

**NATIONAL COMPANY LAW TRIBUNAL
GUWAHATI BENCH
GUWAHATI**

ORDER SHEET OF THE HEARING ON 18th APRIL, 2024, 10:30 A.M.

**IA (IBC)/2/GB/2023
In CP (IB)/9/GB/2019**

**Present: 1. Hon'ble Member (Judicial), Shri H.V. Subba Rao
2. Hon'ble Member (Technical), Shri Satya Ranjan Prasad**

IN THE MATTER OF	Stressed Assets Stabilization Fund (SASF) Vs Amit Pareek, RP, 2. Dilip Construction Pvt. Ltd.
UNDER SECTION	U/s 60(5) of IBC, 2016.

For Petitioner (s) : Mr. Yakshay Chheda, Adv.

For Respondent (s) : Mr. Amit Pareek, CS.

ORDER

IA (IBC)/2/GB/2023

Order Pronounced through VC *vide* separate sheets.

Sd/-
Satya Ranjan Prasad
Member (Technical)

Sd/-
H.V. Subba Rao
Member (Judicial)

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in CP (IB)/9/GB/2019**

In the Matter of:

An Application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 34 of the National Company Law Tribunal Rules 2016;

-And-

In the Matter of:

Stressed Assets Stabilization Fund (SASF), Principal Office at 3rd Floor, D Wing, IDBI Tower, WTC Complex, Cuffe parade, Mumbai-400005;

.... Applicant

Versus

Amit Pareek, Resolution Professional of National Plywood Industries Ltd, having its office at 4th Floor, Ram Prasad Complex, Chatribari, Guwahati, Assam-781001;

.... Respondent No.1

-And-

Dilip Construction Private Limited, Registered Office at Plot No. L/29, Baramunda Housing Board Colony, Bhubaneshwar- 751003.

.... Respondent No.2

Shri H. V. Subba Rao : Member (Judicial)

Shri Satya Ranjan Prasad : Member (Technical)

Appearances (through video conferencing):

For Petitioner : Mr Yakshay Chheda, Adv.

For Respondent(s) : Mr Amit Pareek, CS.

**Order reserved on: 21.03.2024
Order pronounced on: 18.04.2024**

ORDER

1. The present application has been filed by the Applicant- Stresses Assets Stabilization Funds (SASF) under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 34 of the National Company Law Tribunal Rules 2016, seeking the following reliefs:
 - i. *Impugned Order dated 04.05.2022 as issued by Respondent No. 1 classifying Respondent No. 2 as a Financial Creditor of the Corporate Debtor basis an unsecured loan of Rs. 4 Crore is illegal, arbitrary and contrary to the facts & records as maintained by the Corporate Debtor.*
 - ii. *Claim of Respondent No. 2 in relation to Rs. 4 Crore to the Corporate Debtor be classified as an Operational Creditor.*
 - iii. *Pending the hearing and final disposal of the present application, an Order be passed restricting Respondent No. 2 to vote as a Financial Creditor in the Committee of Creditors of the Corporate Debtor.*
2. The brief facts of the case as per the petition are as follows:
 - 2.1 The main Petition CP (IB)/09/GB/2019 filed by the Applicant-Financial Creditor under Section 7 of the Insolvency and Bankruptcy Code, 2016 was admitted by this Adjudicating Authority on 26.08.2019 and Mr. Sandeep Khaitan was appointed as Interim Resolution Professional (IRP), who was later confirmed as the Resolution Professional (RP).
 - 2.2 On 25 November 2019, Dilip Constructions Private Limited- Respondent No. 2 submitted its claims to the RP under two separate heads i.e. Rs. 5.91 Crore as an Operational Creditor and Rs. 4 Crore as a Financial Creditor.
 - 2.3 Pursuant to receipt of all the claims, the RP prepared a list of Creditors as on 01.01.2020 where Respondent No. 2 was shown as a Financial Creditor as far as the amount of Rs. 4 Crore was concerned. RP called upon Respondent No. 2 for providing the accounting books. Despite assuring that it would be provided, Respondent No. 2 failed to provide the same. Later, Respondent No. 2 allegedly stated that as part of the negotiated settlement with the banks in 2006, Respondent No. 2 paid Rs 2.5 Crore on behalf of the Corporate Debtor to the Applicant and further interest free advances were made.

