

**NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD**

SPECIAL BENCH - COURT 1 (URGENT HEARINGS THROUGH VIDEO CONFERENCE)

PRESENT: HON'BLE SHRI K ANANTHA PADMANABHA SWAMY – MEMBER JUDICIAL

HON'BLE SHRI VEERA BRAHMA RAO AREKAPUDI - MEMBER TECHNICAL

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING HELD ON 04.01.2021 AT 10:30 AM

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|----------------------------------|---|
| TRANSFER PETITION NO. | |
| COMPANY PETITION/APPLICATION NO. | IA No. 555/2020 in CP (IB) No. 143/7/HDB/2019 |
| NAME OF THE COMPANY | A P Gems & Jewellery Park Pvt Ltd |
| NAME OF THE PETITIONER(S) | Phoenix Tech Tower Pvt Ltd |
| NAME OF THE RESPONDENT(S) | A P Gems & Jewellery Park Pvt Ltd |
| UNDER SECTION | 7 of IBC |

Counsel for Petitioner(s):

| Name of the Counsel(s) | Designation | E-mail & Telephone No. | Signature |
|------------------------|-------------|------------------------|-----------|
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Counsel for Respondent(s):

| Name of the Counsel(s) | Designation | E-mail & Telephone No. | Signature |
|------------------------|-------------|------------------------|-----------|
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ORDER

IA 555/2020 in CP(IB) 143/7/HDB/2019 is listed today for orders.

IA is allowed.

Orders pronounced vide separate orders.


MEMBER (T)


MEMBER(J)

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**NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH, HYDERABAD**

**IA No.555 OF 2020
in
CP (IB) No.143/7/HDB/2019**

Under section 65(5) (sic.) read with section 21(2)
of the I&B Code, 2016.

M/s Phoenix Tech Power Private Limited
A company incorporated under the provisions
Of the Companies Act, 1956
Having registered office at:
Plot No.14/46, IDA Uppal, Habsiguda
Hyderabad – 500039.

.. **Petitioner/ CoC/ Applicant
Financial Creditor**

VERSUS

1. Dr. K.V. Srinivas
Resolution Professional
A.P. Gems & Jewellery Park Private Limited
2. A.P. Gems & Jewellery Park Private Limited
Registered Office at T.S. No.6/1
Road No.10, Banjara Hills
Hyderabad – 500034.
Telangana. India
3. Telangana State Trade Promotion Corporation
5-10-174, Fateh Maidan Road
Basheerbagh, Hyderabad
Telangana 500004.

.. **Respondents**

In the matter of:

M/s Phoenix Tech Power Private Limited
A company incorporated under the provisions
Of the Companies Act, 1956
Having registered office at:
Plot No.14/46, IDA Uppal, Habsiguda
Hyderabad – 500039.

.. **Applicant/
Financial Creditor**

And

A.P. Gems & Jewellery Park Private Limited
A company incorporated under the
Provisions of the Companies Act, 1956
Having Registered Office at T.S. No.6/1

Road No.10, Banjara Hills
Hyderabad – 500034.
Telangana. India

.. Respondent
Corporate Debtor

Date of order : 04.01.2021

Coram:

**HON'BLE SHRI K. ANANTHA PADMANABHA SWAMY
MEMBER (JUDICIAL)**

and

**HON'BLE SHRI VEERA BRAHMA RAO AREKAPUDI,
MEMBER (TECHNICAL)**

Parties / counsels present:

For the Petitioner : Ms. Varalakshmi Tadepalli, Advocate.

For respondent no.1 : Dr. K.V. Srinivas, Resolution Professional.

For respondent no.3 : Mr. H, Ramchandra Rao, Additional Advocate
General assisted by Mr.D.V.A.S. Raviprasad and
Mr.U. Sanjeev Kumar, Advocates.

**Per: SHRI VEERA BRAHMA RAO AREKAPUDI,
MEMBER (TECHNICAL)**

Heard on: 11.11.2020, 23.11.2020 and 07.12.2020.

AVERMENTS :

The applicant herein is the Financial Creditor and the petitioner in the main petition. The applicant is the sole CoC Member in the CIRP commenced pursuant to order dated 04.06.2019 passed in CP (IB) No.143/7/HDB/2019. The present application is filed *inter alia*, praying for an order to remove TSTPCL, which is a related party, from the CoC and restore voting percentage of the applicant to 100% as earlier existed; to remove Resolutions passed in 7th, 8th and 9th CoC Meetings; to declare TSTPCL as a related party; to declare the actions of Resolution Professional in allowing the unauthorised representative of TSTPCL to file the claim and participate in CoC Meetings as illegal; and to exempt the time period lost in contesting this application for regaining its 67% voting right which has been unduly removed by the Resolution Professional.

2. The applicant has also claimed interim relief to order Resolution Professional not to open Resolution Applications received by him from the

prospective Resolution Applicants and not to place respondent no.1, i.e. Resolution Professional (sic.) not to (sic.) before the existing CoC with related party as one of its Members holding 67% voting rights; order the Resolution Professional not to convene any CoC Meeting with related party as one of its Members holding 67% voting rights.

3. This IA is filed against the decision of the Resolution Professional in admitting the promoter/ related party/ shareholder of the Corporate Debtor as a Member of CoC considering the claims of the related party arising from its equity ownership interest in the debt in the Corporate Debtor as 'Financial Debt' and placed the same in priority over the applicant/ Financial Creditor and other operational creditors.

