, i.e., the date with effect from which (including that day) all economic benefits pertaining to the Impugned Loan including all realizations and recoveries, if any, made on and after said date shall be for the benefit of RARE ARC, has been defined as August 12, 2020, in Clause 1.1(g) of the Assignment Agreement.

(v) The Hon'ble NCLAT vide an order dated August 27, 2021, set aside the **First CIRP** Order dated August 12, 2020, (**Annexure D** at page 67 of the Application) – as collusive.

(vi) Upon an application filed by YES Bank under Section 7 of the I&B Code, this Tribunal vide an order dated February 11, 2022, initiated CIRP of the Corporate Debtor (Sarga Hotel private Limited) in CP (IB) No. 302 of 2021. Mr. A. Gupta was appointed as IRP.

(vii) The RP issued a public announcement on February 14, 2022, informing all the stakeholders having an interest in the CIRP and invited claims from the Creditors of the Corporate Debtor and List of Creditors as on September 13, 2022, recorded that the Claim of RARE ARC, the Assignee as a 'related party financial creditor' (**Annexure B** at Pages 47-48 of the Application).

(viii) The RARE ARC filed an I.A. (IB) 822 of 2022 on July 18, 2022, challenging the decision passed by the RP classifying RARE ARC as a 'related party' and seeking directions from this Bench to inter alia direct the RP to allow RARE ARC to participate, represent and vote in the capacity of a financial creditor with in Committee of Creditors (COC) constituted for the Corporate Debtor.

(ix) In the meantime, CIRP was initiated against SREI Equipment Finance Limited ("**SEFL**") and SREI Infrastructure Finance Limited ("**SIFL**") by this Tribunal vide its Order dated October 08, 2021, and Mr. Rajneesh Sharma was appointed as the Administrator to carry out the duties of the RP.

(x) During CIRP, the Administrator filed an Application being **I.A. (IB) 744/KB/2022 in C.P. (IB) 294/KB/2021** ("**Administrator's First Application**") on or around July 24, 2022, wherein, amongst others, the **"Impugned Loan"** has been classified as transaction amounting to fraudulent trading and wrong trading under Section 66 of the Insolvency and Bankruptcy Code, 2016, (**Annexure G** at Page 102 of the Application).

(xi) On August 22, 2022, the RP apprised the members of the COC regarding the Administrator's First Application.

(xii) The Administrator filed another Application I.A. (IB)77(KB) in C.P. (IB) 294/KB/2021 on December 26, 2022 ("**Administrator's Second Application**") which contains additional information that leaves no doubt that the assignment of the Impugned Loan by SREI Equipment Finance Limited ("**SEFL**") to RARE ARC is not an independent commercial transaction but a collusive transaction between SREI Equipment Finance Limited ("**SEFL**") and RARE ARC, (Annexure A-1 on Page 11 of the Second Affidavit of the RP in I.A. (IB) 822 of 2022).

(xiii) It is urged that it is a settled principle as laid down by the Hon'ble Apex Court in the judgment of ***Phoenix Arc Private Limited* v. *Spade Financial Services Limited*,** reported in **(2021) 3 SCC 475**, that a fraudulent transaction cannot be classified as a '**financial debt**' under the provisions of the Insolvency and Bankruptcy Code, 2016 and therefore, the decision of the RP admitting the claim of the RARE ARC, Respondent No. 2 as a 'financial creditor' is liable to be set aside.

5. Submission in Reply made by Mr. Avishek Gupta, Resolution Professional, (the Respondent No. 1):

(i) During the CIRP of the Corporate Debtor (Sarga Hotel Private Limited), a claim from RARE ARC, on behalf of RARE ARC 051 TRUST (for brevity "**051 Trust**") was received by the RP for an amount of Rs. 393.43 Crores (hereinafter referred as "**Claim**") in Form-C on February 24, 2022, as a financial Creditor.

(ii) In the process of verification of the Claim, it came to light that the loan which formed the subject matter of the Claim was assigned to RARE ARC (acting in its capacity as a trustee of the 051 Trust) by the SREI Equipment Finance Limited ("**SEFL**") pursuant to an Assignment Agreement dated September 09, 2020 and the assignment was made effective retrospectively with a Cut-Off dated August 12, 2020, being the same date when the Corporate Debtor was admitted into the First CIRP vide Order dated August 12, 2020, which was subsequently set aside as "collusive" by an Order dated August 27, 2021 passed by the Hon'ble NCLAT.

