NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 70 of 2024

(Arising out of Order dated 04.01.2024 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench (Court-II), Kolkata IA No.1054/(KB)/2023 in CP(IB)/302(KB)2021)

IN THE MATTER OF:

Shristi Infrastructure Development
Corporation Limited
Plot No. X-1,2 & 3, Block - EP,
Sector - V, Salt Lake
City Kolkata WB - 700091 … Appellant

Versus

1. Mr. Avishek Gupta,
Resolution Professional
[Sarga Hotel Private Limited Under CIRP]
CK-104, Sector-2, Salt Lake Kolkata,
West Bengal – 700091

2. JC Flowers Asset Reconstruction Private Limited
12th Floor, Crompton Greaves House,
Annie Desant Road, Worli,
Mumbai, Maharashtra – 400030

3. Shriram Multicom Private Limited
61/29/N3, N.S.B. Road,
Raniganj - 713347, Dist. – Burdwan … Respondents

Present:

For Appellant:	**Mr. Dhruv Mehta, Sr. Advocate with Mr. Shyam Aggarwal, Ms. Sugandh Kochhor, Ms. Srishti, Advocates.**
For Respondents:	**Mr. Ramji Srinivasan, Sr. Advocate with Ms. Pooja Mahajan, Ms. Mahima Singh, Ms. Shreya Mahalwan, Ms. Namrata Saraogi, Ms. Shruti Pandey, Advocates for R1.**
	Mr. Abhinav Vasisht, Sr. Advocate with Mr. Raunak Dhillon, Ms. Madhavi Khanna, Mr. Nihaad Dewan, Ms. P. Singh, Advocates for R2.
	Mr. Joy Saha & Mr. Abhijeet Sinha, Sr. Advocates, Mr. Sidhartha Sharma, Ms. Namrata Basu, Mr. Arjun Asthana, Ms. Shalini Basu, Ms. Trisha Dhera, Advocates for SRA.

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal by Shareholder of the Corporate Debtor has been filed challenging order dated 04.01.2024 passed by National Company Law Tribunal, Kolkata Bench, Court-II, Kolkata in IA No.1054/(KB)/2023, by which order the Adjudicating Authority has allowed the Application filed by Resolution Professional ("**RP**") for approval of the Resolution Plan submitted by Shriram Multicom Pvt. Ltd. – Respondent No.3 herein.

2. Brief facts of the facts of the case giving rise to this Appeal are:

(i) The Appellant, holding Company of Corporate Debtor – SARGA Hotel Pvt. Ltd. has leased a parcel of land admeasuring 3.5 Acres to the Corporate Debtor, on which a five-star Hotel was established. Earlier named as Shristi Hotel, subsequently known as "Westin Hotel", run by the Corporate Debtor.

(ii) On Section 7 Application under Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "**Code**") filed by Yes Bank Ltd. the Corporate Insolvency Resolution Process ("**CIRP**") commenced against the Corporate Debtor by order dated 11.02.2022. Shri Avishek Gupta, the Respondent No.1 herein was appointed as Interim Resolution Professional ("**IRP**") and subsequently conformed as RP. On 28.04.2022, the RP issued Expression of Interest ("**EOI**").

(iii) An IA No.690(KB)/2022 was filed by the Appellant seeking direction from the Adjudicating Authority to exclude the subject property from CIRP of the Corporate Debtor. A prayer was also made for setting aside the Invitation of Expression of Interest dated 28.04.2022. Certain other IAs were also filed in the CIRP of the Corporate Debtor by other entities.

(iv) The RP sought extension of CIRP from the Adjudicating Authority, which was allowed from time to time. The Resolution Plan was submitted by Respondent No.3, along with three other Resolution Applicants. On 30.05.2023, Resolution Plan submitted by Respondent No.3 was approved by 100% vote share of the Committee of Creditors (“**CoC**”).

