

**THE NATIONAL COMPANY LAW TRIBUNAL  
CHANDIGARH BENCH, CHANDIGARH  
(Exercising powers of Adjudicating Authority under  
the Insolvency and Bankruptcy Code, 2016)**

**IA No. 59/2021 & 296/2021  
In  
CP (IB) No.174/Chd/Chd/2018  
(admitted)**

**In the matter of:**

Small Industries Development Bank of India (SIDBI)

....Petitioner-Financial Creditor

Versus

International Mega Food Park Limited

....Respondent-Corporate Debtor

And in the matter of:-

**IA No.59/2021**

**Under Section 60(5) of the IBC, 2016**

**Schreiber Dynamix Dairies Private Limited**

having its registered office at  
215, Atrium Building, C wing,  
Unit-1018, 10th Floor, Andheri Kurla Road,  
Andheri East, Mumbai-400093.

...Applicant

Vs.

**Mr. Sumat Kumar Gupta,**

Resolution Professional of International Mega Food Park Ltd.  
having its registered address at  
Manmohan House-2581/3B/1. Ghora Factory Road.  
Industrial Area-A, Ludhiana-141001.

...Respondent

**And in the matter of IA No. 296/2021**

**Central Goods and Service Tax, Chandigarh  
Through its Deputy Commissioner**

having its registered office at

IA No. 59/2021 & 296/2021  
In  
CP (IB) No.174/Chd/Chd/2018  
(admitted)

Division 1, C R Building Plot No. 19,  
Sector 17C, Chandigarh

...Applicant

**Order delivered on: 28.08.2023**

**Coram: HON'BLE MR. HARNAM SINGH THAKUR, MEMBER (JUDICIAL)  
HON'BLE MR. SUBRATA KUMAR DASH, MEMBER (TECHNICAL)**

**Present:**

For the Applicant in

IA No. 59/2021

: Mr. Manish Jain, Advocate

Ms. Divya Sharma, Advocate

For Applicant in

IA No. 296/2021

: Mr. Sourabh Goel, Advocate

Ms. Shivani Sahni, Advocate

For respondent in

IA No. 59/2021 &

IA No. 296/2021

: Mr. Rajansh Thukral, Advocate

Mr. Sidharth Thukral, Advocate

**Per: Subrata Kumar Dash, Member (Technical)**

**ORDER**

**IA No. 59/2021**

This application has been filed by Schreiber Dynamix Dairies Private Limited (herein referred to as 'SDDPL') against the Resolution Professional with a prayer *inter alia* to set aside the decision of the Resolution Professional dated 23.09.2019 classifying the applicant as a 'related party' of the corporate debtor.

2. The applicant has been classified as a 'related party' of the corporate debtor under Section 5(24)(a) and 5(24)(m) of the Code without providing any basis and has stated the following:

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- i. The Resolution Professional has alleged that the applicant has formed a partnership with the corporate debtor and, therefore, is a 'related party' on the basis of certain provisions in the Lease Deed dated 06.12.2005 executed by the applicant and the corporate debtor (Annexure A-2 of the application), Utility Services and Common Facilities Agreement dated 08.02.2016 (Annexure A-3 of the application). It is stated that at the request of the corporate debtor, the applicant agreed to support the corporate debtor in order to enable to supply utility services to the Applicant and other lessees at the Food Park as well as also to the operations of the Corporate Debtor itself. The applicant agreed to invest monies for modifying the utility assets, pre-operative expenses, and working capital. Accordingly, on 08.12.2017, the applicant and the corporate debtor executed a Utility O & M Agreement which *inter alia* provided that the Applicant had the right to operate and manage some of the utility assets and appoint a third party for the same. The Applicant and the Corporate Debtor also agreed that the Applicant would appoint Thermax Limited for operating and maintaining the boilers, refrigerators, and compressors. The Utility O & M Agreement also provided a profit-sharing mechanism whereby the surplus generated from the utility operations would be shared between the Applicant and Corporate Debtor in an agreed ratio. A copy of the Utility O & M Agreement dated 08.12.2017 has been attached as Annexure A5 to the application.
- ii. It is stated that the Corporate Debtor and the Applicant mutually decided to terminate the Utility O & M Agreement with effect from 31.01.2019. It is further stated that the letter dated 31.12.2018 formed a part of Form C

dated 14.03.2019 submitted by the Applicant with the Respondent vide its email dated 14.03.2019. It is stated that the respondent, therefore, at all material time had knowledge of the letter dated 31.12.2018.