4. Andhra Pradesh State Trade Promotion Corporation Limited (APSTPCL) has since been taken over by Telangana State Trade Promotion Corporation Limited (TSTPCL), by way of new incorporation, taking over the interest of APSTPCL in the Corporate Debtor by virtue of AP Reorganisation Act, 2014. For the purpose of convenience the said entity is referred to as "**TSTPCL**".

5. It is averred that TSTPCL is the promoter and 5.1% shareholder of the Corporate Debtor. The Corporate Debtor is a Special Purpose Vehicle (SPV) created by IOI Corporation, Berhad, Malaysia through its wholly owned subsidiary, Projects IOI Mauritius Limited pursuant to Memorandum of Understanding (MoU) dated 12.08.2002 entered into with APTPCL (now TSTPCL) for establishment of Gems and Jewellery Park at Hyderabad. The Corporate Debtor is a joint venture of Projects IOI Mauritius Limited and APTPCL (now TSTPCL).

6. It is further averred in para 1.3 that TSTPCL had allotted requisite land to the Corporate Debtor for a consideration of Rs.12,77,91,125/- wherein as a part of settlement of the land cost, TSTPCL was allotted 2,75,000 equity shares of Rs.10/- each aggregating to Rs.27,50,000 and 9,15,000 preference shares of Rs.10 each aggregating to Rs.91,50,000/-. The balance consideration of **Rs.11,58,91,125/-** was treated as unsecured loan as per the scheme mentioned in para 1.3.



7. It is averred in para 1.4 that due bifurcation of the state of Andhra Pradesh, Telangana State Trade Promotion Corporation Limited (TSTPCL) was newly incorporated taking over the interest of APTPCL in the Corporate Debtor among others pursuant to AP Reorganisation Act, 2014.

8. It is averred in para 1.5 that TSTPCL continued to hold 5.1% equity shares of the Corporate Debtor as on date of CIRP. Financial Statements of TSTPCL upto 2014-15 and Financial Statement of TSTPCL 2015-16 to 2019-20 are relevant.

9. It is averred in para 1.6 that non-executive Directors of TSTPCL are on the Board of the Corporate Debtor and that TSTPCL had always significant influence on the decisions of the Corporate Debtor.

10. It is further averred in para 1.7 that balance consideration of Rs.11,58,91,125/- payable by the Corporate Debtor to TSTPCL in terms of Agreement dated 03.07.2004, which was treated as unsecured loan and interest accrued thereon was payable from the sale proceeds of the built up space of the project. Thus, though balance consideration of Rs.11,58,91,125/-and interest thereon were payable to TSTPCL it did not become due as on date of CIRP.

11. The applicant has challenged the decision of the Resolution Professional in admitting TSTPCL as a Member of the CoC on the following grounds:

(A) That the Resolution Professional had failed to note that TSTPCL is a related party. The applicant relied on the definition of 'related party' as provided under subsection 24 to section 5 of the I&B Code. Relevant part of the said subsection as relied on by the applicant is reproduced hereunder for ready perusal:

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

(a) a director or partner of the corporate debtor or a relative of a director or partner 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;



(j) any person who controls more than twenty per cent. of voting rights in the corporate debtor on account of ownership or a voting agreement;

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

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

(i) participation in policy making processes of the corporate debtor; or

(iv) provision of essential technical information to, or from, the corporate debtor;

(B) The applicant has also relied on Annual Return of the Corporate Debtor for the year 2014-15, which was approved by Directors of Corporate Debtor before initiation of CIRP. The applicant has reproduced excerpts from the Annual Return to emphasise that the Resolution Professional has considered TSTPCL, which is a related party, as Financial Creditor and admitted it as a Member of CoC. It is contended that such conduct of the Resolution Professional is in disregard of section 5(24) of the I&B Code. It is also emphasised that TSTPCL is 5.1% shareholder of the Corporate Debtor and thus, a related party of the Corporate Debtor.

(C) Decision of the Resolution Professional in admitting the TSTPCL as a Member of CoC granting 67% voting rights while reducing voting rights of the applicant (sole Financial Creditor) from 100% to 33% is arbitrary and against the law.

(D) The applicant relied on decision of the NCLT, Allahabad in the case of **J.R. AGRO INDUSTRIES P. LTD Vs. SWADISHT OILS P LTD.**, (2018) 146C LA260, [Company Application No.59 of 2018 in Company Petition No.(IB) 13/ ALD/ 2017. 24.07.2018], to bring home the following points:

(i) How claims related to category of **related persons**, whether familial or business capacity and their voting rights be dealt with. (para 2.4. Page 13 of the IA).



(ii) Claim of a related party should rank subordinate to the claim of operational creditors and treated at par with equity shareholders are partners under waterfall principle under section 53(1)(h) of the Code. (para 3.3, page 18 of the IA)

(E) The Resolution Professional considered the claim of the TSTPCL (related party) as financial debt and placed the same on par with the applicant's claim.

(F) The applicant further referred to section 5(8) of the I&B Code, where 'financial debt' is defined. From the above the applicant contends that TSTPCL was a shareholder and investor in its joint venture/ Special Purpose Vehicle.

(G) The applicant has reproduced excerpts from Standalone Financial Statements for period 01.04.2014 to 31.03.2015 (ANNEXURE-III) to bring home the point that no tax (TDS) was deducted on the accrued interest to TSTPCL as it never became due or payable to TSTPCL.

