IN THE NATIONAL COMPANY LAW TRIBUNAL, DIVISION BENCH – I, CHENNAI

IA/493(CHE)/2023 in IA/349(CHE)/2023 in CP(IB)/279/CHE/2021

(filed under Section 60(5) read with Section 30(2) of the Insolvency And Bankruptcy Code, 2016)

*In the matter of **GBJ Hotels Private Limited***

1. **G. Balasubramaniam,**
   Promoter / Suspended Director of GBJ Hotels Private Limited
   T.S. No. 4035, Krishnasamy Nagar, 50 feet Road,
   Ramanathapuram,
   Coimbatore – 641 045

2. **B. Jeevarathinam**
   Suspended Director of GBJ Hotels Private Limited
   T.S. No. 4035, Krishnasamy Nagar, 50 feet Road,
   Ramanathapuram,
   Coimbatore – 641 045

... *Applicants*

-Vs-

1. **CA Mahalingam Suresh Kumar**
   Resolution Professional for
   GBJ Hotels Private Limited
   IBBI/IPA-001/IP-P00110/2017 – 2018/10217
   Having Office at
   S.P.P. & Co., Chartered Accountants,
   27/9, Nivedh Vikas, Pankaja Mill Road,
   Puliyakulam Road, Coimbatore – 641 045

2. **Indian Overseas Bank**
   Represented by its Chief Manager
   Asset Recovery Management Branch
   Cross – cut road, Gandhipuram
   Coimbatore – 641 012

3. **K.P. Advisory Services LLP**
D. No. 6-3 – 865/1/2, Flat No.203,
Greenland Apartments,
Ameerpet, Begumpet,
Secunderabad, Hyderabad,
Telangana – 500 016

... *Respondents*

Order pronounced on 25th August, 2023

CORAM:

Justice RAMALINGAM SUDHAKAR, PRESIDENT
SAMEER KAKAR, MEMBER (TECHNICAL)

For Applicant	*: K.S. Ravichandran, PCS*
For Respondent	*: E. Om Prakash, Senior Advocate – R1* *For A. G. Sathyanarayana, Advocate* *M.L. Ganesh, Advocate – R2* *S. Satish Parasaran, Senior Advocate – R3* *For Vishnu Mohan, Advocate*

ORDER

(Heard through physical mode)

This Application has been filed by the Suspended Directors of the Corporate Debtor viz. GBJ Hotels Private Limited under section 60(5) read with 30(2) of IBC 2016 seeking relief as follows:

a) *To reject the Resolution Plan of the Respondent No. 3 / Successful Resolution Applicant, which would otherwise be prejudicial to the interest of the Applicants / suspended Directors herein;*

b) *To grant such other further reliefs as this Hon'ble Tribunal may deem fir considering the facts and circumstances of the case and thus render justice;*

2. **FACTS IN BRIEF :-**

2.1. The Corporate Insolvency Resolution Process (in short 'CIRP') in respect of the Corporate Debtor viz. GBJ Hotels Private Limited was initiated by this Tribunal vide its order dated 19.04.2022 and the 1st Respondent herein was appointed as the Interim Resolution Professional (in short 'IRP').

2.2. The 1st Respondent has caused a public announcement in Form – A as per Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations') in 'Dinamani' (Tamil) & 'The New Indian Express' (English) as per Section 15 of the IBC, 2016.

2.3. It is stated that there were 4 final Resolution Applicants in respect of the Corporate Debtor viz.

(a) Bommidala Enterprises Private Limited
(b) Sayaji Hotels Limited
(c) KP Advisory Services LLP; and
(d) Chettinad Logistics Private Limited

2.4. It is stated that brief highlights of the presentation was made before the CoC in the 9th COC Meeting by the Resolution Applicants. Further, it is stated that as on 21.12.2022, the Resolution Plan of M/s. Bommidala Enterprises Private Limited proposed the highest Resolution Plan Value (RPV) of Rs. 120 Crores (with recovery of 70.6%) compared to the RPV of the other three Resolution Applicants.

2.5. It is stated that the RP has suggested that the highest bidder be chosen as the 'Anchor Bid' for the purposes of selecting Resolution Plan under 'Swiss Challenge' price determination auction and the COC members present at the

9th COC meeting agreed for adopting the bid of M/s. Bommidala Enterprises as the 'Anchor Bid'.

2.6. Thereafter, it is stated that two rounds of Swiss Challenge method of bidding, took place on 29.12.2022 and 02.01.2023 and at the end of the 2nd round of Swiss Challenge, M/s. KP Advisory Services LLP emerged as the successful bidder and requested time for submission of their revised Resolution Plan incorporating their final bid amount in the Resolution Plan.