(iii) It also came to light that 15% Security Receipts (for brevity "**SR**") of 051 Trust are held by RARE ARC while the remaining 85% SRs are held by the SREI Equipment Finance Limited ("SEFL") which in the opinion of the RP, is a related party of the Corporate Debtor, both being part of the Kanoria Group of Companies.

(iv) Under Section 21(1) of the Insolvency and Bankruptcy Code, 2016, the RP after collation of all claims was required to make a determination of the financial position of the Corporate Debtor and constitute a COC. Section 21 (2) of the Insolvency and Bankruptcy Code, 2016 says that:

> **"***The committee of creditors shall comprise all financial creditors of the corporate debtor: Provided that a related party to whom a corporate debtor owes a financial debt shall not have any right of representation, participation or voting in a meeting of the committee of creditors*.**"**

(v) Further, the Hon'ble Apex Court of India in the case of ***Phoenix Arc Private Limited* v. *Spade Financial Services Limited*,** reported in **(2021) 3 SCC 475** held that:

> **"***...those related party financial creditors that cease to be related parties in order to circumvent the exclusion under*

the first proviso to Section 21(2), should also be considered as being covered by the exclusion thereunder.**"**

Hence, it is the duty of RP to ensure that no related Party, directly or indirectly, has a representation in COC.

(vi) It was informed to the RARE ARC by the RP that while the Claim of RARE ARC is being admitted as a financial creditor, RARE ARC shall not have any right to represent, participate or vote in the COC of the Corporate Debtor as per the proviso of Section 21(1) and ruling in ***Phoenix* v. *Spade* (Supra)**, as RARE ARC is a related party financial creditor.

(vii) The RP gave detailed reasons vide its email dated 30/04/2022 as to why the assignment from SREI Equipment Finance Limited **("SEFL")** to RARE ARC appeared to have been made in suspicious circumstances with effect from the date of the First CIRP Admission Order, i.e., August 12, 2020, while the Assignment Agreement between SREI Equipment Finance Limited ("SEFL") and RARE ARC was entered into on September 09, 2020.

(viii) That apart, when the assignment was made, SEFL was a related party of the Corporate Debtor (Sarga Hotel Private Limited) under clauses (h), (i), (j), (l) and (m) of Section 5(24) of the I&B Code, 2016 as both SEFL and the Corporate Debtor are eventually owned, directly or indirectly, by the Kanoria Foundation whose ultimate beneficiaries are understood to be the members of the Kanoria Family.

(ix) Thus aggrieved **I.A. No. 822 of 2022 ("I.A. 822")** was filed by RARE ARC against the RP, challenging the treatment of its Claim. In the Reply to I.A. 822, the RP, inter alia, duly apprised this Adjudicating Authority that after the filing of I.A. 822 by RARE ARC, the RP was served with an application bearing **I.A. (IB) No. 744 of 2022** in **CP (IB) No. 294 of 2021** being ***SREI Equipment Finance Limited Through its Administrator***

Rajneesh Sharma* v. *Kanoria Foundation **("SEFL Avoidance Application I")** filed under Section 66 of the I&B Code, 2016 by the Administrator of SEFL (currently undergoing CIRP), in which the Administrator flagged the term loan given by SREI Infrastructure Finance Ltd ("SIFL") (which was later transferred to SEFL and subsequently assigned to Rare ARC) as fraudulent and unusual for various reasons and also stated that the Corporate Debtor is connected/ linked to SIFL, SEFL and the Kanoria group of companies.

(x) The RP also filed two supplementary affidavits, bringing certain additional facts and documents on record before this Adjudicating Authority regarding the failure of Rare ARC to disclose the source of funds for an upfront payment of Rs. 43.85 Crore stated to be made to SEFL for the assignment.

(xi) In **I.A. (IB) No. 77 of 2023** in **CP (IB) No. 294 of 2021**, being *SREI Equipment Finance Limited Through its Administrator Rajneesh Sharma* v. *OSPL Infradeal Private Limited* **("SEFL Avoidance Application II")** by the Administrator of SEFL under Section 66 of the Code in which the Administrator has raised questions in respect of the assignment of the loan from SEFL to RARE ARC and mentioned certain transactions which leave no doubt that assignment of loan by SEFL and RARE ARC, is made to vitiate the CIRP of the Corporate Debtor.

(xii) The RP had also brought the fact regarding the filing of the **SEFL Avoidance Application I** to the attention of the COC of the Corporate Debtor, which included Yes Bank Limited.

