IN THE NATIONAL COMPANY LAW TRIBUNAL,

KOLKATA BENCH(Court-II)

KOLKATA

IA.(IB)No. 514/KB/2022
In
C.P (IB) No.202/KB/2021

In the matter of

An application under section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the National Company Law Tribunal Rules, 2016.

And

In the matter of:

Sarga Udaipur Hotels and Resorts Private Limited

Corporate Debtor/Corporate Applicant

And

In the matter of:

Housing & Urban Development Corporation Ltd.

…Applicant

Date of hearing :30/01/2023

Order Pronounced on : 30/08/2023

Coram:

Ms.Bidisha Banerjee, Member (Judicial)
Mr.Balraj Joshi, Member (Technical)

Counsels appeared through Physically/ Video Conference

Mr.Jishnu Saha,Sr. Adv.	] For HUDCO
Mr.Ashok Jain, Adv.	]
Mr.Deepak Jain, Adv.	]
Mr.Ishaan Saha,Adv.	]
Mr.Subodh Kr.Agarwal,PCA	] For IRP
Mr.Rajesh Lihala, IRP in person	]
Mr.Rahul Auddy,Adv.	] For IRP
Mr.Aditya Gooptu,Adv.	]

O R D E R

Per: Balraj Joshi, Member (Technical)

1. This Adjudicating Authority convened through hybrid mode.

2. This is an application filed under section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the NCLT Rules ,2016 by applicant Housing & Urban Development Corporation Ltd. (hereinafter referred to as "HUDCO") to seek directions upon the Interim Resolution Professional in connection with CIRP initiated against SARGA, to include the Applicant herein in the Committee of Creditors (CoC in short) and any decision if any taken by Committee of Creditors till date be set aside and fresh decisions be taken after hearing HUDCO and after inclusion of HUDCO in the CoC.

3. Ld. Sr. Counsel Mr. Jishnu Saha would assert as under:

i. That the CD has 4 financial creditors. Of the same, two, namely Srishti Infrastructure Development Corporation Ltd. (SIDCL) and Srishti Urban Infrastructure Development Ltd. (SUIDL) are admittedly related parties of the CD. JSP Tracom

Private Limited, another financial creditor also appears to be somehow under the control of the CD. The applicant is the fourth financial creditor.

ii. The applicant had entered into a loan agreement with the CD. Consequent upon the failure of the CD to service the loan, a sum of Rs.23,82,02,414 became due and payable by the CD to the applicant, for which the applicant submitted the requisite form 'C' to the RP claiming the said sum. The applicant is the only secured creditor of the CD. Being entitled to be a part of the Committee of Creditors (CoC) of the CD as its single largest and only secured creditor, the applicant also requested the RP to include it in the CoC.

iii. Although, the RP approved the applicant's claim for a sum of Rs.20,60,55,675 (without, however, disclosing any basis or jurisdiction for excluding its balance claim), he refused to include the applicant in the CoC upon contending that the applicant was a related party of the CD. This led to a series of correspondence between the applicant and the RP. The RP essentially contended that as the applicant was a promoter of Sristhi Urban Infrastructure Development Ltd.(SUIDL), which in turn was a promoter of the Corporate Debtor , as such, it was a related party and could not form a part of the CoC under section 5(24) of the IBC. To support such contention, it was stated that the audited

annual accounts of the CD for the year 2016 had disclosed the account of the applicant under the heading related party and the accounts of the CD for the years 2016 and 2017 had been signed by individuals who were managers of the applicant in their capacity as directors of the CD.

4. At hearing, it was argued by Mr. Subodh Kumar Agarwal, for the IRP that HUDCO the applicant who seeks inclusion in the CoC is a promoter of Shristi Infrastructure Development Corporation Ltd. (SIDCL) which in turn is the promoter of the Corporate Debtor SARGA Udaipur Hotels and Resorts Private Limited. Therefore, HUDCO cannot form part of the Committee of Creditors (CoC) of the Corporate Debtor in the present matter being a related party in terms of Section 5(24) of the Insolvency and Bankruptcy Code, 2016.That the said fact was taken note of by the IRP and vide email dated 26.05.2022 the IRP had indicated as under:

" Re: Non-acceptance of entire claim of HUDCO

After receiving your email, I have asked my team to re-verify your entire claim once again. Accordingly, the status of your claim is "Under Consideration".