- iii. The application under Section 7 of the Code against the corporate debtor was admitted by this Tribunal's Order dated 28.02.2019. After submission of his claim, the Applicant sent an email to the Resolution Professional calling upon to admit the Applicant's claim immediately and also to include the Applicant as a Member of the CoC. Subsequently, on 06.05.2019, the Applicant received an email from the Resolution Professional wherein it was *inter alia* stated that the applicant is a related party of the corporate debtor under Section 5(2)(m) of the Code. Though the applicant was allowed to attend the third meeting of the CoC on 13.05.2019, he was prevented from voting on the ground that it was a related party of the corporate debtor. The applicant has placed on record the large number of emails constituting the correspondence of this issue of the related party with the Resolution Professional. It is stated that the applicant is merely a lessee of the corporate debtor and no essential, technical information is being provided to or from the corporate debtor.
- iv. It is stated that not a single instance of the applicant sharing essential, technical information with the corporate debtor is placed on record. It is also stated that Clause XVIII (Pg. 90 of the Application) of the O&M Agreement specifically records the understanding between the parties that

*“The Parties' relationship is at all times that of Independent contractors. No provision of the Agreement creates a joint venture or partnership between the Parties between the parties or makes a Party*

*the agent of the other Party for any purpose (unless otherwise agreed therein)".*

3. The respondent has filed his reply by Diary No. 00029/01 dated 15.02.2021, stating that the Resolution Plan is pending before the Adjudicating Authority for approval, the applicant is declared as a related party based on the Utility Operation & Management Agreement dated 06.12.2017 entered into between the applicant and the corporate debtor. (Annexure A-5 of the application). It is submitted that a letter dated 31.12.2018 issued by the applicant to the corporate debtor stating that by virtue of the terms of the agreement, the decision to exit the Utility Operation & Management Agreement expired on 31.01.2019. Thus, the applicant is no more a related party. The authenticity of the letter dated 31.12.2018 is questioned by the respondent-Resolution Professional on various grounds. It is also pointed out that instead of 3 months' notice contemplated for termination of the agreement, stated to be terminated with one month's notice. The respondent has also raised the issue of limitation invoked by the impugned order passed on 23.09.2023 has been challenged by the applicant by filing an application on 15.01.2021. It is further stated that the Resolution Plan is on the verge of approval by the Bench and hence, this application is absolutely untimely.

4. Rejoinder has been filed by diary No. 0029/3 dated 01.03.2021, wherein it is stated that the applicant took a portion of the food park on lease from the corporate debtor and the corporate debtor was to provide the applicant certain utilities required for running the manufacturing facilities such as electricity, steam, refrigeration, cold storage etc.

i. The corporate debtor found it difficult to provide the utilities due to financial difficulties and frequent breakdown of its utility. On 08.12.2017, the

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(admitted)

applicant and the corporate debtor executed a Utility Operation and Management Agreement (hereinafter referred to as Utility O & M Agreement).

- ii. The applicant and the corporate debtor also agreed that the applicant would appoint Thermax Ltd. for operating and maintaining the building, refrigeration, and compressors. The said agreement in no way demonstrates that there has been an exchange of essential technical information between the applicant and the corporate debtor.
- iii. It is submitted that the RP has placed undue emphasis on the solitary clause of the Utility O & M Agreement which states that the applicant shall share the income, after meeting all expenses incurred for utilizing assets, to allege that the corporate debtor and the applicant have formed a partnership and are therefore related parties under Section 5(24) (a) of the Code, 2016.
- iv. It is submitted that Clause XVIII of the Utility O & M Agreement (Annexure A-5 to the application) clearly states that the relationship between the corporate debtor and the applicant is at all times that of an independent contractor and that the agreement does not create any partnership between the parties. In view of the precarious financial conditions of the corporate debtor, the applicant instead of charging the corporate debtor agreed to share the surplus after meeting the expenses.
- v. It is submitted that even assuming for the sake of agreement that the corporate debtor and the applicant formed a partnership, it would not bring the applicant under the provisions of Section 5(24) (a) of the IBC which provides that: *“Debtor will be considered as a related party of the*

*Corporate Debtor. Further, a 'Corporate Debtor' is defined in section 3(8) of the IBC as a corporate person who owes a debt to any person. "Corporate person" is defined in section 3(7) of the I&B Code, as a Company, a Limited Liability Partnership ("LLP), or any other person incorporated with limited liability under any law for the time being in force. A 'Corporate Debtor' as used in Part II of the IBC is therefore a Company or an LLP. Hence, it is submitted that in section 5(24)(a) of the IBC, reference to a director or partner of a Corporate Debtor would mean a director of the Corporate Debtor, where the Corporate Debtor is a Company, and a partner of the Corporate Debtor, where the Corporate Debtor is an LLP. In the present case, since the Corporate Debtor is a Company, the reference to a partner of the Corporate Debtor in section 5(24)(a) of the IBC is not relevant."*