(xiii) Subsequently, in respect of the **SEFL Avoidance Application I filed by the Administrator of SEFL**, this instant application was filed by Yes Bank Limited challenging the decision of the RP to admit the Claim of Rare ARC as a 'financial debt'.

(xiv) It is averred that during verification of the Claim of Rare ARC, the facts emerging from **SEFL Avoidance Application I** and **SEFL Avoidance Application II** were not available to the RP and thus, the RP admitted the Claim of RARE ARC as a financial debt, while excluding RARE ARC from the COC as being akin to a related party. The SEFL Avoidance Application I and SEFL Avoidance Application II were filed by the Administrator of SEFL subsequently, by which time, RARE ARC had already challenged the RP's decision on its Claim by way of **I.A. 822 of 2022**.

6. Submission in Reply made by RARE ARC, Respondent No. 2:

(i) The RARE ARC, Respondent No. 2, per contra submits that this instant Interlocutory Application was filed at very belated stage and with an intention of preventing the hearing and adjudication of the IA 822/KB22022 which would give the Respondent No. 2 a place in the COC.

(ii) That the cause of action of this application, as stated in the application itself arose on 24th July 2022 and the application has been affirmed and filed on October 28, 2022 after a gap of 3 month which was a significant time gap under the I&B Code wherein the CIRP is required to be completed within 270 days.

(iii) This application is totally based on the application filed by the Administrator of SREI being I.A. 599/KB/2022 against the Corporate Debtor which is sub-judice and thus, the RP of the Sarga Hotel should not take any step on the basis of an averment which is yet to be decided.

(iv) Further, the Respondent No. 2 has brought on record the following documents, which confirms that the applicant herein has accepted the loan facilities by erstwhile lenders SREI to CD, as under:

a) NOC dated December 07, 2017 issued by applicant (Yes Bank) confirming ceding of 2nd charge in favour of SIFL for credit facilities of Rs. 994 million and first pari passu charge on the excluded assets. (**Annexure "A"** in the Reply Affidavit by RARE ARC).

b) Inter Se Agreement dated February 21, 2019 between YES Bank Limited and SREI Infrastructure Finance Limited wherein, YES bank has agreed to cede second charge in favour of SREI on the said securities of CD (**Annexure "B"** in the Reply Affidavit by RARE ARC). Para no. 7 of the said Inter Se agreement states that "*This Inter Se agreement shall be valid and enforceable even if Borrower (CD) is admitted in IBC or under any proceedings (including under NCLT)*"

(v) The right to the recovery of loan by the lender always stays whatever may be the status of the account provided the money was given by the lender (SEFL) to the borrower (Sarga Hotel Private Limited). This right has been assigned to Rare ARC (Respondent no. 2 herein) and thus, without prejudice to the aforesaid, even if any classification of the account is made, right to recovery does not go, hence if the same is established, the lender should be given a place in the COC.

(vi) Unless, COC was properly constituted with all requisite members and each the Financial Creditors are given position according to respective exposure, the constitution of COC is invalid and the entire CIRP process is bad in law and is liable to be set aside.

(vii) With regard to the assignment of the loan from SEFL to Rare Asset (Respondent no. 2 herein), the assignment was absolutely in conformity of law. The same is further evident from the letter dated September 21, 2020 issued by YES Bank in favour of Rare ARC, post assignment of debt at

Annexure "C", Page 28 of the reply Affidavit by RARE ARC) which says in Para 5 of the Agreement as:

> "***5.*** *In view of the assignment as stated above, the terms of the Inter se Agreement shall be applicable on RARL* (RARE ARC) *and RARL* (RARE ARC) *will be bound by the same rights and obligations. Accordingly, we request RARL. to be guided by the terms of Inter-se Agreement and comply with the Inter-se Agreement, including but not limited to voting under CIRP in line with YBL. We have attached a copy of the Inter-se Agreement for your records and easy reference.*
>
> "*This letter shall not in any way be construed as YBL* (YES Bank Limited) *conceding or acquiescing to the participation of RARL in the committee of creditors of the Corporate Debtor and YBL reserves all rights under applicable law, contract and equity*.'
>
> "*Capitalized terms used herein but not defined otherwise shall have to meaning ascribed to the term under the Inter-se Agreement.*"

(viii) When the First CIRP was set aside by the Hon'ble NCLAT then all acts pertaining to the same are a complete by-gone.