Re: Non-inclusion of HUDCO in the Committee of Creditors of Sarga Udaipur Hotels and Resorts Private Limited (Corporate Debtor)-

While taking the decision we have considered the following points;

1) We have verified Audited Annual Accounts of Corporate Debtor(CD) from the year 2016 and found that the account of HUDCO has been disclosed under

the heading "Related Party". Also the accounts of the year 2016 and 2017 has been signed by Mr.Duraiswamy Guhan and accounts for the year 2018 has been signed by Mr.Alok Kumar Joshi in their capacity as director of CD. Both individuals were Managers of HUDCO".

5. It was argued by Mr. Agarwal that there was a clear indication by the IRP, vide email dated 28/05/2022 that in terms of section 5(24) (f) of IBC, 2016, any Body Corporate whose board of directors, Managing Director or Manager, in the ordinary course of business, acts on the advice, direction or instruction of a director, partner or manager of the corporate debtor is a related party to the Corporate Debtor.

Further in terms of Section 5(24)(h) "Any person on whose advice, direction or institution, a Director, partner or Manager of the Corporate Debtor is accustomed to act falls under the definition of a related party and since the CD is a subsidiary of M/s Shristi Urban Infrastructure Development Ltd.(SUIDL which is a company jointly promoted by HUDCO and Shristi Infrastructure Development Corporation Ltd.(SIDCL) as per a joint Venture Agreement. Dr. Alok Kumar Joshi, Executive Director (Head-Operation) of M/s Housing and Urban Development Corporation Ltd.(HUDCO) is the director of Corporate Debtor. As such they fit the bill for being called a related party.

Further under section 5 (24)(m)(i), any person associated with the CD on account of participation in policy making of the corporate debtor is a related party and HUDCO is

participating in the policy making of CD through Dr.Alok Kumar Joshi. Hence, HUDCO cannot be included in the CoC.

6. Ld. Sr. Counsel Mr. Jishnu Saha, would asseverate as under:

i. That HUDCO being major financial creditor and only secured creditor must be included in CoC and the CoC meetings should be postponed until the present issue relating HUDCO's participation in the CoC is resolved.

ii. Further that, as per the attachment filed by the corporate debtor itself, the said corporate debtor has shown loan from related parties of Rs.18,58,31,905/- and loan from HUDCO separately at Rs.4,78,73,287/-. Thus, the Corporate Debtor itself has admitted the fact that HUDCO's transaction is not a related party transaction.

iii. That HUDCO, as a leading techno-financial institution in the country has its own set of policies and documentation process to safeguard HUDCO's time value of money as a purely term lender.

iv. That under no circumstances, it can be alleged that HUDCO is a related party. It was a purely regular lender borrower relationship arrangements by duly entered enforceable agreement as has been done by HUDCO with its all other regular borrowing agencies since its inception of 52 years.

v. Further, that, SUIDL is a JV promoted by SIDCL and HUDCO. The shareholding of Corporate Debtor SUHRPL are with SIDCL and SUIDL only, and HUDCO has no shareholding thereof. Hence, on this count also there is no reason for IRP to consider HUDCO as

related party.

vi. That the applicant clarified that HUDCO could not be a related party under section 5(24) of the Code as it had no shareholding or any voting rights in the CD and that merely because it had some stake in SUIDL, it did not fall under any of the clauses (a) to (m) of Section 5 (24).It was further asserted that HUDCO had no control over the management of the CD. It had appointed nominee directors to the board of the CD in terms of clause 19 of the loan agreement without any right to manage or influence the management of the CD as is clear from clause 20 of the said agreement.