5. Brief note has been filed by the applicant via diary No. 0029/7 dated 27.04.2023, wherein it is stated that the applicant is a subsidiary of USA USA-based company providing utilities in no way indicates that the essential technical information has been exchanged. The corporate debtor offered utilities such as power, steam, refrigeration, etc. but they are not classified as related parties. The applicant agreed to support the corporate debtor to supply utility services at the food park. Apart from being the lessee, and provider of certain utilities, the applicant was also the creditor. There was no exchange of essential technical information between the applicant and the corporate debtor of M/s. Thermax Limited was in fact to be appointed for the operation and maintenance of the utility assets which was subsequently replaced by M/s. Par Techno neither M/s. Thermax Limited nor M/s. Par Techno has been declared as a

'related party'. Clause XVIII, of the Agreement dated 08.12.2017 subsequently mentioned that joint ventures or partnership is not created. The applicant was denied its right of representation, participation, or voting at a meeting of the Committee of Creditors and also denied the opportunity to submit the expression of interest on the basis of wrong declaration as a related party. Applicant's claim has not been admitted.

6. The respondent has filed his response by diary No. 0029/10 dated 18.05.2023, wherein it is stated that:-

- i. There is a delay of over 18 months in filing this application.
- ii. The Utility Agreement is the profit-sharing agreement in the case of the applicant. This agreement clearly mandates of sharing technical information, whether there has been actual sharing or not, is not required to be gone into.
- iii. This O&M Agreement was for the mutual benefit by sharing of profits and by sharing of technical information.
- iv. This Adjudicating Adjudicating cannot decide whether the O&M Agreement subsisted on the date of commencement of CIRP on 28.02.2019, as the said agreement was terminated on 31.12.2018.
- v. The fact of partnership cannot be denied by writing a contrary and invalid clause in the agreement.

7. The short note by the respondent filed by diary No. 0029/12 dated 30.05.2023, states that MGT-7 clearly shows that the letter dated 31.12.2018 regarding the termination of the O & M Agreement dated 08.12.2017 is false and fabricated.

8. Written submissions along with judicial decisions have been filled by the respondent-RP by diary No. 00029/5 dated 06.07.2022, wherein, it is pointed out that there is delay and latches in filing the application under Section 42 of IBC order of liquidation is to be challenged within 14 days. It is further alleged that the letter dated 31.12.2018 is false and fabricated and unless the validity of the O & M Agreement is determined, the related party status of the applicant cannot be determined. This Adjudicating Authority has no jurisdiction to decide the contractual obligations between the parties and this agreement does not relate to insolvency of the corporate debtor. A reference is made to the judgment of Hon'ble NCLAT Chennai Bench in the matter of **Mr. Sumit Binani (RP of M/s KSK Mahanadi Power Company Ltd.) Vs. Mr. V. Venkatachalam, RP, M/s KSK Water Infrastructures Pvt. Ltd & Ors in Company Appeal (AT) (CH) (Insolvency) No. 234 of 2021** which held in para 67 & 68 that

*"67. As the law laid down by the Hon'ble Supreme Court in the decisions above, the NCLT and NCLAT should not interfere with a parties contractual right."*

*68. Accordingly, this Tribunal is not expected to function as an original and Appellate Jurisdiction to decide and adjudicate upon the disputes pertaining to contractual obligations.*

*Accordingly, the issue is answered against the Appellants."*

9. A ledger account statement has been filed by the applicant by filing the compliance affidavit by diary No. 00029/8 dated 27.04.2023, the same is attached as Annexure A-1 to the aforesaid affidavit. A compliance affidavit has been filed by diary No. 00029/9 dated 08.05.2023, wherein the board meeting dated 26.03.2012 and a letter dated 31.12.2018 placed on a sealed cover by an affidavit dated 26.04.2023 filed by diary No. 0029/8 dated 27.04.2023.

10. We have heard the learned counsel for the parties and have gone through the relevant records carefully.

11. The relationship between the applicant and the corporate debtor is very clearly outlined in the Utility Operation and Management Agreement dated 08.12.2017. The relevant clause that needs special mention in the present context are as under:

**“II. Purpose:**

*The Parties concur that the purpose of this Agreement is to enable smooth and steady transfer of the rights to operate and manage the Utility Assets from IMFPL to SDDPL with effect from the Effective Date in order to enable provision of uninterrupted and timely supply of Utility Services for as long as required by SDDPL or till the Lease Deed is in force, whichever is earlier. The transfer of operation and management rights of Utility Assets shall mean the transfer of absolute rights terms of the operation and management of the Utility Assets. ...*