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- 2.4 While initially the RP admitted the claim of Respondent No. 2 as a Financial Creditor and Operational Creditor, on 08.07.2020, the RP sent an email to Respondent No. 2 stating that upon perusal of papers, books of accounts and records of the Corporate Debtor and in the absence of any contract/agreement for the alleged unsecured loan of Rs. 4 Crore to the Corporate Debtor, Respondent No. 2 should re-submit its entire claim of Rs. 9.91 Crore in Form B as an Operational Creditor of the Corporate Debtor.
- 2.5 The RP had appointed BDO India LLP to carry out accounting investigation for the purposes of determining preferential, undervalued, fraudulent and extortionate transactions. The report was submitted on 26.08.2020 wherein it was stated that an amount of Rs. 11.99 Crore was advanced by Respondent No. 2 to the Corporate Debtor as an advance towards supply of goods. However, on 01.07.2019, the classification of Rs. 4 Crore was changed from an advance to unsecured loan without any document or purpose for such an alleged loan.
- 2.6 On 27.02.2021, after nearly six months of its claim being rejected by the RP, Respondent No. 2 filed an application IA No. 14 of 2021 under Section 60(5) before this Tribunal seeking *inter alia* an order directing the RP to reinstate the claim and position of Respondent No. 2 as a Financial Creditor on the Committee of Creditors of the Corporate Debtor. The matter was extensively heard on various occasions and the Tribunal *vide* Order dated 08.04.2022 directed the Respondent No. 2 and the Applicant herein to file additional/relevant documents in support of their respective claims before the new RP Mr. Amit Pareek (Respondent No. 1 herein) appointed pursuant to order dated 08.04.2022 passed in IA No. 43 of 2021.
- 2.7 On 04.05.2022, Respondent No. 1 issued the Impugned Order under Regulation 13(2) of CIRP Regulations erroneously classifying the amount of Rs. 4 Crore extended by Respondent No. 2 to the Corporate Debtor as an unsecured loan.
- 2.8 The Applicant and other parties challenged the Order of this Tribunal passed in IA No. 43 of 2021 before the Hon'ble Appellate Tribunal wherein *vide* order dated 10.05.2022, Hon'ble NCLAT passed the following orders:

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“Till the next date of hearing, no further steps shall be taken in pursuance of the Impugned Order.”

- 2.9 Hence, the Applicant filed the present Application seeking *inter alia* an order of this Tribunal for setting aside the alleged classification of Respondent No. 2 as a Financial Creditor under Regulation 13(2)(d) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, dated 04.05.2022 issued by the RP-Respondent No.1 as being illegal, arbitrary and without providing any reasons in violation of principles of natural justice.
3. Respondent No.1 *vide* reply dated 13.09.2023 submits that:
- 3.1 *Vide* an order dated 08.04.2022 in IA No. 43 of 2021, the Respondent was appointed as the new Resolution Professional (RP) in the matter of **CP NO. (IB) 09/GB/2019 - Stressed Assets Stressed Assets Stabilization Fund (SASF) Vs. National Plywood Industries Ltd** with certain directions to examine the fresh claims.
- 3.2 This Tribunal *vide* order dated 08.04.2022 while disposing I.A. No. 14 of 2021 provided liberty to Dilip Construction Pvt. Ltd. and SASF to file additional/relevant documents, if any, in support of their claim to the new RP i.e. the R1 in the instant I.A. R1 *vide* e-mail date 20.04.2022 intimated all the stakeholders about his appointment as New Resolution Professional along with the order dated 08.04.2022.
- 3.3 Despite the intimation to the Applicant herein i.e. SASF, the Applicant had not filed any additional/relevant documents to the Respondent No.1, but Respondent No.2 herein i.e. Dilip Construction Pvt. Ltd submitted their claim along with supporting documents *vide* e-mail dated 23.04.2022. Based on the claim forms and documents and other relevant information Respondent No.1 revised the List of Creditors on 04.05.2022.
- 3.4 Respondent No.2 submitted a claim of Rs. 4,00,00,000 (Rupees Four Crore Only) along with supporting documents i.e. Ledger Copy as on 26.08.2019, Correspondence with Bank regarding payment of Rs. 250 Lakh to SASF against OTS of NPIL along with Cheque Copies and Bank of India's certificate, Copy

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- of Annual Accounts and Balance sheets from 2005 till 2020, Proof of Incorporation and based on such available documents and proof, R1 accepted the claim of Rs. 4 Crore and inducted Respondent No.2 in the Committee of Creditors (CoC) as Financial Creditor.
- 3.5 In the beginning, the erstwhile RP (Mr. Sandeep Khaitan) had admitted the claim of Respondent No.2 as a Financial Creditor amounting to Rs. 4 Crore but later after 7 months from the initiation date of CIRP, it was communicated to Respondent No.2 by the erstwhile RP *vide* e-mail dated 09.07.2020 that Respondent No.2 should re-submit the entire claim of Rs. 9.91 Crore in Form B as an Operational Creditor. Thereafter, Respondent No.2 filed an application under Section 60(5) of IBC 2016 on 27.02.2021, before this Tribunal challenging the act of erstwhile RP and seeking to include the claim of Rs. 4 Crore as Financial Creditor and include the Respondent No.2 in the CoC meetings. This Tribunal on 08.04.2021 in I.A. No. 14 of 2021 directed the parties to file their written submissions and on 27.07.2021, directed the CoC to clarify the exact nature of transaction of Rs. 4 Crore. The matter was disposed of by this tribunal *vide* order dated 08.04.2022.
- 3.6 Upon perusal of the available records and information, and classifying Respondent No.2 as Financial Creditor, Respondent No.1 has observed that the Respondent No.2 has directly paid a sum of Rs. 2, 50, 00,000/- to the Applicant on 24.03.2006 on behalf of the CD and Rs. 1, 50, 00,000/- during the FY 2006-07 to the CD whereas no goods have been supplied by the CD to the Respondent No.2 during that period. In addition, thereof, Respondent No.2 has also provided financial assistance to the CD as sum of Rs. 5,05,00,00/- during FY 2007-08. Further, it was observed that Respondent No.2 used to advance/finance the CD since FY 2005-06 till the initiation of CIRP in crore of rupees whereas a very nominal amount has been adjusted/repaid to Respondent No.2 by the CD since 2005-06. It is pertinent to note that Respondent No.2 and the CD have had a healthy financial relationship for past many years, and it was the financial assistance of Respondent No.2 which helped the CD throughout the BIFR period in past. Also, from the record of the Respondent No.2, it is