2.7. Thus, it is stated that post Swiss Challenge Process, on 01.02.2023, at the 11th COC Meeting, the revised Resolution Plans of both K P Advisory Services LLP and Bommidala Enterprises Private Limited were put to vote. It was informed by the RP, that both the Resolution Applicants are compliant under Section 29A of the IBC, 2016, both the Resolution Plans comply with the requirements of Section 30 of the IBC, 2016, meet the mandatory contents provided under Regulation 38 of the CIRP Regulations and provide

for such measures for maximization of the value in compliance with Regulation 37 of the CIRP Regulations.

2.8. It is stated that vide resolution passed in the 11th COC meeting dated 01.02.2023, the final revised resolution plan of the SRA i.e. K P Advisory Services LLP stood approved by a majority vote of **98.34%** by Indian Overseas Bank, the 2nd Respondent / Financial Creditor.

2.9. It is stated that the Applicant, by this instant Application, challenge the approved Resolution Plan of KP Advisory Services LLP, the SRA, as the said Plan is nothing but a farce and an eye-wash. It is submitted that the said Application approved by the COC of the Corporate Debtor and filed by Respondent No. 1/ Resolution Professional with this Tribunal in IA(IBC)/349(CHE)/2023, is prima facie contrary to the provisions of the IBC, 2016 and is liable to be set-aside *in limine*.

3. GROUNDS OF OBJECTIONS

A. CONSTITUTION OF THE SRA / 3RD RESPONDENT – NOT ENTITLED TO SUBMIT A RESOLUTION PLAN

3.1. It is stated that as per section 5 of the Limited Liability Partnership Act, 2008, any individual or body corporate can only become a partner in an LLP. However, in the present case, the SRA which is an LLP consist of (i) Empower Discretionary Trust, (ii) M/s. Surya Trust, (iii) M/s. PVN Raju Discretionary Trust. Hence it was contended that 'Trust' is neither an 'individual' nor a 'body corporate' it cannot become a partner in a LLP. Thus, it was submitted that the 3rd Respondent / SRA cannot submit a Resolution Plan, since it is not properly constituted.

B. PAYMENTS TO OPERATIONAL CREDITORS AND DISCRIMINATORY TREATMENT TO RELATED PARTIES

3.2. It is stated that the SRA provides for payment to 'Other Creditors – Related parties' a sum of Rs.35.49 Crores. It is stated that as per Clause 4.2(4) of the Resolution Plan, the SRA proposes to pay the said proposed sum as 0.01% Non

– Cumulative Redeemable Preference Share (NCRPS) of Re.1/- of the Corporate Debtor, to settle the entire amount of admitted claim. It is stated that the said arrangement made by the SRA is discriminatory and the SRA in the name of providing payments to the Applicants, have provided for a clause suggesting issuance of NCRPS.

3.3. It is stated that the Applicants herein fall under the category of "related party unsecured financial creditors." The RP however, has failed to even classify them correctly. The Resolution Plan proposed by the SRA provides for a total payment of Rs.6,96,796/- (Rupees Six Lakhs Ninety-Six Thousand Seven Hundred and Ninety-Six Only) to the Operational Creditors (Workmen & Employees) and provides for a sum of Rs. 18,89,56,461/- (Rupees Eighteen Crores Eighty-Nine Lakhs Fifty-Six Thousand Four Hundred and Sixty-One Only) to the Operational Creditors (other than Workmen & Employees).

3.4. However, it is stated that the SRA, has very discretely made out a new category of creditors called "Other Creditors Related Parties" and proposed a payment in the form of NCRPS. Such categorisation is nothing but moonshine of an apparent proposal for payment, cleverly carved out for the purposes of increasing the Resolution Plan Value and squarely discriminatory in nature. It is stated that the Applicants herein, cannot be treated in such manner for the sole reason that they are 'related parties' to the Corporate Debtor. It is stated that the RP and the COC ought to have ensured that there is equitable treatment of similarly situated creditors.

3.5. It is stated that the provisions of IBC, 2016, only creates 'Related Party' as a separate class for the exclusion from COC and disentitling Related Parties from filing Resolution Plans. Other than this, the I&B Code does not contemplate any other distinction between related parties and other creditors for payment of dues. This current Resolution Plan is discriminatory as it provides for a differential mode of

payment in the form of NCRPS to the Applicants herein, merely because they are related parties.

3.6. Thus, it is stated that in the absence of a classification of a related party as a separate class for payment of creditors under a Resolution Plan, the same is impermissible in law and violative of the IBC, 2016 and Article 14 of the Constitution of India.

