

BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT 1

IA 953 of 2020 in CP(IB) 279 of 2018 With
IA/13(AHM)2021

Coram: MADAN BHALCHANDRA GOSAVI, MEMBER (JUDICIAL)
VIRENDRA KUMAR GUPTA, MEMBER (TECHNICAL)

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING BEFORE THE AHMEDABAD BENCH OF THE
NATIONAL COMPANY LAW TRIBUNAL ON 06.04.2021

IA 953 of 2020 in CP(IB) 279 of 2018

Name of the Company:

Rajdeep Clothing & Advisory Pvt Ltd & Ors
V/s
Brijesh kumar Mishra RP of Krishna Knitwear
Technology Ltd

IA /13(AHM)2021 in CP (IB) 279 of 2018

Name of the Company:

Abhinandan Multitrade Private Limited
V/s
Brijesh kumar Mishra RP of Krishna Knitwear
Technology Ltd

Section:


60(5) of the Insolvency and Bankruptcy Code, 2016

(COMMON ORDER)

The case is fixed for pronouncement of order.

The order is pronounced in open court vide separate sheet.


(VIRENDRA KUMAR GUPTA)
MEMBER (TECHNICAL)


(MADAN B. GOSAVI)
MEMBER (JUDICIAL)

Dated this the 6th day of April, 2021.

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**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT-1**

**IA 953 of 2020 in CP (IB) No. 279 of 2018 with
IA No. 13 of 2021**

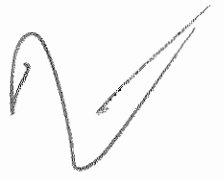
[An application under Section 60(5) of IBC, 2016]

In the matter of :

IA 953 of 2020 in CP (IB) No. 279 of 2018

In the matter between:

- 1. M/s Rajdeep Clothing and Advisory Pvt. Ltd.**
R M-81, Sudarshan Nagar,
MIDC – Phase II, Dombivali (E)
Thane – 421201
- 2. M/s. Ritu Multitrade Services Pvt. Ltd.**
Kamat Industrial Estate,
396, Veer Savarkar Marg
Prabhadevi, Mumbai – 400025
- 3. M/s. Eloquent Traders Pvt. Ltd.**
Chamunda Darshan Bldg.
Near Yogi Hospital, Kilwani Road
Silvassa, DNH – 396230
- 4. M/s. Wellworth Apparels Pvt. Ltd.**
R M – 81, Sudarshan Nagar,
MIDC – Phase II, Dombivali (E)
Thane – 421201
- 5. M/s. Hikal Pro Estate Pvt. Ltd.**
Gala No. 108, Everest Ind. Estate,
Near 66 KVA, Power Sub Station,



Amli, Silvassa-DNH-396230

6. M/s. Tanvish Trading Pvt. Ltd.

Unit – 3, 1st Floor,
Kamat Industrial Estate,
396, Veer Savarkar Marg
Prabhadevi, Mumbai-400025

7. M/s. Vignaharta Corrugators Pvt. Ltd.

R M – 81, Sudarshan Nagar,
MIDC – Phase II, Dombivali (E)
Thane-421201

.....Applicants

Versus

Mr. Brijesh Kumar Mishra,
Resolution Professional (RP) of
Krishna Knitwear Technology Ltd
A Company under CIRP
Flat No. 202, Bhoj Bhawan
Plot No. 18-D, Sion-Trombay Road
Chembur–Mumbai–400071

.....Respondent

IA No. 13 of 2021 in CP (IB) No. 279/NCLT/AHM/2018

1. M/s. Abhinandan Multitrade Pvt. Ltd.

Having address at:
24, Mezzanine Floor,
Swadeshi Mill Compound,
Opera House, Girgaon,
Mumbai-400004

2. M/s. Kaushal Logistics Pvt. Ltd.

R M-81, Sudarshan Nagar,
MIDC-Phase II, Dombivali (E)
Thane-421201

3. M/s. Express Suitings Pvt. Ltd.

Office No. 24, Mezzanine Floor,
Swadeshi Mill Compound,
Opera House, Girgaon,
Mumbai-400004

4. M/s. Heavy Steel Pvt. Ltd.

R M-81, Sudarshan Nagar,
MIDC-Phase II, Dombivali (E)
Thane-421201

5. M/s. Bridge Infra Pvt. Ltd.

Gala No. 106, Everest Ind. Estate,
Near 66 KVA, Power Sub Station,
Amli, Silvassa-DNH-396230

6. M/s. Devika Trading Pvt. Ltd.

Office No. 24, Mezzanine Floor,
Swadeshi Mill Compound,
Opera House, Girgaon
Mumbai-400004

.....Applicants

Versus

Mr. Brijesh Kumar Mishra,

Resolution Professional (RP) of
Krishna Knitwear Technology Ltd
A Company under CIRP
Flat No. 202, Bhoj Bhawan,
Plot No. 18-D, Sion-Trombay Road,
Chembr-Mumbai-400007

.....Respondent

Order Reserved on: 22.03.2021
Order Pronouncement on: 06.04.2021

Coram: MADAN B. GOSAVI, MEMBER (J)
VIRENDRA KUMAR GUPTA, MEMBER (T)

Appearance:

In IA 953 of 2020

For the Applicant : Learned Senior Counsel Mr. Navin Paha a.w. Learned Counsel Mr. Yuvraj Thakore
For the Respondent: Learned Counsel Ms. Mamta Binani

In IA 13 of 2021

For the Applicant : Learned Counsel Mr. Saumitra Chaturvedi
For the Respondent: Learned Counsel Ms. Mamta Binani

ORDER

[PER VIRENDRA KUMAR GUPTA, MEMBER (T)]

Facts as stated in IA 953 of 2020 in CP (IB) No. 279 of 2018

1. Through this application, applicants are seeking a direction from this Authority to Resolution Professional (hereinafter referred to as "**RP**") to re-constitute Committee of Creditors (hereinafter referred to as "**COC**") by including the applicants and assign voting rights to them in respect of Corporate Insolvency Resolution Process (hereinafter referred to as



“**CIRP**”) of the Corporate Debtor, namely, M/s Krishna Knitwear Technology Ltd.

2. The applicants had filed an application under Section 7 of Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “**IBC, 2016**”) against the Corporate Debtor which was heard and reserved for order. However, pending disposal of their such application, the Corporate Debtor was admitted into CIRP in an application filed by Andhra Bank, another Financial Creditor, against the same Corporate Debtor vide order dated 13.01.2020. The Respondent No. 1 in the present application was appointed as Interim Resolution Professional (hereinafter referred to as “**IRP**”), and thereafter, confirmed as Resolution Professional (hereinafter referred to as “**RP**”). The IRP published Form-A in the newspaper on 30.01.2020 inviting claims from the Financial Creditors by 13.02.2020. It is claimed by the applicants that they filed their claims within prescribed period in Form-C with all supporting documents regarding genuineness of their claims. On 24.02.2020 and 25.02.2020, three applicants i.e., 5, 6 and 7, namely, Hikal

Pro Estate Pvt. Ltd., Tanvish Trading Pvt. Ltd. and Vingharata Corrugators Pvt. Ltd. received mails from the RP wherein certain queries were raised. The applicant at serial no. 1 to 4, namely, Rajdeep Clothing & Advisory Pvt. Ltd, Ritu Multitrade Services Pvt. Ltd., Eloquent Traders Pvt. Ltd, and Wellworth Apparels Pvt. Ltd., did not receive any query in respect of their claims. It is also claimed that queries raised with the Applicant No. 5, 6 and 7 were also having no substance. First meeting of COC was held on 29.02.2020 which was not informed to Applicants No. 5, 6 and 7, however, notice by applicants no. 1, 2, 3 and 4 had been received. In the said COC meeting Applicants No. 1, 2, 3 and 4 participated and noted that amount claimed by them had been substantially reduced. The details of amount claimed by them and admitted by RP in first meeting of COC are as under:

Sr. No.	Name of Applicant	Date of submission of claim	Amount of claim (Rs. in crores)	Amount admitted by Respondent (Rs. in crores)
1.	Rajdeep Clothing & Advtsory Pvt. Ltd.	10.02.2020	52.83	14.46

2.	RituMultitrade Services Pvt. Ltd.	08.02.2020	32.51	7.05
3.	Eloquent Traders Pvt. Ltd.	07.02.2020	17.08	4.75
4.	Wellworth Apparels Pvt. Ltd.	10.02.2020	39.69	8.04
5.	Hikal Pro Estate Pvt. Ltd.	08.02.2020	14.57	0.00
6.	Tanvish Trading Pvt. Ltd.	10.02.2020	21.01	0.00
7.	Vignaharta Corrugators Pvt. Ltd.	08.02.2020	31.72	0.00
	Total		209.41	34.30

3. The Applicants No. 1 to 4 raised the issue with the Respondent who did not give any satisfactory reply except stating that their claims were under examination. It has also been claimed that claims of the Applicants No. 5, 6 and 7 had not been admitted at all and nothing was heard by them in that regard from the RP. It has also been claimed that 3rd and 4th meeting of the COC which were held on 07.07.2020 and 19.08.2020, RP did not call Applicants No. 5, 6 and 7 in any of these meetings. Subsequently, on 14.08.2020 a mail had been received by them which led to an understanding on their part that the RP had no intent to consider their genuine claims. On

14.10.2020, the Applicants No. 5, 6 and 7 received a mail that they were related party to the Corporate Debtor in terms of Clause (f), (h), (l) and (m) of sub-section 24 of Section 5 of IBC, 2016. As per applicants, the basis for such allegation/decision was that the applicants were having directorship in the Companies whose name appeared in the order of Securities Appellate Tribunal (hereinafter referred to as "**SAT**") in case of *Sanjay Kumar Tayal vs. SEBI in Appeal No. 68 of 2013 order dated 11.02.2014*. It has also been claimed in this application that copy of this order was not provided to them. It has also been claimed in the application that the RP without substantiating the fact as to how the applicants were related to the Corporate Debtor under Section 5(24) of IBC, 2016 arrived at such conclusion and denied the legitimate claims of the applicants. The applicants also sent replies on 29.10.2020 to the Resolution Professional answering all the objections which were raised by him and also provided necessary documents to support their case. However, failing to receive any response from the RP, this application was filed on 29.12.2020 as the applicants had all reasonable

apprehensions that by keeping the issue pending in this manner, the respondent was acting to the detriment to their rights and interests and had a biased approach which was in gross violation of the scheme, objects and relevant provisions of IBC, 2016.

4. It has also been claimed that as against the applicant's claims worth Rs. 2094/- crores, the RP admitted the claims at Rs. 30.03/- crores only and this was done with only one agenda to reduce their voting share so that there could not be any reasonable/legal hurdle for him to achieve the requisite majority of 66% in COC.

Brief contentions of the Applicants

5. The Learned Senior Counsel, after narrating the factual aspects as discussed hereinbefore, contended that at no point of time applicants were a related party of the Corporate Debtor. It was also claimed that the order of the SAT which was relied on by the RP had neither any reference to the Corporate Debtor nor remotely connected to the applicants; hence, the stand of the RP was not at all tenable in law. The

Learned Senior Counsel further pleaded that to treat applicants as related party that too based upon an order passed in the year 2014 in a totally different context under different law could not be a proper basis. To further buttress this argument, the learned senior counsel made legal contention that IBC, 2016 was a complete CODE in itself and provisions of this CODE were applicable, and therefore, in view of the provisions of Section 238 of the CODE, such order could not be made a basis. He further augmented his case by stating that the RP miserably failed to show as to how the provisions of Section 5(24) and/or Section 5(24A) were applicable. Learned Senior Counsel further contended that Due Diligence Report from the expert i.e., Practising Company Secretary had been obtained and which was placed in the paper book wherein after considering the provisions of Section 5(24), Section 2(76) r.w. Section 188 of Companies Act, 2013 and accounting standard 18, it had been categorically certified that applicants were not a related party to the Corporate Debtor as per any provisions of IBC, 2016. It was, therefore, claimed that this report had already been provided to the Respondent No. 1

(RP) but there was no response from the RP. Thereafter, Learned Senior Counsel also submitted that as per Regulation 13(1) of CIRP Regulations, 2016 respondent was responsible to examine every claim within seven days from the receipt of last date of the claim, and therefore, query which could be raised by the RP, the same should have been done latest by 20.02.2020, however, this was not done at all. A reference to Regulation 14(1) and 14(2) was made to contend that the respondent did not act in accordance with such regulations in not considering the valid and enforceable amounts claimed by the applicants because only the principal amount was admitted whereas interest claims were ignored.

6. Learned Senior Counsel further contended that in addition to said report the affidavits by respective applicants had also been filed wherein it had been categorically stated that applicants were never a related party of the Corporate Debtor in terms of provisions of Section 5(24) of IBC, 2016.