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observed that it has shown the amount financed to the CD as loans and advances since 2005-06. Hence, considering huge amount of more than Rs. 9 Crore till FY 2007-08 by Respondent No.2 to the CD and the end use of the utilization of fund received from the Respondent No.2, their claim amount of Rs. 4, 00, 00,000/- is justified as the Financial Creditor.

- 3.7 The presumption made by the Applicant that the entire amount of Respondent No.2 should be Operational Creditor is not legal and valid. Furthermore, Applicant being a Financial Creditor of the CD cannot have any locus to challenge a claim of other Financial Creditor and to file the instant IA, the subject matter of which was already been disposed by this Bench in IA No. 14 of 2021 *vide* order dated 08.04.2022.
- 3.8 The Applicant and others have challenged the order of this Tribunal in IA No. 43 of 2021 before the Hon'ble Appellate Tribunal. However, the Applicant has not challenged the matter of IA No. 14 of 2022 before the Hon'ble NCLAT. The Hon'ble NCLAT on 10.05.2022 in respect of IA No. 43 of 2021 passed the interim order to not take any further steps till the disposal of the matter.
- 3.9 The claim of Applicant is an abuse of due process of law and the instant application is neither maintainable nor tenable in the eyes of law and is liable to be dismissed on the following grounds:
- i. Respondent No.1 is the Resolution Professional and in his professional capacity examined the claim of the Respondent No.2 based on the claim and available documents and information and therefore considered Respondent No.2 as Financial Creditor as defined under Section 5(7) of the Insolvency and Bankruptcy Code. The claim submitted by the Respondent No.2 which has been annexed as Annexure E perspicuously establishes that Respondent No.2 is a Financial Creditor and Financial Debt is owned to the Respondent No.2.
 - ii. The instant applicant is not maintainable before this Tribunal as the same application was filed before the same bench in IA No. 14 of 2021 which was disposed by this bench on 08.04.2022. The Order in IA No. 14 of 2021 stated that:

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“Heard both the sides at length. An order has been passed by this Bench today in I. A. No. 43 of 2021 in C.P. (IB) No. 09/GB/2019. The Petitioner and the Respondent No. 1 are at the liberty to file any additional/ relevant documents, if any, in support of their claim with the new RP within 10 days from the date order is uploaded on the e-portal/website. The RP is also given 7 days’ time thereafter to examine and finalize their claim in accordance with the provisions of the Insolvency & Bankruptcy code, 2016, Rules and Regulations. Hence IA No. 14 of 2021 in C. P. (IB) No. 09/GB/2019 is disposed of with the above observation.”

- iii. Respondent No.2, *vide* email dated 23.05.2022 sent the claim of Rs. 400 Lakh and based on that claim and supporting documents, the Respondent RP filed the revised list of creditors before NCLT. The matter and the parties involved in IA No. 14 of 2021 are directly and substantially related to the present application which has already been disposed of by this Tribunal. It is settled law that a matter already decided by a Tribunal cannot be re-opened or refiled and or re admitted again, if this principle is not followed would cease to have any meaning. Hence, the present Application is liable to be rejected since the same matter has been disposed of by the same bench in IA No. 14 of 2021 dated 08.04.2022.
- iv. In the matter of ***Company Appeal (AT) (Insolvency) No. 519 of 2020 - Rajnish Jain Vs. Manoj Kumar Singh & Ors***, Hon’ble NCLAT stated that:

“58. Thus, we hold that the Order of the adjudicating Authority rejecting CA No. 142/2019 is correct and needs no interference. However, we set aside the reasoning relying on the decision of COC for holding BVN Traders to be Financial Creditor. We find that the committee of Creditors has no adjudicatory power to decide as such whether a creditor who files its Claim is a ‘Financial’ Or ‘Operational’ Creditor.

59. Based on the above discussion, we clarify and hold that during CIRP, the IRP is authorized to collate the claims, and based on that he is empowered to constitute the Committee of Creditors.

We hold that the Resolution Professional may add to existing claims of claimants already received or admit or reject further claims and update the list of Creditors. But after categorization of a claim by the IRP/ Resolution Professional we hold that they cannot change the status of a Creditor.

For example, if the Resolution Professional has accepted a claim as a Financial Debt and Creditor as a Financial Creditor, then he cannot review or change that position in the name of updation of claim. It is also to be clarified that while updating list of Claims the Resolution Professional, can accept or reject claims which are further received and update list.”

The erstwhile RP accepted the claim of the Respondent No.2 as Financial Creditor and after 7 months of accepting that claim, the erstwhile RP asked Respondent No.2 *vide* e-mail dated 09.07.2020 to resubmit the claim of Rs. 400 lakh, as Operational Creditor in Form B and barred Respondent No.2 from the 8th CoC meeting onwards. The Applicant in the present matter being a Financial Creditor itself cannot file an application regarding consideration of a creditor as ‘Financial Creditor’ or ‘Operational Creditor’.