C. <u>RESOLUTION PLAN VALUE IS FARCE</u>

3.7. It is stated that the SRA and the COC has failed to see that the Resolution Plan value has been ornamentally jacked up by providing for Rs. 10 Cores towards non-existent "CIRP Costs", Rs.5 Crores towards unnecessary "Contingencies" and Rs.35 Crores padded up by agreeing to issue 0.01% preference shares redeemable in 20 years. It is stated that the sanction letter dated 04.10.2017 issued by the Indian Overseas Bank, will show that the valuation of the prime security was Rs. 194 Crores, at that point of time itself,

when the Corporate Debtor had just commenced its operations.

3.8. It is stated that if stakeholders are likely to get more than what a Resolution Plan offers, *ipso facto*, it is clear that there is "no maximisation of value of assets". Thus, there is no proof of any negotiation with the SRA for the purpose of maximisation of value of assets and the Resolution Professional is not precluded from adding a premium solely because from day one the SRA will be able to enjoy the entire revenue generated from the hotel property, without any waiting period for construction or for any other purposes whatsoever.

D. MATERIAL IRREGULARITY

3.9. It is stated that specific amendment to the CIRP Regulations under Regulation 36C, has been made for the purpose of a proper preparation of a marketing strategy for the Corporate Debtor's assets, so that an effort is made in a befitting manner to bring maximisation of value of assets of

Corporate Debtor. However, it is stated that in the present case, no such effort to this effect was undertaken except making two Form-G advertisement in "Economic Times" inviting Expression of Interests from Prospective Resolution Applicants ('PRA).

3.10. It is stated that no 'Sector' specific effort was made by the RP in order to find a better PRA who can bring better value higher than the fair value of the assets of the Corporate Debtor.

3.11. It is stated that in the present case, the Liquidation value is arrived at Rs.210 Crores. However, the Resolution Plan which has a value of Rs.134 Crore value has been submitted as if it is worth Rs. 184 Crores. Since the COC, consisting of the sole financial creditor gets the whole of the money, unmindful of the other stakeholders, breaching the trust and betraying the stakeholders, the Resolution Plan stood to be approved.

3.12. It is stated that the bank, being a creditor, had diverted funds of the Corporate Debtor more than two years prior to the commencement of the CIRP, and such diversion of funds constitute 'preferential' treatment to a financial creditor which is contrary to the Scheme of the Code and they ought to be brought back to COC and made available for distribution to stakeholders. It is stated that the Corporate Debtor was running their business with 20% cut-back facility provided by the Financial Creditor. It is stated that, the sole Financial Creditor viz. IOB, the 2nd Respondent herein in utter transgression of fiduciary responsibility had organized the CIRP in a such a manner that it alone enjoys the benefits of the Resolution Plan leaving all other stakeholders high and dry. Besides pocketing money in a preferential manner for its sole benefit, the 2nd Respondent / Financial Creditor has approved such a plan where the resolution plan value has been wholly appropriated by the sole Financial Creditor, and that too in cash.

3.13. It is stated that the RP has admitted a total of 30 claims of the Operational Creditors (other than Workmen and Employees and Government Dues) as on 13.12.2022 to the tune of Rs. 13,55,03,657/- (Rupees Thirteen Crores Fifty-Five Lakhs Three Thousand Six Hundred and Fifty-Seven Only). It is stated that out of the above Rs.13.55 Crores, the claim of one M/s. B.E. Billimoria & Co Limited of Rs.9,18,48,031/- (Rupees Nine Crores Eighteen Lakhs Forty-Eight Thousand and Thirty-One Only), has been admitted by the RP.

3.14. It is stated that the above claim ought not to have been admitted, on account of the provisions of the Arbitration and Conciliation Act, 1996 read with the moratorium contained in Section 14 of the I&B Code. The RP has overstepped his jurisdiction and converted a disputed liability into an admitted claim, contrary to the provisions of the IBC, 2016 and thereby prejudged the OP No. 44 of 2021 filed by the Corporate Debtor before the Hon'ble

Madras High Court under Section 34 of the ACA. It is stated that the above flaw is not an ordinary matter. It cannot be brushed aside as a matter having a bearing on the distribution side alone. It speaks volumes about the arbitrary manner in which the Corporate Insolvency Resolution Process (CIRP) have been carried out.

3.15. It is stated that it is shocking to know that much contrary to the amended Regulation 34B of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the COC of the Corporate Debtor at the 11th Meeting held on 01.02.2023 has approved a performance incentive to a roaring extent of 2.5% payable to the RP. It is stated that the Resolution Plan itself appears to have been presented in a surreptitious way, as if it is of Rs. 184 Crores in value. Over and above this, the RP has sought and the COC has in fact approved a performance-linked incentive as per Regulation 34B(4) of the CIRP Regulations, as aforesaid.

4. Under the aforementioned circumstances, the Applicant states that the if such a Resolution plan is approved, the same would case great irreparable loss, injury, prejudice and hardship for the Application and accordingly sought for rejection of the said Resolution Plan.