(v) An IA No.1054 of 2023 was filed by the RP on 02.06.2023 seeking approval of Resolution Plan. An IA No.1221 of 2022 was filed by the Appellant seeking dismissal of IA No.1054 of 2023 until decision in IA No.690 of 2023. IA No.1808 of 2023 was also filed by the Appellant seeking copy of the Resolution Plan. On 06.12.2023, the parties were heard and judgment was reserved in IA No.1054 of 2022.

(vi) On 04.01.2024, the Adjudicating Authority pronounced the order on various Applications including IA No. 690 of 2022, IA No.1054 of 2023, IA No.1221 of 2023 as well as IA No.1808 of 2023. By order dated 04.01.2024 impugned in the present

Appeal, Resolution Plan submitted by Respondent No.3 was approved by the Adjudicating Authority. Aggrieved by the said order, this Appeal has been filed.

3. We have heard Shri Dhruv Mehta, learned Senior Counsel appearing for the Appellant; Shri Ramji Srinivasan, learned Senior Counsel appearing for RP; Shri Abhinav Vasisht, learned Senior Counsel with Shri Raunak Dhillon, appearing for Respondent No.2 – CoC; and Shri Joy Saha, learned Senior Counsel and Shri Abhijeet Sinha, learned Senior Counsel have appeared for, Successful Resolution Applicant ("**SRA**") – Respondent No.3.

4. Shri Dhruv Mehta, learned Senior Counsel appearing for the Appellant submits that the impugned order exceeds the scope of EOI issued by RP, since the Plan contain conditions, which were beyond the submission of EOI. The SRA during arguments sought certain reliefs and concessions pertaining to the balance land outside the leasehold area. The Adjudicating Authority committed error in granting reliefs and concessions with regard to utilities and shared services, which were situated outside the leasehold area. The concessions having sought by the SRA without consent of the Appellant and despite the fact that shared utilities are situated on a land which is owned by the Appellant. The shared utilities and services were not part of Information Memorandum, hence, no reliefs and concessions could have been granted with regard to said shared utilities and services. The Resolution Plan cannot deal with properties, which is not part of the Information Memorandum. It is submitted that the Appellant has filed two separate Applications praying for dismissal of IA

No.1054 of 2023 and for providing copy of the Resolution Plan. The Adjudicating Authority by the impugned order has bound the Appellant in providing unfettered and unbridled access to the shared assets, utilities and equipment/ installations, which belong to the Appellant. The Corporate Debtor was merely allowed to use the same being a subsidiary of the Appellant. The Appellant having challenged the Resolution Plan, the permissive use granted to the Corporate Debtor stands withdrawn and SRA cannot be allowed to have any access to the shared utilities and premises unless permitted by the Appellant. The Resolution Plan has been approved by CoC, whereas several Applications including the Application filed by Rare ARC, questioning the composition of CoC was pending. The Appellant cannot be compelled to provide access to the shared utilities and services, which lay on the land, which is owned by the Appellant. There has to be an arrangement with the Appellant for permitting any access to the shared utilities and services.

5. Shri Ramji Srinivasan, learned Senior Counsel appearing for the RP refuting the submissions of learned Senior Counsel for the Appellant submits that the CoC has approved the Resolution Plan with 100% vote share. The commercial wisdom of the CoC cannot be challenged by the Appellant. There are no ground within the meaning of Section 61(3) to assail the order of Adjudicating Authority approving the Resolution Plan. It is submitted that reliefs and concessions, which have been granted by Adjudicating Authority were necessary for running the Corporate Debtor. It is further submitted that Resolution Plan was not conditional on grant