(H) The applicant further elaborately dealt with the provisions of the Memorandum of Understanding (MoU) entered into between the former APSTPCL and IOI Mauritius Limited and contended that no amount shown to be a contingent liability to TSTPCL was neither disbursed by the TSTPCL nor did the Corporate Debtor raise any fund in the form of money or price or consideration under the MoU or any contract or otherwise from its joint venture partner.

(I) There was no debt and hence no actionable claim for TSTPCL.

(J) The Resolution Professional failed to appreciate that no claim existed for TSTPCL as the Corporate Debtor has not breached any of its contract with TSTPCL. In this context the applicant referred to the following definitions under section 3 of the I&B Code:

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|---------------|----|----------|
| Section 3(10) | .. | Creditor |
| Section 3(11) | .. | Debt |
| Section 3(6) | .. | Claim |

Further the applicant contended that there ought to be a liability in order to be a debt and relied on the decision of the Hon'ble Supreme Court in the case of **PIONEER URBAN LAND AND**

INFRASTRUCTURE LIMITED & OTHERS Vs. UNION OF INDIA AND OTHERS, A.I.R. 2019 SC 4055, wherein the Hon'ble Apex Court held thus,

"Thus, in order to be a "debt", there ought to be a liability or obligation in respect of a "claim" which is due from any person.

"Claim" then means either a right to payment or a right to payment arising out of breach of contract, and this claim can be made whether or not such right to payment is reduced to judgment. Then comes "default", which in turn refers to non-payment of debt when whole or any part of the debt has become due and payable and is not paid by the corporate debtor. Learned counsel for the Petitioners relied upon the judgment in Union of India v. Raman Iron Foundry (1974) 2 SCC 231, and, in particular relied strongly upon the sentence reading:"

(K) The applicant has alleged that one Venu Madhav, a retired employee had been designated as General Manager of TSTPCL. Resolution Professional has allowed him to file claim in Form-C and participate in CoC Meetings.

(L) The Resolution Professional has reduced voting percentage of the Financial Creditor from 100% to 33% and granted 67% voting rights to TSTPCL, admitted it to CoC as Financial Creditor in violation of section 21(2) of the I&B Code.

12. For the reasons stated above the applicant contends that Minutes of Meeting of 7th, 8th and 9th CoC and resolutions passed therein are required to be removed from the record of CIRP process and the time period lost in contending and contesting against the Resolution Professional has to be exempted from CIRP process since the applicant is contesting to regain its lost 67% voting right.

COUNTER DATED 08.08.2020/ 21.08.2020 FILED BY RESPONDENT No.1/ RESOLUTION PROFESSIONAL

13. Respondent no.1 has pointed out that this IA is filed under section 65(5) and there is no section 65(5) of the I&B Code inasmuch as **section 65 has only two subsections.**

14. It is averred that the Corporate Debtor was promoted by Suresh Chukapalli and his spouse, Ms. Madhumati Chukkapalli. They were the





first Directors of the Corporate Debtor and held 100% shares in the Corporate Debtor. Ms. Madhumati Chukkapalli and VBP Rao had incorporated the applicant/company, formerly known as Phoenix Motors Pvt Ltd and Phoenix Tech Park Pvt Ltd., on 21.03.2002. Ms. Madhumati Chukkapalli holds 99.99% shares in the applicant/ company. Memorandum of Association (MoA) of the Corporate Debtor is at ANNEXURE-1. MoA of the applicant is at ANNEXURE-2. Directorship of Suresh Chukkapalli and Ms. Madhumati Chukkapalli is at ANNEXURE-3.

15. It is averred that the applicant had granted loans to the Corporate Debtor in 2007-08 and 2009-10. The applicant had granted loans to Corporate Debtor during 2005 to 2011 aggregating to Rs.9 crores. In 2011, the applicant had sold its entire stake to Projects IOI Mauritius Limited. The applicant had executed a loan agreement on 29.01.2011 (ANNEXURE-6) pursuant to which the outstanding loan of Rs.9 crores was to be repaid to the applicant by the Corporate Debtor within 18 months. Thus, the claim of the applicant arises out of loans given to the Corporate Debtor.

16. It is submitted that the applicant was the sole members of the CoC. Subsequently, Resolution Professional had included TSTPCL as a member of CoC in 7th CoC Meeting held on 15.06.2020. TSTPCL filed its original claim in Form-C (ANNEXURE-7) before the Resolution Professional for an amount of Rs.29,12,24,880/-, which was revised subsequently to Rs.27,94,26,148/-, and further revised to Rs.38,62,42,140/-. The Resolution Professional has admitted the claim to the extent of Rs.38,46,16,545/-.

17. It is submitted that the Resolution Professional has examined whether TSTPCL falls within the meaning of 'related party' under section 5(24) of the I&B Code and on satisfaction that it does not fall, the Resolution Professional has included the TSTPCL as a Member of the CoC in 7th CoC Meeting held on 15.06.2020. The applicant did not raise objection either during 7th CoC Meeting or during 8th CoC Meeting. On the contrary, the applicant had approved the Minutes of 7th CoC Meeting and did not raise objection till 9th CoC Meeting held on 27.07.2020 (ANNEXURE-10). Minutes of 7th CoC and 8th CoC Meeting are at ANNEXURES-8 and 9.

18. It is averred that the applicant had addressed e-mail communication that inclusion of TSTPCL as a Member of CoC be reconsidered and leave of the Adjudicating Authority was sought to challenge such inclusion. The applicant without discussing the issue with the Resolution Professional had directly approached the Tribunal.