vii. HUDCO neither has shareholding nor any voting rights in the Corporate Debtor namely **Sarga Udaipur Hotels and Resorts Private Limited**. In fact shares of the Corporate Debtor are held by two companies- SUIDL and Shristi Infrastructure Development Corporation Limited (SIDCL) and merely because HUDCO has some stake holding in SUIDL it does not fall under any of the clauses (a) to (m) of Section 5(24).Further HUDCO has no control over the management of the Corporate Debtor.

viii. That HUDCO having substantial claim as a lender and being a financial creditor of the Corporate Debtor is an important member of the Committee of Creditors. The Committee of Creditors of the Corporate Debtor will be in clear violation of the provisions of the Code and IBBI Regulations framed thereunder besides causing grave prejudice to the interest of HUDCO.

ix. That the report of the Insolvency Law Committee and its observations with regard to 'Related Party' in clauses 1.23 to 1.25, and the judgment of the Hon'ble Supreme Court in the case of ***Phoenix ARC (P) Ltd. versus Spade Financial Services Ltd. (2021) 3 SCC 475 (Paras100 to 104)*** clarifies that

> " … *the exclusion under the first proviso to Section 21(2) is related not to the debt itself but to the relationship existing between a related party financial creditor and the corporate debtor. As such, the financial creditor who in praesenti is not a related party, would not be debarred from being a member of the CoC.*

x. As the relationship between the applicant and the CD was clearly one of borrower and lender, with the applicant not in a position to advise, direct or instruct the directors of the corporate debtor or to participate in its policy, there can be no question of the applicant being a related party of the CD. That the applicant was a related party with reference to the provisions of Section 5(24) (f),(h), (m) and (i) of the Act. The RP's mail of 28th May,2022 would clearly demonstrate that the applicant does not satisfy any of the conditions of section 5(24) (f,) (h), (m) or (i)

7. Ld. Sr. Counsel would further emphasize that RP's allegation that the applicant is a related party and is thus ineligible under section 21(2) of the Code to be included in the CoC, is both false and bereft of any legal basis in view of the following:

a. Srishti Urban Infra Development Ltd. (SUIDL) is a joint venture of the applicant HUDCO and Srishti Infrastructure Development Corporation

Ltd. (SIDCL).

b. The applicant had sanctioned a loan of Rs.71.07 crores to SUIDL in 2007 for a construction project in Rajasthan.

c. The CD is a special purpose vehicle incorporated for construction of the project. The CD is the 100% subsidiary of SUIDL. Such fact will be apparent from the board resolution of the applicant dated 4th July,2007, at page 4 of the Rejoinder.

d. The total capital of the CD was 4.95 crores of which 1.95 crores was contributed by SIDCL and 3 crores by SUIDL.

e. It is accordingly apparent that no equity has been infused by the applicant into the CD. The applicant is thus not an associate or holding company of the CD within the meaning of section 5(24) (i) of the Code.

f. As per clause 19 of the loan agreement dated 7th November, 2008 as well as article 27 of the articles of Association of the CD, the applicant is entitled to appoint one nominee director on the board of the CD to facilitate and ensure repayment of its dues. In terms of clause 19 of the loan agreement, the applicant's nominee director on board of the CD was not required to hold any qualifying shares in the CD.

g. In terms of the aforesaid provisions of the loan agreement and Articles of Association of the CD,

the applicant had nominated only one director on the board of the CD.

h. The applicant as such had no role to play in the preparation of the accounts of the CD and consequently cannot be held responsible for the misdescription of the applicant as a related party of the CD in the same.

i. It is as such clear that the applicant cannot be considered a related party of the CD under section 5(24) (m) of the Code, as the applicant has no right to participate in the police making process of the CD, there is no interchange of managerial personal or directors of the applicant and the CD, and there is no exchange of essential technical information between the applicant in the CD.

j. It is material to note that the applicant is also not a registered member of the CD and accordingly does not have any right to participate in meetings of the shareholders of the CD.