or non-grant of reliefs and concessions. The grant of reliefs and concessions was the prerogative of the Adjudicating Authority and the Appellant has no right to object to the reliefs and concessions sought by the SRA under the Resolution Plan. All reliefs and concessions prayed and granted were intended at facilitating the smooth and successful implementation of the Resolution Plan by the SRA. The reliefs and concessions granted does not adversely affect the rights/ interest of the Appellant. It is submitted that certain assets of the Corporate Debtor, which were situated on the land owned by the Appellant outside the area leased to Westin Hotel, which includes utilities/ equipment/ installations, which are required for running the Hotel were created and owned by the Corporate Debtor. Since very inception, the assets of the Corporate Debtor were being used to provide basic utility services, which were designed to be used by as common shared services between the Westin Hotel (owned and operated by Corporate Debtor) and the residential commercial project (owned and operated by the Appellant). The Corporate Debtor had ownership rights over the relevant assets and had rights to access relevant assets for the purpose of provision of common shared services. It is submitted that the Appellant was well aware of the Resolution Plan, since its Managing Director was part of the CoC and as Ex-Director of the CD, who was given the copy of the Resolution Plan. All details pertaining to CIRP including the Plan were well within the knowledge of the Appellant. It is further submitted that relevant part of Resolution Plan has already been shared with the Appellant in pursuance of order in IA No.1808 of

2023. It is submitted that IA No.690 of 2022 having decided by separate order with regard to which Company Appeal (AT) (Insolvency) No.71 of 2024 has been filed by the Appellant, hence, no submissions are advanced in this Appeal. It is submitted that various Applications filed by the Appellant were only an attempt to obstruct and frustrate resolution of the Corporate Debtor.

6. The learned Senior Counsel for the CoC also refuted the submissions of the Appellant and submits that the Appellant being the erstwhile Promoter, has no locus to challenge the approval of the Resolution Plan. It is submitted that treatment of certain "shared services' under the Resolution Plan cannot be a ground to challenge the approval of the Resolution Plan, especially when the Resolution Plan expressly specifies that the provision relating "shared services" is not a condition precedent to the implementation of the Resolution Plan. Clause 8.4 and 8.5 of the Resolution Plan specifically provides that requirement of providing the Corporate Debtor/ SRA access to shared services/ utilities/ equipment/ installations would not be a condition precedent to the implementation of the Resolution Plan. The Resolution Plan has already been implemented by SRA and on 14.02.2024 first tranche of the financial payment has been made to relevant stakeholders of the Corporate Debtor. The SRA having acquired the Corporate Debtor as a going concern, permitting the Corporate Debtor to enjoy the shared assets and services, which was being utilized by Corporate Debtor prior to CIRP is essential for implementation of the Resolution Plan. Reliefs and concessions granted access and

utilization of shared utilities and services, which were being enjoyed by the Corporate Debtor prior to CIRP were on the same terms and in the same manner, which in no manner affect the right of the Appellant. The submission of the Appellant that license has been revoked by the Appellant with regard to shared services is completely misconceived. Section 60, sub-section (b) of the Easement Act, prohibits a grantor from revoking a license, when the licensee has executed a work of permanent character and incurred expenses in the execution of the same. *Inter se* dispute between the Appellant and the Corporate Debtor in no manner affect the approval of implementation of the Resolution Plan nor the said dispute needs to be adjudicated by NCLT and this Appellate Tribunal. The Appellant was not entitled to a copy of the Resolution Plan, since at relevant time it was confidential document, whereas the same was illegally obtained by the Appellant through its Managing Director – Sunil Jha, who was Suspended Director of the Corporate Debtor. The SRA is implementing the Resolution Plan, in which Appellant has no right to create obstruction. There are no grounds made out in this Appeal to interfere with the impugned order.

7. Shri Joy Saha, learned Senior Counsel appearing for SRA refuting the submissions of learned Senior Counsel for the Appellant submits that shared services have been continuing since 2007. Shared services were paid by the Corporate Debtor and assets created for utilities and services in the land outside the area of lease hold land was paid by the Corporate Debtor. All assets are mentioned in Fixed Asset Register of the Corporate Debtor and Books of the Corporate Debtor. There was no question of any

license to the Corporate Debtor by the Appellant since they were same entity. There was no question of termination of license, since there was no license in existence. The Appellant had allowed the Corporate Debtor to establish the shared services and utilities on land belonging to the Appellant, which is being used both by the Corporate Debtor and the Appellant to his residential and commercial block. Corporate Debtor having been sold as a going concern, SRA cannot be denied use of the shared utilities.

