

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 184 of 2018

[Arising out of Order dated 26th April, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench at Kolkata in C.A.(IB) No. 377/KB/2018 in C.P.(IB)387/KB/2017]

IN THE MATTER OF:

SREI Infrastructure Finance Limited

Having its office at
'Vishwakarma', 86C, Topsia Road (South),
Kolkata – 700 046.

...Appellant

Vs

1. Mr. Sumit Binani

Resolution Professional,
Adhunik Alloys & Power Ltd.,
4th Floor, Room No.6, Commerce House,
2A, Ganesh Chandra Avenue,
Kolkata. And

Also at:
At Line Road, Cuttack – 753 012,

Site Office at:
Arjeepalli, Via Chatrapore,
Ganjam – 761 020.

2. Price Water House Coopers Private Limited

Having its office at
Plot No. Y-14,
Block-EP, Sector-V,
Salt Lake Electronics Complex,
Bidhan Nagar, Kolkata – 700 091.

3. State Bank of India

Having its office at
1, Strand Road, Samriddhi Bhawan,
Kolkata – 700 001.

4. ICICI Bank

Having its office at
2B, Gorky Terrace,
Kolkata – 700 017.

5. IFCI

Having its office at
Chatterjee International Centre,
3rd Floor, 33A, Jawaharlal Nehru Road,
Kolkata – 700 071.

6. Punjab National Bank

Having its office at
52A, Shakespeare Sarani,
Kolkata – 700 017.

7. Allahabad Bank

Having its corporate office at
2, Netaji Subhas Road,
Kolkata – 700 001.

8. Reliance Commercial Finance Limited

Having its office at
7th Floor, the A. C. Market Complex,
1, Shakespeare Sarani,
Kolkata – 700 071.

9. Bhagwati Power And Steel Ltd.

Through its Authorised Signatory
Mr. Deepak Jain
Having Registered Office at:
D-22, Sector 5, Devendra Nagar,
Raipur, Chattisgarh – 492 001.

10. Orissa Metaliks Pvt. Ltd.

Having Registered office at
1, Garstin Place, Orbit House,
3rd Floor, Room No. 313,
Kolkata – 700 001.

...Respondents

Present:

For Appellant: Mr. S. N. Mookherjee, Senior Advocate assisted by
Mr. Diwakar Maheshwari, Mr. Shounak Mitra,
Mr. Arijit Mazumdar, Mr. Aditya V Singh,
Mr. Zulfikar Ali Alquaderi and Mr. Yugam Taneja,
Advocates.

For Respondents: Mr. Mukul Rohatgi, Mr. Mihir Thakore and Mr. Arun Kathpalia, Senior Advocates with Mr. Mahesh Agarwal, Mr. Anuj Singh, Ms. Neeha Nagpal, Ms. Manisha, Mr. Arshit Anand and Mr. Divyang Chandi Ramani, Advocates for Respondent No. 9.

Mr. Arjun Asthana and Ms. Sreenita Ghosh, Advocates for Resolution Professional.

Ms. Misha and Mr. Shantanu Chaturvedi, Advocates for Committee of Creditors.

Mr. Nitish Massey and Mr. Abhishek, Advocates for Orissa Metaliks Pvt. Ltd.

J U D G M E N T

BANSI LAL BHAT, J.

The Appellant - 'SREI Infrastructure Finance Limited', one of the 'Financial Creditors' of Respondent No. 1 - 'M/s Aadhunik Alloys and Power Ltd.' (hereinafter referred to as 'Corporate Debtor') is aggrieved of order dated 26th April, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata, whereby and whereunder the Adjudicating Authority declined to pass an order of restraint upon the Respondents from continuing with the Corporate Insolvency Resolution Process (CIRP) of the Corporate Debtor, negotiating with any other bidder and/or approving any Resolution Plan till the pendency of application being CA(IB) No. 377/KB/2018 arising out of CP(IB)No.387/KB/2017. The impugned order has been assailed on the grounds set out in the memorandum of appeal.