k. As such, the applicant does not unilaterally have the power to influence any decision in the CD, and accordingly cannot by any stretch of imagination be called the related party of the CD within the meaning of section 5(24) (f) or (h) of the Code. One of the supporting contentions cited in the rejoinder is regarding approval of the SUHRPL board to file a section 10 petition with NCLT. It has been stated that despite HUDCO

not consenting to the proposal, the proposal was passed by the board, which proves that HUDCO had no control on the decisions of the board which were primarily made by the directors nominated by SUHRPL and SUIDL.

l. The RP's allegation in its letter dated 21st May, 2022 that the applicant is a promoter of the CD or is a related party of the CD under section 5(24) of Code, is entirely misconceived and baseless.

m. In the light of the aforesaid, it is clear that the applicant is not a related party of the CD under clauses 5(24)(f),(h),(i) or (m), or any other provision of the Code.

8. It was further contended that the constitution of the CoC only with JSP Tracom Private Limited, which at best is a creditor only for the sum of Rs.5 lakhs.

i. Even this is extremely doubtful as a financial statement of the said JSP Tracom Private Limited at page 93 demonstrates that JSP Tracom Private Limited has given no intercorporate deposits. That the company petition was admitted on an application filed by the CD itself under section 10 of the Code of 2016.The attempt of the CD is clearly to hijack the entire CIRP through the said JSP Tracom Private Limited over which it obviously exercises control.

ii. As the applicant is not entitled to participate in shareholders meeting of the CD, the applicant has not in any manner consented to the filing of

the application for voluntary initiation of its CIRP under section 10 of the Code.

iii. That the CD has clearly acted in collusion with the said JSP Tracom Pvt. Ltd. to contrive the above voluntary CIRP under section 10 of the Code, with the fraudulent and malicious intent of denying and defeating the legitimate claim of the applicant herein.

9. Reference is made to paragraphs 5 and 6 of the Rejoinder, which are summarized as follows:

a. Article 4, Clause 15 of the loan agreement dated 7.11.2008 executed between the applicant herein and CD at page 50 of the petition provides: " The Borrower Covenants that it shall take prior approval of HUDCO in writing before further borrowing from any other source."

b. No alleged inter corporate deposit could thus have been obtained by the CD without obtaining the prior written consent of the applicant herein.

c. The purported amount borrowed by the CD from JSP Tracom Pvt. Ltd. by way of inter corporate deposit, in flagrant violation of the loan agreement dated 7.11.2008 executed by and between the CD and applicant herein cannot form a lawful debt owed to JSP Tracom Pvt. Ltd.

d. The purported inter corporate deposit of

only Rs.5 lacs was executed by JSP Tracom Pvt.Ltd. to the CD for the period of 15 days at and interest of 13% per annum together with penal interest of 2% per annum.

e. Financial Statement of JSP Tracom Pvt. Ltd. for FY 2019-20 under the head of inter corporate deposit, shows NIL amount. [Annexure K4 of CP]

f. There is no board resolution of the CD authorizing the availing of any purported inter corporate deposit from JSP Tracom Pvt.Ltd.

g. There is no reflection of such purported borrowing from JSP Tracom Pvt. Ltd. in the books and accounts of the CD.

h. No valid debt is owed by the CD to JSP Tracom Pvt. Ltd. The application under section 10 of the Code filed by the CD in collusion and concert with JSP Tracom Pvt. Ltd. is based on an unlawful transaction contrived with the fraudulent and malicious intent and defeating the legitimate claim of the applicant herein.

i. The voluntary CIRP process is malafide, collusive instituted in abuse of process of law and of this Adjudicating Authority for purposes other than resolution of insolvency of the CD.

j. In the circumstances, appropriate action deserves to be initiated and penalties imposed against the CD as well as the said JSP Tracom Pvt. Ltd. under section 65(b) of the Code.

10. So far under section 5(24)(f) is concerned, Ld. Sr. Counsel would vehemently deny that Board of Directors, Managing Director or Manager of Corporate Debtor, in the ordinary course of business or otherwise acted on the advise, direction or instruction of Dr. Alok Kumar Joshi of HUDCO as alleged, merely because that he was made one of the Director.