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

9. The Resolution Plan submitted by Respondent No.3, has been approved by the CoC with 100% vote share. There are only very limited ground to challenge the approval of Resolution Plan. The Hon'ble Supreme Court in ***K. Sashidhar v. Indian Overseas Bank - (2019) 12 SCC 150*** (paragraph 52) and ***Committee of Creditors of Essar Steel India Ltd. vs. Satish Kumar Gupta and Ors. - (2020) 8 SCC 531*** (paragraph 67) has held that the Adjudicating Authority and the Appellate Tribunal are not to sit in appeal over the commercial wisdom of the CoC, which is paramount and non-justiciable and under the scheme of the Code, every dissatisfaction does not partake the character of a legal grievance. It is settled proposition that approval of the Resolution Plan can be interfered with, only when the Resolution Plan violates any of the provisions of Section 30, sub-section (2) of the Code. The grievance, which has been advanced by the Appellant in the present case is essentially with regard to reliefs and

concessions granted by the Adjudicating Authority with regard to direction that Corporate Debtor shall continue to be given unfettered and unbridled access to all its assets, including any movable assets located on properties that do not belong to the Corporate Debtor. The submission is that utilities and services which are being used by the Corporate Debtor are situated outside the leased land area of the Corporate Debtor and they are situated on the land, which is owned by the Appellant and Adjudicating Authority could not have issued any direction to the Appellant to continue to give unfettered and unbridled access to the Corporate Debtor of utilities and services, which are situated in the land owned by the Appellant. It is further submitted that shared utilities and assets, situated outside the lease hold land of the Corporate Debtor were not part of the Information Memorandum. We may first notice the relevant Clauses of the Resolution Plan, where certain reliefs and concessions have been asked for. Paragraphs 8.4 and 8.5 of the Resolution Plan are relevant to be noticed. In this context, we may notice paragraph 8.3, 8.4 and 8.5 of the Resolution Plan, which covers the entire gamut of utilities/ equipment/ installations, which are as follows:

> "**8.3** As per the Information Memorandum, various utilities, equipment, installation and plant has been installed/built by the Corporate Debtor to meet the need its business operations - water and power supply, fire prevention, sewer treatment Plant (STP), HVAC (mainly cooling towers), IT System Server, ('Utilities Equipment/Installations'). The Utilities Equipment/ Installation were built by using the funds of the Corporate Debtor are the assets of Corporate Debtor, and form an integral part/lifeline of its business and critical to the overall

functioning of the Hotel and are in place since the inception/beginning of Hotel operations, without which operations of the Hotel comprising of 304 rooms, banquets, bar & restaurants, lawn, parking, gym etc. cannot operate at and is a potential risk to life of guest/staff at the Hotel Building. The Utilities Equipment/Installations were constructed/erected/installed, both on the Lease Land and outside the perimeter of the Leased Land but within 8 Acres of la i.e. the Entire Land, to cater the requirement of both Hotel Building and Residential Tower i.e. on a sharing basis ('Shared Services'). The electric cables, water pipe lines, drainage, plumbing. Heating Ventilation and Air Conditioning (HVAC) pipelines, Fire Fitting System, High Speed Diesel (HSD) pipelines etc. are interconnected with the Hotel Building erected on the Leased Land and Residential Tower erected outside the Leased Land but within 8 Acres Land, i.e., the Entire Land. The Corporate Debtor is maintaining, at its own costs, all such shared services till date as per information and explanations provided to the Resolution Applicant by the Resolution Professional. No formal agreement for such Shared Services was entered/executed between the Corporate Debtor and SIDCL as confirmed by Resolution Professional and the data available in VDR. On specific query, the Resolution Professional vide FAQs uploaded in the VDR confirmed as follows:

"Utilities services were designed as common shared services of hotel part, residential part and commercial part. Permissions, approvals and connections for such utilities were taken in name of SIDCL. Basic utilities outside leasehold premises which are necessary for Hotel Operations are as follows:

- Power
- Water & Fire Prevention
- Sewerage Treatment Plant (STP)

- HVAC (mainly cooling towers)
- IT System Server"

8.4 To keep the Corporate Debtor as a going concern, it is necessary that the Resolution Applicant/Corporate Debtor have unhindered and uninterrupted possession, access and usage of the Utilities Equipment/Installations and the Shared Services and both are available to the Corporate Debtor for smooth functioning of the Hotel without any obstruction of whatsoever nature. The Resolution Applicant clarifies that this requirement is not a condition precedent to implementation of the Resolution Plan and Financial Proposal in this Resolution Plan shall remain unaffected. The details of Shared Services, as per assessment of the Resolution Applicant, located outside the leasehold land are as follows:

SR. No.	SERVICES	IDENTIFICATION No. IN ANNEXURE VI TO THE RESOLUTIOIN PLAN
1.	Underground Tank for Domestic Water (Raw + Treated)	Marked as ‘1’
2.	Underground water tank for Fire	Marked as ‘2’
3.	Cooling Tower	Marked as ‘3’
4.	Diesel Generator Sets for Hotel (2 Nos.)	Marked as ‘4’
5.	Hotel diesel Generator Isolator/ Amf panel for DG 1 and DG 2	Marked as ‘5’
6.	Underground High-Speed Diesel Tank	Marked as ‘6’
7.	Customer High Tension Plant	Marked as ‘7’
8.	Substation Battery Room	Marked as ‘8’
9.	RMU plus metering room	Marked as ‘9’
10.	Transformer	Marked as ‘10’
11.	Underground Sewage Treatment Plant	Marked as ‘11’

12.	High Speed diesel unloading Area	Marked as '12'
13.	Boiler	Located at Lower Basement of Residential Tower
14.	Water supply connection by New Town Kolkata Development Authority	Interconnected beneath land
15.	Sewage and Drainage Connection	Interconnected beneath land
16.	Electric cables, Plumbing lines, HVAC pipelines, Diesel Pipelines etc.	Interconnected
17.	Information Technology (IT) Server	6^{th} Floor of the Hotel Building
18.	Other Miscellaneous Services	Interconnected

85. The Corporate Debtor shall have the right to relocate the Utilities Equipment/Installations to the Leased Land or erect a new utility equipment on Leased Land within a period of 5 years extendable by a further period of two years from the Effective Date, at its own expenses. If new utilities and equipment is erected on the Leased Land, the Resolution Applicant/Corporate Debtor shall have the right to dismantle the existing Utilities Equipment/Installations and use it in the manner considered fit by Corporate Debtor. During the period of 5 years or 7 years, if extended, if the SIDCL or the Residents of the Serviced Apartment Tower II/ Residential Welfare Society/Association for the Serviced Apartments Tower II, if any, wish to use the Utilities Equipment/Installations, SIDCL and Serviced Apartments Welfare Association, as the case may be, shall pay such charges as may be mutually agreed, on built up area basis, in consideration of use of Utilities Equipment/Installations. The Resolution Applicant clarifies that the right to relocate the Equipment/Installations and any conditions to be provided for usage of Utilities Equipment/Installations by the

SIDCL or the Residents of the Serviced Apartment Tower II/ Residential Welfare Society/Association for the Serviced Apartments Tower II, if any, shall not be a condition precedent for implementation of Resolution Plan and Financial Proposal in this Resolution Plan shall remain unaffected. The Corporate Debtor would be entitled for new electricity connection in its own name and utilise its space for new transformer and the West Bengal State Electricity Development Corporation shall provide the new connection on payment of requisite charges, in accordance with applicable law."

