(2023) 06 NCLT CK 0023

In the National Company Law Tribunal

Case No : I.A No. 339, 589 Of 2022, IA NO 186, 167 Of 2023 In CP (IB) No.09/BB/2022

Nirani Sugars Limited Through its Authorized Representative Vs Mr. Shivadutt Bannanje ?

Date of Decision : 02-06-2023

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 5(24), 7, 21(2), 30(2)(e), 60(5)
National Company Law Tribunals, 2016 — Rule 11

Citation : (2023) 06 NCLT CK 0023

Hon'ble Judges : T. Krishnavalli, Member (J);Manoj Kumar Dubey, Member (T)

Bench : Division Bench

Advocate : C.K Nandakumar, Raghuram Cadambi, T .Manish, Naganand, Dhyan Chinnappa, Prateek Rath, Dhananjay Joshi, Srivatsa Rao

Final Decision : Disposed Of

Judgement

Manoj Kumar Dubey, Member (Technical)

IA NO 339 OF 2022

1. This application has been filed by the Resolution Professional of M/s Dnyanyogi Shri Shivkumar Swamiji Sugars Limited(hereinafter called as Applicant) under Section 60(5) of IBC,2016 r/w First Proviso to Section 21(2) of the IBC,2016 and Rule 11 of the NCLT,2016,inter alia seeking exclusion of the Respondents from the Committee of Creditors, by considering them as being covered by the exclusion under the First Proviso to Section 21(2) of the Code; and to permit the Resolution Professional to reconstitute the CoC by disregarding the voting share of the Respondents, in calculating the voting share of the CoC.

2. The facts of the case, briefly stated as under:-

a. It is stated that this Tribunal, vide Order dated 07.03.2022 passed in C.P (IB) No.09/BB/2022 initiated CIRP against the Corporate Debtor M/s Dnyanyogi Shri Shivkumar Swamiji Sugars Limited(herein after the "Corporate Debtor"), whereby Smt Pvitra Vyas was appointed as the Interim Resolution Professional b.

It is submitted that the, appointment of applicant as RP was confirmed by this Tribunal through its order dated 30.05.2022 passed in IA no.174 of 2022.

c. In the 3rd meeting of CoC of the Corporate Debtor on 7.07.2022, the representatives of one of the CoC members-Vijayapur District Central Cooperative Bank, raised objections to the inclusion of the erstwhile directors of the Corporate Debtor in calculating the voting share of the CoC, contenting that they were related parties to the Corporate Debtor and hence, they should not be given any right of representation, participation or voting in the meeting.

d. The applicant took note of the minutes of the 2nd meeting of the CoC dated 25.04.2022, and observed that similar objections were also raised by the representatives of Bank of India (the unsecured financial creditor) against the inclusion of the respondents in the CoC.

e. On examination, the RP noted that the respondents were the Directors of the Corporate Debtor prior to the commencement of the CIRP, and had together resigned from the directorship of the Corporate Debtor on 4.12.2019.Further, the respondents had on 4.12.2019 itself (i.e., the day of their resignation from the directorship of the Corporate Debtor) executed loan agreements with the Corporate Debtor, containing various stipulations in respect of repayment of the loans extended by them .Therefore, the applicant on 15th July 2022, issued notices to the respondents and sought their responses as to why they should not be considered as a related party to the Corporate Debtors as per IBC.

f. The applicant received the responses from all the respondents, against the notices and found that there was no explanation given by the respondents in respect of their relationship with the Corporate Debtors, who have principally asserted that they are not covered under the definition of related party.

g. It is stated that the respondents were the directors of the Corporate Debtor until 04.12.2019, and were in charge of the management and affairs of the Corporate Debtor, and fully aware about the financial and operational position of the Corporate Debtor. Further, the financial statement of the Corporate Debtor for the year ending 2019 under 'Notes forming part of accounts and balance sheet as on 31.03.2019 all the respondents herein have been clearly recognized as 'related party' on the basis of certain transactions, done by them during the relevant period. A perusal of the audited financial statements of the Corporate Debtor reveals that there were transactions pertaining to loans and advances with these related parties which existed since many preceding years. Since these respondents were fully aware of the status of the Financial position of the Corporate Debtor; of which net worth had completely eroded , they collectively resigned from the directorship of the Corporate Debtor on 4.12.2019, and simultaneously signed the loan agreement on the same day; with a clean cut motive to get the Loan amount crystallised as a 'Financial Debt', to initiate CIRP against the Corporate Debtor, by showing that they were related parties of the Corporate Debtor. This was done intentionally with the motive to circumvent the