5. The 1st and the 3rd Respondent have filed their counter refuting the allegations and averments made by the Applicant and the Applicant has filed their rejoinder.

6. Heard the submissions made by the Learned Authorized Representative for the Applicant and the Learned Senior Counsel for the Respondents. The objections raised by the Learned Authorized Representative for the Applicant are dealt with in ad-seriatim hereunder;

7. In so far as the objection relating to the constitution of the LLP of the Resolution Applicant is concerned and also in relation to other issues relating to statement that the Resolution Plan value is farce, and admission / rejection of the claim by the RP, we find it apt to refer to the Judgment of the Hon'ble NCLAT in the matter of **Dr. Ravi Shankar**

Vedam -Vs- Tiffins Barytes Asbestos and Paints Limited & 2 Ors in *TA (AT) NO. 134/2021 (Company Appeal (AT) (Ins) No. 653/2019)* wherein at para 31 and 32 has held as follows;

> 31. The Hon'ble Supreme Court in the matter of 'Arunkumar Jagatramka V. Jindal Steel & Power Ltd. & Anr.', reported in [(2021) 7 SCC 474] in Para 95 has observed as follows:
>
> > *" 95. At this juncture, it is important to remember that the explicit recognition of the schemes under Section 230 into the liquidation process under the IBC was through the judicial intervention of Nclat in Y. Shivram Prasad [Y. Shivram Prasad v. S. Dhanapal, 2019 SCC OnLine NCLAT 172]. Since the efficacy of this arrangement is not challenged before us in this case, we cannot comment on its merits. However, we do take this opportunity to offer a note of caution for NCLT and Nclat, functioning as the adjudicatory authority and appellate authority under the IBC respectively, from judicially interfering in the framework envisaged under the IBC. As we have noted earlier in the judgment, the IBC was introduced in order to overhaul the insolvency and bankruptcy regime in India. As such, it is a carefully considered and well thought out piece of legislation which sought to shed away the practices of the past. The legislature has also been working hard to ensure that the efficacy of this legislation remains robust by constantly amending it based on its experience. Consequently, the need for judicial intervention or innovation from NCLT and NCLAT should be kept at its bare minimum and should not disturb the foundational principles of the IBC. This conscious shift in their role has been noted in the report of the Bankruptcy Law Reforms Committee (2015) in the following terms:*
> >
> > *"An adjudicating authority ensures adherence to the process*
> > *At all points, the adherence to the process and compliance with all applicable laws is controlled by the adjudicating authority. The adjudicating authority gives powers to the insolvency professional to take appropriate action against the Directors and management of the entity, with recommendations from the creditors committee. All material actions and events during the process are recorded at the adjudicating authority. The*

adjudicating authority can assess and penalise frivolous applications. The adjudicator hears allegations of violations and fraud while the process is on. The adjudicating authority will adjudicate on fraud, particularly during the process resolving bankruptcy. Appeals/actions against the behaviour of the insolvency professional are directed to the Regulator/Adjudicator."

(Emphasis Supplied)

32. From the aforenoted para, **it is clear that the 'Foundational Principles' of the Insolvency and Bankruptcy Code, cannot be disturbed and this Tribunal is of the considered view that giving the 'Shareholder', the 'locus' to challenge the approval of the Resolution plan tantamounts to 'disturbing the Foundational Principles of the Insolvency and Bankruptcy Code'.** Keeping in view the facts of the attendant case, the Judgments relied upon by the Appellant are not applicable to the matter on hand.

(emphasis supplied)

8. Thus, the Hon'ble NCLAT has categorically held that a 'Shareholders' does not have any locus to challenge the approval of the Resolution Plan since it tantamount to *'disturbing the Foundation Principles of the Insolvency and Bankruptcy Code'.*

9. Be that as it may, even otherwise the issue as to whether the LLP was properly constituted or not under the LLP Act, 2008 is an issue which is required to be adjudicated by a Civil Court of competent jurisdiction and not by this Adjudicating Authority. The Supreme Court in the matter of **M/s. Embassy Property Developments Private Limited**

-Vs- State of Karnataka & Ors. *(2020) 13 SCC 308* wherein it has been held in para 30 as follows;

> **30.** The NCLT is not even a civil court, which has jurisdiction by virtue of Section 9 of the Code of Civil Procedure to try all suits of a civil nature excepting suits, of which their cognizance is either expressly or impliedly barred. Therefore, NCLT can exercise only such powers within the contours of jurisdiction as prescribed by the statute, the law in respect of which, it is called upon to administer.....