10. The above Clauses of Resolution Plan clearly indicate that reliefs and concessions sought were not condition precedent to implementation of the Resolution Plan. The Adjudicating Authority in paragraph 9, where 'Reliefs and Concessions' have been sought for implementation of Resolution Plan has noticed following in paragraph 9 at Item No.7, which is as follows:

"**9.** Reliefs and Concessions sought by the Resolution Applicant from this Adjudicating Authority are enumerated below for successful implementation of the Resolution Plan:

7)	To pass an order directing that, the Corporate Debtor shall continue to be given unfettered access to all its Assets, including any movable Assets located on properties that do not belong to the Corporate Debtor, on the same terms and in the same manner as were in existence prior to the Insolvency Commencement Date;"

11. The Adjudicating Authority in paragraph 12 has issued the following directions:

"**12.** We have also perused the reliefs, waivers and concessions as sought and as given in Para 18 (Reliefs and Concessions) of

> page 114 to 126 of the Resolution Plan. While some of the reliefs, waivers and concessions sought by the Resolution Applicant come within the purview of the Code and the Companies Act 2013, many others fall under the power and jurisdiction of different government authorities/departments. This Adjudicating Authority has power to grant reliefs, waivers and concessions only with respect to the reliefs, waivers and concessions that are directly in relation to the Code and the Companies Act 2013 (within the powers of the NCL T), and these are granted keeping in mind the object of the Code. Reliefs, waivers and concessions that fall within the domain of other government department/authorities are not granted."

12. When we read the paragraph-9 and paragraph 12 together, it is clear that the reliefs and concessions seeking a direction that Appellant shall continue to give unfettered access to all its assets, including any movable assets located on properties that do not belong to the Corporate Debtor, on the same terms and in the same manner as were in existence prior to the insolvency commencement date, has been granted by the Adjudicating Authority. It is relevant to notice that at the time when this utilities/ equipment/ installations were made the Corporate Debtor was subsidiary of the Appellant, the holding Company. Shared utilities and equipment installed outside the lease land area were permitted to be utilized and used both by the Corporate Debtor for running the Hotel as well as by the Appellant for the purpose of its residential block and commercial establishment. The Corporate Debtor being no longer subsidiary of the Appellant, which has now been taken over by the SRA, there has to be an arrangement between land owner, i.e., the Appellant and SRA for

continuing use and access to the shared utilities and equipment. It is also relevant to notice that the SRA has taken the Hotel of Corporate Debtor as a running concern and for the purposes of running the Hotel, it requires use of shared utilities and services as it was being done prior to initiation of CIRP. We, thus, do not find any error in granting of reliefs and concessions as noted under paragraph-9 (7) quoted above. However, the grant of said reliefs and concessions cannot fetter the right of Appellant to enter into a fresh arrangement with SRA with regard to use of shared utilities, nor it can fetter the rights of the Appellant to seek appropriate relief in a competent Court with regard to shared utilities. In the CIRP of the Corporate Debtor, it was neither necessary, nor appropriate to enter into respective rights and claims of both the parties and the parties have to be left to settle their rights and obligations before the competent Court in accordance with law.

13. The Resolution Plan having been approved by 100% vote share of the CoC and no grounds having been made out to interfere with the approval of the Resolution Plan within the meaning of Section 30, sub-section (2) to establish that Resolution Plan violates any provision of Section 30 sub-section (20 of the Code, we see no reason to interfere with the impugned order approving the Resolution Plan. However, as observed above, approval of Resolution Plan and grant of reliefs and concessions under paragraph-9 (7) as extracted above, does not fetter the right of the parties to enter into an arrangement with regard to shared utilities and equipment, which are located outside the lease hold land of the Corporate Debtor and further,

the approval of Resolution Plan and grant of above reliefs and concessions does not fetter the rights of the parties to establish their rights and obligations in a competent Court. Subject to liberty as aforesaid, we uphold the impugned order dated 04.01.2024 passed by the Adjudicating Authority. The Appeal is disposed of accordingly. Parties shall bear their own costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

NEW DELHI

4th April, 2024

Ashwani