Proviso to Section 21(2) of the Code. Accordingly, the respondents ought not be permitted any right for representation , participation or voting in the CoC

h. The applicant relied on the judgment dated 01.01.2021 of the Hon'ble Supreme Court of India in the matter of Phoenix Arc Private Limited v Spade Financial Services Limited & Ors (Civil Appeal No.2842 of 2020 with Civil Appeal No.3063 of 2020).

i. Accordingly, the RP has sought for exclusion of respondents from the CoC under Proviso to Section 21(2) ; and to Reconstitute the CoC

3. The Respondents have filed the reply for the application vide Diary No. 416 dated 23.01.2023 interalia contending as follows:

i. It is stated that the respondents have cumulatively lent more than Rs.34 crores to the Corporate Debtor, while they were directors in the Corporate Debtor company; therefore it is not in dispute that the respondents are Financial Creditors of the Corporate Debtor.

ii. It is submitted that there were certain disputes/ difference between the respondents, other shareholders and Mr.Sudhir Biradar,Mrs.Kavita Biradar and Mr. Yash Sudhir Biradar ('Purchasers'), in respect to the ownership of the Corporate Debtor company. In order to resolve the dispute, the respondents and other shareholders agreed to sell the entire shares held by them in the Corporate Debtor to the purchasers and resigned from directorships. In order to record the terms of settlement, all the concerned parties entered into Memorandum of Understanding dated 23.09.2019 ('MOU').

iii. It is further submitted that, RP himself has admitted that the loans advanced by the respondents are recorded and accounted in the financial statements of the Corporate Debtor prior to the year 2019 itself and therefore, the entire financial transaction is clearly not a sham transaction. The respondents have resigned on 4.12.2019 and the new management have taken absolute control of the Corporate Debtor on and with effect from 4.12.2019.

iv. It is pertinent to mention that the order dated 7.3.2022 passed by this Tribunal admitting the instant petition was challenged before the Hon'ble NCLAT, Chennai Bench in Company Appeal (AT)(CH)(Ins) No.149 of 2022 by other shareholders of the Corporate Debtor on the ground that the respondents had filed the petition under section 7 of the Code in collusion with the Corporate Debtor. However, NCLAT has dismissed the said appeal vide order dated 02.08.2022.

v. It is submitted that respondents have no control on the affairs of the Corporate Debtor since 4.12.2019 and the Corporate Debtor was admitted in to CIRP on 7.03.2022, which is after a period of twenty-six (26) months from the date of the respondents' resignations from their directorships.

4. The petitioner filed rejoinder vide diary no 1457 dated 14.03.2023 , additional

list of authorities vide diary no 861 dated 14.02.2023 and additional documents vide diary no 1782 dated 28.03.2023.

5. The applicant has filed written submission vide diary no 2008 dated 12.04.2023 inter alia contending as follows:

a) The applicant upon examining the records and financial statements of the Corporate Debtor discovered that the Respondents herein had been associated with the Corporate Debtor as Directors prior to commencement of CIRP and are therefore, related parties as defined under the Code.

b) The Respondents contemporaneously, acting together, resigned from the directorship of the Corporate Debtor on 04.12.2019

c) Each of the Respondents entered into identical loan agreements with the Corporate Debtor on the very same day, i.e., 04.12.2019

d) These agreements are particularly strange in the light of the fact that the Corporate Debtor had been accumulating losses year on year, including amounting to Rs. 86.34 Crores in the year 2019. Therefore, it is strange that directors of the Corporate Debtor would immediately resign and oblige the Corporate Debtor to repay within 30 days, as is set out in Clause 1 of the loan agreements. The Respondents, therefore, evidently knew that entering into such agreements would result in the Corporate Debtor becoming adjudged insolvent, and that should they recall the loans, they would be a part of the CoC of the Corporate Debtor.

e) Further, having waited for two years from the due date, the Respondents themselves filed an application under section 7 of the Code, in C. P. (IB) No. 9 / 2022, which came to be admitted, and as evidently planned, the Respondents came to be included within the CoC.

f) While the definition of 'related party' under section 5(24) of the Code does not include past directors, the Hon'ble Supreme Court of India, in Phoenix Arc Private Limited v. Spade Financial Limited,