Reply of the Respondent

7. In the reply, preliminary objections have been taken as regard to those false pleas and incorrect submissions vis-a-vis treatment of claims of the applicants by the RP. It has also been claimed that an attempt had been made to paint an incorrect picture of the fair and transparent conduct of CIRP by RP despite repeated attempts by the Suspended Board of the Corporate Debtor and the applicants to derail the process. It has also been claimed that the applicants were not only related party but were part of the same corporate group which was formed to engage in corporate malpractices and fraudulent transactions in contravention of law. It has also been claimed on the aspect of related party when the queries were raised since then the management of the Corporate Debtor had denied access to the documents of the Corporate Debtor for the purpose of verification of such claims and having conducted in such manner, now, they are alleging that the RP had not verified the claims in timely manner. It has been submitted that in addition to the said order of SAT, the RP had also appointed Independent Transaction Auditor with due approval of the COC with the object to enquire into and

assist the RP in verifying all claims including related party claims received in the on-going CIRP.

8. Based upon the findings given by the SAT in the matter of Sanjay Kumar Tayal (supra), it has been claimed that all entities (companies) including the applicant's companies were operated and controlled by one common entity i.e., Tayal family. Apart from the transaction auditor's report and the said order of SAT, additional working has also been attached at Annexure-2 at page nos. 41 to 72 of the paper book. It has also been claimed that said order of SAT had been upheld by Hon'ble Supreme Court and copy of the said order has also been attached with their reply as Annexure-4. It has been claimed pleaded that in the said order of the SAT, it was observed that these companies were set up to circumvent the provisions of law and were mere facades to further personal unlawful commercial motives of the common group. It has also been stated by the RP that in addition to these documents, RP had all rights to rely on various other sources to substantiate the facts in discharging of his function/duties and on this

basis, reliance has been placed on the news item published on 23.12.2020. It has also been claimed that having regard to the object of the CODE that related parties should be prevented to take unlawful control to CIRP of the Corporate Debtor; the RP had rightly removed the applicants from COC.

9. As regard to facts regarding verification of claims of the applicants and other claimants in accordance with the law, it has been claimed that verification of claims and constitution of COC and revision of claims/constituents of COC has been done as per law. It has also been particularly stated that in case of applicants, RP repeatedly sought cooperation and documents; however, said efforts did not materialize. It has also been claimed that COC and other stakeholders were regularly apprised of various issues relating to claims and copies of minutes of second to sixth COC meetings have been attached as Annexure-8. It has also been stated that the concerned applicants not only participated in the COC but also exercised voting rights until they were found to be a related party which resulted into re-constitution of COC. As

regard to communications with the applicant for verification of their claims, it has been claimed by the RP that communications were done from time to time and copies thereof were enclosed with the petition. It has also been specifically pointed out that even in respect of Applicants No 5, 6 and 7 principal amount of their debt on the company had been admitted, hence, said pleas were without any merit. As far as claims of the applicants relating to the interest amount was concerned, the same remained unsubstantiated; hence, not considered. It has also been stated that all applicants were aware that their claims and status as related party were pending for re-verification before the Transaction Auditor as they participated in the meeting of COC where the proposal to appoint Transaction Auditor was considered and approved. It has been stated that considering the pandemic situation and lack of co-operation by the Suspended Board of the Corporate Debtor, the RP acted efficiently in accordance with the relevant provisions of law in conducting the CIRP. As regard to reliance placed by the applicants on the Due Diligence Report, it has been pleaded that report produced by applicants is incomplete

and misleading; hence, this report cannot be considered as fact of evidence regarding their status of not a related party as claimed by them. The Learned Counsel for the Resolution Professional also referred to the various correspondences made by RP and also drew our attention to minutes of meetings of COC to substantiate its claims regarding validity of the actions taken by RP. Our attention was also drawn to the Transaction Audit Report.

Rejoinder by the Applicants

10. The Learned Senior Counsel submitted that only one applicant i.e. applicant no 5 was party to the proceedings before SAT and even for such party no observations or findings were recorded which would establish any relationship between this applicant and the Corporate Debtor. As regard to other applicants, it was specifically pointed out that none of them was mentioned in the said order. It was also stated that the report of the practicing company secretary dated 25.10.2020 was complete in all respects and an unambiguous opinion had been given that none of the applicants was a related party and

as against this the report of the Transaction Auditor was based on many assumptions and inconclusive. It was again emphasized that there was no inter-relationship or inter connection between the directors/shareholders of applicant no 5 with the Corporate Debtor at any point of time. The Learned Senior Counsel concluded his argument by stating that there were some common directors between the applicants only and there was not even a single instance of common directorship of such persons with both applicant companies and the Corporate Debtor.

11. Now, we shall discuss the facts of **IA 13 of 2021 in CP (IB) 279 of 2018.**
12. IA 13 of 2021 also involves similar issues as agitated in IA 953 of 2020. In this application, facts reveal that the applicants had filed their claims towards Invocation of Corporate Guarantee with supporting documents on 14.02.2020. The applicants were issued a notice by RP on 25.02.2020 whereby they were invited to participate in first meeting of COC held on 29.02.2020. In the said meeting, it transpired that the RP had

admitted claims towards principal amount only ignoring the huge amount of claims towards interest even though interest was also covered under the Corporate Guarantee issued by Corporate Debtor. It is stated that amount of claim lodged amounted to Rs. 782.87 Crores and amount admitted by the RP stood at Rs. 209.80 Crores. The applicants also participated in the second COC meeting held on 02.06.2020. In the third meeting of COC held on 07.07.2020, the applicants also participated. In the said meetings, it is claimed that the applicants objected to the proposal that claim should be verified by the outside professional. It is claimed that on 19.08.2020, the clarifications were sought which were discussed and explained to the RP. Thereafter, suddenly on 14.10.2020 the applicants received that their claims had been rejected and they had also been removed from COC. In the petition, the said action of the RP has been challenged on following grounds:

- i) *That no documentary evidence has been enclosed along with the letter to establish that the Applicants are related party to the Corporate Debtor.*

- ii) *That reliance placed on the order dated 11.02.2014 of the Hon'ble SAT, which was an Appeal filed by an individual, is absurd as it is not in reference to the corporate debtor.*
- iii) *That the said order does not deal with the issue of related party, as applicable under IBC, 2016.*
- iv) *That the said Appeal i.e. Sanjay Kumar Tayal Vs. SEBI, does not contain name/ specific findings in respect of the Applicants, with particular reference to their connection with the CD.*
- v) *That the order totally relied upon by the Respondent in treating the Applicants as related party of the CD, pertains to the year 2014, i.e. when the IBC was not in existence, as such the reliance placed is highly redundant and uncalled for.*
- vi) *That the provisions of IBC on related party are specific with no ambiguity, leaving no scope for assumptions/ presumptions or drawing adverse inference, as attempted by the Respondent.*
- vii) *That the Respondent failed to provide copy of the order dated 11.02.2014 along with the letters, enabling the Applicants to deal with the same.*
- viii) *That the other reason for non-admission of claims of the Applicants as given by the Respondent that the Corporate Debtor has not disclosed details in respect of any corporate guarantee, in its Balance sheets is illogical and untenable. That non-disclosure on the part of CD in its books cannot defeat the legitimate claims of the Applicants, which were substantiated by way of valid and enforceable documents including corporate guarantee duly executed by the Corporate Debtor in terms of the resolution passed by their Board of Directors.*

- ix) *That the allegation with regards to difference in signatures of the director, who has executed the corporate guarantee deed is unwarranted. That the further allegation of having executed backdated guarantee deed is baseless and such assumptions cannot be the grounds for decline of the claims.*
- x) *That the Respondent without examining the claims on the basis of documents and by correlating the same with the provisions on the related party or without having obtained due diligence report from the experts/ Professionals, ought not to have declined the claims in cursory manner.*

13. The RP has rejected the claims of the applicant from the very beginning. The RP has further relied on the report of the Transaction Auditor to communicate his final decision regarding rejection of their claims as well as treating them a related party of the Corporate Debtor.

14. The other facts and communications are similar to IA 953 of 2020, hence, not repeated.

15. Learned Counsel for the applicant IA 13 of 2021 appeared and made following submissions:

- 1. *The applicants through the present application have prayed this Hon'ble Adjudicating Authority to direct the respondent to admit the claims of the applicants along with interest as per the Form-C filed by the applicants with the respondent and also direct the respondent to reinstate the*

applicant as the members of the Committee of Creditors (hereinafter to be referred as the "CoC") with revised voting share in proportion to the total value of the claims submitted by them. The applicants through the present application have also prayed this Hon'ble Adjudicating Authority to be treated as **"Unrelated Party Financial Creditors"** and consequently seek to be the members of the CoC in relation to Krishna Knitwear Technology Limited (hereinafter to be referred as the "Corporate Debtor"), the Corporate Debtor herein.**(Please Refer to the Reliefs Sought @ Pg No. 29 of the application)**

2. An application filed by one of the financial creditors i.e. Andhra Bank being C.P. (I.B.) No. 279/7/NCLT/ AHM/2018 under section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter to be referred as "IBC"), for initiating Corporate Insolvency Resolution Process (hereinafter to be referred as "CIRP") against the Corporate Debtor was admitted by this Hon'ble Tribunal vide order dated 13.01.2020, appointing Mr. Brijesh Kumar Mishra, the respondent herein as the Interim Resolution Professional.**(Please Refer to Pg No. 39-68)**
3. In consequence to the above, the applicants filed Form-C which was accepted by the Interim Resolution Professional.**(Please refer to Pg Nos. 253-589)**The claims of all the Applicants herein were in respect of the Corporate Guarantees given by the Corporate Debtor towards the financial assistance given by the Applicants to one of the group companies. Upon the failure on part of the group companies to repay the loans taken from the Applicants herein, the Applicants invoked the guarantees given by the Corporate Debtor and filed the respective claims. It is settled proposition of law that the claim towards invocation of corporate guarantees falls under the definition of Financial Debt as defined under the provisions of the IBC thus making the applicants herein as the Financial Creditors of the Corporate Debtor.



4. During the course of the 1st COC meeting dated 29.02.2020, the Applicants came to know that the IRP has admitted claims of the Applicants herein only towards the principal amount ignoring the huge amount of claims towards interest, even though the same were covered under the corporate guarantees issued by the Corporate Debtor. **(Minutes are placed at Pg No. 74-88)** The IRP without assigning any reasons admitted a claim of only Rs. 209.8 crores towards corporate guarantees as against the claims of Rs. 782.87 Crores filed by the Applicants (26% of claim value). The details of the claims submitted to the IRP is as following:-

S. No.	Name of Applicant	Date of submission of claim	Amount of claim (Rs. in crores)	Amount admitted by Respondent (Rs. in crores)
1	Abhinandan Multitrade Pvt. Ltd.	13.02.2020	135.99	35.00
2	Kaushal Logistics Pvt. Ltd.	11.02.2020	88.05	26.00
3	Express Suitings Pvt. Ltd.	10.02.2020	174.93	45.00
4	Heavy Steel Pvt. Ltd.	13.02.2020	147.94	40.00
5	Bridge Infra Pvt. Ltd.	12.02.2020	69.53	18.80
6	Devika Trading Pvt. Ltd.	10.02.2020	166.43	45.00
	Total		782.87	209.80

5. Subsequence to the above the applicants herein received the notice for 2nd COC meeting dated 02.06.2020. **(Please Refer to Pg No. 89-127)** It is pertinent to note that the Resolution Professional (Respondent herein) neither modified the claim value nor the voting share though a period of more than 3 months was available with the Respondent to examine the pending amount of claims and decide the same, based on the documents filed by the Applicants. Instead the respondent in the 2nd CoC meeting suggested appointment of an outside professional other than the Respondent for forming an opinion on the amount, security interest and

admissibility of claims received or to be received from various creditors including a professional advice on the reconstitution of the CoC. (Minutes are placed at Pg No. 128-160. Please Refer to Pg No. 143-145)

6. *This proposition by the respondent was objected to by various creditors in the 3rdCoC meeting including the applicants herein. It was specifically pointed out to the Respondent that the professional being sought to be appointed for carrying out the aforementioned work is already involved in CIRP of one of the group companies i.e. M/K Lifestyle & Industries Ltd., and therefore he may not be appointed as the Transaction Auditor for the Corporate Debtor herein. (Minutes are placed at Pg Nos. 161-196. Please Refer to Pg Nos. 168-171) However without paying any heed to the objections raised, the respondent herein appointed M/s. R. Choudhary & Associates as the Transaction Auditor for the Corporate Debtor.*
7. *The applicants were subsequently also invited to the 4thmeeting of the CoC in the capacity of Financial Creditors and members of the CoC. (Minutes are placed at Pg Nos. 225-252) However, before the 5th meeting, the applicants received the impugned email dated 14.10.2020(Please Refer to pg No. 296) addressed by the Resolution Professional stating that although the applicants were admitted as Financial Creditors in respect of the principal amount (not the interest amount), but now after 4 meetings of CoC they are unable to admit the claims of the applicants even towards the Principal Amount and also further stated that the applicants are also related parties to the Corporate Debtor in terms of Clause (f),(h),(l) and (m) of Section 5(24) of IB Code. The respondent Resolution Professional has placed reliance upon the order dated 11.02.2014passed by the Securities Appellate Tribunal, Mumbai in Appeal No. 68 of 2013(Please Refer to Pg Nos. 612-619) while coming to the aforementioned conclusion. It is also mentioned in the reply affidavit dated 27.01.2021 filed on behalf of the respondent that the decision of the respondent vide email dated 14.10.2020 was based upon the opinion of the Transaction Auditor vide*

report dated 29.08.2020. **(Please refer to Pg Nos. 28 to 38 of the reply Affidavit)**

8. It is submitted that the decision of the Respondent vide email dated 14.10.2020 is completely bad in law and illegal as it is solely based upon the Transaction Auditor's Report dated 29.08.2020 because once the respondent has admitted the claims of the applicants, he is estopped from rejecting the claims especially after the applicants have attended 4 CoC meetings in the capacity of Financial Creditors. Other than the aforementioned, none of the provisions of the IBC permit for such delegation of duties by the Resolution Professional to any third person. Section 21(1) of the IBC specifically states that it is the duty of the Interim Resolution Professional only to constitute the Committee of Creditors after collation and determination of all the claims received by him. For the ready reference of the Hon'ble Tribunal, Section 21(1) is reproduced as hereinafter :-

"21. Committee of Creditors

(1) The interim resolution professional shall after collation of all the claims received against the corporate debtor and determination of the financial position of the corporate debtor, constitute a committee of creditors."