11. Ld. Sr. Counsel would also place the Report of the Insolvency Law Committee dated March,2018 which records the following:-

"Related party"

1.23 It was stated to the Committee that at present, several financial creditors such as banks and ARCs fall within the ambit of the definition of 'related party' in relation to the corporate debtor as defined in section 5(24) of the Code. As a result, such creditors are debarred from participating, being represented or voting in any meeting of the CoC in accordance with the proviso to section 21(2) of the Code.

1.24 The Committee was apprised of cases wherein a financial creditor holding a large portion of financial debt in the corporate debtor was excluded from the CoC on account of equity or

preference shares of the corporate debtor held but it pursuant to a previous debt restructuring. Such financial creditors are presently covered within the ambit of related party in terms of clause(j) of section 5(24) of the Code and consequently debarred from the CoC in accordance with the proviso to section 21(2) of the Code. The Committee noted the various debt restructuring schemes had been introduced by the RBI in the past such as the strategic debt restructuring scheme and scheme for sustainable structuring of stressed assets which enabled financial creditors such as banks to convert part of their debt into equity in the borrower. Such schemes were introduced in order to strengthen the lender's ability to deal with stressed assets and to put real assets back on track by providing an avenue for reworking the financial structure of entities facing genuine difficulties. Therefore, it would be unfair to deny such pure play financial creditors representation or voting rights in the CoC formed under the Code on account of equity held by them pursuant to debt restructuring schemes implemented in the past. The Committee was also informed that the Indian Accounting Standard (Ind AS) 24 which governs related party disclosures in financial statements of certain entities also provides a carve out for providers of finance. Accordingly, it was felt that it must be

clarified in section 21(2) that notwithstanding anything contained in section 5(24), financial creditors which are regulated by financial sector regulators and who become related parties solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date, shall not be considered related parties for the prohibition in the proviso to section 21(2) of the Code.

12. Ld. Senior Counsel Mr. Jishnu Saha appearing for the CD and Mr. Subodh Agarwal for the RP were heard and records perused.

The issue that fell for determination is:

Whether HUDCO is a related party of the CD in terms of Section 5(24) and 5(24A) of the IBC, and as such is ineligible to be included in the CoC in terms of the first proviso to 21(2) of the Code.

The proviso to section 21(2) enjoins that :-

"The Committee of creditors shall comprise all financial creditors of the corporate debtor:

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

Provided further that the first proviso shall not apply to

a financial creditor, regulated by a financial sector regulator, if it is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, or completion of such transactions as may be prescribed, prior to the insolvency commencement date".

13. During the CIRP the Committee of Creditors (COC) is the de facto board of the defaulting Co. It is a settled law that CoC enjoys primacy in the matter of approval /rejecting resolution plan.

In terms of section 5(24 & 24A), the related parties to a corporate debtor have been defined. Section 5(24) of the Code defines the terms "related party", in relation to a corporate debtor and includes the following under 5(24) (f)- & Section 5(24)(m) (ii)

"(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".

5(24)(m) " any person who is associated with the processes of the corporate debtor on account of-

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

iv. interchange of managerial personnel between the corporate debtor and such person; or

14. The decision of the Hon'ble Apex Court in **Phoenix ARC Private Limited** (supra) placed by Ld.Sr. Counsel Mr. Jishnu

Saha on exclusion of a related party also explains the *"rationale for excluding them from the Committee of Creditors (CoC)".*

It is explicit in the judgment that *"The definition of the expression "related party" in S.5(24) is exhaustive, since the expression is defined to "mean" what is set out in sub-clause (a) to (m) of Section 5(24)-Further, the definition describes a commutative relationship, meaning that X can be a related party of Y, if either X is related to Y, or Y is related to X- The definition of "related party" is significantly broad and the intention of the legislative in adopting such a broad definition was to capture all kinds of interrelationships between the financial creditor and the corporate debtor- The objects and purposes of the Code are best served when the CIRP is driven by external creditors, so as to ensure that the CoC is not sabotaged by related parties of the corporate debtor and this is the intent behind the first proviso to S.21(2)"*