Civil Appeal No. 2842 of 2020 with Civil Appeal No. 3063 of 2022, has clarified that even past directors can be held to be related parties. Specifically, the Supreme Court held as follows:

"…

94 Thus, it has been clarified that the exclusion under the first proviso to Section 21(2) is related not to the debt itself but to the relationship existing between a related party financial creditor and the Corporate Debtor. As such, the financial creditor who in praesenti is not a related party, would not be debarred from being a member of the CoC. However, in case where the related party financial creditor divests itself of its shareholding or ceases to become a related party in a business capacity with the sole intention of participating the CoC and sabotage the CIRP, by diluting the vote share of other creditors or otherwise, it would be in

keeping with the object and purpose of the first proviso to Section 21(2), to consider the former related party creditor, as one debarred under the first proviso.

95. Hence, while the default rule under the first proviso to Section 21(2) is that only those financial creditors that are related parties in praesenti 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. Mr Kaul has argued, correctly in our opinion, that if this interpretation is not given to the first proviso of Section 21(2), then a related party financial creditor can devise a mechanism to remove its label of a 'related party' before the Corporate Debtor undergoes CIRP, so as to be able to enter the CoC and influence its decision making at the cost of other financial creditors."

g. In the light of the coordinated resignation and entering into the loan agreements, as well as the simultaneous initiation of the CIRP process by the Respondents, it is clear that they entered into the loan agreements with a view to participate in the CoC, and influence its voting. Therefore, the bar in the proviso to section 21(2) applies, as held by the Hon'ble Supreme Court in Phoenix Arc.

h. The Respondents' contention that their exit was pursuant to agreed terms mentioned in the MoU dated 23.09.2019 and is solely due to alleged differences of opinion that arose between the Respondents and few other existing directors of the Corporate Debtor, is without merit. This is because the Respondents, as former directors of the Corporate Debtor, who had steered the Corporate Debtor to the brink of insolvency, obviously knew that their actions in entering into those loan agreements would result in the Corporate Debtor going into CIRP, and despite this, they entered into agreements on clearly onerous terms. Not just that, they also filed a petition under section 7 of the Code themselves, to ensure to this outcome. This could only have been done with the intention of participating in the CoC, and influencing its decisions.

i. The other contention of the Respondents, that their debt stands duly recognized by the Hon'ble NCLAT, which upheld the admission order in respect of the Corporate Debtor, in its judgment in Company Appeal (AT)(CH)(Ins) No. 149 of 2022 and in I.A. No. 348, 349 and 350 of 2022, also does not hold water. This is because, a related party is entitled, in law, to file a petition under section 7 of the Code, and seek initiation of the CIRP. However, the same related party, by virtue of the bar in the proviso to section 21(2) of the Code, does not have any right of voting or participation in the CoC. It is this distinction which is vital, and the RP has not questioned the claim made – indeed, the same has been accepted.

j. Therefore, the Respondents are related parties of the Corporate Debtor and ought to be excluded from the CoC. If this application is not allowed, it will lead to miscarriage of justice and defeat the purpose of the Code.

k. It is clarified that the Resolution Professional has not, in the present application; sought invalidation of the resolutions already passed by the CoC, and has only sought reconstitution of the CoC going forward. The same is evident from a reading of the prayers in the present application, and it is humbly submitted that the application may please be allowed as prayed for.

6. The Respondent vide diary no 1884 dated 05.04.2023 filed the written submissions inter alia contending that as follows:

a) It is submitted that the Resolution Professional has filed the IA No. 339 / 2022, for treating the Respondents as Related Parties in relation to the Corporate Debtor, and to reconstitute the Committee of Creditors.

b) The Resolution Professional has omitted to mention that the Committee of Creditors has approved a Resolution Plan and that the Resolution Professional has filed an Application, IA No. 588 / 2022, seeking the confirmation of the Resolution Plan by this Hon'ble Tribunal. That being the case, upon the filing of IA No. 588 / 2022, the IA No. 339 / 2022, stands rendered redundant.

c) Section 5(24) of the Insolvency and Bankruptcy Code, 2016, defines a related party in relation of a Corporate Debtor and does not include former Directors of such Corporate Debtor.

d) It is only in certain circumstances that the Hon'ble Supreme Court has held that former Directors of a Corporate Debtor ought to be treated as related parties in relation to the Corporate Debtor.

e) In Phoenix Arc Private Limited v/s. Spade Financial Services Limited & Ors (2021) 3 SCC 475, the Hon'ble Supreme Court has, inter alia, observed:

88. An issue of interpretation in relation to the first proviso of Section 21(2) is whether the disqualification under the proviso would attach to a financial creditor only in praesenti, or if the disqualification also extends to those financial creditors who were related to the Corporate Debtor at the time of acquiring the debt.