**IV. Investment in Utility Assets:**

- a) *SDDPL shall Invest (the "Investment") an amount up to Rs. 25,000,000/- (Rupees Two Crore, Fifty Lac) in modifying the Utility Assets, and an amount up to Rs. 75,000,000 (Rupees Seven Crore Fifty Lac) towards pre-operative expenses, operating deficit and working capital for running day-to-day operations of the Utility Assets. Details of the investment are provided in Annexure "B" appended to this Agreement.*
- b) *SDDPL shall prepare a monthly Investment statement once the above arrangement commences which would be reviewed by the Project Steering Committee.*

**VII. Appropriation of surplus income generated from the Utility Assets (Profit Sharing):**

*The Parties agree that any income left after meeting all the expenses incurred for utilizing the Utility Assets for provision and consumption of Utilities, shall be appropriated based on profit sharing basis.*

*The Profit (surplus Income) Sharing Mechanism shall be as follows:*

**Revenue from operations (A)**

*Revenue generated by supplying Utilities to SDDPL, IMFPL, PSPCL, and other Persons, If any as per the terms of this Agreement.*

**Cost of operations (B)**

*It is agreed between the Parties that all cost & expenses to run the Utilities operation Including, but not limited to, fuel, repairs, manpower, support services, etc. Incurred by IMFPL and or SDDPL through the designated Bank Account shall be considered as cost of operation of Utilities.*

*Details about the operating cost shall be included in the cost module as specified In Annexure "C".*

**Surplus generated (C) i.e. (A-B)**

*The Parties agree to appropriate the surplus generated from the utility operations during the relevant period are as under:*

20% of the Surplus from Utility operations will accrue to SDDL as a O&M Fee for the period Its Investment in the Utility Operation I INR 100,000,000 (Rupees ten Crores) or more. Any Increase/decrease in the Investment would Increase/decrease the O&M Fee proportionately.

80% of the Surplus from Utility operations will accrue to IMFPL and IMFPL would retain the balance Surplus on all illy billings after deducting costs Incurred by SDDPL based on the cod! module outlined in Annexure "D" and as amended by the steering committee from time to time.

If total monthly Surplus exceeds 6,000,000 (Rupees Sixty Lace) SDDPL will retain 10%, of total surplus towards repayment of Its Investment In the Utility Operation.

All Utility charges shall be subject to applicable taxes.

#### **VIII. Project Steering Committee:**

**d.** All decisions of the Committee shall be taken to the extent possible by unanimity falling which the matter shall be decided by a simple majority. The Committees shall meet as often as required but at least once every month at the registered office of either Party or such other venue as decided mutually by the Pales. Where personal attendance Is not possible. Members can participate by tele-conference. Promptly after each meeting of the Committee. the authorized member shall prepare and circulate the minutes of such meetings and after. approval, the approved minutes shall be signed by the members present at the relevant meeting of the Committees. A presence of 2 (two) members from each of the Parties shall constitute proper quorum for the meeting to proceed with the business. Parties shall be free to Invite other required participants to the meetings; however, such invitees shall not be allowed to vote. The members present shall elect the Chairman for every meeting of the Committee.

However, it being agreed between the Parties that in the event the Committee fails to arrive at a decision either unanimously or by simple majority as set out in sub-clause (d) above, the matter shall be referred to the Managing Directors of the respective Parties, for an amicable solution. The said matter shall be referred to the Managing Directors by any member of the Committee, within 15 (fifteen) days of the last meeting date of the Committee In which the said matter was discussed: The Managing Directors shall endeavor to settle the matter referred within a maximum period of 30 (thirty) days from the date of the said written notice. The discussions shall take place at a mutually agreed venue.

#### **XII. Term and Termination:**

- a) A period of one year from the Transfer Date shall be considered as the Pilot Phase of the operations and management of Utility Assets by SDUPL. This period shall be the Lock-in Period wherein neither Party shall be allowed to transfer back the operations and management of the Utility Assets to the other Party..
- b) Upon the completion of the Lock-in Period, SDDPL shall have the right to exit the Utility Operation Agreement by providing a 3 (Three) month written notice.