7. Submission made in the Rejoinder filed by the Applicant:

(i) There was no delay in filing of the Application as alleged in the Reply by RARE ARC. On August 22, 2022 when the RP informed the COC regarding the SREI Application and its contents, whereafter, the Application was filed before this Tribunal.

(ii) The Hon'ble NCLAT in the case of ***Jagdish Kumar Parulkar, RP of Tayal Foods Limited* v. *Vinod Agarwal*** reported in **MANU/NL/0295/2023** has held that:

> "*Regulation 35-A requires a Resolution Professional to form an "opinion" if the corporate debtor has been subjected to an avoidance transaction. Such opinion is to be followed by a "determination" by the Resolution Professional qua such avoidance transaction*."

(iii) The NOC ceded 2nd charge in favour of SIFL for credit facilities of Rs. 994 million has no relevance as the NOC dated December 07, 2017 was issued by the YES BANK (original applicant) in relation to a completely different credit facility and which facility stood already repaid. The fact has been intentionally not disclosed by the Respondent No. 2 and the NOC was issued almost nine months before the impugned loan.

(iv) The Applicant cannot be estopped from challenging the admission of a fraudulent transaction as a financial debt on the basis of the NOC, Inter-Creditor Agreement or the Letter to RARE as it or the Original Applicant could not have reasonably known the nature of the Impugned Loan at the time of issuing or executing as case may be either of these documents.

(v) Ascertainment of the nature of the transaction i.e., the Impugned Loan or its assignment to the Respondent No. 2, is within the purview of the duties of the Resolution Professional or the Administrator of SIFL and SEFL who are in possession of relevant documents.

(vi) The Administrator has challenged the Impugned Loan as fraudulent and the Resolution Professional in performance of its role, has challenged the assignment in **I.A. 822/KB of 2022**.

8. Analysis and Observation:

The applicant has made specifically three prayers which in the substantive terms coalesce to the following :

(a) Direct the Resolution Professional to reject the claim filed by RARE ARC as a 'financial Creditor'

(b) Pending hearing and final disposal of the present Application, stay further hearing of RARE ARC Application i.e., IA (IB) No. 822/KB/2022 in C.P. (IB) No. 302/KB/2021;

(i) In regard to prayer no. 2 , suffice it to say that this Tribunal has already vide order dated 13.09.2022 held that the applicant in IA(IB) 822(KB)/2022 (respondent no. 2 herein) is a related party of the corporate debtor and as the concern of the applicant to that extent has been addressed. It would be relevant to extract the decision of this tribunal in the matter for clarity , which is a below:

> *12. As such we have no hesitation in upholding the decision of the RP to oust the RARE ARC, the applicant in this IA, from the Committee of Creditors being a related party of the Corporate Debtor, which is by virtue of section 21(2) is proscribed for their inclusion in the Committee of Creditors. IA(IB) No. 822/(KB)/2022 therefore fails and is disposed of accordingly.*
>
> *13. We also direct the RP to go ahead with the CIRP accordingly*

As can be seen from the above that the respondent no.2 has been held to be a related party and the RP has been directed to proceed with the CIRP process accordingly and the only issue that remains to be decided now is whether or not the respondent no. 2 i.e. RARE ARC is to be construed as a financial creditor or not.

(ii) Section 18 outlines the duties of the Interim Resolution Professional which inter-alia includes the responsibility to

(b)receive and collate all the claims submitted by the creditors to him pursuant to the public announcement made under sections 13 and 15.

The claims then are to be received and collated in accordance with the Chapter IV of the CIRP regulations.

It is an admitted position that the subject claim of Rs. 393.46 Crores was lodged by the respondent no. in Form C as per the procedure prescribed and was also collated and admitted by the RP accordingly, albeit as a related party [1].

(iii) The issue that is sought to be raised now is that the subject admitted claim which has resulted due to an assignment of the debt by SIFL/SEFL to the Respondent no. 2 is basically collusive in nature and as such the amount of the claim, though admitted as a related party debt should not be considered a Financial debt as the same is for the purposes other than providing a genuine financial debt as envisaged in the code.

(iv) The applicant has relied on the judgement of Hon’ble Supreme Court in the case of Phoenix ARC private Ltd. V. Spade &AAA Financial Services Ltd. & Anr. (2021) 3 SCC 475 (“Phoenix ARC Judgment”), wherein in it has been *inter-alia* held that :

56. *Since the commercial arrangements between Spade and AAA, and the corporate debtor were collusive in nature, they would not constitute a*

[1] Page 47 & 48 of IA 1377/2022

"financial debt". Hence, Spade and AAA are not financial creditors of the corporate debtor.