98. Hence, we would need to consider the meaning of the proviso in the light of the context, object and purpose for which it was enacted. The purpose of excluding a related party of a Corporate Debtor from the CoC is to obviate conflicts of interest which are likely to arise in the event that a related party is allowed to become a part of the CoC. The logic underlying the exclusion has been summarized as follows:

"11.9 The Committee was of the view that the disability under the first proviso to Section 21(2) is aimed at removing any conflict of interest within the Coc, to prevent erstwhile promoters and other related parties of the Corporate Debtor from gaining control of the Corporate Debtor during the CIRP by virtue of any loan that may have been provided by them."

104. Hence, while the default rule under the first proviso to Section2 1(2) is that

only those financial creditors that are related parties in praesenti 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. Mr. Kaul has argued, correctly in our opinion, that if this interpretation is not given to the first proviso of Section 21(2), then a related party financial creditor can devise a mechanism to remove its label of a related party before the Corporate Debtor undergoes CIRP, so as to be able to enter the CoC and influence its decision making at the cost of other financial creditors.

f) Hence, the Respondents submit that the default rule is that only those financial creditors that are related parties in praesenti would be debarred from the CoC. It is only in cases where the related party financial creditors cease to be related parties within the intent of circumventing the exclusion and to enter the CoC and influence its decision making at the cost of other financial creditors that even former related parties would be excluded from the CoC.

g) The Respondents did not resign from the Directorships of the Corporate Debtor to circumvent any exclusion or to be able to enter the CoC to influence its decision-making nor have they in any manner influenced the decision-making of the CoC.

h) The narration of facts in Para No. 18 of the Application, IA No. 339 / 2022, is neither accurate nor complete. As stated in Para No. 7 of the Respondents' Statement of Objections to the IA No. 339 / 2022, there were disputes and differences between the Respondents and other shareholders of the Corporate Debtor in respect of the ownership and management of the Corporate Debtor. Towards amicably resolving the same, the Respondents agreed to sell their shareholding in the Corporate Debtor and to step down from their positions as Directors of the Corporate Debtor. Accordingly, the concerned parties entered into a Memorandum of Understanding, dated 23.09.2019, a copy of which is produced along with the Statement of Objections.

i) Pursuant thereto, on 04.12.2019, the Respondents resigned from their Directorships of the Corporate Debtor. Since the Corporate Debtor had borrowed funds from the Respondents, and the Corporate Debtor was no longer in the control of or in any manner connected with the Respondents, the Corporate Debtor executed individual Loan Agreements, all dated 04.12.2019, with each of the Respondents, agreeing to repay their dues on the terms set out therein.

j) Upon default by the Corporate Debtor, the Respondents filed the above Petition under Section 7 of the IBC, 2016, in this Hon'ble Tribunal, which was admitted by an Order, dated 07.03.2022.

k) The Corporate Debtor challenged this Hon'ble Tribunal's Order, dated 07.03.2022, before the Hon'ble NCLAT, inter alia, contending that the execution of the Loan Agreements was suspicious and fraudulent. In its Order, dated 02.08.2022, passed in Company Appeal (AT)(CH)(Ins) No. 149/ 2022, the

Hon’ble NCLAT took note of the allegations (in Para Nos. 2 o 5) and rejected the said Appeal. A copy of the said Order, dated 02.08.2022, is produced along with the Statement of Objections.

l) The Resolution Professional has also omitted to mention that, in the CoC, the other Financial Creditors, apart from the Respondents, held more than 66% of the voting rights, which demonstrates that the Respondents could not possibly have influenced the decision-making process of the CoC.

m) Except for highlighting the fact that the Respondents’ resignation from the directorships of the Corporate Debtor and the execution of the loan agreements by the Corporate Debtor occurred on the same day, the Resolution Professional has not produced any material to establish the test laid down by the Hon’ble Supreme Court in Phoenix Arc, i.e., the Respondents resigned from their positions as Directors of the Corporate Debtor to circumvent the exclusion from the CoC and to be able to enter the CoC to influence the decision-making process of the CoC.

n) In the circumstances, the Respondents submit that there is no merit in the Application, IA No. 339 / 2022, and that, in the interests of justice and equity, this Hon’ble Tribunal ought to dismiss the Application with exemplary costs.