19. It is submitted that TSTPCL is an undertaking of Government of Telangana and attribution of collusion is not desirable.

20. It is submitted that based on the claims received, the Resolution Professional has to verify, collate and admit the same and then constitute CoC. It is clear that pursuant to loan agreement dated 09.05.2006, an amount of Rs.11,58,91,125/- with interest is payable to TSTPCL by the Corporate Debtor. Thus, for filing a claim before Corporate Debtor, the question of debt not becoming due as on CIRP commencement date does not arise. As regards duties of Resolution Professional, the Resolution Professional relies on decision of the Hon'ble NCLAT in **AXIS BANK LIMITED Vs. EDU SMART SERVICES PRIVATE LIMITED & ANR**, Company Appeal (AT) (Insolvency) No.302 of 2017, and quoted

“53. Duties of Interim Resolution Professional have been prescribed under Section 18 and as per clause (b) therein the Interim Resolution Professional is required to receive and collate all the claims submitted by creditors to him pursuant to the public announcement made under Section 13 r/w Section 15. The claim of the parties should be as on the date of initiation of the Corporate Insolvency Resolution Process (date of order of admission and moratorium). Any person who has right to claim payment, as defined under Section 3(6), is supposed to file the claim whether matured or unmatured. The question as to whether there is a default or not is not to be seen.

54. Therefore, stand taken by the respondents that the claim has not been matured cannot be ground to reject the claim.

55. Section 25 provides the duties of Resolution Professional. As per Section 25(2)(e), the Resolution Professional is required to maintain an updated list of all the claims. Aforesaid fact also suggests that the maturity of a claim or default of debt are not the guiding factors to be noticed for collating or updating the claims. The matter can be looked from another angle. It is only in case of 'debt' and 'default', a 'Financial Creditor' or 'Operational Creditor', may file applications under Section 7 or 9. The 'Corporate Applicant' has also right to file application under Section 10 for initiation of Corporate Insolvency Resolution Process against itself, if it has defaulted to pay the 'debt'. It does not mean that the persons whose debt has not been matured cannot file claim. The 'Financial Creditors' or

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'Operational Creditors' or 'secured or unsecured creditors' all are entitled to file claim."

21. The Resolution Professional has raised queries unto himself, in a tabular form, viz-a-viz section 5(24) of the I&B Code to examine whether TSTPCL falls within the meaning of 'related party', and has answered in negative.
22. The Resolution Professional has submitted that as regards Standalone Balance Sheet of the Corporate Debtor for the Financial Year 2014-15, relied by the Corporate Debtor, 'related party' cannot be established based on definition provided in the Companies Act, 2013 or as per Accounting Standards. Provisions of the I&B Code override other laws.
23. It is submitted that the applicant could not establish as to how the applicant is aggrieved if TSTPCL is included in CoC. On approval of Resolution Plan, proceeds will be distributed in order of priority as provided under section 53 of the I&B Code. The applicant being an unsecured financial creditor stands on equal footing with TSTPCL.
24. The Resolution Professional has dismissed the case law cited by the applicant in the case of J.R. AGRO INDUSTRIES P. LTD Vs. SWADISHT OILS P LTD., rendered by NCLT, Allahabad, as not applicable to the facts of the present case as the same does not deal with the main issue of 'related party'. (para 15)
25. The Resolution Professional alleged that the applicant has misunderstood the transaction out of which the claim of TSTPCL has arisen. Section 5(8)(f) reads as under:
- "(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing."*
26. It is submitted that the claim arose out of loan agreement dated 09.05.2006 (ANNEXURE-12) and other documents furnished by TSTPCL along with claim form. Shareholding of TSTPCL in the Corporate Debtor and loan agreement are two independent transactions not connected with each other. The loan agreement clearly specifies that the amount of

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Rs.11,58,91,125/- shall be treated as unsecured loan payable with interest at 11% p.a. Even if it is assumed for the sake of argument that TSTPCL has sold its entire shareholding in the Corporate Debtor, the loan shall still be payable to TSTPCL. (paras 16 and 17)

27. The Resolution Professional denies the claim of the applicant that "there is no debt and hence there can be no actionable claim for TSTPCL." By virtue of loan agreement entered into between the TSTPCL and the Corporate Debtor dated 09.05.2006 (ANNEXURE-12) an amount of Rs.11,58,91,125/- is payable by the Corporate Debtor to TSTPCL. Books of accounts of the Corporate Debtor reflects the said loan payable to TSTPCL. (para 18)

28. The Resolution Professional contends that the Resolution Professional has neither reduced the voting percentage of the applicant arbitrarily nor the applicant is aggrieved by inclusion of TSTPCL as a Member of CoC. TSTPCL was allowed to form part of CoC in accordance with the provisions of the Code and the applicant is not aggrieved by such inclusion. (Para 20)

COUNTER DATED 01.09.2020/ 02.09.2020 FILED ON BEHALF OF RESPONDENT NO.3/ TSTPCL.

29. It is submitted in para 5 of the Counter that the Government has alienated the subject property to AP Gems and Jeweller Park Pvt Ltd vide GO MS No.481 on 12.04.2005 in respect of the property, viz. piece and parcel of land having TS No.6/1/P of Ward No.11 of Shaikpet Village and Mandal, situated at Road No.10, Banjara Hills, Hyderabad admeasuring acres 2.05 guntas. APSTCL agreed to deliver original authenticated document related the land to AP Gems and Jewellery Park Pvt Ltd upon registration and transfer the land in favour of AP Gems and Jewellery Park Pvt Ltd.