10. Also, the Applicant herein would not be in a position to challenge the constitution of the LLP even before a Civil Court of competent jurisdiction, since he does not have any locus and no way connected with the LLP. While that being the case, the Applicant simply under the garb of Section 60(5) of IBC, 2016 cannot seek to challenge the constitution of LLP. What cannot be done directly cannot also be done indirectly.

11. Even otherwise, the Hon'ble NCLAT in the matter of M/s. **Aswathi Agencies -Vs- Bijoy Prabhakaran Pulipra, & 2 Ors** in *Company Appeal (AT) (CH) (Ins.) No. 179 of 2021* at para 66 and 67 has held that there is no legal impediment for a Trust to be a Resolution Applicant;

66. Dealing with the plea of the 'Appellant' that a 'Resolution Applicant', cannot be a 'Charitable Public Trust', and that in the present case, the 'Resolution Applicant' / 'Lissie Medical Institutions', is a 'Charitable Public Trust', and further that, the 'act of acquiring the Corporate Debtor', under the 'Resolution Plan', cannot be placed under any of the purview of 'Charitable Purpose', this 'Tribunal', aptly points out that the decision of the Hon'ble Supreme Court of India (relied on the side of the '2nd Respondent' / 'Successful Resolution Applicant'), in Sole Trustee Loka Shikshana Trust v. Commissioner of Income Tax, reported in 1976 1 SCC at Page 254, wherein it is observed as under:

> *``The difficult question, however, still remains: what is the meaning of "charitable purpose" which is only indicated but not defined by Section 2(15) of the Act? It seems to me that a common concept or element of "charity" is shared by each of the four different categories of charity. It is true that charity does not necessarily exclude carrying on an activity which yields profit, provided that profit has to be used up for what is recognised as charity. The very concept of charity denotes altruistic thought and action. Its object must necessarily be to benefit others rather than one's self. Its essence is selflessness. In a truly charitable activity any possible benefit to the person who does the charitable act is merely incidental or even accidental and immaterial. The action which flows from charitable thinking is not directed towards benefitting one's self. It is always directed at benefitting others. It is this direction of thought and effort and not the result of what is done, in terms of financially measurable gain, which determines that it is charitable. This direction must be evident and obligatory upon the trustee from the terms of a deed of trust before it can be held to be really charitable.''*

67. **To put it precisely, the word 'Person', is defined as per Section 3 (23) (d) of the I & B Code, 2016, which includes a 'Trust', therefore, there is no 'Fetter' / 'Embargo' or a 'Legal Impediment', for a 'Trust', to be a 'Resolution Applicant',** in submitting a 'Resolution Plan' (in the present case), the candid fact, is that the

> 'Successful Resolution Applicant' / 'Lessie Medical Institutions', being a 'Registered Charitable Trust', under the 'Indian Trust Act, 1882'), in 'Corporate Insolvency Resolution Process', in the cocksure earnest opinion of this 'Tribunal'. Looking at from that perspective, the contra plea taken on behalf of the 'Appellant' is not acceded to by this 'Tribunal'.
>
> *(emphasis supplied)*

12. Further, the Applicant nowhere in his application or in the Additional documents has pleaded the issue as to the constitution of the LLP. **Only for the first time, during the course of argument, such a plea was taken without any supporting averment or pleadings in his application or additional document**. The Supreme Court in the matter of **Bachhaj Nahar -Vs- Nilima Mandal and Ors.** *(2008) 17 SCC 491* has held that it is a fundamental principle that a relief is to be granted only with reference to the prayers made in the pleadings:-

> **12.** The object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the court for its consideration. This Court has repeatedly held that the pleadings are meant to give to each side intimation of the case of the other so that it may be met, to enable courts to determine what is really at issue between the parties, and to prevent any deviation from the course which litigation on particular causes must take.

13. The object of issues is to identify from the pleadings the questions or points required to be decided by the courts so as to enable parties to let in evidence thereon. When the facts necessary to make out a particular claim, or to seek a particular relief, are not found in the plaint, the court cannot focus the attention of the parties, or its own attention on that claim or relief, by framing an appropriate issue. As a result the defendant does not get an opportunity to place the facts and contentions necessary to repudiate or challenge such a claim or relief. Therefore, the court cannot, on finding that the plaintiff has not made out the case put forth by him, grant some other relief. The question before a court is not whether there is some material on the basis of which some relief can be granted. **The question is whether any relief can be granted, when the defendant had no opportunity to show that the relief proposed by the court could not be granted. When there is no prayer for a particular relief and no pleadings to support such a relief, and when the defendant has no opportunity to resist or oppose such a relief, if the court considers and grants such a relief, it will lead to miscarriage of justice. Thus it** is said that no amount of evidence, on a plea that is not put forward in the pleadings, can be looked into to grant any relief.