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*" Bar under first proviso to Section 21 (2) denying right of representation, Participation or voting in a meeting of creditors to a related party-*may *apply to a party who in the present is not a related party, but in the past was a related party and Cesser of the relationship, held, must be bonafide and not merely a device to circumvent bar under section 21(2) proviso*

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"The default rule under the first proviso to section 21(2) is that only those financial creditors that are related party financial creditors that cease to be related parties in order to circumvent the exclusion under the first proviso to section 21(2), should

also be considered as being covered by the exclusion thereunder".

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

"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 is in praesenti is not a related party, would not be debarred from being a member of the CoC. However, in case where the related party financial creditor divests itself of its shareholding or ceases to become a related party in a business capacity with the sole intention of participating in the CoC and sabotage the CIRP, by diluting the vote share of other creditors or otherwise, it would be in keeping with the object and purpose of the first proviso to Section 21(2), to consider the former related party creditor, as one debarred under the first proviso.

" Hence, while the default rule under the first proviso to Section 21(2) is that only those financial creditors that are related parties in praesenti would be debarred from the CoC, those related party financial creditors that cease to be related parties in order to circumvent the exclusion under the first proviso to Section 21(2), should also be considered as being covered by the exclusion thereunder".

15. In the above said backdrop it is seen that in the present case it is admitted that the CD has Four creditors namely ;

1. Shristi Infrastructure Development Corporation Ltd.
2. Shristi Urban Infrastructure Development Limited.
3. M/s JSP Tracom Pvt.Ltd.
4. HUDCO

16. The entire gamut of the related party and their exclusion has to be examined in the overall architecture of the code, which essentially is based on the concept of 'Creditor in control', thereby suspending the board so that they no longer control the affairs of the Corporate Debtor . As the dictum goes, the Corporate Debtor is to be saved from the control of the its own management whose mishandling of the matters have brought the Corporate Debtor to this situation. Having said that, it is important then that the erstwhile management is not allowed to participate in the COC who would always have an inherent interest in giving away the control. It is then natural that the persons losing control would try to get it back by all means on their command, including but not limited to planting their proxies in the CoC, so as to fulfill the objective of regaining the control. Hence the stipulations on related party have been brought in the code and have been structured in the code in section 5(24) and 5(24A) in such a manner that no person who has contributed to the situation is allowed to sit in the CoC.

17. During the process of formation of the CoC , there has been communications galore between the RP and HUDCO, the most significant being an e-mail dated May 28, 2022 from the RP to HUDCO, which is the crux of the entire matter as seen from

the perspective of implementation of the code in the true letter and spirit of its tenets. Let us analyze each of these cited reasons on the facts of the case and examine the applicability thereof :

Section 5(24) (f)

"(f)- Any body 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".

Applicability in the matter:

Here the said body corporate in question is HUDCO and for applicability of this postulate, its board of directors , managing director or manager, in the ordinary course of business, should act on the advice, directions or instructions of a director, partner or manager of the corporate debtor". A cursory look at the logic above reveals the inherent absurdity in the assertion that this postulate hits the present matter. Can it be expected that the board of HUDCO would act at the behest of the Director of the Corporate debtor, including at the behest of Dr. Alok Joshi, who happens to be only an Executive Director of a Division of HUDCO and is not even on the board of HUDCO, Thus on this touchstone, HUDCO does not qualify the test of being a related party.

Section 5(24)(h)

"(h)- Any person on whose advice, directions or instructions , a director, partner or managers of the Corporate Debtor is accustomed to act.

Applicability in the matter:

In order to satisfy the precepts of this clause, all one has to do is to identify the **person** on whose advice or instructions a director, partner or managers of the Corporate Debtor is accustomed to act.