30. It is submitted that the Resolution Professional has admitted the claim of respondent no.3 to the extent of Rs.38,46,16,545/- and recognised and treated respondent no.3 as a Financial Creditor with 67% of voting rights as recorded in 7th Meeting if CoC dated 15.07.2020. (para 8)

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31. It is submitted that respondent no.3 has only 11% equity in the Corporate Debtor. Operations of the Corporate Debtor is managed by the Corporate Debtor itself. As a minority shareholder, respondent no.3 has no say in the operations of the Corporate Debtor. Relying on the definition provided in section 5(24) of the I&B Code, respondent no.3 contends that respondent no.3 holds insignificant shareholding of the Corporate Debtor, and it has no role in the affairs of the Corporate Debtor. Hence it cannot be treated as a 'related party', as such the Resolution Professional has rightly treated respondent no.3. (Para 10)

32. It is further submitted that the Resolution Professional should have gone through the fact that the petitioner being represented by Shri Srikanth Badiga falls under the category of 'related party' to the Corporate Debtor in view of relationship between Phoenix Group and AP Gems and Jewellery Park Pvt Ltd. (para 11)

33. Respondent no.3 contends that the applicant itself becomes a 'related party' for the following reasons:

- (i) **Suresh Chukkapalli** has incorporated AP Gems and Jewellery Park Pvt Ltd. and he was its Managing Director and authorised signatory. He was the first Director and Chairman of Phoenix Group. He was also Director of other companies, such as, Gitanjali Gems Ltd., Gitanjali Infratech Ltd., IOI (India) Projects Pvt Ltd.
- (ii) **Madhumati Chukkapalli** has incorporated AP Gems and Jewellery Park Pvt Ltd. and has subscribed 50% shares therein. She holds 99.99% stake in Phoenix Tech Tower Pvt Ltd. and she was its Director. She is classified as a related party in the financials of AP Gems.
- (iii) **Phoenix Tech Tower Pvt Ltd.** was incorporated on 21.03.2002 having authorised share capital of Rs.5,00,000, while paid up capital is Rs.1,00,000 held by Chukkapalli Madhumati and Chukkapalli Sunitha.
- (iv) **Srikanth Badiga** was Project Coordinator of AP Gems Park Project. He was Director of AP Gems and signatory of Financial and Board Report FY 2011 onwards.

34. It is submitted that respondent no.3 is neither a shareholder nor investor in the joint venture of Corporate Debtor. The Corporate Debtor has allotted shares for an amount of Rs.1.20 crore, which is equivalent to 11% of the total shareholding of the Corporate Debtor. Balance amount was treated as a loan by respondent no.3 to the Corporate Debtor and loan agreement has been executed to that effect. A loan cannot be treated as an investment. Hence it cannot be said that respondent no.3 is an investor and a shareholder in the Corporate Debtor.

35. Respondent no.3 dismisses as not true the allegation that the Resolution Professional has capriciously allowed Venu Madhav, a retired employee under contractual employment with TSTPCL as General Manager to file the claim in Form-C on behalf of respondent no.3 and unauthorisedly allowed him to represent in 7th, 8th and 9th CoC Meetings.

WRITTEN SUBMISSIONS DATED 07.12.2020/ 08.12.2020 FILED ON BEHALF OF TSTPCL.

36. It is submitted that the Resolution Professional has rightly determined the voting share of respondent no.3 at 67% and of applicant at 33% based on the amount due to it by Corporate Debtor.

37. It is submitted that respondent no.3 holds 11% share in the shareholding of SPV/respondent no.2. The SPV owes Rs.38,46,16,545/- to respondent no.3 in view of the loan agreement between respondent no.2 and respondent no.3. Thus, the claim of Rs.38,46,16,545/- has rightly been admitted by the Resolution Professional. For AP Trade Promotion Corporation Ltd (APTPC) was bifurcated into two units, post bifurcation of the State, and the present TSTPCL is incorporated on 27.09.2014 and is owned by Government of Telangana. It was approved by the Expert Committee appointed by Government and SPV is apportioned to TSTPCL.

38. The deponent of TSTPCL contends that as per the loan agreement dated 09.06.2006 (sic.) between the Corporate Debtor and TSTPCL, balance amount of Rs.5,93,23,625/- was treated as loan to respondent-Corporation, repayable with 11% renewal interest on annual rest basis. The deponent contradicts that it is an unsecured loan. The deponent also

contradicts that on payment of Rs.5,65,67,500/- in terms of GO MS No.481 dated 12.04.2005, title of the land is passed on the Corporate Debtor.

39. The TSTPCL in para 8 of the Written Submissions relied on and reproduced the provisions of section 5(24) of the I&B Code to contend that TSTPCL is not a 'related party'. The deponent has provided list of Directors on the Board from the date of inception and contends that the Corporate Debtor had majority of their own Directors and the Directors nominated by the Government and respondent/ Corporation were in minority. Hence the contention of the applicant is not true. It is, therefore, submitted that TSTPCL has no role in the affairs of the Corporate Debtor. Hence respondent no.3 cannot be treated as a 'related party' to the Corporate Debtor under section 5(24) of the I&B Code and that the Resolution Professional has rightly treated respondent no.3/ TSTPCL as a Financial Creditor with 67% voting rights and not a related party.