- i. If SDDPL decides to exit this arrangement, then the purchase value of any Inventory handed over to IMFPL. and the book value of Capex Incurred by SDDPL In the Utility. operation will be converted into a Loan to IMFPL to be recovered from the Rent/Utility Billings over a 3 years' period. Any profit or loss on the date of exit shall be apportionment In the ratio of 80:20 between IMFPL & SDDPL and the balance due from IMPPL will be converted into Loan.
- c) Once the Pilot phase is over and both parties decide to Continue the Utility Operation Agreement shall be Co-terminus with the Lease agreement.
- d) Once the Investment made by SDDPL is recovered, Parles shall have the right to assign & appoint any third party to manage operations & management of the Utility Asset after mutual discussion. This option shall be exercised jointly by the Parties with the condition that the supply of Uninterrupted Utilities would continue without any Impediment. The notice period and Transition arrangements would also be agreed jointly by both parties in such a situation.
- e) In case IMFPL wants to sell its Utility Assets, the first right of refusal shall be given to SDDPL. SDDPL shall have (ho right to decide the same within 60 days from the date of notice. The sale consideration for the Utility Assets shall be at the fair market value or offer price. It is expressly agreed by the Parties that in the event of a sale of the Utility Asset by IMFPL, SDDPL's right under (his Agreement and its right to receive uninterrupted Utilities shall not be affected in any manner; and that the third party shall also be obligated to provide uninterrupted utilities and assume IMFPL's roles and duties under this Agreement.
- f) IMFPL would have the right to exit the arrangement if there is a significant underachievement of operating and financial KPIs (as outlined in Annexure "D' for more than 6 months at any point of time in the contract. The notice period and transition arrangements in such a scenario would be agreed jointly by both parties in such a situation. If IMFPL exits (ho arrangements In such a scenario then the Inventory taken over by IMFPL from SDDPL on the date of transfer would be converted into a secured loan Inventory handed over to IMFPL and the book value of Capex incurred by SDDPL in the Utility operation will be converted Into a secured loan to IMFPL. to be recovered from the Rent/Utility Billings over a 3-year period.

**XVII. Confidential Information and Intellectual Property:**

- a. 'This Agreement or any other document in relation hereto, Information pertaining to SDDPL products and services, the Intellectual Property (as hereinafter defined), and any information and findings of the respective other Party and Its affiliated companies and their businesses, business plans, past, present, and/or future business activities, processes, techniques, methods, plans, products, product lines, product designs, services, trade secrets, and other technical knowledge or secret processes, customer lists, client lists, vendor details, Financial Information, marketing plans, date, drawings, designs, past data concepts, and Ideas, know. how, techniques, scientific data. Information pertaining to the training

procedures/manuals, business strategies, business plans, price lists, technology of manufacture, marketing, imports, exports, and other operational, managerial, or technical information. contract provisions, organizational structure or personnel data, etc. which are not known to the general public (the "Confidential Information") are to be treated as strictly confidential. Each of the parties agree to use such Confidential Information of the other Party only for the purposes of this Agreement, not to disclose them to third parties, protect them against access by third parties, and pose a corresponding obligation upon their Representatives (with IMFPL remaining responsible for any breach by Representatives and/or Contract Staff), but no less than reasonable care, with reference to this Agreement.

- b. 'The Parties undertake that they shall not during the subsistence of this Agreement or at any time thereafter (a) divulge, disclose or make accessible any Confidential Information of the other Party to any Person whomsoever, firm, partnership, corporation or other corporate entity; or (b) make any use whatsoever of any Confidential Information of the other Party for its own purpose or for any other purpose other than the generation, provision, and/ or consumption of the Utiles hereunder; and shall during the subsistence of this Agreement also use their best endeavors to prevent any other Person from doing so.
- c. All documents furnished by disclosing Party to the other receiving Party pursuant to this Agreement which is specifically marked as confidential or otherwise shall be confidential and form part of the Confidential Information of the disclosing Party and to be subject to the confidentiality obligations as contained herein, unless they are generally known to the public, known to the resolving Party prior to such disclosure or have been or are lawfully disclosed by a third party to the receiving Party whom the receiving Party has no reason to believe that the third party has breached any legal obligations to any Person. Such documents shall be kept carefully and with the same degree of care as receiving Party would have to protect its own confidential Information of similar nature and shall be returned to the disclosing Party (Including all copies thereto) upon request or upon expiry or termination of this Agreement and receiving Party shall purge all electronic versions of such documents from its computer systems at that time.
- d. IMFFL acknowledge and agree that SDDPL shall retain all rights, lie, and Interest in and to the Intellectual Property as owned by SDDPL and IMFPL shall not perform any activity, indirectly or directly, that is inconsistent with or challenges SDDPL's ownership of rights in the Intellectual Property. For the purposes of this Agreement the expression "Intellectual Property" means all patentable subject matter, patented or patent pending inventions, non-patentable subject matter, copyrightable subject matter, copyrights, patents, trademarks, trade secrets, know-how, Ideas, suggestions, inventions, discoveries, designs, developments, improvements (whether or not patentable or copyrightable), processors, computer programs, works of authorship, and/or Improvements that are embodied in or related to the SDDPL Products and/or any materials or information accompanying the

*SDDPL. Products, The provisions of this Clause shall survive the expiry or termination of this Agreement.*