- v. Respondent No.1 had sent an email dated 30.08.2023 to all the CoC members including the Applicant with the request to make payment of Urgent CIRP cost mainly relating to the Security Personnel of the CD. Since, no reply was received from the CoC members the Respondent No.1 again sent an email dated 30.08.2023 to the CoC members with a request to make the urgent CIRP Cost. In response to the email of Respondent No.1, the Applicant replied *vide* email dated 02.09.2023 which states that:

“Further, the Hon’ble NCLAT is yet to adjudicate the issue which is pending before the Hon’ble Tribunal Therefore, your request in your mail and your actions are an attempt to circumvent the Hon’ble NCLAT and also can be construed as contempt of the Hon’ble Tribunal. As such, you have no locus to take any of the actions as stated by you including any expenditure incurred in the CIRP of National Plywood Industries Ltd (NPIL). We also question your authority to spend the amount of Rs. 32.50 lakh in the account

of CD, which has no approval / ratification of CoC. In fact, you should refrain from doing anything as it is the prerogative of the existing RP (by virtue of NCLAT stay, his position remains) to approach NCLAT seeking such as approval. In view of the aforesaid, we hereby fail to recognize your position and accordingly are not willing to comply with your various requests including the request for funding.”

The above reply paras of Applicant dated 02.09.2023 means that the Applicant does not recognize the position of present RP and are reluctant to contribute the urgent CIRP cost which is primarily required to meet the expenditure of the Security Personnel to protect the assets of the CD, on the contrary it has filed the instant application challenging the status and/or class of claim of another claimant of the CD which is illegal and void. It is further submitted that the Hon'ble NCLAT has mentioned in its order dated 10.05.2022 that “Till the next date of hearing no further steps shall be taken in pursuance of the impugned order”, which does not in any way invalidate the position of present RP, hence Respondent No.1 is duty bound to protect the asset of the CD and to make at least the urgent CIRP cost.

- 3.10 Respondent No.1/RP relied on the available documents, information and the submissions made by the Respondent No.2 and considered Rs. 4 Crore as financial debt. The Applicant failed to consider that a sum of Rs. 2.50 Crore was paid by the Respondent No.2 to the Applicant for the repayment of the financial debt of the CD in the year 2005-06 further a sum of Rs. 1.50 Crore was also paid by Respondent No.2 to the CD in the year 2006-07 when the CD was under BIFR. Further, Respondent No.2 has regularly financed the CD since 2005-06 whereas a very nominal amount of the repayment or adjustment was made by the CD since 2005-06 till the initiation of the CIRP. In addition, thereof Respondent No.2 has shown the amount financed to the CD under the head of Loans and advances since 2005-06, therefore, it is apparently established that the Respondent No.2 is ‘Financial Creditor’ in the present matter. Despite the opportunity given by this Tribunal in IA No. 14 of 2021, the Applicant failed to submit any document and information against the claim of Respondent No.2.

- 3.11 Hence, the present application is in violation of the code and an abuse of due process of law and is liable to be dismissed.
4. Pursuant to order dated 05.03.2024, Respondent No. 2 filed its written submissions dated 11.03.2024, stating that:
- 4.1 Respondent No.2 is a company incorporated under the Companies Act having long business relations with the Corporate Debtor and as a Financial Creditor had lent finance to the Corporate Debtor (CD) at the explicit request of the promoter when the Corporate Debtor was in BIFR, which further enabled the Corporate Debtor to revive and operate its business and settle the outstanding dues to the secured lenders as directed by the BIFR from time to time. It is with this support that Corporate Debtor became a profit-making entity by the year 2018-19. No financial support had been provided by any financial institution as the Corporate Debtor was declared as a sick industry by the Hon'ble BIFR on 18.04.2006. Moreover, Respondent No.2 as a Financial Creditor, from the very beginning, was involved with assessing the viability of the Corporate Debtor and was engaged in the restructuring of the loan as well as reorganisation of the Corporate Debtor's business when the corporate debtor was under financial stress and declared sick.
- 4.2 Respondent No.2 had advanced funds to a Corporate Debtor over the period from 2005-06 till 2015-16 when the Corporate Debtor was sick and registered with BIFR. The financial help from Respondent No.2 assured the repayment to the Secured lenders of the Corporate Debtor, payment of statutory liabilities and essential working capital for the revival of the Corporate Debtor. It may be noted that in the various Draft Rehabilitation Schemes (DRS) submitted from time to time by IDBI-SASF to the BIFR, all these facts were disclosed in detail.
- 4.3 On 27.03.2006, an amount of Rs. 2,50,00,000 (Two Crore Fifty Lakh) was paid to the Financial Creditor (SASF)/Applicant on behalf of the CD which was shown under the Loans and Advances (Item 11-3, Schedule — 9) in the Balance Sheet of DCPL as on 31.03.2006 for the FY 2005-06. The same was reflected in