40. In para 14 of the Written Submissions TSTPCL contradicts the claim of the applicant that the Corporate Debtor does not owe any amount to TSTPCL as the Loan Agreement itself specifies that an amount of Rs.5,93,23,625/- is payable to the respondent/ Corporation from the sale proceeds of Gems & Jewellery park.

41. In para 18 of the Written Submissions it is contended that the Corporate Debtor has neither made any efforts to sell Gems & Jewellery Park from the date of agreement, viz. 09.05.2006 nor Gems & Jewellery Park is made operational so far. The respondent/ Corporation cannot wait endlessly for sale of Gems & Jewellery Park and repayment of loan.

WRITTEN SUBMISSIONS DATED 21.11.2020/ 09.12.2020 FILED ON BEHALF OF THE APPLICANT.

42. It is contended that the applicant was the sole voting Member of the CoC with 100% voting right. However, in 7th CoC Meeting dated 15.06.2020, respondent no.3/ TSTPCL was included as a Financial Creditor with voting share of 67%. Consequently, the applicant's voting share came down to 33% and respondent no.3 has passed various

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resolutions, misusing its voting share, during 7th CoC Meeting dated 15.06.2020, 8th CoC Meeting dated 09.07.2020 and 9th CoC Meeting dated 27.07.2020. Copies of 7th and 8th CoC meetings (ANNEXURE V(g), and V(h), are at pages 190 and 204 respectively to the IA.

43. It is submitted in para 6 of the Written Submissions that TSTPCL had allotted land admeasuring ac. 2.05 gts at Hyderabad to the Corporate Debtor at market value of Rs.12,77,91,125/- for development of Gems & Jewellery Park at Hyderabad. As part of consideration for the above property, TSTPCL was allotted shares as mentioned in para 1.3 of the IA. Thus, balance consideration of Rs.5,93,23,625/- was payable by the Corporate Debtor to TSTPCL upon sale of the built up space.

44. It is contended that TSTPCL had significant influence on the decisions and functioning of the Corporate Debtor as is evidenced from signatures of the Directors nominated by TSTPCL on the financial documents of the Corporate Debtor. Relying on section 5(24) of the I&B Code, which defines the term 'related party' in relation to a Corporate Debtor, the applicant submits that respondent no.3 falls within the ambit of a 'related party' under clauses (a), (h), (j), (l) and(m) of section 5(24) of the I&B Code. Even in the Books of Account of the Corporate Debtor and TSTPCL, disclosures are made to that effect.

45. Responding to the contention of respondent no.1/ Resolution Professional (para no.8, page no.5 of his Counter dated 08.08.2020) that having two Directors on Board out of four Directors does not result in having significant influence on the decisions of the Board, the applicant contends that Article 62 of the Articles of Association (page no.32 of the reply filed by Resolution Professional), makes it evident that TSTPCL has been in absolute control of the Corporate Debtor and no Board meeting of the Corporate Debtor can be convened without involvement of Directors of respondent no.3.

46. The applicant relied on decision of the Hon'ble NCLAT in **LALIT MISHRA & OTHERS Vs. SHARON BIO MEDICINE LIMITED & OTHERS**, Company Appeal (AT) (Insolvency) No.164 of 2018, to contend that inclusion of TSTPCL/ respondent no.3 as a Financial Creditor of the Corporate Debtor is in violation of sections 21 and 5(24) of the I&B Code.

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47. The applicant contended that though Resolution Professional in his reply dated 08.08.2020 has stated the he had examined whether respondent no.3 falls within the definition of 'related party' to the Corporate Debtor and satisfied that it is not, but has failed to provide reasons or explanations. (para 13)

48. The applicant has dismissed the argument of respondent no.3 that the applicant is a related party to the Corporate Debtor and contended that from the last available Financial Statements of the Corporate Debtor, the applicant herein is neither promoter of the Corporate Debtor nor its shareholder. Hence the applicant does not fall within the meaning of 'related party' under the I&B Code. (Para 14)

49. As regards debt and due the applicant submits that as per agreement dated 03.07.2004 as amended by agreement dated 09.05.2006, the Corporate Debtor had to pay a sum of Rs.5,93,23,625/- to respondent no.3 out of sale proceeds of built up space of the project. However, as the said project had not been completed on the date of initiation of CIRP against the Corporate Debtor, the question of said amount of Rs.5,93,23,625/- becoming due and payable does not arise. Thus, the Corporate Debtor does not owe any amount to respondent no.3.

50. The applicant relied on decision of the Hon'ble NCLAT in **NIKHIL MEHTA & SONS Vs. AMR INFRASTRUCTURE LIMITED**, Company Appeal (AT) (Insolvency) No.07 of 2017, wherein the Hon'ble Appellate Tribunal held:

“ Merely because some "assured amount" of return has been promised and it stands breached, such transaction would not acquire the status of a 'financial debt' as the transaction does not have the consideration for the time value of money, which is a substantive ingredient to be satisfied for fulfilling the requirements of the expression 'Financial Debt'.”

51. The applicant further relied on decision of the Hon'ble Supreme Court in **PIONEER URBAN LAND AND INFRASTRUCTURE LIMITED & ORS. Vs. UNION OF INDIA & ORS.**, (2019) 8 SCC 416, wherein it was held that,





“Thus, in order to be a “debt”, there ought to be a liability or obligation in respect of a “claim” which is due from any person.”