- e. *IMFPL's confidentiality obligations as contained in this Clause, shall survive the expiration of termination of this Agreement and shall remain in full force and effect for at least two (2) after termination or expiration of this Agreement, and for as long as the Confidential Information and/or Intellectual Property remains a trade secret and/or not known to the general public."*

(Emphasis Supplied)

12. To summarise, the aforementioned extracts underline the following facts:
- i. There is a transfer of rights to operate and manage the utility assets from IMFPL to SDDPL during the period in which this agreement was in operation. The SDDPL has ownership as well as joint management of the assets of the corporate debtor.
  - ii. SDDPL has made a considerable investment in the utility assets which will be supplying the critical inputs to all the units operating in the IMFPL, i.e., corporate debtor.
  - iii. There is a provision for revenue sharing by the parties and also the reimbursement of costs incurred by the SDDPL. The decisions in running the utilities will be controlled by a committee having equal representation of the members of SDDPL and IMFPL.
  - iv. There is a provision for the pilot phase and subsequent extensions of the operations based on the mutual consent of the parties.
  - v. Each of the parties has access and right to use the confidential information and intellectual property, only for the purpose of this agreement. Thus, the parties have access to each other's data, drawings, designs, past data concepts and ideas, know-how, techniques, scientific data, information pertaining to the training procedures/manual business strategies, business plans, price lists, technology of

manufacture, marketing, imports, exports and other operational, managerial or technical information. Each of the parties agrees to use such confidential information of the other party only for the purpose of this agreement.

13. The learned counsel for the applicant has vehemently argued that the relationship between the parties as defined in Clause 18 of the Utility Operation and Management Agreement dated 08.12.2017 is that all independent contractors and no provision of the agreement creates a joint venture or relationship between the parties or makes a party the agent of other parties for any purpose except as otherwise expressly stated in this agreement

- i. The learned counsel for the respondents has placed much emphasis on the fact that the termination letter dated 31.12.2018 is not authentic. He states that the said letter provides for termination of the contract by giving a notice of one month which is contrary to the stipulation of a period of three months dated 08.12.2017. Per contra, the applicant has argued that the aforementioned Utility Operation and Management Agreement dated 08.12.2017 was terminated on 31.12.2018, i.e., before the commencement of CIRP on 28.02.2019. We note that if the Utility Operations & Management Agreement is held to be subsisting on the date of commencement of CIRP on 28.02.2019, then the applicant is rightly classified as a 'related party' as the applicant is agitating 'related party' status on the ground that the above-said agreement was terminated on 31.12.2018.

14. We have heard the learned counsel for the parties and have perused the relevant records carefully.

15. In the case in hand, the following issues need to be adjudicated:
- i. Whether the aforementioned Utility Operation and Management Agreement makes the applicant a ‘related party’ of the corporate debtor within the meaning of Section 5 (24) of the IBC.
  - ii. Whether any termination of the Utility Operation and Management Agreement dated 08.12.2017 before the date of initiation of CIRP on 28.02.2019 will save the applicant from coming within the definition of “related party”.
16. Before analyzing the facts of the case, a reference is made to the decision of the Hon’ble Apex Court in **“Phoenix ARC Pvt. Ltd. v. Spade Financial Services Limited (2021); Civil Appeal No. 2842 of 2020** which holds, inter alia, that *“The IBC recognizes that for the success of an insolvency regime, the real nature of the transactions has to be unearthed in order to prevent any person from taking undue benefit of its provisions to the detriment of the rights of legitimate creditors”*. In this connection, the expression ‘related party’ in relation to a corporate debtor as defined in Section 5(24) is extracted below:

*\*5. In this Part, unless the context otherwise requires*

*(24) “related party”, in relation to a corporate debtor, means—*

*xxxx*

*(h) any person on whose advice, directions, or instructions, a director, partner, or manager of the corporate debtor is accustomed to act;*

*xxx*

*(m) any person who is associated with the corporate debtor on account of—*

*(i) Participation in policy-making processes of the corporate debtor; or*

*(ii) having more than two directors in common between the corporate debtor and such person; or*

*(iii) interchange of managerial personnel between the corporate debtor and such person; or*

*(iv) provision of essential technical information to, or from, the corporate debtor;*

(Emphasis Supplied)

To put these provisions in the proper context, we refer to the following extract from the decision of the Hon'ble Supreme Court in the case of

***Spade (Supra):***

*“The expression ‘related party’ is defined in Section 5(24) in relation to a corporate debtor. xx The definition of ‘related party’ under the IBC is significantly broad. The intention of the legislature in adopting such a broad definition was to capture all kinds of interrelationships between the financial creditor and the corporate debtor.”*

xxxx

*“However, in the present case, we are assessing its definition only under the IBC, which is exhaustive. (Emphasis Supplied)*

17. While a strict determination of intent or mens rea may not always be possible in summary proceedings, it is possible to draw the inference from the facts at hand. As outlined in para 12 above, the applicant-SDDPL had considerable investment in and profit-sharing arrangement with the corporate debtor-IMFPL. Under the agreement, the parties had access to the confidential and intellectual property of each other including sharing of know-how, technique, and confidential data. Taking into account the terms and conditions of the Utility O & M Agreement dated 08.12.2017, we hold that the applicant is a ‘related party’ of the corporate debtor within the meaning of the provisions of Section 24 of the IBC.