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- the Balance Sheet of NPIL for the FY 2005-06 of CD under unsecured loans in Schedule D.
- 4.4 Further in the year 2007, specifically on 09.03.2007, 12.03.2007 and 23.03.2007 another 1, 50, 00,000 (Rupees One Crore Fifty Lakh) was paid by DCPL to the CD which was also shown under Loans and Advances (item 11-3, Schedule — 9) in the Balance Sheet as on 31.03.2007 for the FY 2006-07. The same was reflected in the Balance Sheet for the FY 2007-08 of the CD under unsecured loans in Schedule D.
- 4.5 The Audited Annual Accounts with the Balance Sheets for FY 2005-06, 2006-07 and 2007-08 of Respondent No.2 M/s Dilip Constructions Pvt Ltd (DCPL) has been annexed and the Audited Annual Balance Sheets of the Corporate Debtor National Plywood Industries Limited (NPIL)-CD) for the FY 2005-06, 2006-07 and 2007-08 has also been annexed.
- 4.6 Respondent No.2 is a valued customer and key provider of funds to the CD since the BIFR period. Respondent No.2 has also been willing to take part in repayment in the form of finished goods on normal commercial terms. On 01.07.2019, as per the mutual agreement, Respondent No.2 supplied as repayment of Rs.591.08 Lakh of the loan and treated Rs.400.00 Lakh as an unsecured loan. This agreement benefited the Corporate Debtor greatly because, without it, the entire Rs.991.08 Lakh would have been an unsecured loan to be admitted as a Financial Debt, incurring interest in future. In Respondent No.2's balance sheet for FY19-20, Rs.400.00 Lakh due from the CD has been shown as an unsecured loan and the balance amount has been shown as Advance against Trade Payable. The CD, by not paying any interest to Respondent No.2, has saved an amount of approx. Rs.1300 Lakh from 2006-2019 calculated on the average annual amount invested by the answering respondent at a standard bank rate of 14% p.a.
- 4.7 From 2006 till 30th June 2019, the entire amount due from CD had been shown as a loan in the books of Respondent No.2. It was mutually decided on 30.06.2019 that out of the total sum dues Rs. 4.00 Crore would be refundable through normal banking channels and the balance would be settled through the

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supply of goods at preferential pricing. Reference drawn to (Annexure- A7) the balance sheet for FY 2017-18, under the head B-1 (d) Other loans and advances and Annexure-A7) under Note 2.9 the entire amount paid to the CD was considered as loan in the books of answering respondent. A reference drawn to (Annexure-A8) the balance sheet for FY 2018-19, under the head B-1 (d) Other loans and advances and (Annexure-A8) under Note 2.9 the entire amount paid to CD was considered as loan in the books of the answering respondent. Reference drawn to (Annexure-A9) the balance sheet for FY 2019-20, under the head B-2 (e) Term Loans and Advances and (Annexure-A9) under Note 2.13 (e) others (unsecured, considered good) Rs. 4.00 Cr was considered as unsecured loan in the books of the answering respondent in the name of the CD and balance amount payable by CD was reflected under Note 2.13 (d) Advance against Trade Payable.

- 4.8 The Applicant filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016, being C.P. No. (IB)/09/GB/2019, against the Corporate Debtor and the same, was admitted by this Tribunal on 26.08.2019, and Mr. Sandeep Khaitan was appointed as Interim Resolution Professional. On 25.11.2019, Respondent No.2 submitted its claims under two heads operational creditors and financial creditors amounting to Rs. 5.91 crore and Rs. 4 Crore respectively. If Respondent No.2 had not agreed to split the total amount dues from CD as of 30.06.2019, and made the adjustment in books on 01.07.2019, Respondent No.2 would have been entitled to claim the entire Rs. 9.91 Crore as a Financial Creditor of CD. It is well settled law that the Financial Creditors are those creditors who are directly engaged in advancing credit to the corporate debtor.
- 4.9 The erstwhile RP had relied on the papers submitted, and the company books as on the CIRP commencement date, and said claims were admitted under the head of operational and financial creditor by erstwhile RP as it was submitted by Respondent No.2. *Vide* email dated 09.07.2020, the erstwhile RP intimated Respondent No.2 that the claim of Rs. 4.00 Crore which was admitted as a financial loan to the CD was not for any sum lent to CD. Accordingly, the

erstwhile RP asked Respondent No.2 to re-lodge the entire claim in FORM -B, as an operational creditor. Without considering the clarification and verifying the documents supplied, the erstwhile RP under the instruction of the Applicant had arbitrarily reclassified Respondent No.2 as an Operational Creditor from the Financial Creditor for the claim of Rs. 4.00 Crore and barred Respondent No.2 from participating in CoC as a Financial Creditor from 8th CoC meeting onwards so that the Applicant would have unfettered primacy in the committee of creditors.