The Hon'ble Apex Court further held that,

“Claim” then means either a right to payment or a right to payment arising out of breach of contract, and this claim can be made whether or not such right to payment is reduced to judgment. ...”

It is contended that in light of the above judgment respondent no.2, the Corporate Debtor does not owe any amount to respondent no.3 and thus, there is no default. As such the claim of respondent no.3 ought not to have been admitted by the Resolution Professional and such an action on the part of the Resolution Professional is arbitrary and illegal.

OBSERVATIONS

52. We have heard the learned counsel for the applicant/ Financial Creditor as well as the learned counsel for respondent no.1/ Resolution Professional and respondent no.3/ TSTPCL through videoconference. Perused the documents filed by both the sides in support of their respective contentions.

53. The applicant herein/ Messrs Phoenix Tech Power Private Limited has contended that the Resolution Professional of the Corporate Debtor, in 7th Meeting of CoC has suddenly and injudiciously included respondent no.3/ TSTPCL as a Financial Creditor with a voting share of 67%. The applicant has further contended that respondents no.3 and 4 are related parties as TSTPCL continued to hold 5.1% equity shares of the Corporate Debtor from the date of initiation of CIRP. The applicant further submitted that two of the Directors of the Corporate Debtor are non-executive Directors of TSTPCL and have been nominated by TSTPCL on the Board of Directors of the Corporate Debtor. Therefore, they submitted that TSTPCL had significant influence on the decision and functioning of the Corporate Debtor, which was evidenced from the signatures of the above Directors nominated through TSTPCL, on the financial documents of the Corporate Debtor. The applicant herein has claimed that respondent no.3 herein clearly falls within the ambit of 'related party' as per clauses (a), (h), (j), (l) and (m) of section 5(24) of the I&B Code. It is also submitted that disclosures to that effect have also been made in the Books of





Accounts of the Corporate Debtor and TSTPCL, which proves that respondents no.3 and 4 are related parties as per the said definition provided in the I&B Code.

54. In response, the Resolution Professional has submitted that he had included TSTPCL as a Member of the CoC in its 7th Meeting held on 15.06.2020 based on various documents furnished by TSTPCL and in consonance with the provisions of the I&B Code. The Resolution Professional has further submitted that initially he had not included TSTPCL as part of CoC as it was being examined by him whether TSTPCL would fall within the meaning of 'related party' as defined u/s 5(24) of I&B Code. However, based on the documents provided by TSTPCL and having satisfied that it falls within the said definition had included it as a Member in its 7th CoC meeting dated 15.06.2020. The Resolution Professional further averred that representative of the Financial Creditor / applicant herein was also present in 7th CoC Meeting when TSTPCL was included as a new Member. However, he had not raised any objection on inclusion of TSTPCL in the CoC. The Resolution Professional has further submitted that just about an hour before commencement of 9th CoC Meeting the applicant had raised the issue through e-mail. The Resolution Professional contended that he has been vested with power to verify, collate and admit the claims in relation to the Corporate Debtor. He vehemently denied that the Resolution Professional in collusion with TSTPCL is rewarding themselves at the expense of creditors. He also averred that two directors on Board out of total four directors do not result in having significant influence on the decisions of the Board of Directors by TSTPCL as decision of nominee-directors is not standalone and will always depend on the decision of other two directors. He further claimed that mere signing of financial statements does not mean that the directors have significant influence on the Board. The Resolution Professional has arrived at a conclusion based on the analysis given at pages 7 to 10 of his reply that TSTPCL is not a related party. He also averred that definition of 'related party' as per Companies Act, 2013 and as per Accounting Standards cannot be relied on to establish that a party is related party under the provisions of the Code. The provisions of the Code override other laws as laid down u/s 238 of the Code. Thus, he also claimed that any reference to the Financial Statement of the applicant is totally uncalled for and is totally misconceived and cannot be considered for the instant application. The Resolution Professional further claimed that he

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has included TSTPCL as a Member of CoC strictly in accordance with the Code.

55. We have heard both the counsels and have gone through the record placed before us in the instant application. The issue to decide herein is whether TSTPCL is a related party as claimed by the applicant or not and its inclusion in the CoC as a Financial Creditor to the Corporate Debtor is as per the IBC.

56. To arrive at a decision in this regard we have relied on the Articles of Association of the Corporate Debtor as well as definition of 'related party' as defined under section 5(24) of the I&B Code.

ARTICLES OF ASSOCIATION :

Decision in the matters relating to (a) to (r) of Article 62 of the Articles of Association is to be taken by an affirmative vote of three or more directors, which must include one director nominated by respondent no.3, which clearly shows that in all important matters of the Corporate Debtor, the nominee-directors have significant role to play in protecting the interests of the Corporate Debtor and shareholders. Said Article 62 is reproduced hereunder:

"62. Action on the following matters should be taken only by affirmative vote of 3 (three) or more directors ("disqualified majority") but there must be included in the qualified majority at least one director nominate by APTPC.