7. Heard, learned senior Counsel for the applicant and the respondent. We have carefully perused the pleadings of the party and extant provisions of the Code and Rules made there under.

8. During the proceeding before this Tribunal, the Ld. Senior Counsel for the Applicant-RP in this IA pointed out that the persons mentioned at Sr. Nos.4 to 12 at Page 4 of the petition were all related parties (as they were the previous Directors of the Corporate Debtor) having a total of 27.79% of voting share in the CoC. He pointed out to the Form No.DIR-12 filed by these persons with the CoC to show resignation from the Directorship on the same date of 04.12.2019 by all these persons. All these Forms havebeen attached to the IA. It is also contended that there was acceptance of these resignations simultaneously on the same date by the Company, and later on the same date the Agreements for the above referred to Loans in respect of the outstanding amounts of these persons with the Corporate Debtor was executed, the Stamp Paper for the Loan Agreement was also being of the same date 04.12.2019. It is further contended by the Counsel that the Loan Agreements for all these persons were also identically worded.

It is further stated by the Counsel that these persons deliberately waited for two years although the Loan was to be repaid within a period of 30 days from the date of Agreement i.e., 04.12.2019. This was in order to get over the look back period of two years so as to show it that it was not by related parties and the CP was filed on 31.01.2022.

The Ld. Senior Counsel referred to the Judgment of Hon’ble Supreme Court in the case of Phoenix ARC Private Limited vs. Spade Financial Services Limited & Ors. (Civil Appeal No.2842 of 2020 with Civil Appeal No.3063 of 2020) specifically paras 66, 67, 90 along with 94 and 95, which has also been mentioned in the IA at pages 13 to 14, in support of the contention regarding the Respondents herein to be excluded from the CoC in view of the Proviso to Section 21(2) of the Code.

Shri Dhananjay Joshi, Ld. Senior Counsel for the Respondents in his submissions during the proceeding stated that RP have filed two applications which are contrary to each other. While IA No.339 of 2022has been filed for direction for exclusion of the Respondents under Proviso to Section 21(2) of the Code and reconstitution of the CoC, he has also filed IA No.588 of 2022 for approval of the Resolution Plan passed by the same CoC . And it is contended that on filing of IA No.588 of 2022 for approval of the Resolution Plan, IA No.339 of 2022 becomes redundant. It is further stated that the Respondents were not covered in the definition of 'Related Party', for which he placed reliance on paras 82, 88, 90 and 95 of the Judgment of the Hon'ble Supreme Court in the case of Phoenix ARC cited above. He further refers to the Hon'ble NCLAT order dated 02.08.2022 in which the Appeal against the initiation of CIRP was rejected.

In response to this, Shri C.K. Nandakumar, Ld. Senior Counsel representing the RP in IA No.339 of 2022 states that this decision of Hon'ble NCLAT is only for the validity of initiation of CIRP and not related to the constitution of the CoC involving the related parties as discussed above. So this decision does not help the Respondents.

9. It is observed that, the respondents in the application no 339 OF 2022 resigned from the Directorship of the Corporate Debtor on 4.12.2019, and on the same day, respondents executed loan agreements with the Corporate Debtor. Also, the respondents were a related party during the relevant time of various transactions with the Corporate Debtor. It is clearly pointed out in the Annual Report of 2019, enclosing financial statements of the Corporate Debtor for the year ending 31.03.2019; that all the respondents except R1 were related parties on the basis of certain transactions for the year as per AS-18 issued by ICAI. The Hon'ble Supreme Court of India in Phoenix Arc Private Limited v Spade Financial Services Limited & Ors (Civil Appeal No.2842 of 2020 with Civil Appeal No.3063 of 2020 observed that "the exclusion under the first provisio to Section 21(2) is related not to the debt itself but to the relationship existing between a related party financial creditor and the Corporate Debtor."