2. For better understanding of the controversy, it would be appropriate to trace the genesis thereof by wading through the factual matrix, which is reproduced hereunder:-

Somewhere in 2017, 'State Bank of India' filed an application under Section 7 of Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'I&B Code') being CP (IB) No. 387/KB/2017 against the Corporate Debtor for triggering Corporate Insolvency Resolution Process, which was admitted by the Adjudicating Authority on 03.08.2017. The Interim Resolution Professional made public announcement. Subsequently, Committee of Creditors (CoC) was formed and Resolution Professional was appointed. Pursuant to the publication of Expression of Interest inviting prospective Resolution Applicants for submission of Resolution Plans the Resolution Professional received four Resolution Plans from:-

- (a) Bhagwati Power & Steel Ltd. (BPSL)
- (b) Orissa Metaliks Pvt. Ltd. (OMPL)
- (c) Edelweiss Asset Reconstruction Company (EARC)
- (d) SREI Infrastructure Finance Ltd. (SREI)

On the basis of evaluation matrix as decided upon by the CoC, the Appellant was declared as the highest evaluated Resolution Applicant (H1). When the negotiations with Appellant were underway, Respondent No. 9 – 'Bhagwati Power & Steel Ltd.' approached the Adjudicating Authority with

an application being CA(IB)289/KB/2018, on consideration whereof the Adjudicating Authority directed the Resolution Professional to consider the application of Respondent No.9 and its Resolution Plan in accordance with the provisions of I&B Code before submitting the same to the CoC. During the course of hearing before the Resolution Professional, Respondent No. 9 submitted an additional representation dated 12.04.2018 containing details about ineligibility of the Appellant to participate in the Resolution process as a Resolution Applicant. Respondent No. 9 relied upon order dated 16.11.2017 passed by the Adjudicating Authority (National Company Law Tribunal) Hyderabad, by which the Appellant holding more than 20% of the equity shares of the 'Deccan Chronicle Holding Ltd.' (DCHL) was held to be a 'related party' and not allowed to participate as the member of the CoC in a resolution process of 'DCHL'. Respondent No. 9 prayed for rejecting the Resolution Plan submitted by the Appellant. Resolution Professional sought clarification from the Appellant with regard to issue of its ineligibility in terms of Section 29A of the Code. Appellant submitted a detailed representation to prove its eligibility. Resolution Professional obtained legal opinion and having regard for the order dated 16.11.2017 passed by the Adjudicating Authority (National Company Law Tribunal) Hyderabad Bench in '*SREI Infrastructure Finance Ltd. Vs. Canara Bank & Ors.*' held the Appellant ineligible. Resolution Professional placed the matter before the CoC, which took a decision to negotiate with the H2 bidder only. Negotiations with the H2 bidder were underway when the Appellant

questioned the decision of Resolution Professional and CoC in rejecting the Appellant as a Resolution Applicant by filing CA(IB) No. 377/KB/2018. The Adjudicating Authority passed an order dated 07.05.2017 directing the CoC to consider the question of eligibility of the Appellant under Section 29A independently. In pursuance thereto CoC looked into the aspect of eligibility of the Appellant and was of the view that the Appellant was at that moment ineligible. Meanwhile the Appellant filed an appeal before this Appellate Tribunal wherein, in terms of interim order dated 09.05.2018 this Appellate Tribunal directed the CoC to decide as to which resolution plan will be accepted and keep the said resolution plan in a sealed cover so that it is not given any effect without prior permission of this Appellate Tribunal. Besides, the Adjudicating Authority was also restrained from passing any order of liquidation. Pursuant to such direction, the CoC voted upon the BPSL Resolution Plan as amended and same was approved by CoC with 100% voting. This development was brought to the notice of this Appellate Tribunal. On 29.05.2018, this Appellate Tribunal directed the Resolution Professional to place the BPSL Resolution Plan already approved by the CoC before the Adjudicating Authority in a sealed cover with direction to the Adjudicating Authority to consider the same for approval subject to the outcome of the appeal. The Resolution Professional filed an application before the Adjudicating Authority under Section 30 (1) of the Code for approval of BPSL Resolution Plan. Same is stated to be pending consideration before the Adjudicating Authority. Appeal filed by the

Appellant was decided by this Tribunal vide judgment dated 20.07.2018 holding that the Appellant could not be treated to be a '*related party*' in relation to the Corporate Debtor – 'DCHL'. The Resolution Professional convened the meeting of the CoC on 28.07.2018 to take further steps in the light of judgment dated 20.07.2018 of this Appellate Tribunal. CoC deliberated upon the issue and arrived at the conclusion that the Appellant had become eligible under Section 29A of the Code for submission of Resolution Plan for the Corporate Debtor.