9. Further, Regulations 10 and 13 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 also specifically mandates that it is the duty of the Interim Resolution Professional or the Resolution Professional only to verify each and every claim along with security interest if any. Further regulation 13(e) specifically mandates that the list of creditors prepared by the Resolution Professional has to be presented at the first meeting of the CoC. For the ready reference of this Hon'ble Tribunal Regulations 10 and 13 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 are reproduced as hereinafter :-

“10. Substantiation of claims.

The interim resolution professional or the resolution professional, as the case may be, may call for such other evidence or clarification as he deems fit from a creditor for substantiating the whole or part of its claim.”

“13. Verification of claims.

(1) The interim resolution professional or the resolution professional, as the case may be, shall verify every claim, as on the insolvency commencement date, within seven days from the last date of the receipt of the claims, and thereupon maintain a list of creditors containing names of creditors along with the amount claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims, and update it.

(2) The list of creditors shall be –

(a) available for inspection by the persons who submitted proofs of claim;

(b) available for inspection by members, partners, directors and guarantors of the corporate debtor;

(c) displayed on the website, if any, of the corporate debtor;

(ca) filed on the electronic platform of the Board for dissemination on its website: Provided that this clause shall apply to every corporate insolvency resolution process ongoing and commencing on or after the date of commencement of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fifth Amendment) Regulations, 2020;]

(d) filed with the Adjudicating Authority; and

(e) presented at the first meeting of the committee.”

Thus, on a bare reading of the aforementioned regulations it is crystal clear that it is the duty of the Interim Resolution Professional or the Resolution Professional only to verify and collate the claims, constituting the CoC, and that there is no provision for delegating this duty to any outsider for the purpose of altering the list of the creditors presented at the first CoC meeting. Therefore, the report dated 29.08.2020 and the observations made therein along with the appointment of the Transactional Auditor is completely bad in law, illegal and arbitrary.

Further, it may be appreciated that the legislature consciously only conferred powers on the IRP or an RP to carry out the aforementioned duties. The provisions of the code in no manner even suggests that the intention of the legislature was such to allow the IRP/RP to delegate the powers and duties conferred upon them by to Code to a third party. It has been time and again held by the Hon'ble Apex Court in various judgments that conferring unfettered powers on the delegate would be an abdication of legislative responsibility, and that essential legislative functions cannot be delegated. Therefore also the appointment of the Transaction Auditor by the respondent herein and the Report dated 29.08.2020 is completely bad in law, illegal and arbitrary and hence should be rejected.

Even otherwise, it is also settled law that as per the mandate of S. 21 of the Code the Resolution Professional's duty is only to verify and collate the claims and not adjudicate it. Therefore also the respondent herein may be directed to admit the claims of all the Applicants herein along with interest as per Form-C filed by them and reinstate them as members of the CoC along with revised voting share in relation to the total value of the claims of the applicants.

10. The applicants through the present application have also prayed this Hon'ble Tribunal to be treated as "Unrelated Party Financial Creditors" and consequently seek to be the members of Committee of Creditors in relation to Krishna Knitwear Technology Limited, the Corporate Debtor herein.
11. As stated earlier by the respondent herein by the impugned email dated 14.10.2020 have declared the applicants as related parties to the Corporate Debtor in terms of Clause (f),(h),(l) and (m) of Section 5(24) of IB Code and have debarred them from acting as the members of the CoC.
12. The respondent Resolution Professional has placed reliance upon the order dated 11.02.2014 passed by Securities Appellate Tribunal, Mumbai in Appeal No. 68 of 2013 while coming to the aforementioned conclusion.
13. The controversy in the proceedings before the Hon'ble Securities Appellate Tribunal, Mumbai was whether the promoters of Bank of Rajasthan Limited instead of reducing their holding in the Bank (as mandated by the RBI Guidelines dated 25.02.2005) had rather increased their stakes in the Bank through surrogate acquisition. The investigation done also pertained to alleged violations of the SEBI Act, Rules and Regulations in relation to certain on market and off market transfer of shares of Bank of Rajasthan by entities listed in the reference.
14. So far as the present applicants are concerned, none of them were made party to the said proceedings before the Securities Appellate Tribunal, Mumbai. It is also pertinent to mention that even otherwise the order passed by SAT does not make any observation or record any finding which would establish any relationship between the applicants herein and the Corporate Debtor as defined in Clauses(f), (h), (l) and (m) of Section 5(24) of IB Code.
15. Upon receiving the aforementioned impugned email dated 14.10.2020 from the Resolution Professional, the applicants herein also obtained a report from Honey Soni, a PCS dated 26.10.2020 **(Please refer to Pg.300)** wherein while comparing the composition of Board of Directors of Corporate Debtor vis-à-vis the composition of the applicants herein and the shareholding pattern of Corporate Debtor vis-à-vis that of the applicants

herein, a report is given stating in clear terms that none of the applicants herein are related parties under any of the clauses of Sec. 5(24) of IB Code. The same was provided to the respondent herein however for the reasons best known to the respondent, the respondent chose not to reply to the said report.

16. Pursuant to the order dated 10.2.2021 made by the Hon'ble Adjudicating Authority, Ahmedabad, the applicants have also filed affidavits dated 17.2.2021 wherein it is in terms averred in Para 9 thereof that the applicants are not related/ connected with the Corporate Debtor at any point of time in terms of the provisions of Sec. 5(24) of IB Code, Sec. 2(76) and 2(77) of Companies Act, 2013.
17. The transaction audit report dated 29.8.2020 produced by Resolution Profesional at Pg. 28 of Reply Affidavit makes a wrong statement @ Pg. 31 that as per the order of SAT, it is evident that there are common directors between the applicants and the Corporate Debtor. The order of SAT does not in any manner state about the commonality of directors of the applicants herein and the Corporate Debtor. Even otherwise the report nowhere makes a reference to the list of directors of the Corporate Debtor.
18. The phrase "person acting in concert" as defined in Regulation 2(1)(q) of the Takeover Regulations, 2011 of SEBI may not have any application in view of specific provision contained in Sec. 5(24) under the IB Code. It would be relevant at this stage to make reference to the observations made by the Hon'ble Supreme Court in Phoenix ARC Limited, Civil Appeal No. 2842 of 2020 to the extent of following observations:-

"59. The term 'related party' has also been defined by Parliament in the Companies Act, 2013 for all corporations. The definition of the expression has also been expanded for listed entities by the Securities Exchange Board of India by amendment to the Equity Listing Agreement to include elements mentioned under applicable accounting standards. However, in the present case, we are assessing its definition only under the IBC, which is exhaustive. The purpose of defining the term

separately under different statutes is not to avoid inconsistency but because the purpose of each of them is different. Hence, while understanding the meaning of 'related party' in the context of the IBC, it is important to keep in mind that it was defined to ensure that those entities which are related to the Corporate Debtor can be identified clearly, since their presence can often negatively affect the insolvency process."

19. *The Hon'ble Apex in the same matter after discussing the interpretation of the proviso, keeping in mind the object of the Code along with the intention of the legislature, has also specifically clarified that the exclusion under the first proviso to Section 21 (2) would not apply to a financial creditor who in presenti is not a related party and that such financial creditor would not be debarred from being a member of the CoC. The relevant excerpt of the judgment is reproduced as hereinafter:-*

"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 presenti is not a related party, would not be debarred from being a member of the CoC. ..."

20. *In the present case admittedly even as per the Respondent there are no facts or evidences to show that the applicants herein are related parties to the Corporate Debtor in presenti and therefore the decision of the respondent to treat the applicants herein as related party is completely illegal and maybe quashed and set aside.*

21. *In the circumstances, since the applicants are not related parties as per Sec. 5(24) of IB Code, this Hon'ble Adjudicating Authority may be pleased to allow the present application directing the Respondent herein to admit the claims of the Applicants herein along with interest as per Form-C and reinstate them as members of the CoC with revised voting share in proportion to the total value of claims.*

16. Resolution Professional has filed written submission on 03.03.2021, however, it is seen that in the additional affidavit filed on 18.03.2021 claims made in written submission have been incorporated in the such affidavit, hence, not mentioned separately. In such additional affidavit filed, RP states as under:

1. *The letter of appointment and terms thereof of the Transactional Auditor, by the Resolution Professional, has been sent to the Transactional Auditor vide an email of the Resolution Professional dated 17.07.2020. The email confirms the appointment of the transactional auditor and entails the scope of work, the terms, the timeline and a general head.*

The same is marked herewith and marked as 'Annexure-B'.

2. *The clarification with regard to the point on financial debt and the applicability of the concept of person in concert is adumbrated below:*

Re: Corporate Guarantee

- a. *The Corporate Debtor, i.e. Krishna Knitwear Technology Limited has not received any loans from the Petitioners/Claimants.*
- b. *The Petitioners/Claimants are all private limited companies and are not Banks or Financial Institutions.*

The names are:

- i. *Abhinandan Multitrade Private Limited*

- ii. *Bridge Infra Private Limited*
- iii. *Devika Trading Private Limited*
- iv. *Express Suiting Private Limited*
- v. *Heavy Steel Private Limited*
- vi. *Kaushal Logistics Private Limited*

c. *The Claim was sent to the Resolution Professional by all these Companies. The claim is in the nature of purported Corporate Guarantees extended by the Corporate Debtor to all the said Petitioner Companies/Claimants on a loan taken by one KSL & Industries Limited.*

3. *The Resolution Professional mentions that in the beginning, at the stage of collation of papers, the above mentioned six companies were made a part of the Committee of Creditors in good faith, basis their respective Claim forms, while side by side the papers and information was being sought from the said Petitioner Companies/Claimants.*

The same is evident from the minutes of the first meeting of the Committee of Creditors dated 29.02.2020 (page 136 of the Reply Affidavit please), where the names are featuring in the list of Committee of Creditors and also duly re-iterated on page 140 of the Reply Affidavit.

4. *The CoC in its first meeting itself held on 29.02.2020 (where the said six Petitioner Companies/Claimants were also a part of CoC), discussed and the decision to appoint a transaction auditor with a mandate of not only identification of PUFÉ transactions but also for the purpose of re-verification of*

claims and authentication of each and every document submitted by the creditor with regard to their claim was taken.

The same is evident from the minutes of the first meeting of the Committee of Creditors dated 29.02.2020 (page 146 of the Reply Affidavit).

The said verification was mandated for each Claim and the Petitioner Companies/Claimants also approved this resolution. The same is duly evident from the Voting Summary Sheet placed at page 149 of the Reply Affidavit under 'Resolution no.10'.

5. *The RP held the second CoC meeting on 02.06.2020. The Petitioner Companies/Claimants were still a part of the CoC.*

The same is evident from the names of the said Companies featuring in the list of Committee of Creditors in the minutes of the second CoC placed at page 151 of the Reply Affidavit.

6. *The reasons on the appointment of transaction auditors was entailed in the said minutes which, inter-alia, laid out that:*

'He (RP) further added that as per the decision of the Committee in its first meeting, regarding the appointment of the professional (Transactional Auditor) to assist the Resolution Professional in re-verification of claims and authentication of each and every document submitted by Creditors with regard to their claim including interest thereof, emanating out of some serious concerns raised by few Banks with claim documents of certain unsecured lenders.....'

The same is evident from the minutes of the second meeting of the Committee of Creditors dated 02.06.2020 placed at page 166 of the Reply Affidavit (first paragraph).

7. *The RP held the third CoC meeting on 03.07.2020. The Petitioner Companies/Claimants were still a part of the CoC.*

The same is evident from the names of the said Companies featuring in the list of Committee of Creditors in the minutes of the third CoC meeting placed at page 185 of the Reply Affidavit.

8. *The appointment of R D Choudhary, Chartered Accountants, was made in the third CoC meeting held on 03.07.2020.*

The same is evident from the minutes of the third CoC meeting placed at page 191 of the Reply Affidavit.