- 4.10 The erstwhile RP has also failed to record the evidence produced by the Respondent No.2 that the money was borrowed or raised by the Corporate Debtor under transactions having the commercial effect of borrowing. A copy of the ledger showing payment made to Corporate Debtor- NPIL has been annexed. Being aggrieved, Respondent No.2 filed application IA No. 14 of 2021, which was disposed of by an order dated 08.04.2022.
- 4.11 The New RP/Respondent No. 1 after due verification of the claim lodged by the Respondent No.2 reinstated it as Financial Creditor of the Corporate Debtor for the claim of Rs. 4.00 Crore and accordingly, reconstituted the CoC on 04.05.2022.
- 4.12 It is a settled law that the CoC has no role in deciding the status of a creditor or claim and that such an exercise cannot be treated as an exercise of its commercial wisdom. Hence, the Applicant cannot change the status of a creditor from Financial to Operational based on a resolution by a majority of the CoC, which was found tainted by this Tribunal and the same was upheld by the Hon'ble NCLAT and Hon'ble Apex Court and an RP cannot arbitrarily overturn the earlier decision and re-classify a creditor from Financial to Operational.
- 4.13 Section 18(1)(b) of the Code authorises IRP to receive and collate all the claims submitted by claimants, under the public announcement made under Sections 13 and 15 of the Code. Section 18(1)(c) authorises IRP to constitute a Committee of Creditors. Undisputedly, in this case, the IRP after collation of claims admitted the Claim of Respondent No.2 as a Financial Creditor and the debt as a Financial Debt. Up to the 8th CoC meeting. Respondent No.2 being a Financial

Creditor was a member of the Committee of Creditors. Thereafter, under the pretext of updating of creditors, the erstwhile RP re-classified Respondent No.2 from a Financial to Operational Creditor. This high-handedness act of the resolution professional reeks of collusion with the Applicant to put the Applicant as a preferential creditor and raise the voting share of Applicant in the CoC.

4.14 The Allahabad High Court has also observed that if a Resolution Professional has accepted a claim as a Financial Debt and a Creditor as a Financial Creditor, then he cannot review or change that position in the name of updating the Claim. The court terms the attempt of the Resolution Professional as an act of collusion. The same was established before this tribunal and erstwhile RP was removed by an order dated 08.04.2022 in IA 43 of 2021. It is therefore prayed that the said application of the applicant be dismissed *in limine* as the same as no merit and not maintainable.

4.15 To establish that the present application is devoid of merit and is not maintainable, Respondent No.2 submits the following objections:

- i. Respondent No.2 is Financial Creditor, and the claim is Financial Debt as per the definition under Section 5(7) and 5(8) of the Code.
- ii. The erstwhile RP *vide* email dated 09.07.2020 stated that there was no agreement or consideration of the time value of money, and Respondent No.2 cannot be classified as a Financial Creditor. This word time value of money has not been defined under the IBC Code and reverting to the Dictionary meaning or the meaning of the phrase as is generally understood, the time value of money concept states that cash received today is more valuable than cash received at some point in the future. The reason is that someone who agrees to receive payment at a later date foregoes the ability to invest that cash right now. The only way for someone to agree to a delayed payment is to pay them for the privilege, which is known as interest income. NASDAQ Glossary of Financial Terms defines Time Value of Money as: “*The idea that a dollar today is worth more than a dollar in the future, because the dollar received today can earn interest up until the time the future dollar is received.*”

In *Nikhil Mehta and Sons vs. AMR Infrastructure Ltd. Company Appeal (AT) (Insolvency) No. 07 of 2017*, NCLAT dealt with the issue of interpretation of the phrase "time of value of money" as follows:

“The key feature of financial transaction as postulated by section 5(8) is its consideration for time value of money. In other words, the legislature has included such financial transactions in the definition of 'Financial debt' which are usually for a sum of money received today to be paid for over a period of time in a single or series of payments in future. It may also be a sum of money invested today to be repaid over a period of time in a single or series of instalments to be paid in future. In Black's Law Dictionary (9th edition) the expression 'Time Value' has been defined to mean "the price associated with the length of time that an investor must wait until an investment matures or the related income is earned". In both the cases, the inflows and outflows are distanced by time and there is a compensation for time value of money”.

iii. In *Dr BVS Lakshmi Vs Geometrix Laser Solutions Private Limited — Company Appeal (AT) (Insolvency) No. 38 of 2017*, the NCLAT while dealing with the concept of disbursement held as follows:

“If the Claimant claims to be 'Financial Creditor', he will have to show that debt is due which he has disbursed against the 'consideration for the time value of money' and that the borrower has raised the amount directly or through other modes like credit facility or its de-materialized equivalent, note purchase facility or the issue of bonds, notes, debentures, loan stock or any other similar instrument. To show that there is a debt due which was disbursed against the 'consideration for the time value of money', it is not necessary to show that an amount has been disbursed to the 'Corporate Debtor'. A person can show that the disbursement has been made against the 'consideration for the time value of money' through any instrument. Any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction for which only the market value of such

transaction shall be taken into account, it is not necessary to show the amount has been disbursed. The disbursement against the 'consideration for the time value of money' is the main factor."

It is, therefore, a case of erstwhile RP misrepresenting the interpretation of time value of money and rejecting the financial claim of the Respondent No.2 and arbitrarily classifying the Respondent No.2 as an Operational Creditor from the Financial Creditor.