10. The Hon'ble Apex Court in the case of Phoenix ARC (cited supra) has given a clear-cut finding in paras 94 and 95 of the Judgment that under Proviso to Section 21(2) not only those financial creditors that are related parties presently would be debarred from the CoC; but those former related parties who, under a deliberate act, ceased to be the related party in order to circumvent the disqualification under this Proviso would also be covered under the exclusion granted by this Proviso. The Hon'ble Apex Court held that if this interpretation is

not given to the First Proviso of Section 21(2), then a related party can devise a mechanism so as to remove its categorisation as a 'related party' before the CD undergoes CIRP; so as to enable itself to enter the CoC and influence the decision making at the cost of the other Financial Creditors. The sequence of events in this case narrated above establishes that the Respondents herein were clearly engaged in devising a mechanism so as to escape the disqualification imposed by the Proviso to Section 21(2) of the Code.

The events, as narrated above are glaring in the sense that all the Respondents simultaneously and in tandem resigned on the same date i.e., 04.12.2019.The resignations were accepted by the Company the same day, and subsequently on the same date of 04.12.2019 the agreements for the Loan in respect of the outstanding amount of these persons with the Corporate Debtor were executed with the Agreements being exactly identical. Not only that, these persons waited for a period of two years for filing of the Application u/s 7 of the Code, so as to avoid the lookback period limit of two years. Nothing more is required to show that this entire Plan was a device or a design entered into to somehow circumvent the stipulation as per the Proviso to Section 21(2); thus enabling them to qualify to enter the CoC without getting hit by this restriction. The contention of the Respondent's Counsel and the interpretation given by him of the relevant paras of the Hon'ble Apex Court Judgment in the Phoenix ARC case, which has been stated above, is not tenable in Law, and therefore is liable to be rejected. It is not acceptable that the Respondents did not resign from the Directorship simultaneously to defeat the scope and ambit of the First Proviso to Section 21(2) so as to enable them to enter the CoC to influence its decision making.This explanation does not hold ground in light of the glaring facts mentioned above. Clearly, it was a device or design created by these persons acting in tandem with the intention of circumventing the exclusion imposed by Section 21(2) read with its First Proviso.

In a the recent decision, the NCLT New Delhi Bench in the case of IA No.611/ ND/2021 in CP (IB)-1164(ND)/2019 in order dated 17.03.2023 decided on the same issue of related party being part of CoC who were liable to be excluded under the First Proviso to Section 21(2) of the Code. It was held by the Coordinate Bench of the NCLT New Delhi that the Resolution Plan passed by the CoC which comprised of the related parties of the Corporate Debtor is void ab initio; as it violates Section 21(2) read with Section 30(2)(e) of the IBC, 2016.

The explanation given regarding there being disputes between the Respondents and other Shareholders of the Corporate Debtors and therefore for resolving they had to resign their Directorship, selling their shareholding etc. is just a make belief story to justify and explain their action. The reliance of the Counsel for the Respondent on the decision of the Hon'ble NCLAT dated 02.08.2022 in their support is not tenable, since the Hon'ble NCLAT order was only regarding the issue of validity of initiation of CIRP and had nothing to do with the matter regarding the composition of the CoC which is comprised of the related parties which were clearly debarred under the said Proviso.

11. We therefore conclude that the respondents in IA 339 of 2022 are required to be excluded as per the requirements of first proviso to Section 21(2) of IBC, 2016, being related parties to the Corporate Debtor; and therefore, the entire constitution of CoC is erroneous in the eyes of law. For this reason, this Adjudicating Authority hereby directs the RP to reconstitute the CoC and; to proceed further in the matter as per law.

12. Accordingly IA 339 OF 2022 is disposed of.

IA NO 589 OF 2022

1. The present application is filed on 01.12.2022 by Nirani Sugars Limited (hereinafter "applicant") through its authorized signatory seeking to stay further processing of the Resolution Plan approved by the present Committee of Creditors (hereinafter "CoC") in its 11th CoC meeting, to issue direction for the adjudication of IA No.339 of 2022 ,to issue direction for reconstitution of CoC ,to issue a direction that any decision taken by the CoC in regards to approval of resolution plan be declared null and void and to issue direction that no further decisions may be taken by the CoC till IA NO.339 of 2022 is adjudicated by this Tribunal.