9. *The RP held the fourth CoC meeting on 19.08.2020. The Petitioner Companies/Claimants were still a part of the CoC.*

The same is evident from the names of the said Companies featuring in the list of Committee of Creditors in the minutes of the fourth CoC meeting placed at page 199 of the Reply Affidavit.

10. *The RP did not get any support and co-operation from the Directors of the Corporate Debtor. Hence, no data, document or supportings was forthcoming or received from the Directors in relation to the Claims of the Petitioner Companies/Claimants.*

The same is prevalent from pages 205 to 207 of the Reply Affidavit.

11. *The RP held the fifth CoC meeting on 27.10.2020. By this time the RP had received the report of the Transactional Auditor. The Report is dated*

29.08.2020. The Petitioner Companies/Claimants had to be then dropped from the CoC, basis the said Report, which contained some grave and very serious findings.

The said exclusion from the CoC, for the first time, is prevalent from the absence of the names of the Petitioner Companies/Claimants from the List of names of Committee of Creditors contained in the minutes of the fifth CoC meeting, placed on page 226 of the Reply Affidavit.

The said report of the Transactional Auditor and the updated List of Creditors was placed for discussion and noting in the said fifth CoC meeting. The same is evident from page 233 of the Reply Affidavit.

12. The RP kept on asking for details/clarifications from the Petitioner Companies/Claimants, but to no avail, hence the Claims remained uncorroborated.

The same is evident from the emails and correspondences dated 02.06.2020 placed on page 288 of Reply Affidavit. Then again on 14.08.2020 placed on page 290 of Reply Affidavit. Then again on 16.08.2020 placed on page 292 of Reply Affidavit.

13. On the contrary, the transaction audit report dated 29.08.2020 records that the purported Corporate Guarantees claimed being relied upon by the Petitioner Companies/Claimants are not recorded in the books of the Corporate Debtor, and in fact, the financial statements of the Corporate Debtor categorically show that no Corporate Guarantees were executed by the Corporate Debtor. Furthermore, upon meticulous scrutiny of the records, severe discrepancies were found in the alleged records appended by the Petitioner Companies/Claimants alongwith their Claims. Pursuant to the

verification of the books of the Corporate Debtor, the transactional auditor has concluded that the Applicants have engaged in fabrication of records and have back-dated various documents to raise the alleged claims.

The same is evident from relevant pages of the Transactional Audit Report placed on pages 31 to 36 of the Reply Affidavit.

14. The said Petitioner Companies/Claimants were duly informed of the rejection by the Resolution Professional, giving all cogent reasons, vide his email dated 14.10.2020.

The said email is placed at page 51 of the Reply Affidavit.
The Petitioner Companies/Claimants never reverted nor sent any email to the RP.

Re: The issue of Related Party

15. Reliance has been placed on the Securities Appellate Tribunal Order dated 11.02.2014 placed on page 63 of the Reply Affidavit.

- I. Page 83 on top features the name of 'KSL and Industries Limited' as a group company and places it in the same basket as that of the Corporate Debtor, i.e. Krishna Knitwear Technology Limited. The loan in the case in hand has been taken by KSL and Industries Limited. The loan is therefore extended within the group.
- II. Now, it has been written by the Transactional Auditor on page 31 that at the time of providing loans to the said KSL and Industries Limited, the Directors of the Petitioner Companies/Claimants and the parties to the execution of the

Corporate Guarantees from the side of the Corporate Debtor in favour of the said Petitioner Companies/Claimants were same.

III. *In other words, the same set of people executed both: The giving of Corporate Guarantee documents from the side of the Corporate Debtor and also the purported paper formalities from the receiving end of the Petitioner Companies/Claimants.*

i. *The same has been laid out on page 34 of the Reply Affidavit. The said Mr. Farindra Bihari Rai has resigned from all the Group Companies of Tayal Group latest in March, 2015.*

16. *Hence the Claim of Corporate Guarantees was rejected in totality and the reasons were entailed on page 31 onwards.*

d. *SEBI SAT Order: The related party under section 5(24)(f)(h)(l)(m) has been invoked basis the SEBI SAT Order read with dismissal of the appeal made by the affected parties by the Hon'ble Supreme Court.*

e. *SEBI Order has been referred to on page 31 of the Reply Affidavit. Common Directorship issue has also been mentioned in the said order.*

f. *It will be pertinent to give illustration of one Director as an example, viz. Awdhesh kumar N Singh. He is/was a director in ElnetConpro Private Limited and Ador Construction Private Limited. Both these names feature in the SEBI SAT Order on page 82 (sl.no.34) and on page 83 (sl.no.37). All the entities have been placed as a Group as laid out on page 89 of the Reply Affidavit.*

- g. Awdhesh kumar N Singh is/was also a Director in some of the Petitioner Companies/Claimants.*
- h. The loan has been taken by KSL & Industries Limited, a group entity again.*
- i. The Corporate Debtor i.e. Krishna Knitwear Technology Limited also belongs to the same group as has been entailed on page 83 (top of the page-serial no. iv) of the Reply Affidavit (SEBI SAT Order).*
- j. Therefore, section 5(24)(f)(h)(l)(m) of the Insolvency & Bankruptcy Code gets attracted and falls in the category of Related Party.*

17. Both these matters were heard together. Now, these are being disposed of through common order. In both applications the following issues are involved:

- (i) Whether Resolution Professional, after including Financial Creditors in Committee of Creditors, can remove them from COC for the reason that they are related parties, without prior approval of Adjudicating Authority?
- (ii) Whether Financial Creditors, though they may be a related party remain entitled to be a part of COC without

having any voting rights or right to participate or represent in the COC meetings?

(iii) whether such financial creditors, in view of evidence brought on record, are a related party of the corporate debtor or not?

(iv) Whether opportunity of hearing to the affected parties is to be given before taking such action?

18. Now, we will deal with these questions in the following manner:

(i) Whether Resolution Professional, after including Financial Creditors in Committee of Creditors, can remove them from COC for the reason that they are related parties, without prior approval of Adjudicating Authority?

(ii) Whether Financial Creditors, though they may be a related party remain entitled to be a part of COC without having any voting rights or right to participate or represent in the COC meetings?

In IA No. 953 of 2021, there are 7 applicants. Claims of applicant no. 1 to 7 have been admitted at principal amount. Applicants no. 1 to 4 have participated in first four COC meetings whereas applicants no 5 to 7 were never informed about COC meeting nor any communication was made by RP as regard to status of claims submitted by them. It is further claimed that RP issued certain queries, which according to the applicants were of arbitrary nature and the sole object was to not to invite applicants no 5 to 7 for participation in COC meetings. In IA 13 of 2021, the claims pertain to amount of corporate guarantees which were invoked and such amount includes interest also. It is further noted that all supporting documents as required were attached with Form-C submitted by all applicants in both the applications. It is noteworthy that the basis for treating all the applicants as a related party is based upon the order of SAT dated 11.02.2014 and a report submitted by Transaction Auditor appointed by RP.

19. In this factual background, now, we have to look at the relevant provisions of the CODE as far as issue of admission,

reduction or rejection of claims submitted by the Financial Creditors is concerned and their exclusion from COC, if they are found to be a related party of the Corporate Debtor within the meaning of the provision of Section 5(24) of CODE initially or subsequently. The commencement of Corporate Insolvency Resolution Process (CIRP) happens with the admission of Corporate Debtor into CIRP by the order of Adjudicating Authority to that effect. IRP is also appointed from this date only as there is amendment in law which earlier provided for an appointment of IRP within fourteen (14) days from the date of commencement of CIRP. The public announcement of the initiation of CIRP and request for submissions of claims is made as per the provision of Section 13(1)(b) of CODE. Such public announcement contains the information as provided in provisions of Section 15 of CODE. Such public announcement, as per the provisions of Section 15(1)(c), must contain the last date for submissions of claims. Section 15(1)(d) of CODE provides that IRP shall be responsible for receiving claims. As per the provision of Section 15(1)(e) public announcement must specify the penalties which can be levied for false or

misleading claims. At this stage itself, we point out that no penalties have been imposed or recommended for false or misleading claims, though, the claims have been reduced substantially in respect of unsecured loans and claims relating to corporate guarantees have been rejected in toto. This factual position contradicts the claim of Resolution Professional as well as Transaction Auditor that claims were neither genuine nor supported by the documentary evidence to the extent required as per their opinion.

It is an established position of law that management of affairs of the Corporate Debtor gets vested in IRP from the date of appointment of IRP. The IRP has got twin role to play i.e., to run the affairs of the Corporate Debtor as a going concern as well as to conduct the CIRP as per the provisions of CODE r.w. IBBI (Insolvency Resolution Process for Corporate Person) Regulations, 2016. As per the provision of Section 17(2)(d) of CODE, IRP has authority to access books of account, records and other relevant documents of corporate debtor available

with other government authorities, statutory auditors, accountants and such other persons as may be specified. Thus, IRP can have access or obtain information/details from various sources other than the corporate debtor itself. After stating out basic framework relating to the scope of functions to be discharged by the IRP, we reach to Section 18 of the CODE which provides for the duties of the IRP. As per Section 18(a)(iii) of CODE, it is the duty of the IRP to collect all information regarding list of assets and liabilities as on the initiation date which is in addition to the general power contained in main clause(a) which provides for determining the financial position of the corporate debtor. The term "financial position" has been defined in clause 5(9) of CODE so as to mean that financial information of a person as on a certain date. It is pertinent to note that under Section 19 of CODE, personnel of the corporate debtor or its promoters or any other person associated with the management of the corporate debtor have been assigned with the responsibility to extend the cooperation to IRP failing which under Section

19(2) of CODE, IRP can approach this Adjudicating Authority for appropriate direction/relief.

20. After having this over view, we come to the provisions of Section 18(b) of CODE which provides that IRP shall receive and collate all claims submitted by creditors to him pursuant to the public announcement made under Section 13 and Section 15 of CODE. Section 18(c) provides that IRP has to constitute a Committee of Creditors. Section 21(1) also provides for the same. In fact, Section 21(1) is the consolidated version of Section 18(a), 18(b) and 18(c) of the CODE. Under Section 25(2)(e) maintain an updated list of claims. Now, coming to CIRP Regulations in relation to claims of all kinds of creditors, Regulation 7, 8, 8A, 9 and 9A provide the procedure of filing of claims by such creditors. Under Regulation 10, the IRP or RP is authorised to call for such other evidence or clarification as he deems fit for substantiation of whole or part of its claim. The cost of proving the debt due to a creditor is to be borne by such creditor. Regulation 12(1) provides procedure for compliance of Section 13(1)(b) r.w. Section

15(1)(c) of the CODE. Regulation 12(2) gives further period of 90 days from the insolvency commencement date to a creditor who fails to submit claim with proof within the time stipulated in the public announcement made in pursuance to Section 13(1)(b) r.w. Section 15(1)(c) of the CODE. Thus, Regulation 12(2) extends the period of filing of claim beyond the period specified in the public announcement. Regulation 12(3) provides that in case a creditor files a claim in terms of Regulation 12(2) happens to be a financial creditor under Regulation 8, then, it shall be included in COC from the date of admission of his claim. However, as per proviso to said Regulation 12(3), any decisions taken by COC prior to such inclusion would remain valid. As per Regulation 13(1), it is the duty of the IRP/RP to verify every claim as on insolvency commencement date within seven days from the last date of receipt of claims and maintain a list of creditors containing names of creditors along with amount claimed, amount admitted and security interest, if any, in respect of such claims and update such list. This Regulation, thus, implements the mandate of Section 18(b) and Section 25(2)(e)

of the CODE. Clause (a), (b), (c) and (ca) of Regulation 13(2) provide for availability and display of such list to various category of persons. Clause (d) of Regulation 13(2) provides for filing of list of creditors with the Adjudicating Authority. Clause 13(2)(e) provides that such list of creditors be presented at the first meeting of COC. Regulation 14(1) and 14(2) provide for best estimation of the amount claimed by RP on the basis of information available with him and such estimate can also be revised when RP comes across additional information warranting such revision.