18. The applicant has challenged its exclusion from COC and has stated that the applicant was denied its right of representation, participation, or voting at a meeting of the COC and also denied the opportunity to submit the expression of interest. It is further stated that the corporator debtor and the applicant mutually decided to terminate the Utility O & M Agreement with effect from 31.01.2019 by a letter dated 31.12.2018.

19. The membership of the CoC is determined in accordance with the provisions of Section 21(2), which reads as:

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

*Provided that a financial creditor or the authorised representative of the financial creditor referred to in subsection (6) or sub-section (6-A) or sub-section (5) of Section 24, if it is a related party of the corporate debtor, shall not have any right of representation, participation or voting in a meeting of the committee of creditors:*

*Provided further that the first proviso shall not apply to a financial creditor, regulated by a financial sector regulator, if it is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares or completion of such transactions as may be prescribed, prior to the insolvency commencement date.”*

(Emphasis Supplied)

20. As in the present case, the CIRP was initiated on 28.02.2019, the applicant averred that at the time of initiation of CIRP, the impugned utility O & M Agreement was terminated. In its averments, the respondent has stated that there are many apparent discrepancies in the aforementioned letter dated 28.02.2019, which leads to the conclusion that the same is not genuine. The learned counsel of the applicant has argued that his client cannot be a ‘related party’ after the cessation of the agreement based on which it was termed a ‘related party’ in the first place. This issue has also been extensively dealt with

in the aforementioned decision of the Hon'ble Apex Court in the case of **Phoenix ARC Pvt. Ltd.(supra)**, wherein the Hon'ble Apex Court held that:

*“Hence, while the default rule under the first proviso to Section 21(2) is that only those financial creditors that are related parties in present IA would be debarred from the CoC, 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”.*

21. In view of the aforementioned facts and judicial decisions, and the terms and conditions of the Utility O & M Agreement dated 08.12.2017 between the parties, we hold that the applicant is a “related party” of the Corporate Debtor and the termination of the said agreement before the CIRP will not make any material change to the status of the applicant who continues to be a ‘related party’ of the corporate debtor after the initiation of CIRP also.

22. Thus, the Applicant's prayer to set aside the decision of the resolution professional dated 23.09.2019 classifying the applicant as a ‘related party’ of the corporate debtor is not acceded to.

23. In the result, IA No. 59/2021 is dismissed and disposed of accordingly.

**IA No. 296/2021**

24. The present application has been filed by the applicant, i.e. the Central Goods and Service Tax, Commissionerate (In short-CGSTC) Chandigarh, for setting aside the impugned order dated 26.11.2020 passed by Resolution Professional whereby the claim of the applicant to the tune of Rs. 4,13,79,360/- has been wrongly rejected on the ground that the Resolution Plan has been finalized by the CoC vide meeting dated 07-03-2020 and the matter is pending before this Hon'ble Tribunal for consideration of the Resolution Plan.

25. The applicant has stated that on the basis of the audit of records for the period from April 2014 to June 2017, the show cause notice was issued on 16.10.2019 to the corporate debtor, who was represented through the Resolution Professional. After adjudication by an order dated 02.11.2020, the demand of Rs. 2,06,79,180/- along with interest towards duty and Rs. 2,06,99,680/- towards the penalty under Section 73(1), 68, 77, 78 & 70 of the Service Tax Act, 1944 and Rs. 50644/- as interest, was confirmed against the debtor. The issues on which the demands were raised pertain to :

- a) Issue related to non-payment of Rs. 1,74,74,091/- under Rule 6(3) of the CCR, 2004.
- b) Issue related to non-payment of Service Tax of Rs. 26,97,673/-.
- c) Short payment of Service Tax of Rs. 4,39,949/- under RCM during reconciliation of accounts with ST-3 returns.
- d) Short-payment of Service Tax of Rs. 49,911/-.
- e) Non-payment service tax on GTA services under RCM of Rs. 3,008/-.
- f) Wrong Utilization of CENVAT credit amounting to Rs. 14,548/-.
- g) Non-payment of interest Rs. 50,644/- on delayed payment of service Tax Challans.
- h) Penalty for non-filing of ST-3 return for the period April-June, 2017.
- i) Late Fee for late filing of ST-3 return for the period April-September, 2016.
- j) Penalty for not making amendments to ST-2 Certificate.