15. The relevant principle relating to circumstances in which the deficiency in, or absence of, pleadings could be ignored, was stated by a Constitution Bench of this Court in *Bhagwati Prasad* v. *Chandramaul* [AIR 1966 SC 735] : (AIR p. 738, para 10)

> *"10. ... If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial,* then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely, in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is : *did the*

parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. *To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another."*

17. It is thus clear that a case not specifically pleaded can be considered by the court only where the pleadings in substance, though not in specific terms, contain the necessary averments to make out a particular case and the issues framed also generally cover the question involved and the parties proceed on the basis that such case was at issue and had led evidence thereon. As the very requirements indicate, this should be only in exceptional cases where the court is fully satisfied that the pleadings and issues generally cover the case subsequently put forward and that the parties being conscious of the issue, had led evidence on such issue. But where the court is not satisfied that such case was at issue, the question of resorting to the exception to the general rule does not arise. The principles laid down in *Bhagwati Prasad* [AIR 1966 SC 735] and *Ram Sarup Gupta* [(1987) 2 SCC 555 : AIR 1987 SC 1242] referred to above and several other decisions of this Court following the same cannot be construed as diluting the well-settled principle that without pleadings and issues, evidence cannot be considered to make out a new case which is not pleaded. **Another aspect to be noticed, is that the court can consider such a case not specifically pleaded, only when one of the parties raises the same at the stage of arguments by contending that the pleadings and issues are sufficient to make out a particular case and that the parties proceeded on that basis and had led evidence on that case. Where neither party puts forth such a contention, the court cannot obviously make out such a case not pleaded, suo motu.**

(emphasis supplied)

13. In the present case, as already alluded *supra* for the first time, during the course of argument, a plea is taken by the Applicant in

relation to the constitution of LLP without any supporting averment or pleadings in his application or additional document. As a result of which, the Respondents have been denied an opportunity to deny the said allegation made by the Applicant, which amounts to violation of Principal of Natural Justice.

14. Hence in view of the decision of the Supreme Court in the matter of **Bachhaj Nahar** *(supra)* and also in view of the dispositive reasoning stated *supra,* the objections raised by the Applicants on the ground that the constitution of LLP, has no legal legs basis and is rejected.

15. In so far objections raised by the Applicant as to discrimination in payment to the Related parties are concerned, we find it apt to refer to the Judgment of the Hon'ble Supreme Court in the matter of **M.K. Rajagopalan -Vs- Dr. Periasamy Palani Gounder & Anr** in *Civil Appeal Nos. 1682 – 1683 of 2022,* wherein at para 52 to 54, it is held as follows;

> 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.
>
> 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 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.

(emphasis supplied)

16. The Judgment of the Hon'ble Supreme Court in the case of M.K. **Rajagpolan** *(supra)* would directly answer the objection raised by the Applicant in relation to the discrimination of payment in the Resolution Plan. Thus, the objections raised by the Applicants on the said ground also has no legal basis and is rejected.

17. In so far as the plea of material irregularity is concerned, the Learned Authorized Representative for the Applicant submitted that the RP has not prepared a proper marketing strategy in order to invite Resolution Applicants and no specific 'Sector' based effort was made by the RP in order to find a better PRA who can bring better value higher than the fair value of the assets of the Corporate Debtor.

18. It is required to be noted that the Applicant has not pointed out any violation in relation to the procedure through which the Resolution Plan was invited from the PRAs. However, it is the contention of the Applicant that the RP has not made a proper marketing strategy. In this connection, reference was made to Regulation 36C of CIRP Regulations which states as follows;

> **36C. Strategy for marketing of assets of the corporate debtor.**
>
> (1) The resolution professional shall prepare a strategy for marketing of the assets of the corporate debtor in consultation with the committee, where the total assets as per the last available financial statements exceed one hundred crore rupees and may prepare such strategy in other cases.
>
> (2) Decision of implementing such strategy along with its cost shall be subject to the approval of the committee.
>
> (3) The member(s) of committee may also take measures for marketing of the assets of the corporate debtor

19. It could be seen that the aforesaid Regulation i.e. Regulation 36C was inserted by Notification No. IBBI/2022-23/GN/REG093, dated 16th September, 2022 (w.e.f. 16-09-2022). In the present case, the 1st Form – G was approved by the CoC as early as on 02.06.2022 and was published on 03.06.2022. The 2nd Form – G was published on 16.09.2022 i.e., the

date on which Regulation 36C of CIRP Regulations, 2016 came into force. It is seen that Form – G was given vide publicity by advertising in "Economic Times", (English) All India Editions" and "Dinamani", (Tamil) Coimbatore Edition". Hence, the arguments made by the Learned Authorized Representative for the Applicant is *non est* in law and without any substance and is required to be rejected outright.