21. We need to look into some more aspects relating to role and powers of IRP/RP to give findings on the issues involved. As per Section 22 of CODE, first meeting of COC is to be held within seven (7) days of the constitution of COC. In such meeting, as per the provisions of Section 22(2) to 22(5) of CODE, the COC may approve the IRP to function as RP or may replace such IRP by another Insolvency Professional. The procedure for replacement of IRP, if it is so resolved by COC, is prescribed under Section 27 of CODE. It is needless to

mention that term "Resolution Professional" as defined in Section 5(27) of CODE provides that it includes IRP. Hence, where the term "Resolution Professional" has been used in a context indicated otherwise, it would include both IRP as well as RP. Now, the CIRP starts with speed and momentum. In this process meetings of COC are crucial as certain decisions can be taken by RP only with the approval of COC as provided in Section 28 of CODE. Section 24(2) provides that all meetings of COC shall be conducted by the Resolution Professional. As per Section 24(3)(a), it is provided that the Resolution Professional shall give notice of each meeting of COC to the members of COC including authorised representative. Further, as per Section 24(3)(b), notice is also to be given to the members of suspended Board of Directors or the partners of the corporate persons, as the case may be. Section 24(3)(c) provides that notice is to be given to Operational Creditors or their representative, if their aggregate dues is not less than ten per cent (10%) of the total outstanding debt. Thus, it is evident that all the stakeholders have been given an opportunity to participate in COC meetings

subject to other statutory limitations created on their rights. Section 24(4) of CODE, accordingly provides that directors, partners and Operational Creditors will not have any right to vote in such meeting and their absence shall not invalidate the proceedings of any meeting as well. Section 24(6) and Section 24(7) of CODE provide regarding the manner in which voting share shall be assigned by RP to each creditor and how each creditor shall vote. Section 24(8) of CODE provides how the meeting shall be conducted. The relevance of the above discussion is to show that RP has been endowed with the responsibilities as facilitator and administrator for the smooth conduct of CIRP. If we look at the main provision of Section 21(2) of CODE, it is noted that such provision, in unambiguous terms, states that COC shall comprise of **(all)** Financial Creditors of the Corporate Debtor. The proviso thereto provides that if such Financial Creditor is a related party of the Corporate Debtor then it shall not have any right of representation, participation or voting in a meeting of COC. Thus, if Section 21(2) of CODE is read as a whole then it clearly emerges that even if a Financial Creditor is found to be

a related party it shall remain constituent of COC but it shall not have any voting right. This position of law further gets substantiated from the contents of Form-C whereby Financial Creditors submit proof of claim. This Form-C has been revised two times i.e. firstly w.e.f. 01.04.2018 and secondly w.e.f. 03.07.2018. The same are reproduced in the chronological order i.e., 30.11.2016, 01.04.2018 and 03.07.2018. For our purposes, the relevant part is **affidavit** to be made by a Financial Creditor as the concluding part of this form. Form-C introduced originally is reproduced as under. Thereafter, we would reproduce, for our purposes, the relevant part only as amended from time to time.

FORM C

PROOF OF CLAIM BY FINANCIAL CREDITORS

(Under Regulation 8 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016)

[Date]

To
*The Interim Resolution Professional / Resolution Professional,
[Name of the Insolvency Resolution Professional /
Resolution Professional] [Address as set out in
public announcement]*

From

[Name and address of the registered office and principal office of the financial creditor]

Subject: Submission
of proof of claim.

Madam/Sir,

[Name of the financial creditor], hereby submits this proof of claim in respect of the corporate insolvency resolution process in the case of [name of corporate debtor]. The details for the same are set out below:

PARTICULARS	
	NAME OF FINANCIAL CREDITOR
	IDENTIFICATION NUMBER OF FINANCIAL CREDITOR (IF AN INCORPORATED BODY PROVIDE IDENTIFICATION NUMBER AND PROOF OF INCORPORATION. IF A PARTNERSHIP OR INDIVIDUAL PROVIDE IDENTIFICATION RECORDS* OF ALL THE PARTNERS OR THE INDIVIDUAL)
	ADDRESS AND EMAIL ADDRESS OF FINANCIAL CREDITOR FOR CORRESPONDENCE.
PARTICULARS	
	TOTAL AMOUNT OF CLAIM INCLUDING ANY INTEREST AS AT THE INSOLVENCY COMMENCEMENT DATE)
	DETAILS OF DOCUMENTS BY REFERENCE TO WHICH THE DEBT CAN BE SUBSTANTIATED

	DETAILS OF HOW AND WHEN DEBT INCURRED	
	DETAILS OF ANY MUTUAL CREDIT, MUTUAL DEBTS, OR OTHER MUTUAL DEALINGS BETWEEN THE CORPORATE DEBTOR AND THE CREDITOR WHICH MAY BE SET-OFF AGAINST THE CLAIM	
	DETAILS OF ANY SECURITY HELD, THE VALUE OF THE SECURITY, AND THE DATE IT WAS GIVEN	
	DETAILS OF THE BANK ACCOUNT TO WHICH THE AMOUNT OF THE CLAIM OR ANY PART THEREOF CAN BE TRANSFERRED PURSUANT TO A RESOLUTION PLAN	
	LIST OF DOCUMENTS ATTACHED TO THIS PROOF OF CLAIM IN ORDER TO PROVE THE EXISTENCE AND NON-PAYMENT OF CLAIM DUE TO THE OPERATIONAL CREDITOR	

Signature of financial creditor or person authorised to act on his behalf [Please enclose the authority if this is being submitted on behalf of an operational creditor]
Name in BLOCK LETTERS
Position with or in relation to creditor
Address of person signing

*PAN number, passport, AADHAAR Card or the identity card issued by the Election Commission of India.

AFFIDAVIT

I, [name of deponent], currently residing at [insert address], do solemnly affirm and state as follows:

1. [Name of corporate debtor], the corporate debtor was, at the insolvency commencement date, being the ___ day of 20 , justly and truly indebted to me in the sum of Rs. [insert amount of claim].

2. *In respect of my claim of the said sum or any part thereof, I have relied on the documents specified below:
[Please list the documents relied on as evidence of claim]*
3. *The said documents are true, valid and genuine to the best of my knowledge, information and belief.*
4. *In respect of the said sum or any part thereof, I have not nor has any person, by my order, to my knowledge or belief, for my use, had or received any manner of satisfaction or security whatsoever, save and except the following:*

[Please state details of any mutual credit, mutual debts, or other mutual dealings between the corporate debtor and the creditor which may be set-off against the claim.]

Amended part of Form-C w.e.f 01.04.2018 is reproduced as under:

[DECLARATION]

I, [Name of claimant], currently residing at [insert address], do hereby declare and state as follows: -

- 1 *[Name of corporate debtor], the corporate debtor was, at the insolvency commencement date, being the.....day of.....20....., actually indebted to me in the sum of Rs. [insert amount of claim].*
- 2 *In respect of my claim of the said sum or any part thereof, I have relied on the documents specified below: [Please list the documents relied on as evidence of claim].*
- 3 *The said documents are true, valid and genuine to the best of my knowledge, information and belief and no material facts have been concealed therefrom.*
- 4 *In respect of the said sum or any part thereof, neither I, nor any person, by my order, to my knowledge or belief, for my use, had or received any manner of satisfaction or security whatsoever, save and except the following:*

[Please state details of any mutual credit, mutual debts, or other mutual dealings between the corporate debtor and the creditor which may be set-off against the claim].

- 5 ***I am / I am not a related party in relation to the corporate debtor, as defined under section 5 (24) of the Code.***

It can be seen from the contents of revised Form-C, the word "Affidavit" has been substituted by word "Declaration". Note below clause-4 has been deleted. New Clause-5 has been added.

This part (declaration) was again amended with w.e.f. 03.07.2018 and a new Clause-6 was added. This amended part of Form-C is reproduced as under:

DECLARATION

I, *[Name of claimant]*, currently residing at *[insert address]*, do hereby declare and state as follows: -

1. *[Name of corporate debtor]*, the corporate debtor was, at the insolvency commencement date, being the.....day of.....20....., actually indebted to me for a sum of Rs. *[insert amount of claim]*.
2. In respect of my claim of the said sum or any part thereof, I have relied on the documents specified below: *[Please list the documents relied on as evidence of claim]*.
3. The said documents are true, valid and genuine to the best of my knowledge, information and belief and no material facts have been concealed therefrom.
4. In respect of the said sum or any part thereof, neither I, nor any person, by

my order, to my knowledge or belief, for my use, had or received any manner of satisfaction or security whatsoever, save and except the following:

[Please state details of any mutual credit, mutual debts, or other mutual dealings between the corporate debtor and the creditor which may be set-off against the claim].

5. *I am / I am not a related party of the corporate debtor, as defined under section 5 (24) of the Code.*
6. ***I am eligible to join committee of creditors by virtue of proviso to section 21 (2) of the Code even though I am a related party of the corporate debtor.***

As can be seen from the changes made from time to time, Clause-4 is amended by deleting the requirements of details as regard to mutual set-off as such information/details are to be given in column-7 of Form-C itself. It is important to note that w.e.f. 01.04.20218 a new clause (5) has been inserted to the effect that the creditor has to give a declaration that he is not a related party in relation to the Corporate Debtor as defined under Section 5(24) of the CODE. In this regard, it is important to note that Section 29A regarding ineligibility of a person to be a Resolution Applicant had been brought on statute w.r.e.f. 23.11.2017 by Insolvency and Bankruptcy Code (Amendment) Act, 2018 dated 18.01.2018. The definition of related party in

Section 5(24) was always there in the CODE. Further, provisions of Section 5(24A) defining a related party in relation to an individual were brought in w.e.f. 06.06.2018. Thus, such changes in Form-C were necessitated because of incorporation of provisions of Section 29A in the CODE. Thereafter, a significant and notable insertion comes into force w.e.f. 03.07.2018 in the form of Clause-6 of the declaration part of Form-C which is most relevant for deciding the issue on hand as regard to whether a related party can be a member of COC.

Clause-6 of this declaration makes clear, in no uncertain terms, the scope of proviso to Section 21(2) and its implications which have already expressed that even a related financial creditor will remain part of COC which gets further fortified from this clause that financial creditor, even though being a related party, cannot be ousted from COC.

22. We further think it pertinent to mention that IBC is a complete CODE in itself and unless IBC, 2016 incorporates the provisions of other Acts, provisions of other Acts cannot be

applied to IBC, 2016 as such although some assistance can be taken there-from in a given set of circumstances. As noted earlier, provisions of Section 5(24) of the CODE have been part of the statute since beginning which define who could be a related party in relation to a Corporate Debtor. This clause, in fact, uses the word "means" which further indicates the legislative intent as to how to determine the nature relationship of related party in relation to a Corporate Debtor to find an answer to such issue which crops up during the course of CIRP of a Corporate Debtor. Provisions of Section 3(37) of the CODE also provide that "words and expression" used in the CODE and not defined in this CODE but defined in certain statutes shall have the meanings respectively assigned to them in those Acts. In the list of Acts mentioned in Section 3(37) of the CODE, the Securities and Exchange Board of India (SEBI) Act, 1992 is included. The term "person acting in a concert" is not mentioned in any of the clauses of Section 5(24) of CODE, hence, there is no occasion to refer to definition of this term for the purposes of interpreting provisions of Section 5(24) meaning thereby that one needs to confine itself to the provisions of

Section 5(24) of the CODE as this specific provision defines that who could be a related party to Corporate Debtor. As against this, if we look at the provisions of Section 29A r.w. Clause (f) thereof, it is noted that the main provision itself mentions that a person shall not be eligible to submit a Resolution Plan, if such person, or any other person acting jointly or in concert with such person prohibited by SEBI from trading the securities or accessing the securities markets whereas provisions similar to main clause of Section 29A or clause(f) to Section 29A do not exist in Section 5(24) of the CODE for determining of status of a financial creditor as a related party. It is also to be noted that in Section 29A not only related but other categories of persons have also been made ineligible to submit Resolution Plan, hence, in that section wider definition has been given in respect of an ineligible person and in that context person acting in concert, in certain situations provided therein, have been barred from submitting Resolution Plan and for this purpose, the definition of such term as given in SEBI Act can be used in view of provisions of Section 3(37) of the CODE as the same has not been defined in the CODE. Thus, for the purpose of Section

29A, both persons acting jointly or in concert and a related party would be treated as “connected person” as defined in Explanation I of clause (j) of Section 29A of CODE. However, for the purpose of Section 29A also, in our view, the provisions of Section 5(24) or 5(29A) of CODE will also have to be applied to find out the meaning of the term “related party” as these terms have not defined in Section 29A separately. Thus, for different purposes, the legislature has provided distinct provisions i.e., Section 21(2) for constitution of COC and Section 29A as regards to ineligibility of certain persons including a related party to submit a Resolution Plan and this mechanism further confirms our view that related party even though it may not be eligible to submit a Resolution Plan but it would remain a member of COC having no voting rights.

23. Now, having discussed the broad features of relevant provisions of CODE, we also consider it pertinent to mention that we are conscious of the fact that errant promoters/management need not to be given an opportunity to derail the process of CIRP in any manner. We are also

conscious of the fact that the legislature has provided statutory mechanism for achieving this purpose. However, at the same time, such provisions cannot be used in a manner so as to give unbridled or unfettered rights to RP /COC as well. Though, the structure of IBC gives the most crucial role to the COC but there is an apparent conflict of interests viz-a-viz their interests and the resolution of Corporate Debtor, in a sense, being a secured creditor if COC members prefer an opportunity to realize their amount if they have security interest without going through the process of resolution and in that situation they generally prefer liquidation as seen from the brief history of happenings under IBC. It is for this reason, number of instances of liquidation are more as compared to the resolutions. Thus, some check and balances have been provided in the CODE so that other stakeholders, either directly or indirectly, can approach appropriate Authority i.e. Adjudicating Authority or Appellate Authority, if need arises subject to condition that they fulfill the criteria prescribed in Section 60(5) of the CODE. For this reason also, in our view, proviso to Section 21(2) provides that they will not have a right

on representation or voting but they will certainly be entitled to join/attend the meetings of Committee of Creditors. Provisions of Section 24(6) of CODE also provide so by making its obligatory on the part of RP to give notice of each meeting to the suspended management or Operational Creditor.