26. The applicant-Revenue Department submitted a claim before the Resolution Professional in Form C dated 06.11.2020, and the RP by an order dated 26.11.2020 had informed the applicant that the said claim is being

rejected on the ground that the Resolution Plan was already approved by the CoC on 07.03.2020 and an application for approval of Resolution Plan was pending for consideration before the NCLT, Chandigarh under Section 36 of the Code.

27. In the reply filed, the resolution professional pointed out that this application is not maintainable because the claim has been filed in the wrong form and format. Furthermore, the claim was filed very late, i.e., after the approval of the resolution plan by the COC. In the present case, the claim resulted from an order dated 02.11.2020 of the applicant, whereas the CIRP was initiated on 28.02.2019. This claim has arisen subsequent to the initiation of CIRP and much beyond the due date for filing the claim before the Resolution Professional. It is submitted that the demand in respect of the alleged claim was created after the commencement of the CIRP on 16.10.2019 when the Moratorium under Section 14 of IBC was in force and no proceeding could be initiated by the Applicant Department against the corporate debtor in terms of the alleged show cause notice dated 16.10.2019. It is further stated that the applicant could have filed their claim to the Resolution Professional since the amount of the claim was already determined and crystallized in terms of the show cause notice.

28. The respondent has relied on the following judicial decisions:

- ***The Hon'ble NCLAT in Company Appeal (AT) (Insolvency) No. 309 of 2018 in the matter of Sales Tax Department, State of Maharashtra Through Deputy Commissioner of State Tax Vs. M/s. Raj Oil Mills Limited & Ors***, wherein it is held that the Sales Tax Department is an operational creditor within a manner of Section an operational creditor within a manner of section 5(20) of the IBC Code.
- ***G.V. Suresh Kumar & Ors. Vs Kapil Dev Taneia, RP in CIRP of M/s Apex Drugs Ltd in Company Appeal (AT) (Insolvency) No.***

**1162 of 2019**, wherein it is held that after the resolution plan that has already submitted, no claim can be entertained by the IRP/RP.

- **The Hon'ble Supreme Court, in the case of Ghanashyam Mishra and Sons Private Limited through the Authorized Signatory versus Edelweiss Asset Reconstruction Company Limited through the Director & Ors in civil appeal no. 8129 of 2019 decided on 13.04.2021**, wherein the clean Slate policy has been laid down.
- **The Asst. State Tax Commissioner, State Tax Department, Government of Maharashtra Vs. Shri Parthiv Parikh Resolution Professional, M/s. Jaihind Projects Ltd and others in Company Appeal (AT) (Ins) No.583 of 2020**, lays down that the delay in claims should not be allowed as it will mere complete disruption of CIRP lays down that the delay in claims should not be allowed as it will mean complete disruption of CIRP.

A perusal of the aforementioned decisions relied upon by the respondent clearly shows that those are not specifically applicable to the facts of the present case.

29. For a proper appreciation of this issue, we refer to the decision of the Hon'ble Supreme Court in the case of **Sundaresh Bhatt, Liquidator of ABG Shipyard vs. Central Board of Indirect Taxes and Customs dated 26.08.2022**, wherein it is held that:

*"The basis of the above discussions, the following are our conclusions:*

*i) Once a moratorium is imposed in terms of Sections 14 or 33(5) of the IBC as the case may be, the Respondent authority only has a limited jurisdiction to assess/determine the quantum of customs duty and other levies. The Respondent authority does not have the power to initiate recovery of dues by means of sale/confiscation, as provided under the Customs Act.*

*ii) After such assessment, the Respondent authority has to submit its claims (concerning customs dues/operational debt) in terms of the procedure laid down, in strict compliance of the time periods prescribed under the IBC, before the adjudicating authority.*

30. In the case at hand, the claim resulted from an order dated 02.11.2020 of the applicant, whereas the CIRP was initiated on 28.02.2019. Keeping in view of the above discussions, we hold that this application is not maintainable because the claim has arisen after the initiation of CIRP and during the moratorium period.. However, the applicant is at liberty to file its claim through an application before this Adjudicating Authority as laid down in the decision of the Hon'ble Apex Court in the case of **Sundaresh Bhatt (supra)**.

31. In view of the strict timelines involved in a resolution process, the applicant can file the same, if so advised, within 30 days of this order.

32. In the result, this IA No. 296/2021 is dismissed and disposed of accordingly.

Sd/-  
**(Subrata Kumar Dash)**  
**Member (Technical)**

Sd/-  
**(Harnam Singh Thakur)**  
**Member (Judicial)**

August 28, 2023  
JGS/PB