(v) The applicant has relied on two avoidance transaction IAs filed by the Administrator in the matter of CIRP of SIFL & SEFL under section 66 wherein the subject assignment and its financing is purportedly determined to be fraudulent. It is relevant to mention here that the CIRP of SIFL &SEFL was initiated by virtue of an order dated 08.10.2021 of this Tribunal under FSP rules of the code , after their boards were superseded by RBI and Mr. Rajneesh Sharma was appointed as an Administrator on 4.10.2021. These applications being IA(IB)744(KB)2022 and IA(IB)77(KB) 2023 in CP(IB)294(KB)2022, filed by the Administrator under Section 66 of the code, are pending adjudication of Court no. 1 of this tribunal.

(vi) Section 66 deals with " Fradulent trading or wrongful trading" is reproduced below:

> ***66. Fraudulent trading or wrongful trading***. -
> *(1) If during the corporate insolvency resolution process or a liquidation process, it is found that any business of the corporate debtor has been carried on with intent to defraud creditors of the corporate debtor or for any fraudulent purpose, the Adjudicating Authority may on the application of the resolution professional pass an order that any persons who were knowingly parties to the carrying on of the business in such manner shall be liable to*
> *make such contributions to the assets of the corporate debtor as it may deem fit.*
> *(2) On an application made by a resolution professional during the corporate insolvency resolution process, the Adjudicating Authority may by an order direct that a director or partner of the corporate debtor, as the case may be, shall be liable to make such contribution to the assets of the corporate debtor as it may deem fit, if-*
>> *(a) before the insolvency commencement date, such director or partner knew or ought to have known that the there was no reasonable prospect of avoiding the commencement of a*

corporate insolvency resolution process in respect of such corporate debtor; and

(b) such director or partner did not exercise due diligence in minimising the potential loss to the creditors of the corporate debtor.

2[(3) Notwithstanding anything contained in this section, no application shall be filed by a resolution professional under sub-section (2), in respect of such default against which initiation of corporate insolvency resolution process is suspended as per section 10A.]

Explanation. – For the purposes of this section a director or partner of the corporate
debtor, as the case may be, shall be deemed to have exercised due diligence if such diligence was reasonably expected of a person carrying out the same functions as are carried out by such director or partner, as the case may be, in relation to the corporate debtor.

(vii) The RP in the instant case has **not** filed any Avoidance (incl.Fradulent) transaction in the present matter and has relied only on the such applications having been filed in the CIRP of the SIFL& SEFL by the Administrator therein to and seeks an order from this Adjudicating Authority upon arriving at a *"conclusion that the Claims of Rare ARC ought to be rejected as being fraudulent, it may pass such orders in this regard as it may deem fit"*. As already stated above these applications[2], are pending adjudication by the Adjudicating Authority in Court no. 1.

(viii) Further the applicant has also relied on the averments in the Avoidance IAs (supra) by the Administrator, the applicant contends that since the Administrator has to make a determination and form an opinion in terms of Regulation 35A of the code in regard to the Avoidance & fraudulent transactions, before filing the application with this Adjudicating Authority , and the very fact that the applications have been filed by the Administrator as being fraudulent, these pass the muster of " Collusive

[2] IA 744/2023 and IA 77/2022

transactions" and therefore in line with Phoenix judgment, the respondent no. 2 should not be recognised by the RP as a Financial Creditor.

(ix) In view of the foregoing, we are inclined to hold that no clear case has been made out either by the applicant or not even by the RP that the assignment to RARE ARC by SIFL/SEFL is collusive in nature so that the judgement of the Hon'ble Supreme Court (supra) can find its application in the instant case. As such we are not passing any directions on the RP as prayed at prayer no. (a) of this IA.

(x) We however make it clear that we are by no means commenting on the merits of two IAs (supra), which are pending adjudication before Court no. 1 of this Adjudicating Authority.

9. The present Interlocutory Application being **I.A. (I.B.) No. 1377/KB/2022** is accordingly **disposed of** in terms of above order.

10. The Registry is directed to send e-mail copies of the order forthwith to all the parties inclusive of the Counsels on Record.

11. Urgent certified copy of this order, if applied for, be issued upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Bidisha Banerjee
Member (Judicial)

This Order is signed on the 18th Day of October, 2023.

Bose, R. K. [LRA]