Being the only nominee of the Financial creditor, the only person who could be put in this category is Dr. Alok Joshi. However, the prospect that a director, partner or managers of the Corporate Debtor would be expected to act upon instructions of Dr. Alok Joshi is only feasible when such a person is the whole time director of the Corporate Debtor and is participating in day-to-day working of the Corporate Debtor, which Mr. Alok Joshi is certainly not doing because of the fact that he is only a nominee director whose job is to safeguard the loan granted by HUDCO and to see that no harm comes to that investment. Nothing more than this. Thus on this altar also the charge of related party fails.

Section 5(24)(m)(i)

(m) any person who is associated with the Corporate Debtor on account of -

(i)- Participation in policy making processes of the Corporate Debtor

Applicability in the matter:

Admittedly the only role that Dr. Alok Joshi had to safeguard the investment of its nominating enterprise and not quite participate in running the day-to-day affairs of the Corporate Debtor, the policy essentially emerging out of such day-to-day working. As such he could not control the policy making processes. The policy-making process in would consist of six steps: Agenda setting, Policy formulation, Adoption,

Implementation, Evaluation, and Policy maintenance. There is nothing shown to us which might indicate that Dr. Alok Joshi has performed a role in any of the ingredients of the policy making process as outlined herein. Even if for the sake of argument it is assumed that he would be sitting in the board meeting where some of the constituents of the 'policy making processes' would have been discussed, would he have influenced them in any manner when his views were not considered even for filing a Section 10 application which he had opposed, thus performing his designated role of a protector of the loan asset of HUDCO while being a nominated member on the board without any shares and voting power. It does not need any more explanation to say that he did not participate in the so called "Policy making process" of the Corporate Debtor. The proof of the pudding is in eating - suffice it to say that his view, if any in the matters did not carry any weight and he was performing his role as a passive spectator even when it came to taking a major policy decision like filing of an application under Section 10 of the code, which was done despite HUDCO not consenting the same. Section 10 Application is the most crucial policy decision which could have been taken by a management of an enterprise. If in such a significant decision also, HUDCO did not have a say, how can one conclude that it would participate and cause any influence on any policy of the Corporate Debtor.

18. Now it is well settled that the main object of the code is to resolve the insolvency and maximize the value of the corporate debtor. The very fact that the agreement between HUDCO and the Corporate Debtor has been titled as ' Loan Agreement'

and not a Shareholders agreement speaks loudly on the intent and purpose of putting up a nominee director by HUDCO in the board of the Corporate Debtor , i.e. to see that no decision in taken in the board that has the potential to undermine the security of the loan thus granted or to say in crude terms to keep a watch on the management of the Corporate Debtor so that it does not squander away the money of the Corporate Debtor which may result in frustration of the repayment capability of the Corporate Debtor. PERIOD.

Given these circumstances the moot question is – Can a person (read Alok Joshi) whose primary purpose of being put in the board as per the "Loan Agreement" was to safeguard the repayment of the load in the agreed terms, would take such decisions in the CoC that would be detrimental to the very cause for which he was put up in the board of the Corporate Debtor, albeit without any voting rights. The answer is a resounding 'NO'. As regards the influence of SUIDL of which the applicant is a shareholder to the extent of 40% in the Corporate Debtor , it is clear that the weighted influence that HUDCO could at all exercise in the Corporate Debtor through SUIDL is only 24.4%, which means that the other party is having a two thirds majority in the board and any decision in the board including any amendment in its articles does not need the approval or concurrence of HUDCO. As such the influence that HUDCO could wield on the affairs of Corporate Debtor, and in that sense qualify for being a related party, was only THEORETICAL and it does not fit in the shoes of a role of a related party as brought out in the BLRC report as well as the Phoenix judgment(supra) .

19. In light of the above, we hold that HUDCO is not a related party of the Corporate Debtor and as such deserves a place in the CoC being a creditor and direct the RP to reconstitute the CoC.

20. **IA(IBC)/514/KB/2022** is disposed of accordingly.

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

(Balraj Joshi)
Member (Technical)

(Bidisha Banerjee)
Member (Judicial)

Order signed on this, the 30 day of August, 2023

PJ.