- iv. It is a settled law that the CoC has no role in deciding the status of a creditor or claim and such an exercise cannot be treated as an exercise of its commercial wisdom. Hence, the erstwhile RP cannot change the status of a creditor from Financial to Operational based on a resolution by a majority of the CoC, and an RP cannot arbitrarily overturn the earlier decision and re-classify a creditor from Financial to Operational creditor. In *Swiss Ribbons Private Limited and Anr vs. Union of India and Ors. (2019) 4 SCC 17*, the Hon'ble Supreme Court has held that Resolution Professional has no adjudicatory powers.
- v. The Applicant has no locus for filing this application as one creditor of the CoC cannot challenge the claim of another creditor. The determination of the claim, admission and rejection of any claim is the domain of the Resolution Professional. If the claim is rejected the aggrieved party can file an application under section 60(5) of the Code before the Adjudicating Authority for adjudication. The same issue has been settled by this Tribunal in IA 14 of 2021 with the observation recorded in the Order dated 08.04.2022. It is settled law that a matter decided by the Tribunal cannot be adjudicated further and is barred under *Res-Judicata*.
- vi. Respondent No.2 has duly submitted all documents with the RP, as per the order dated 08.04.2022 passed in IA 14 of 2021 and has duly satisfied the queries raised by the RP, regarding Rs. 4.00 Cr paid to the Corporate Debtor and after due verification and vetting the Respondent No.2 has been reinstated as a Financial Creditor of the Corporate Debtor.

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- 4.16 Respondent No.2 submitted the books of accounts with erstwhile RP, the same was arbitrarily rejected to give unfettered privilege to the Applicant in the CoC, against which Respondent No.2 filed an application before this Tribunal being IA no. 14 of 2021 challenging the said arbitrary and malafide act of the erstwhile RP in collusion with the Applicant, the matter was duly considered by this Tribunal and an order was passed on 08.04.2022, directing the new RP/Respondent No.1 to re-verify the claims. And Respondent No. 2 was allowed to file additional documents in support of the claim of Rs. 4.00 Cr.
- 4.17 Hence, the present application is frivolous, malafide and devoid of merit and liable to be dismissed.
5. Heard Ld. Counsel Mr Yakshay Chheda for the Applicant, Respondent No.1 Mr. Amit Pareek, RP and Ld. Counsel Mr. Abhijeet Sarkar for Respondent No.2 and perused the material available on record.
6. Based on the averments advanced by the parties and material available on record, we are of the considered view that:
- 6.1 It is apparent that main Petition CP (IB)/09/GB/2019 filed by the Applicant Financial Creditor under Section 7 of the Insolvency and Bankruptcy Code, 2016 was admitted by this Adjudicating Authority on 26.08.2019 and Respondent No.2, i.e. Dilip Constructions Private Limited submitted its claims to the RP under two separate heads i.e. Rs. 5.91 Crore as an Operational Creditor and Rs. 4 Crore as a Financial Creditor.
- 6.2 Pursuant to admission of claims in the abovementioned CIRP, the erstwhile RP prepared a List of Creditors as on 01.01.2020 where Respondent No. 2 was shown as a Financial Creditor to the tune of Rs. 4 Crore. However, it is the contention of the Applicant that Respondent No.2 did not have anything on record to establish that this amount to the tune of Rs. 4 Crore amounted to Financial Debt under the Code. To support its contention, the Applicant draws attention of this Bench to the email sent by the erstwhile RP on 08.07.2020 to Respondent No. 2 which stated that upon perusal of papers, books of accounts and records of the Corporate Debtor and in the absence of any

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- contract/agreement for the alleged unsecured loan of Rs. 4 Crore to the Corporate Debtor, Respondent No. 2 should re-submit its entire claim of Rs. 9.91 Crore in Form B as an Operational Creditor of the Corporate Debtor.
- 6.3 It is interesting to note that being disgruntled by the communication of the erstwhile RP asking Respondent No.2 to re-submit its entire claim of Rs. 9.91 Crore as Operational Debt, it filed IA No. 14 of 2021 under Section 60(5) before this Tribunal seeking *inter alia* an order directing the RP to reinstate the claim and position of Respondent No. 2 as a Financial Creditor on the Committee of Creditors. Subsequently, this Tribunal *vide* Order dated 08.04.2022 in IA. No. 14 of 2021 directed the Respondent No. 2 and the Applicant herein to file additional/relevant documents in support of their respective claims before the new RP Mr. Amit Pareek (Respondent No. 1 herein) appointed pursuant to Order dated 08.04.2022 passed in IA No. 43 of 2021.
- 6.4 Now, it must be understood that the new RP appointed by this Tribunal had the mandate to receive relevant documentation and paperwork in support of the claims received by him by both the Applicant and Respondent No.2 and make appropriate classification regarding the same. On 04.05.2022, the present RP/Respondent No.1 issued the Impugned Order under Regulation 13(2)(d) of CIRP Regulations which classified the amount of Rs. 4 Crore extended by Respondent No. 2 to the Corporate Debtor as an unsecured loan. The Applicant and other parties challenged the Order of this Tribunal passed in IA No. 43 of 2021 before the Hon'ble Appellate Tribunal.
- 6.5 It appears that only the Order passed in IA No.43 of 2021 has been challenged before the Hon'ble NCLAT and there subsists no challenge in form of an appeal *vis a vis* Order dated 08.04.2022 passed in IA No. 14 of 2021. The Hon'ble NCLAT *vide* Order dated 08.02.2024 in Company Appeal (AT) (Insolvency) No. 525 of 2022 disposed of the appeal arising out of IA No.43 of 2021 and directed that the new RP, who was appointed by the impugned Order of this Tribunal, to conclude the entire CIRP process within 90 days from the date of the NCLAT Order, under the supervision and control of Committee of Creditors.