- a. Approval, modification of the contract of employment of the Managing Director.*
- b. A decision to recommend to the general meeting appointment or change of statutory auditors;*
- c. All transactions regarding buildings, land and other fixed assets, including the lease, purchase, sale, transfer and mortgage of these assets,*
- d. Providing loans, guarantees or other extensions of credit, other than the ordinary course of business;*
- e. Acquisition, creation permitting to subsist, disposal or winding up of any subsidiary companies of the company.*
- f. Doing of anything that would result in the company coming under the control of any other company or person;*
- g. Increase or reduction of the capital of the company;*
- h. Merger into, or acquisition of all, or a part of, the business of, or purchase or acquisition of shares, or any ownership interest in another legal person or entity;*

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- i. *Entry into any partnership or Profit sharing agreement with any person or entity;*
- j. *Dissolution or voluntary winding up of the company;*
- k. *Transfer in any one transaction or series of transactions of all or substantial portion of company's business or assets;*
- l. *Falling, declining or ceasing to insure, or to keep insures, with reputable insurers to their full replacement value all insurable assets of the company against all such risks as are usually insured by prudent companies carrying on Business similar to the company.*
- m. *Changing the structure, power or purpose of the company including changes in the Memorandum of Association and Articles of Association;*
- n. *Acquiring or selling interest in/ to other company or business;*
- o. *Merger or amalgamation of the company with any other company or amalgamation of any other company with the company or sale of the companies undertaking or substantial part of the undertaking;*
- p. *Entry into any contract, agreement or transaction, other than in the ordinary course of business, or other than an arm's length basis, or granting favourable or concession terms to any of the shareholders, their associates or private interests;*
- q. *The Board may from time to time raise or borrow any sums of money, for and on behalf of the company from the members or other persons, companies' banks or financial institutions or any of the Directors may himself/ herself advance money to the company on such interest as may be approved by the Board of Directors.*

All borrowings from Banks, Financial institutions and other agencies including issue of debentures and providing corporate guarantees."

DEFINITION OF 'RELATED PARTY' UNDER SECTION 5(24) OF THE CODE :

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

(a) a director or partner of the corporate debtor or a relative of a director or partner 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;

(j) any person who controls more than twenty per cent. of voting rights in the corporate debtor on account of ownership or a voting agreement;

(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

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(iv) provision of essential technical information to, or from, the corporate debtor;"

57. It is the case of the applicant the respondent no.3 is having 11% voting share in the Corporate Debtor and it is also the fact that balance amount of Rs.5,93,23,625/- is payable by Corporate Debtor to respondent no.3 vide loan agreement dated 09.05.2006. It is a fact that respondent no.3 is a shareholder in the Corporate Debtor and having voting share of 11%. We have to examine whether respondent no.3 is a related party or not in light of the above definition. We observe that respondent no.3 squarely fits into the definition of 'related party' under section 5(24) (a), (h), (j), (l) and (m) of the Code. From the record submitted to the Tribunal it is observed that out of four directors of the Board of Directors, two directors are nominated by respondent no.3. We are of the view that the role and responsibility of the Directors is to protect the interests of the Corporate Debtor and not to merely sit in the Board meetings of the corporation. They have a fiduciary role to protect the interests of the Corporate Debtor and are responsible for shareholders of the Corporate Debtor at all times. The Board is responsible to the shareholders of the Corporation. Therefore, the claim of the Resolution Professional that they are only nominated members and they do not have much say in the functioning of the company is untenable. Every director has responsibility to protect the interests of shareholders. Accordingly the Directors nominated by the corporation have to oversee the functioning of the Corporate Debtor. Besides they are also responsible to protect the interests of the shareholders, in this case, respondent no.3. We, therefore, cannot go by the submissions made by the Resolution Professional as well as respondent no.3 that they are merely nominated members on the Board and they do not have much say in the functioning of the Corporate Debtor.

58. Therefore, we are not in agreement with the views of the Resolution Professional as well as respondent no.3 in this regard that they are only nominee-directors and that they do not have much say in the functioning of the Corporate Debtor. Further on a close perusal of the Companies Act, Listing Regulations, it is evident that disentitling of a shareholder, who is a related party from exercising his voting rights in respect of any resolution relating to any contract or arrangement to which such a related party is a party. Therefore, we are not in a position to accept the contention of respondents no.1 and 3 that nominee-director does not

have significant influence on the functioning of the Corporate Debtor as untenable and not acceptable. Based on Article 62 of the Articles of Association, respondent no.3 clearly falls into the definition of 'related party' as defined under clauses (a), (h), (j), (l) and (m) of section 5(24) of the Code. We, therefore, come to the conclusion that respondent no.3 falls under the definition as aforesaid.

59. When we juxtapose and read the Articles of Association as well as the definition of 'related party' as given in the I&B Code, it is evident that two nominee-directors of respondent no.3 have significant influence in decision making process of the Corporate Debtor. The Articles of Association clearly mention that action on important matters should be taken only by affirmative vote of 3 (three) or more directors, but there must be included in the qualified majority at least one director nominate by APTPCL.

60. Article 62 plays vital role in deciding the subject matter in this case. From reading of Article 62 it is clearly evident that nominee-directors of respondent no.3 have significant influence in the functioning of the Corporate Debtor and they cannot now claim that they are only nominee-directors and they do not have much role in the Corporate Debtor. Such a claim is untenable.

61. We are, therefore, not in agreement with the decision taken by the Resolution Professional to include respondent no.3 as a Member of the CoC. Accordingly we are of the view that TSTPCL falls within the meaning of 'related party' as given in the I&B Code and Articles of Association of the Corporate Debtor. Accordingly, we direct that the Resolution Professional shall reconstitute the CoC treating the TSTPCL as a 'related party'. Accordingly the IA is disposed of with the above directions to the Resolution Professional.


VEERA BRAHMA RAO-AREKAPUDI
MEMBER (TECHNICAL)


K. ANANTHA PADMANABHA SWAMY
MEMBER (JUDICIAL)

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