23A We have, thus, gone through the legal framework governing the process of admission, rejection or revision of claims submitted by creditors of the Corporate Debtors, determination of status of a creditor as a related party, voting rights Financial Creditors, constitution of COC and reporting compliance related thereto. Few important questions arise for our consideration. It has been observed that IRP/RP are primarily responsible for preparation and updating of list of creditors. First and foremost question which needs to be asked is whether in the garb of exercise of such duty IRP/RP can review the status of a creditor i.e., from Financial Creditor to Operational Creditor or vice-versa or a non-related Financial Creditor can be treated as related party without prior approval of Adjudicating Authority. From the perusal of all provisions as

well as regulations it is apparent that no such power exists either with RP or COC. As far as powers of COC, in this regard, are concerned, this scheme has been intentionally designed by legislature so that the Financial Creditors who only have voting rights cannot usurp the CIRP because a number of decisions cannot be taken without approval of COC with minimum percentage of vote required for approval or rejection of such actions. Thus, if the COC is given any power, which is certainly prone to misuse of abuse due to apparent conflict of interest. Now, coming to the powers of IRP/RP, it is apparent that they are responsible for collating the claims, revising the claims from time to time based upon information coming to their possession or being provided by the creditors. We have found no provision in the CODE or Regulations which permit for review of status of a creditor as all provisions focus only on the amount of claim. Thus, IRP /RP cannot, on its own, review and reverse his own earlier decision without approval of Adjudicating Authority. When we apply this general legal position to the facts of the case, it is noted that in the first meeting of COC itself the aspect of some of the

Financial Creditors being a related party was raised in that meeting by some of the members and in spite of that the RP treated applicants no 1 to 4 as an unrelated party and allowed them to participate in first four meetings of the COC. Applicants no 5 to 6 did not participate as their claims had not been accepted itself and not because of the reason that they were a related party. This factual position also leads to a logical inference that there were sufficient documentary evidences as far as applicants no. 1 to 4 are concerned which were attached with Form-C. It is also noted that all such documentary evidences were also provided by applicants no 5 to 7 but no material on record is produced by RP to justify its decision in not admitting their claims which were subsequently admitted at the principal amount. Thus, arbitrariness in the approach of RP is clearly reflected. We are further of the view that scope of updating exercise is limited and confine to the determination of quantum of claim and, by no stretch of imagination it gives any power to the IRP /RP to review the status of a creditor. This position does not mean that once a creditor is categorized, this category cannot be

changed. For this purpose, the right approach would be to file an application before the Adjudicating Authority with the relevant material for appropriate directions and the decision of the Adjudicating Authority would resolve that issue. This position will not change even if report of some External Expert has been taken by RP on its own or with the approval of COC. It may not be out of place to mention that this decision of the Adjudicating Authority cannot be challenged by RP though COC or the creditor can challenge the same before the Appellate Authority as they may be an aggrieved party.

23B The other important question is whether constitution of COC can be changed by RP and if so, under what circumstances and to what extent. It is an admitted position of law that IRP is required to constitute COC in terms of provisions of Section 21(1) of the CODE. The RP is also entitled to determine the voting share to be assigned to each Financial Creditor, being a member of COC and who is not a related party as per the provisions of Section 24(6), 24(7) r.w. first proviso to Section 21(2) of the CODE. As per Regulation 12(3), if a claim of a

Financial Creditor is admitted under Regulation 13(2), such Financial Creditor shall be included in COC from the date of admission of such claim. It is specifically provided in proviso to Regulation 12(3) that any decision taken prior to such inclusion would remain valid in spite of change of constitution of COC because of such re-constitution of COC. Thus, the only situation which has been prescribed in the CODE r.w. Regulation 12 (3) is this one. This re-constitution happens only because of admission of a claim of a Financial Creditor subsequently meaning thereby the Financial Creditors who have already been included cannot be excluded from COC by RP for any reason of whatsoever nature. We are, however, of the view that this legal situation is subject to decision of the Adjudicating Authority which can correct or modify the constitution of COC, if facts and circumstances of case demand so and an appropriate application is made by RP to this effect. We again state that decision of the Adjudicating Authority in this regard cannot be challenged by RP though it may be challenged by any member of COC who is aggrieved by such decision. Before leaving this issue we also consider it

pertinent to mention that the power to constitute COC, as such, cannot include a power to re-constitute COC except as provided in the CODE or CIRP Regulations. Thus, the Financial Creditor who is a part of COC, cannot be removed by RP without prior approval of the Adjudicating Authority.

24. Although, we have already reached to a conclusion but we also consider it relevant to discuss the role and responsibilities of RP so that CIRP can be conducted in an efficient manner and desired results are obtained within the timelines prescribed under the CODE/Regulations made thereunder and that would not only guide the RP in the present case but would also be of great help to all Insolvency Professionals acting as IRP/RP. From the perusal of all substantive provisions of law as contained in the CODE itself, it is abundantly clear that Resolution Professional is only an Administrator and Facilitator and does not have any adjudicatory powers. This position of law has been established through number of judicial pronouncements including the leading one, being the decision of Hon'ble Supreme Court in the case of *Swiss*

Ribbons. The position of liquidator stands on a different footing as the liquidator has been given adjudicatory powers as far as determination of claims is concerned and as per Section 42 of the CODE, Adjudicating Authority acts as an Appellate Authority against the decisions of liquidator while accepting or rejecting or reducing the claims of creditors. This is so because there is no Committee of Creditors in the liquidation process of Corporate Debtor. Further, even during CIRP there exists no provision in law that Committee of Creditors can take a final decision on the aspect of admission or rejection or reduction of claims of Financial Creditor or its status. It is not at all in dispute that Adjudicating Authority is the supervisory body for IRP/Resolution Professional. Though, Committee of Creditors is not under its superintendence, nevertheless, Committee of Creditors has been given final powers only as regard to approval of Resolution Plan or liquidation of Corporate Debtor and matters specified under Section 28 of the CODE or replacement of a Resolution Professional under Section 27 of CODE. Therefore, any irregularity or violation of principles of natural justice in other

areas of CIRP can certainly be looked into by the Adjudicating Authority and if it is found that the actions/decisions of Committee of Creditors are also not in accordance with the provisions of law, then, in our considered view, the same can be reviewed for both violations and reversed by Adjudicating Authority.

24A Hence, we hold that final determination of claims of Financial Creditors lies with the Adjudicating Authority and actions of RP are subject to this determination by the Adjudicating Authority. Accordingly, in our opinion, for this reason also action of Resolution Professional in reducing the claimed amount deserves to be reversed and cancelled.

25. Having stated so, similar position of law is applicable as regard to determination of status of a financial creditor i.e., whether such financial creditor is a related party or not. In the present case, RP has initially inducted such financial creditors as members of COC and then without prior approval of this Authority, removed them from COC, hence, we direct RP to reconstitute the COC by including them in COC irrespective of the

fact that whether they are a related party or not subject to limitation as contained in proviso to Section 21(2) of the CODE.

25A Our views expressed hereinbefore also find support on some aspects involved in these application from the order of Hon'ble NCLAT in the case of *Mr. Rajnish Jain vs Manoj Kumar Singh and Ors in Company Appeal (AT) (Insolvency) No. 519 of 2020 dated 18.12.2020.*

26. Now, we have to decide question no 3 i.e. whether such financial creditors, in view of evidence brought on record, are a related party of the corporate debtor or not.

In this regard, it is an admitted position that the source of such classification is the order of SAT dated 11.02.2014 which was passed under provisions of SEBI Act, 1992 based upon the definition of person acting in concert and that too for the purposes of prohibiting such persons from trading in securities markets. It is to be noted that even the Transaction Auditor has relied on such order in a substantial manner. Said order was admittedly passed in the year 2014. It is not in dispute that applicants no. 1 to 4 submitted the requisite

forms along with supporting documents to prove their claim and made requisite declaration that they were not a related party as they were included in COC and also attended first four meetings. Applicants no. 5 to 7 also submitted their claims and made statement in similar fashion but since their claims were not admitted initially and only principal amount has been admitted subsequently. They were declared as a related party simultaneously. Hence, they have not been included in COC at any point of time. At this stage, it may not be out of place to mention that none of the provisions which relate to admission or rejection or reduction of claims submitted by financial creditor except the declaration in Form-C by such financial creditors itself, provide for determination of their status as a related party. Thus, the legislature has cast primarily obligation on the claimants to state that they are not a related party of Corporate Debtor. Thereafter, verification of their claims starts and list is updated by Resolution Professional on the basis of further information provided by such creditors. If RP during CIRP comes to know that such persons are related parties though this fact has not

been disclosed by such persons, then, in our view, RP should, firstly, bring this material to the notice of such persons directly as well as in COC meeting where such persons are still members so that their position on this material can be obtained and matter can be decided. However, it has not been done so in the present case.

27. In the present case, report of external expert has been taken; hence, it becomes imperative for us to see whether such action of RP is justified as per the provisions of CODE. Before proceeding further, we may mention that as per the provision of Section 23 (2) of CODE all the powers and duties vested or conferred on IRP are also available to the Resolution Professional. Now, we come to Section 20 of CODE, sub-section (1) thereof makes it obligatory on the part of Interim Resolution Professional to make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern. Section 20(2)(a) of CODE provides that for the purposes of sub-section (1), the Interim Resolution

Professional shall have the authority to appoint accountants, legal or other professionals as may be necessary. In other clause of Section 20(2) of CODE, reference has been made to keep the corporate debtor as a going concern. Similar provisions have been made in Section 25 of CODE. However, as per Section 25(2)(d) of CODE, the Resolution Professional can appoint accountants, legal or other professionals in the manner as specified by the Board. The word "specified" has been defined in Section 3(32) of CODE which refers to regulations made by the Board under this CODE. The IBBI has specified CIRP Regulations. However, in such regulations, it has not been provided whether for the purpose of verification of claims submitted by the financial creditors or other creditors, under what circumstances an external agencies can be appointed by the RP. Having stated so, Regulation 10 of CIRP Regulation, 2016, however, cast duty **only** on IRP to call for such other evidence or clarification as it deems fit from a creditor for substantiating the whole or parts of its claim. As per Regulation 11 of CIRP Regulations, 2016, the creditor is liable to bear the cost of proving the debt due to such creditor.

However, in case of rejection of all such claims, in our view, having regard to the language of Regulation 11 of CIRP Regulations, 2016, cost of outside agency cannot be recovered from the creditor, in case of rejection of claim as this has not been done at the instance of the Resolution Professional/COC. IBBI has issued a Circular No. IP/003/2018 dated 03.01.2018. The subject matter of this Circular is Insolvency Professional and his responsibilities. A specific reference has been made with respect to obtaining or certification as regard to eligibility of Resolution Applicant to submit Resolution Plan and it has been directed that he shall not require any certificate from another person certifying eligibility of a Resolution Applicant. **In the said Circular, it has been specifically directed that an Insolvency Professional shall not outsource any of his duties and responsibilities under the CODE.** Thus, the ultimate conclusion which appears to us by reading of such Circular that the action of RP in appointing External Transaction Auditor, though, it may be with the approval of COC is in violation of such directions given by IBBI in general and more particularly in the present case having

regard to such report which we would consider in the later part of the order. Having stated so, we also took note of the Circulation No. IBBI/IP/013/2018 dated 12.06.2018 which relates to fee, other expenses to be incurred for CIRP. In the opening para of this Circular, IBBI has stated that the Insolvency Professional conducts the entire CIRP and such responsibility of an IRP require highest level of professional excellence, dexterity and integrity. It has also been mentioned that Insolvency Professional may pay the fee for the services obtained for conducting CIRP. It has also been mentioned that Insolvency Professional is obliged under Section 208(2)(a) of CODE to take reasonable care and diligence while performing his duties including incurring expenses which should be necessarily reasonable though such criteria is context specific and cannot be defied in a precise manner. Thereafter, in the said Circular regulatory framework has been outlined. In Annexure-B, it has been provided that what would constitute reasonable cost and reasonable fee. A reference to statement of best practices has also been made in this regard. Thus, the focus of IBBI is absolutely clear that Insolvency Professional

cannot outsource his responsibilities at the first stage in a liberal manner and if need arises then it can do so but that should be very prudent and reasonable. From the minutes of meetings of COC, contents of appointment letter appears that main object of such appointment was to obtain Forensic Audit Report to ascertain the transactions of the nature as specified in Section 43,45,50 or 66 of the CODE and verification of claims and status of such applicants as a related party was an additional job. However, as noted from the minute of 6th meeting of COC held on 21.12.2020, no report on the preferential, undervalued, extortionate and fraudulent transactions has been given by Transaction Auditor. Further, no application, in this regard, appears to have been filed with this Authority as yet. No material has been brought on record to show that time for submission of such report had been extended. Thus, such appointment, in our opinion, has not served the main purpose. Accordingly, we are of the view that such appointment is not in accordance with the provisions of CODE, CIRP Regulations and aforesaid Circulars particularly when Transaction Auditor has relied on the documents which

were in public domain and provided to him by RP himself. In fact, the Transaction Auditor's report is inconclusive, as stated earlier and is also based on Financial Statements ignoring the source documents altogether. As regard to outsourcing of responsibility or certification of certain matters by RP and scope thereof, the observations of Hon'ble Supreme Court in the case of ArcelorMittal (India) (P) Ltd. Vs. Satish Kumar Gupta & Ors as reported in (2019) 2 SCC can also be referred to. The relevant findings of Hon'ble Supreme Court in 80 and 81 are reproduced as under:

80. *However, it must not be forgotten that a Resolution Professional is only to "examine" and "confirm" that each resolution plan conforms to what is provided by Section 30(2). Under Section 25(2)(i), the Resolution Professional shall undertake to present all resolution plans at the meetings of the Committee of Creditors. This is followed by Section 30(3), which states that the Resolution Professional shall present to the Committee of Creditors, for its approval, such resolution plans which confirm the conditions referred to in sub-section (2). This provision has to be read in conjunction with Section 25(2)(i), and with the second proviso to Section 30(4), which provides that where a resolution applicant is found to be ineligible under Section 29-A(c), the resolution applicant shall be allowed by the Committee of Creditors such period, not exceeding 30 days, to make payment of overdue amounts in*

accordance with the proviso to Section 29-A(c). A conspectus of all these provisions would show that the Resolution Professional is required to examine that the resolution plan submitted by various applicants is complete in all respects, before submitting it to the Committee of Creditors. The Resolution Professional is not required to take any decision, but merely to ensure that the resolution plans submitted are complete in all respects before they are placed before the Committee of Creditors, who may or may not approve it. The fact that the Resolution Professional is also to confirm that a resolution plan does not contravene any of the provisions of law for the time-being in force, including Section 29-A of the Code, only means that his prima facie opinion is to be given to the Committee of Creditors that a law has or has not been contravened. Section 30(2)(e) does not empower the Resolution Professional to “decide” whether the resolution plan does or does not contravene the provisions of law. Regulation 36-A of the CIRP Regulations specifically provides as follows:-

“36-A.(8) *The resolution professional shall conduct due diligence based on the material on record in order to satisfy that the prospective resolution applicant complies with-*

- (a) the provisions of clause (h) of sub-section (2) of section 25;*
- (b) the applicable provisions of section 29A, and*
- (c) other requirements, as specified in the invitation for expression of interest.*

(9) *The resolution professional may seek any clarification or additional information or document from the prospective resolution applicant for conducting due diligence under sub-regulation (8).*

(10) *The resolution professional shall issue a provisional list of eligible prospective resolution applicants within ten days of the last date for submission of expression of interest to the committee and to all prospective resolution applicants who submitted the expression of interest.*

(11) *Any objection to inclusion or exclusion of a prospective resolution applicant in the provisional list referred to in sub-regulation (10) may be made with supporting documents within five days from the date of issue of the provisional list.*

(12) *On considering the objections received under sub-regulation (11), the resolution professional shall issue the final list of prospective resolution applicants within ten days of the last date for receipt of objections, to the committee."*

81. *Thus, the importance of the Resolution Professional is to ensure that a resolution plan is complete in all respects, and to conduct a due diligence in order to report to the Committee of Creditors whether or not it is in order. Even though it is not necessary for the Resolution Professional to give reasons while submitting a resolution plan to the Committee of Creditors, it would be in the fitness of things **if he appends the due diligence report carried out by him** with respect to each of the resolution plans under consideration, and to state briefly as to why it does or does not conform to the law.*

The above observations strongly support the view taken by us that RP should not or rather cannot outsource or delegate his responsibilities or functions in a casual manner or otherwise

to draw support from such report for its arbitrary and unreasonable approach.

28. Further, no material has been brought on record by the Resolution Professional as to what prompted him to treat such applicant/financial creditor as a related party on the basis of the order of SAT by the RP as well as Transactional Auditor at a later stage although this order was already available in public domain including at the time of initiation of CIRP and submission of claims by applicants.
29. These facts have been taken into consideration in the peculiar circumstances of the case having regard to declaration made by the applicants in Form-C and if, before taking any decision, these facts would have been disclosed to them and their comments would have been taken then matter could have been resolved in either way on that stage only without going into the further process such as appointment of External Consultant etc. RP could have focused on main objects i.e., insolvency resolution of Corporate Debtor and managing the affairs of the Corporate Debtor as a going concern.



30. Now, proceeding further, we have to analyze the proceedings as regard to how and for what purpose the External Expert has been appointed. The issue of appointment of Transactional Auditor firstly arose in first COC meeting held on 29.02.2020. From discussion on agenda item no. 10, it is noted that some lenders opined that some claims received belonged to related parties so it was advisable to have a clear opinion on the same. However, the basis for such view has not been disclosed in the minutes. It was also specifically submitted that such Transaction Auditor should be independent and should not have any strings connected with Corporate Debtor or any other interested party. It was also discussed that as per Regulation 35A of CIRP Regulations, 2016, RP was obliged to form an opinion whether corporate debtor had been subjected to any transaction covered under Section 43,45,50 or 66 and for that purpose also it was imperative to determine whether any of such transactions were with related parties. In second meeting of Committee of Creditors held on 02.06.2020 firstly the minutes of first COC held on 29.02.2020 were taken note of and, thereafter, discussions were held to the issue relating

to the verification of claims as well as appointment of Transactional Auditor. It was informed by RP that certain quotations had been received from same professional for the purpose of assisting the RP in determination of preferential, undervalued, extortionate credit and fraudulent transactions. After discussion, for the purpose of meeting requirement of Regulation 35A, M/s R. Choudhary and Associates was appointed as the Transaction Auditor for this purpose. However, in the resolution passed for that purpose it was also mentioned that such professional should also give an opinion on the claim, interest, and admissibility thereof etc. This view if duly supported by the fact that the nomenclature of external expert has been given as Transaction Auditor which essentially leads to the purpose of verification of preferential, undervalued, extortionate and fraudulent transactions where any related party other than the applicants could also be involved.

31. Third meeting of COC was held on 03.07.2020. The discussion was held on the appointment of said firm as Transaction

Auditor. Suspended Management specifically pointed out that Mr. R. D. Choudhary was engaged as RP who was already associated with CIRP of M/s K Life Style and Industries Ltd, a group company, hence, appointment of Mr. R. D. Choudhary would affect the independent working and confidentiality of information relating to the Corporate Debtor, hence, his appointment may be re-considered. Even one of the institutional financial creditors i.e., Bank of Maharashtra expressed same view and stated that there was a situation of conflict of interest in his appointment. However, their views were rejected but such discussion certainly raises the question as to why only this professional was appointed and no other independent professional entity could be appointed. According to us, cost factor, in such situation, is of secondary nature particularly when necessity of such appointment is in question itself. In this meeting, an update on the list of creditors was also made and it was stated by RP that process of up-dation of list of creditors was in progress and on availability of relevant information and transaction Auditor's Report, the updated list of creditors shall be provided to the COC in the fourth meeting

of COC. The fourth meeting of COC was held on 19.08.2020 wherein progress made so far in this regard was discussed in a summary manner.

32. Fifth meeting of COC held on 27.10.2020. It is worthwhile to mention that in earlier meetings applicants financial creditors were present but in this meeting none of the applicants was present because after 4th meeting held on 19.08.2020, the RP excluded them from COC and mail had been sent to them to that effect on 14.10.2020. It is worthwhile to mention that in the 4th meeting of COC no discussion happened as to what would happen if financial creditors were considered as related party and in that situation what action should be taken by RP/COC. Further, no material has been brought on record to show that any communication apart from discussion in COC meeting was exchanged between RP and COC members to that effect. In this meeting only discussion on this aspect happened in item no. 7 and COC took note of these facts. In item no 16, the issue of identification of immovable properties belonging to the Corporate Debtor arose. It was requested by RP to COC

members to provide details if they had anything in their possession. Indian Bank, one the financial creditors and member of COC informed that Indian Bank was also member of COC of another group company i.e. K Life Style Ltd and the Resolution Professional of that corporate debtor informed to them that he had identified certain properties which belonged to this corporate debtor. We are mentioning these facts to show that RP in that proceeding had filed an appeal before Hon'ble NCLAT in that case whereby he was aggrieved by the decision of this Authority for an order passed in respect of an application filed under Section 19(2) of CODE and even the Hon'ble NCLAT directed both RPs to cooperate with each other. It is also to be noted that such RP only was appointed External Transactional Auditor in spite of reservations expressed by certain members of COC. This meeting of COC was held on 21.12.2020 wherein it has been mentioned in item no. 6 as regard to transaction audit and matters incidental thereto that the Resolution Professional wrote an e-mail to the Transaction Auditor on **08.12.2020** to provide the report on the basis of documents and information supplied to

them for the time being which can be updated on the receipt of availability of desired information/documents. However, no updated report as a consequence of this request or statement of fact that the report which had already been submitted by Transactional Auditor on 29.08.2020 was final, has been brought on record. Thus, this situation shows that report submitted by Transactional Auditor was based upon incomplete information and details available as on that date and even in that report, the Transaction Auditor has itself admitted this situation. Therefore, in our considered opinion, such report cannot be a proper basis to consider the applicants as related party and to reject or reduce their claims.

33. Generally, we do not go into the detail but facts of the present case demand that a proper analysis as regard to conduct of CIRP by RP. The appointment Transaction Auditor was made on 17.07.2020. The Scope of work is defined as under:

SCOPE OF WORK

1. *In accordance with the provisions of Regulation 35A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulation, 2016, the Resolution Professional shall be required to form an opinion on whether the Corporate Debtor has been subjected to any transaction falling under the purview of the following sections of the Insolvency & Bankruptcy Code, 2016;*
 - a. *Section 43: Preferential Transactions*
 - b. *Section 45: Undervalued Transactions*
 - c. *Section 50: Extortionate Credit Transactions*
 - d. *Section 66: Fraudulent trading or wrongful trading*
2. *A detailed report and professional opinion on the amount, security interest and admissibility of claims received or to be received from various creditors including but not limited to giving professional advice on the re-constitution of the Committee of Creditors pursuant to such claim verification or re-verification upon analyzing the relevant provisions of the Code and the Regulations made thereunder.*

From the perusal of above para, it is noted that transaction audit has to be completed by Transactional Auditor as per the time-line given in the appointment letter which is thirty (30) working days from the receipt of this letter which could be extended mutually, if required. Thus, *prima facie* the facts are on two things. However, even as on date, no application under

Section 43, 45, 50 and 66 has been filed or from progress reports up to 21.12.2020 nothing is mentioned therein as far as this part of scope of work is concerned.

34. Now, we come to the covering letter of the report given by the Transactional Auditor on 29.08.2020. As per subject of this letter, this is their final report. In this letter, it is mentioned that additional scope of work was to verify the claims and giving a professional advice as regard to reconstitution of committee as per the provisions of Section 21 of CODE. Other two paras are reproduced so as to appreciate whether such reporters have any validity in the eye of law because so many qualifications/exceptions have been made.

*We have been provided detail of claims along with proof of claims submitted by various financial creditors vide email dated 23rd July, 2020. **Based on preliminary verification of documents, we observed that certain documents are missing and are pending to be provided by claimants.** The same has been conveyed to you vide email dated 25th July, 2020.*

*As per you request, we hereby providing the detailed final report on committee **to be re-constituted based on information provided along with the claim,** information provided by Resolution Professional and based on information gathered from public*

domains. We hereby provide the report containing the financial creditors who shall be form part of the Committee of Creditors along with the amount of their claims admitted based on information available and their voting share in the committee of creditors and list of financial creditors who will not be form part of Committee of Creditors and amount of claims admitted/ not admitted based on records provided by RP along with the detailed findings.

The Transaction Audit report has been given in two parts. One parts relates to non-admission of claims pertaining to corporate guarantees which are subject matter of IA 13 of 2021, hence, will be dealt while disposing of that application in the later part of this order.

In IA 953 of 2020 the claims of applicants/financial creditors who had given loans have been dealt in second part of such report. Out of nine (9) financial creditors mentioned therein, two financial creditors, namely, Capman Compro Pvt. Ltd. and Chams Holding Pvt. Ltd. are not part of any of these two applications, hence, not of any relevance. One reason for non-admission of aforesaid members in COC has been that name of M/s. Hikal Pro-Estate Pvt. Ltd. appeared in the impugned order of SAT. Second reason which is given in the report is that there were common directors of six (6) applicants

companies and the Corporate Debtor. However, these six (6) applicant companies do not include the name of M/s Hikal Pro-Estate Pvt. Ltd., hence, for this reason; the link between Corporate Debtor and directors of this company is not established. We have also gone through the details enclosed in Annexure-II of the report showing common directorship of individuals but on careful perusal of such details which are placed in the paper book from page no. 45 to 72, we have not found any director which is or was director of the corporate debtor though there is a common directorship between applicants themselves. Thus, the conclusions arrived by the External Transaction Auditor are without any basis and, therefore, required to be reversed. Further, the report is in explicit contravention of the provisions of Section 21 r.w. the contents of Form-C which shows lack of understanding of law on the part of the External Transactional Auditor as well as a determined approach to exclude the applicants from COC. Further, merely if some person's name or entities names have appeared in the said order of SAT, in our opinion, one more issue which arise for our consideration is whether relationship

at any point of time prior to two years period from the commencement of CIRP, can declare them as a related party for all times to come. In the present case, SAT order of 2014 which is more than six year prior to commencement of CIRP and alleged transaction pertain to year 2007 to 2009, hence, in our considered opinion; the same cannot be a proper basis to form such opinion. Hon'ble Supreme Court in the case of Phoenix Arc Private Limited has also expressed such concern in para 92 of their order.