- 6.6 Therefore, the legal and logical corollary is that the mandate of the present RP appointed through the Order of this Tribunal dated 08.04.2022 in IA No. 43 of 2021 is legitimate and he carried out a valid exercise to determine the “Financial Creditor” status of Respondent No.2, through the Impugned Order dated 04.05.2022 under Regulation 13(2) (d) of CIRP Regulations which classified the amount of Rs. 4 Crore extended by Respondent No. 2 to the Corporate Debtor as an unsecured loan.
- 6.7 However, the question arises whether the Applicant in the present IA (IBC)/2/GB/2023 i.e. Stressed Assets Stabilization Fund (SASF) has the locus to challenge the categorisation of another creditor as a Financial Creditor as carried out by the RP. The Hon’ble NCLAT in *Company Appeal (AT) (Insolvency) No. 519 of 2020 - Rajnish Jain Vs. Manoj Kumar Singh* observed that it was the primary duty of the Resolution Professional to receive, collate and verify claims which could not be further delegated to CoC. On issue of reclassification of the status of the creditors, The NCLAT referred to the judgements of *M/s. Dynepro Private Limited v. Mr. V. Nagarajan [Company Appeal (Insolvency) No. 229 of 2018]*, wherein it was held that a resolution professional lacked the jurisdiction to decide the claim of one or other creditor or its categorization and *Swiss Ribbons Private Limited and Another v. Union of India and Others [Writ Petition (Civil) No. 99 of 2018]*, wherein the Hon’ble Supreme Court held that a resolution professional has no adjudicatory power. The present RP who is Respondent No.1 in this Application carried out the exercise of classifying the status of Respondent No.2 for the first time because all previous endeavours of classification including review of status were completed by the erstwhile RP. Therefore, it cannot be said that there was any review of the list of claims by the present RP but rather a fresh look by the present RP which tantamount to a fresh admittance of or an updation of claim.
- 6.8 Among other things, Section 25 of the IBC casts a duty on the RP to protect and preserve the assets of the CD including continued business operations. To aid this duty, Section 25(2) of the Code imposes a further mandate on the RP to maintain an updated list of claims. However, in view of the Code and the

abovementioned rulings, it is evident that it is not permissible to change the category of a creditor in a CoC once it is constituted. Regulation 13(1) of CIRP Regulations imposes another duty on the RP to verify every claim received by it as on the insolvency commencement date and maintain a list of creditors containing names of creditors along with the amount claimed by them. It is important to understand that in the present case before this Tribunal, there is a complex history of the erstwhile RP classifying Respondent No.2 as Financial Creditor and then later changing its status to that of an Operational Creditor which was brought as a dispute before this Tribunal in form of IA. No. 14 of 2021. In natural course, this Tribunal appointed a new RP *vide* Order in IA. No. 43 of 2021 and disposed IA. No. 14 of 2021 by allowing both the Applicant and Respondent No.2 to file additional documentation and material before the new RP/ Respondent No.1 in respect of their claims.

- 6.9 Consequently, the classification undertaken by the present RP on 04.05.2022 was not a *suo moto* review but an exercise in pursuant to the rightful Order of this Tribunal dated 08.04.2022 in IA. No. 14 of 2021 to examine and finalise the claims. In light of the above discussion and observations, we do not find any legitimate reason to interfere with the categorisation made by present RP on 04.05.2022 which classified the amount of Rs. 4 Crore extended by Respondent No. 2 to the Corporate Debtor as an unsecured loan. Since, the above Application is not tenable on points of law as laid down by Hon'ble NCLAT, findings on other facts and issues is not necessary and therefore is not dealt with in this order.
- 6.10 At last, it is discerned that the RP has not exercised any adjudicatory powers except classifying part of claim of Respondent No.2 as "Financial Debt" and the rest as "Operational Debt" as was done by the previous RP. The present Applicant namely SASF having kept quiet without filing any application challenging the same classification done by the erstwhile RP is now estopped from challenging the same classification done by the present RP as it would amount to taking advantage of its own wrong. The conduct of the present Applicant is only to take advantage of restarting of the CIRP process as per

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orders of the Hon'ble NCLAT, only to have complete control as the sole Financial Creditor on the CoC. For the foregoing reasons, this Tribunal did not find any irregularity or illegality committed by the present RP and the above Application filed by SASF is devoid of merits.

7. Accordingly, the above IA i.e., **IA (IBC)/2/GB/2023 in CP (IB)/9/GB/2019 is REJECTED** and shall stand dismissed and disposed of.
8. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.
9. Certified Copy of this order may be issued, if applied for, upon compliance with all requisite formalities.
10. File be consigned to records.

Sd/-

**Satya Ranjan Prasad
Member (Technical)**

Sd/-

**H.V. Subba Rao
Member (Judicial)**

Signed this on 18th day of April, 2024.