2. The facts of the case, are briefly stated as under:-

a) It is submitted that, following initiation of CIRP in CP IB 09/BB/2022 ,the RP published Form G on 7.8.2022 and the last date for submission of the Plan was 16.10.2022. Vide email dated 22.08.2022, the applicant expressed its interest in submission of the resolution plan. Upon the verification of Expression of Interest, the applicant had been selected as a Prospective Resolution Applicant ('PRA'). On the basis of the Information Memorandum ('IM'),Evaluation Matrix and the Request for Resolution Plan ('RFRP'), and in compliance to IBBI (CIRP) Regulations, 2016 the Applicant submitted the resolution plan with the respondents.

b) Vide email date 04.11.2022, the applicant was informed by the respondent that the 10th CoC shall be conducted on 9.11.2022 and each PRA shall be provided with a one-time opportunity to improve their bid and to make suitable modifications to the Resolution Plan including any discrepancy raised by the RP or the CoC.

c) Subsequent to 10th CoC meeting, and to the shock of the applicant, three resolution plans from the Prospective Resolution Applicants were put for vote before the 11th CoC meeting; and vide email dated 21.11.2022, the applicant was informed that the Resolution Plan submitted by him was rejected by a voting share of 88.28%.

d) There are material irregularity in the conduct of the entire CIRP, since 9 0ut of 10 Unsecured Financial Creditors were disqualified from being part of CoC; being

‘Related Parties’ of the Corporate Debtor in view of Section 21(2) of IBC,2016; and were prevented from voting in CoC.The CoC in the present case is constituted of Secured and Unsecured Financial Creditors wherein the voting share enjoyed by the Secured Financial Creditors is 45.25% and Unsecured Financial Creditors is 54.73%.Out of the latter 27.29% rests with related parties; thus having a dominant role in passing of the Resolution Plan.

e) IA NO.339 /2022 filed by RP seeking change in the constitution of CoC was pending adjudication, in which it was contended that out of 10 unsecured financial creditors, 9 financial creditors enjoying a voting share of 27.29% were related party to the Corporate Debtor. Thus the applicant had a reasonable believe that the voting on the plan shall be kept pending till IA No.339 of 2022 is decided.

f) The applicant cited the judgment of Hon’ble Apex Court in the case of Phoenix Arc Private Limited v.Spade Financial Services Limited & Ors.,(2021) 3 SCC 475 and Keshardeo Chamria v.Radha Kissen Chamria (1953) 4 SCR 136 and others in support of its contention.

3. The Respondent has filed the reply for the applications vide Diary No. 1175 dated 28.02.2023 inter-alia contenting as under:-

i. It is submitted that, the applicant was privy to the composition of CoC, and participated in the meeting when called upon and never raised any objection to the composition of CoC until it lost the resolution process. Moreover, the applicant attended a meeting with the CoC and has also modified its resolution plan after taking in to consideration the inputs given by CoC and the respondents.

ii. The Successful Resolution Applicant (‘SRA’) has secured 100% votes and even if the alleged related parties are removed from the CoC, the SRA will have sufficient votes of the CoC. Therefore, a mere exclusion of the alleged related parties would not make any difference.

iii. It is submitted that, the applicant is indirectly questioning the commercial wisdom of the CoC.

4. Heard, learned senior Counsel for the applicant and the respondent .We have carefully perused the pleadings of the party and extant provisions of the Code and Rules made there under.

5. During the proceedings before this Adjudicating Authority, the Learned Senior Counsel for the applicant Shri Naganand made a common submission for IA No.339 and 589 of 2022; which has been discussed above in IA No.339. In particular for this IA, he emphasized that no notice was given for the 11th CoC meeting in which the Resolution Plan was approved, and merely the information for rejection of the applicant’s proposal was shared by e mail dated 21.11.2022. It was thus contended that entire process was vitiated by “Material Irregularity”. Reliance was placed on the judgement of the Hon’ble Apex Court in Keshardeo Chamria v.Radha Kissen Chamria (1953) 4 SCR 136 and others, in which the

scope of the expression “Material Irregularity”was explained.Accordingly, it was prayed that the IA No.339 be disposed off, and direction be issed for reconstitution of CoC; and the approval granted by the CoC for the Resolution plan be declared null and void.

6. In view of the decision taken in IA 339 OF 2022, in the order passed above,the constitution of the CoC has been held to be erroneous; and it has been directed for its reconstitution ;and therefore the prayers in this IA 589 have already been taken care of and adjudicated upon in the order passed for IA NO.339 OF 2022.