20. In relation to the issue of cut – back facility of 20% paid to the Financial Creditor to be treated as 'preferential transaction', the said objection is required to be nipped at the bud itself since one of the main ingredients of Section 43 of IBC, 2016 is that the impugned transaction should have the effect of putting such creditor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with Section 53 of IBC, 2016. In the present case, the cut back 20% was offered to the **sole** Financial Creditor / 2nd Respondent viz. Indian Overseas Bank, who is the **only** secured creditor in respect of the Corporate Debtor and is standing first in the queue under Section 53 of IBC, 2016. Hence it is absolutely preposterous on the part of the Applicant to state that the cut back facility of 20% is a 'preferential

transaction', since the said Financial Creditor is the only person entitled to such cut back facility. No other Financial Creditor has placed such an objection before us. Thus, the objections raised by the Applicants on the said ground has no legal basis, hence rejected.

21. In relation to the issue of payment of performance incentive to the RP is concerned, it is apposite to refer to Regulation 34B of the CIRP Regulations, which states as follows;

> **34B. Fee to be paid to interim resolution professional and resolution professional.**
>
> (1) The fee of interim resolution professional or resolution professional, under regulation 33 and 34, shall be decided by the applicant or committee in accordance with this regulation.
>
> (2) The fee of the interim resolution professional or the resolution professional, appointed on or after 1st October 2022, shall not be less than the fee specified in clause 1 for the period specified in clause 2 of Schedule-II: Provided that the applicant or the committee may decide to fix higher amount of fee for the reasons to be recorded, taking into consideration market factors such as size and scale of business operations of corporate debtor, business sector in which corporate debtor operates, level of operating economic activity of corporate debtor and complexity related to process.
>
> (3) After the expiry of period mentioned in clause 2 of Schedule-II, the fee of the interim resolution professional or resolution

professional shall be as decided by the applicant or committee, as the case may be.

(4) For the resolution plan approved by the committee on or after 1st October 2022, the committee may decide, in its discretion, to pay performance-linked incentive fee, not exceeding five crore rupees, in accordance with clause 3 and clause 4 of Schedule-II or may extend any other performance-linked incentive structure as it deems necessary.

(5) The fee under this regulation may be paid from the funds, available with the corporate debtor, contributed by the applicant or members of the committee and/or raised by way of interim finance and shall be included in the insolvency resolution process cost.

(emphasis supplied)

22. It is the contention of the Learned Authorized Representative for the Applicants that the COC in its 11th Meeting held on 01.02.2023 has approved a performance incentive to a roaring extent of 2.5% payable to the RP. It was submitted that the same was not in consonance with the table provided under Schedule – II.

23. Regulation 34B (4) of the CIRP Regulations clearly state that the CoC in its discretion may decide to pay the performance – linked incentive fee in accordance with the Schedule or any other performance – linked incentive structure as it deems necessary. In the present case, the CoC exercised its discretion by adopting to the second limb of

Regulation 34B (4) and accorded 2.5% of performance – linked incentive to be paid to the RP. Hence, there cannot be any quarrel by the Applicant in relation to the same.

24. Further, during the course of argument the Learned Authorized Representative for the Applicant raised an issue in relation to the SRA's capability to implement a Resolution Plan. All these issues are squarely falling within the domain of 'commercial wisdom' of CoC and cannot be subject to judicial intervention. In this connection we find it apt to refer to the decision of the Hon'ble Supreme Court in the matter of **Ngaitlang Dhar -Vs- Panna Pragati Infrastructure** *(2022) 6 SCC 172* has held in para 32 as follows;

> 32. It is trite law that "commercial wisdom" of the CoC has been given paramount status without any judicial intervention, for ensuring completion of the processes within the timelines prescribed by IBC. It has been consistently held that it is not open to the adjudicating authority (NCLT) or the appellate authority (NCLAT) to take into consideration any other factor other than the one specified in Section 30(2) or Section 61(3) IBC. It has been held that the opinion expressed by the CoC after due deliberations in the meetings through voting, as per voting shares, is the collective business decision and that the decision of the CoC's "commercial wisdom" is non-justiciable, except on limited grounds as are available for challenge under Section 30(2) or Section 61(3) IBC. This position of law has been consistently reiterated in a catena of judgments of this Court, including:

(i) *K. Sashidhar* v. *Indian Overseas Bank* [*K. Sashidhar* v. *Indian Overseas Bank*, (2019) 12 SCC 150 : (2019) 4 SCC (Civ) 222] ,

(ii) *Essar Steel India Ltd. (CoC)* v. *Satish Kumar Gupta* [*Essar Steel India Ltd. (CoC)* v. *Satish Kumar Gupta*, (2020) 8 SCC 531 : (2021) 2 SCC (Civ) 443] ,