35. As contrast to this view of Transaction Auditor, the applicants have filed affidavit as per directions of this Authority to the effect that they were never a related party in addition to the report of independent Practicing Company Secretary which was filed by them along with their letter dated 29.10.2020 in case of all applicants. In this reply, it was also claimed that there are not a related party. We have also perused the contents of report submitted by the independent Practicing Company Secretary that reports have been given after taking into consideration of relevant provisions of the CODE,

Companies Act, 2013 and Accounting Standards 18. As stated earlier, as the Transactional Auditor has relied only on the said order for examination of claims of unsecured financial creditors who granted loans and no other material has been brought on record. This fact also raises a question as to what was the necessity of appointing such Transactional Auditor as this information could not have been found by the RP itself with little efforts and perhaps in that situation the approach of RP could have been more reasonable because the Transactional Auditor has given a wrong finding of fact as regard to common directorship. Further, from the material on record, it is seen that no reply has been given RP to the letter of applicants dated 29.10.2020. From the minutes of meetings COC, it appears that this issue has never been considered and reviewed by COC also in this manner.

36. One more reason on the basis of which the report of the Transactional Auditor is liable to be rejected is that a blanket claim has been made in respect of all applicants that they were a related party in terms of provisions of Clause (f), (h), (l)

and (m) of sub-section 24 of Section 5 of CODE. For the sake of read reference these clauses are reproduced as under:

5(24) "related party", in relation to a corporate debtor, means—

(f) anybody corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;

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

(l) any person who can control the composition of the board of directors or corresponding governing body of the corporate debtor;

(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;

From the perusal of above Clauses, it is apparent that these clauses deal with different situations for deciding the issue where a party is a related party or not. Hence, without meeting

the specific requirements of these clauses a party cannot be declared as a related party by applying all clauses in an arbitrary manner like this. Further, no material has been brought on record to support such findings except the working which has been given for this purpose and on that basis also, in our view, these clauses cannot be made applicable in the present case.

37. Thus, considering all facts and specific legal position, we hold that the action of RP is not only against the provisions of law, both in respect of declaring such party as a related party and also excluding them from COC on one hand but it is also arbitrary, unreasonable and biased on the other hand.
38. To further support that the principles of natural justice have crossly violated, we also draw support from the provisions of Section 30(4) and Section 30(5) of the CODE that in the event of a person who has filed Resolution Plan is found to be ineligible under Section 29A(c) and opportunity of hearing for rectifying the disability would be given for a limited period, hence, legislature has not intended that even a related party, if

found to be violative of provisions of Section 29A of the CODE, can submit a Resolution Plan after removing such disability. Once it is so, it is highly desired that related party of the Corporate Debtor, if has got claims against the Corporate Debtor, should not be given such treatment and that too without giving an opportunity of hearing. Having stated so, we again reiterate that we do not wish to give leeway to errant and fraudulent managements in any way as far as their fake or fraudulent claims are concerned but in the present case this does not appear to be a fact situation. Further, where the Corporate Debtor has been subjected to any transaction as specified in Section 43, 45, 50 and 66 of CODE separate mechanism exists which can be invoked in that situation even in case of related parties.

39. It is also noted that even in case of applicants who had given unsecured loans, where ever Form-26 AS were required by the RP, the same have been provided which fact further creates a question mark as to why the claims as regard to interest, in such cases, have been rejected. In this regard, we also

consider it pertinent to mention that even loan agreements and other documents exist which provide for interest as well. No mention of these facts have been made in the report of Transactional Auditor except one observation that claims of aforesaid creditors have been admitted to the extent of principal amount based upon the Books of Account which reflects adversely on the approach of the Transaction Auditor in cases where Form-26 AS had been submitted and which fact has not been taken into consideration by the Transaction Auditor.

40. Now, coming to IA 13 of 2021, it is noted that in this case amounts relating to corporate guarantees are only involved and there is no unsecured loan. RP initially rejected its claims for the reason that these corporate guarantees remained unsubstantiated. Transaction Auditor in its report held that the provisions of Section 186 of Companies Act, 2013 and Section 372(A) of Companies Act, 2013 were violated. It is also noted that in the said report that as per provision of Section 186(4) of the Companies Act, 2013, the company was liable to

be disclose the details of guarantee given by the company in the financial statements and it was also to be disclosed that for what purposes such guarantee had been given. There is a categorical finding that in Financial Statements commencing from 2013 till Financial Year 2016-2017 such details have not been given. The reference to the notes given in the financial statements on these points has also been made. From the perusal of said disclosure, it is noted that the company had not given any guaranties for loans taken by others from Bank or financial institutions. It is also claimed that the account of Corporate Debtor before SBI had been classified as NPA on 30.03.2011 by SBI and thereafter by Banks as well and whereas so-called corporate guarantee was executed by Corporate Debtor on 29.11.2012. Hence, there was a violation of provisions of Section 372(A) of the Companies Act, 1956 as prior approval of public financial institutions was not obtained. Other ground which has been taken is that authenticity of the signature on corporate guarantee agreement was also under cloud. At this stage, as far as this aspect is concerned, we are unable to understand how this

report could be given by a person who is not handwriting expert, and therefore, it does not have any validity in law. Apart from that it has been alleged that guarantees were back dated because in case of M/s. Bridge Infra Pvt. Ltd. the registered office mentioned in the corporate guarantee deed was not the registered office as the same had been changed in the year 2015. It has also been stated that the stamp papers for loan agreements as well as corporate guarantee were having serial no in a sequence, hence, both agreements were executed at the same time. Thus, on these grounds, legitimacy and authenticity of the documents have been challenged and it has been concluded **that legitimacy of such documents needed a further investigation and substantiation.** As far as ground of non-disclosure is concerned, it is noted that the disclosure made is with reference to loan guarantees given in respect of loan taken from public financial institutions or from other Banks, hence, it does not relate to unsecured financial creditors which are not a public financial institutions. As far as the legitimacy and authenticity of documents of corporate guarantee and loan agreement is concerned, it has been stated

by the Transactional Auditor itself that further investigation and substantiation were required which means that no final conclusion could be given without such process being completed.

41. The other reasons are similar to the reasons given in respect of unsecured financial creditors which had already been dealt with while disposing of IA 953 of 2020, hence, not discussed separately. It is to be noted that substantial documents were submitted by the applicants while claim was made in requisite Form-C. The applicants have also filed affidavits that they were not a related party or connected with the Corporate Debtor at any point of time in terms of provisions of Section 5(24) of CODE and Section 2(76), Section 2 (77) of the Corporate Debtor. Specific claim has been made in such affidavit that clauses i.e., (f), (h) (l) and (m) of Section 5(24) of CODE were also not applicable.
42. The applicant has also made contention that the financial creditors were not a public financial institutions, hence, such observation of Transactional Auditor were not having any

strength. This aspect has already been dealt with by us. The applicants have also raised a legal contention that related party should be in present and for this proposition, reliance has been placed on the decision of Hon'ble Supreme Court in the case of *Phonix Arc Private Limited vs. Spade Financial Services Limited & Ors* dated 01.02.2021. However, in Para 91 it has been held that the definition of related party could be applied at the time when debt was created. Further, in Para 92, it has been held that if this view was taken as a standard rule then an absurd conclusion may arise because entities which had legitimately taken over the debt of the related party or where related party entity had stopped being a related party long ago, would be treated as related party. In Para 94 the Hon'ble Supreme Court has culled out an exception by keeping into consideration the object and purpose of first proviso to Section 21(2) of CODE and has held that where a financial creditor divests itself of its shareholding or ceases to become a related party in a business capacity with a sole intention of participating in COC and sabotage the CIRP, in that situation a former related party would be considered as one falling

under the first proviso. Accordingly, when we apply this ratio of the decision, we have to see whether a device has been used by the so-called related parties to cease as related party to sabotage CIRP. No material has been brought on record by the RP to this effect. Further, no material has also been brought on record even to conclude that whatever material was there on that basis these parties could be considered as a related party at any stage for the purposes of Section 5(24) or Section 21(2) of the CODE.

43. Whether opportunity of hearing to the affected parties is to be given before taking such action?

It is a legitimate expectation, both in equity and in law that person who is going to be punished or again whom some adverse action is being taken or his rights are prejudiced or adversely impacted because of some action of the other person, such affected person should get an opportunity to present his case. This principle is called 'Audi Altrem Partem' which requires hearing the view point of a person before taking a decision against such person. In the present case, this

principle has grossly been violated as evident from the facts and sequence of events narrated hereinbefore and for the sake of brevity, we do not repeat the same.

43A We have also gone through the communication made by Resolution Professional and it is noted that after initial communication as regard to submission of information and some details, no communication has been made with them as regard to the aspect of related party. Hence, we do not find any merit in the contention of the RP that it conducted the CIRP in most transparent and fair manner rather having regard to the facts stated hereinbefore the picture is otherwise. This aspect has already been considered by us in earlier part of our order and it has been established that the conduct of CIRP is not in accordance with the object and scheme of CODE, Regulations made thereunder. We also find that the news item taken in support by the RP appeared on a web platform on 23.12.2020 much after the exclusion of these parties from COC, hence, such item, on the face of it, does not support the approach of the RP. Further, RP has to conduct CIRP as per provisions of

law and is not supposed to form an opinion based upon such news item. Even otherwise, the contents of this news item indicate that it is an instance of sponsored news. Thus, we hold that principles of natural justice have been violated both by RP as well as COC.

44. In the facts of the case and the manner in which CIRP is being conducted, as evident from the proceedings which have taken place as regard to rejection of claims and re-constitution of COC by excluding the applicants from COC, we are of the considered view that some accountability mechanism for the authorised representatives of members of COC is also required on lines of provisions of Section 70(2) of CODE wherein Insolvency Professional can be questioned for its deliberate contravention of the provisions relating to CIRP/Liquidation of the Corporate Debtor. We also consider it appropriate to mention that principles of natural justice and equal opportunity are cardinal to any process including CIRP which is to be completed in a time-bound manner and any deviation there-from may invite judicial intervention as commercial

wisdom of COC is final in respect of certain matters only which have been specifically mentioned in the CODE and the matters as regard to status of a Financial Creditors being a related party and re-constitution of COC, which are under our consideration in the present applications, do not fall into that category. Thus, till such mechanism is brought on the statute or even otherwise, we humbly advise the COC to work in a fashion which meets the objects and scheme of the CODE so that interests of all stakeholders are taken care of.

45. Final conclusions are as under:

- (i) None of the parties i.e., applicant financial creditors in both IAs are a related party of the Corporate Debtor.
- (ii) Claim amounts of all applicants in IA 953 of 2020 have wrongly been reduced having regard to the material on record and, therefore, such claims are to be re-verified after considering all source documents produced by applicants including Form-26AS for respective financial years.

- (iii) Since they are not a related party, they are entitled to be a member of COC. COC be re-constituted forthwith. Voting rights of each applicant would be determined in accordance with the provisions of Section 24(6) of CODE, if the amount of their claims changes on account of implementation of our directions in para (ii) above.
- (iv) The claims of all applicants in IA 13 of 2021 are to be re-verified having regard to all source documents. Further information/details, if any, required may be obtained. Applicants will provide the same for this purpose.
- (v) Considering the facts and circumstances of the both IAs as mentioned and considered by us while disposing of these applications, we have reached to a conclusion that for smooth conduct of CIRP, RP needs to be replaced. Accordingly, we remove present RP and appoint **Mr. Ravi Kapoor, having Registration No. IBBI/IPA-002/IP-N00121/2017-18/10290, e-mail id-ravi@ravics.com** as new RP. The present RP shall hand over all documents and materials to new RP within three (3) days from the

date of taking over the position of RP by the new RP Mr. Ravi Kapoor.


(vi) We direct the Registry to provide copy of this order to new RP through e-mail and by Speed-Post forthwith on pronouncement of this order so that new RP can take over the charge within three days thereafter.

(vii) We also direct the Registry to send a copy of this order to IBBI within seven days of our order so that appropriate action against the outgoing RP Mr. Brijendra Kumar Mishra can be taken by IBBI as per prescribed mechanism, if considered necessary.

46. In the result, IA 953 of 2020 and IA 13 of 2021 stand allowed and disposed of in terms indicated above.

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


(Virendra Kumar Gupta)
Member (Technical)


(Madan B. Gosavi)
Member (Judicial)

Dated this the 6th day of April, 2021

Rajeev Sen/Stenographer