7. Accordingly, IA NO.589 OF 2022 is disposed of .

IA NO 167 OF 2023

1. The present application is filed on 13.01.2023 by Successful Resolution Applicants (herein after “SRAs”) seeking direction to the First Respondent to implead the applicants herein as respondents and to file statement of objection in IA NO. 589 of 2022.

2. Heard Learned Senior Counsel for the applicant. We have carefully perused the pleadings of the party and extant provisions of the Code and Rules made thereunder.

3. During the proceedings, before this Adjudicating Authority, the Learned Senior Counsel for the applicant Shri.Dhyan Chinnappa opposed the IA NO 589 of 2022 and explained why the bid of SRA was accepted inspite of Nirani Sugars Limited offering more.He further clarified that facts of IA No.589 of 2022 is not similar to Jayanta Banerjee v.Shashi Agarwal and Others-NCLAT,New Delhi in CA (AT) (InS) No.348 of 2020. This Adjudicating Authority has already allowed the applicant as respondent in IA 589 of 2022 and permitted to file objections. The same was filed on 13.02.2023 and is taken on record.Hence the prayer made was already been taken care of.

4. Considering the reasons discussed in the order passed in I.A No.589 as above, the IA NO 167 of 2023 is disposed of.

IA NO 186 OF 2023

1. The present application is filed on 10.01.2023 by Nirani Sugars Limited (hereinafter “applicant”) through its authorized signatory seeking to allow the applicant to intervene, to issue direction for reconstitution of CoC and raise objection in IA 339 OF 2022 and not to dispose-of IA NO 588/2022 or pass any Order in IA 588/2022 till the disposal of IA NO 589/2022 and IA 339/2022.

2. It is pointed out here that the submissions in respect of IA No.339 of 2022 by the Applicant and the Respondents have been elaborately discussed in the Order passed in IA No.339 of 2022 which has been decided above. Shri S.S. Naganand, Ld. Sr. Counsel attended on behalf of the Applicant in IA No.186 of 2023 and argued on similar lines, as by the Applicant’s Counsel in IA No.339 of 2022. It

was explained by the Ld. Sr. Counsel for this IA that while he supports in general the contention raised by the Ld. Sr. Counsel for the Applicant in IA No.339 of 2022; specifically he reiterates the relevant paras of Hon'ble Apex Court's Judgment in the case of Phoenix ARC (cited supra). He pointed out that although the IA No.339 of 2022 was filed on 11.08.2022 for a direction to declare the constitution of the CoC as invalid and requesting for for its reconstitution on the basis of related parties having been included in the same, still the RP has gone ahead with the 11th Meeting of the CoC for the approval of the Resolution Plan;and as application for approval of same was filed vide separate IA No.588 of 2022 on 30.11.2022. It was stated that the Applicant in IA No.339 of 2022 in Para 16 has itself explained that these persons were included in the list of related party in the Annual Report and Balance Sheet of the Corporate Debtor as on 31.03.2019, Note-12; and therefore should have been excluded from the CoC. The Counsel has also emphasised the ratio of the Hon'ble Apex Court Judgment at Paras 94 and 95 which has already been discussed above in IA NO.339; in which the law related to the Proviso to Section 21(2) of the Code has been clearly laid down. Moreover, he has also referred to the Hon'ble NCLAT Judgment dated 4.06.2021 in the case of Jayanta Banerjee vs. Sashi Agarwal and Anr. in Company Appeal (AT) (Insolvency) No.348 of 2020 especially to Paras 84 and 85 of this particular Judgment. In these paras, it was held by the Hon'ble NCLAT that when the constitution of the CoC violates the Proviso of Section 21(2) of IBC, 2016, such constitution is nullity in the eyes of Law and vitiates the entire CIRP. In such a case, the decision of the CoC cannot be validated on the pretext of exercise of commercial wisdom.

This Tribunal in the orders passed today in IA No.339 of 2022 has held that the Respondents mentioned in that particular IA were all related parties which were disqualified under the First Proviso to Section 21(2) of the IBC, 2016. Accordingly, it has been held that the constitution of the CoC is erroneous in the eyes of Law and the direction for reconstitution of the CoC has been issued accordingly after exclusion of these related parties. Therefore, the prayer in this IA No.186 of 2023 has already been taken care of while disposing of IA No.339 of 2022 and there is no need to pass any separate order in this IA and therefore the instant IA No.186 of 2023 stands disposed of accordingly.