(iii) *Maharashtra Seamless Ltd.* v. *Padmanabhan Venkatesh* [*Maharashtra Seamless Ltd.* v. *Padmanabhan Venkatesh*, (2020) 11 SCC 467 : (2021) 1 SCC (Civ) 799] ,

(iv) *Kalpraj Dharamshi* v. *Kotak Investment Advisors Ltd.* [*Kalpraj Dharamshi* v. *Kotak Investment Advisors Ltd.*, (2021) 10 SCC 401 : (2022) 1 SCC (Civ) 233]

(v) *Ghanashyam Mishra & Sons (P) Ltd.* v. *Edelweiss Asset Reconstruction Co. Ltd.* [*Ghanashyam Mishra & Sons (P) Ltd.* v. *Edelweiss Asset Reconstruction Co. Ltd.*, (2021) 9 SCC 657 : (2021) 4 SCC (Civ) 638]

25. In so far as the issue that the Resolution Plan value is much lesser than the Liquidation value, we may usefully refer to the decision of the Hon'ble Supreme Court in the matter of **Maharasthra Seamless Limited –Vs- Padmanabhan Venkatesh & Ors.** in *Civil Appeal No. 4242 of 2019* at para 26 and 27 has held as follows;

> "26. No provision in the Code or Regulations has been brought to our notice under which the bid of any Resolution Applicant has to match liquidation value arrived at in the manner provided in Clause 35 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons)

Regulations, 2016. This point has been dealt with in the case of Essar Steel (supra). We have quoted above the relevant passages from this judgment.

> 27. It appears to us that the object behind prescribing such valuation process is to assist the CoC to take decision on a resolution plan properly. Once, a resolution plan is approved by the CoC, the statutory mandate on the Adjudicating Authority under Section 31(1) of the Code is to ascertain that a resolution plan meets the requirement of sub-sections (2) and (4) of Section 30 thereof. We, per se, do not find any breach of the said provisions in the order of the Adjudicating Authority in approving the resolution plan."

26. The Hon'ble Supreme Court has categorically held that there is no provision in IBC, 2016 or in the Regulations which stipulates that the bid of the Resolution Applicant has to match the Liquidation value of the Corporate Debtor. This answers the plea of the applicant.

27. Further, upon perusal of the minutes of the CoC, it is seen that the Applicant have been attending the CoC meetings from time to time. Also, the RP has filed an Application under Section 19(2) of IBC, 2016 i.e. IA(IBC)/641(CHE)/2022 against the Applicants herein for non – cooperation. It is seen from the order dated 28.07.2022, there was no appearance on the part of the Applicants in the said Application. Hence,

this Tribunal was constrained to pass an order against the Applicants herein to hand over the documents to the RP. Further, the Applicants herein who are all along participating in the CoC meetings cannot at this point of time question the valuation of the Corporate Debtor. At this juncture, it is necessary to refer to the Judgment of the Hon'ble NCLAT in **Rohit Jindal -Vs- Fanendra Harakchand Munot** in *Company Appeal (AT) (Ins.) No. 97 of 2023*, wherein at para 7, it has been held as follows;

> 7. The second submission of counsel for the appellant is with regard to valuation of the assets, the valuation of the assets was undertaken by the Resolution Professional in accordance with the CIRP Regulation, 2016. **The promoters if they were aggrieved by the valuation taken by the IRP/RP and the valuation received before the CoC, the course open for the promoters was to approach the Adjudicating Authority questioning the valuation at the relevant time when the question could have been gone into and examined before Form-G was issued and Form-H has been submitted by the Resolution Professional on the basis of the valuation undertaken in the process. At this stage, appellant cannot be allowed to raise the question of valuation**
>
> *(emphasis supplied)*

28. Further, it is also pertinent to mention here that the Applicant herein has been classified as 'Wilful Defaulter' by Reserve Bank of India on 12.04.2022. Thus, in any case, the Applicant herein cannot submit a Resolution Plan, since he is ineligible under Section 29A(b) of IBC, 2016.

29. Thus, upon considering the plea of the applicant and analysing the submission made by the Learned Authorized representative for the Applicant and the Learned Senior Counsel for the Respondents, we have no hesitation to hold that the Applicant has not made out a case to interdict the Resolution Plan approved by the CoC in favour of the successful Resolution Applicant. We also find that there is no error or violation of the IBC, 2016, the attendant Regulations in respect of the CIRP of the Corporate Debtor. In view of the same, we are inclined to dismiss this Application.

30. Accordingly, IA(IBC)/493(CHE)/2023 stands **dismissed**. No costs.

-Sd-

SAMEER KAKAR
MEMBER (TECHNICAL)

-Sd-

Justice RAMALINGAM SUDHAKAR
PRESIDENT

Raymond