3. A piquant situation has arisen due to judicial process as the CoC is of the view that the Appellant who earlier emerged as H1 has been found eligible in terms of Section 29A of the Code for submission of Resolution Plan for the Corporate Debtor while the Resolution Plan of BPSL approved by CoC with 100% voting is pending approval before the Adjudicating Authority. The issue for consideration of this Appellate Tribunal is whether the finding recorded by this Appellate Tribunal in terms of judgment dated 20.07.2018 in the matter of '*SREI Infrastructure Finance Ltd. Vs. Canara Bank & Ors.*', Company Appeal (AT) (Insolvency) No. 316 & 317 of 2018 could be relied upon to decide the issue of ineligibility of the Appellant as regards submission of Resolution Plan for the Corporate Debtor.

4. Learned counsel for the Appellant would submit that the question involved in Company Appeal (AT) (Insolvency) Nos.316 & 317 of 2017 was whether the Appellant was a '*related party*' of DCHL by virtue of holding

24.6% shareholding in DCHL and the question has been answered in negative by this Appellate Tribunal. It was immaterial that Respondent No. 9 was not a party in Company Appeal (AT) (Insolvency) Nos.316 & 317 of 2017 and the finding recorded by this Appellate Tribunal that the Appellant was not a '*related party*' of DCHL would be binding. He would further submit that the Respondent No. 9 is estopped from contending that the decision of 20th July, 2018 is not relevant as it has accepted in its affidavit that such decision is relevant and would determine the instant appeal. It is further submitted that the membership is determined on the basis of entry in the register of members and the mere fact that the Appellant had asserted itself as a shareholder of the DCHL will make no difference as there is no estoppel against statute.

5. The Resolution Professional, in its additional affidavit dated 01.08.2018, has taken the stand that in view of order of this Appellate Tribunal dated 20.07.2018 in DCHL matter the Appellant is now eligible under Section 29A of the Code to submit a resolution plan for the Corporate Debtor.

6. The Committee of Creditors has taken the stand that pursuant to the order of this Appellate Tribunal in DCHL matter the Appellant is not a '*related party*' of the Deccan Chronicle. It is submitted on behalf of Committee of Creditors that in the event of this appeal being allowed CoC may be allowed to negotiate with both Resolution Applicants i.e. 'SREI

Infrastructure Finance Ltd.’ and ‘Bhagwati Power & Steel Ltd.’, afresh and accordingly approve a resolution plan with the condition that the minimum upfront cash consideration payable to Financial Creditors shall be Rs.3 Crores to Rs.6 Crores which has been offered in the resolution plan submitted by BPSL and approved by the CoC.

7. It is contended on behalf of Respondent No. 9 - ‘Bhagwati Power & Steel Ltd.’ that the Appellant SREI is a shareholder of DCHL – a fact admitted and accepted by the Appellant in various letters, statutory filings and pleadings. It is contended that the Appellant has admitted that 6,60,37,735 equity shares of DCHL were allotted to it. Reference is made to various documents including Appellant’s disclosure dated 14.01.2015 to NSE and BSE regarding acquisition of 6,60,37,735 equity shares of DCHL. It is contended that the admission made by the Appellant is admissible against it. It is further submitted that DCHL has issued share certificate in favour of Appellant which is *prima facie* proof of its shareholding. Learned counsel for Respondent No. 9 would contend that in terms of provisions of Section 46 (1) of the Companies Act, 2013 share certificate issued under the common seal of the Company specifying the shares held by any person shall be *prima facie* evidence of the title of such person to such shares. It is further contended that the share certificates were duly issued and the name of SREI appeared in the shareholders/members list. Without a formal order of Tribunal cancelling such shares, the shareholding of SREI continues to exist. Learned counsel for Respondent No. 9 would further contend that the

register of members can only be rectified as per procedure established by law. It is further contended that the judgment rendered by this Appellate Tribunal on 20th July, 2018 in DCHL matter is a *judgment in personam* and not *judgment in rem*. Further that DCHL is not a party in the present appeal and status of Appellant SREI was not the question involved in DCHL matter. It is contended that the Appellant does not qualify as an eligible Resolution Applicant as it holds approximately 24% equity shares in Deccan which makes SREI a '*connected person*' of Deccan and at the time of submission of resolution plan account of Deccan had been classified as NPA since more than one year before. It is lastly contended that Respondent No. 9 is the Successful Resolution Applicant with its resolution plan having been approved by CoC with 100% vote and its bid is Rs.326 Crores as compared to Appellants bid of Rs.300 Crore and the negotiation has already been closed.

8. Heard learned counsel for the parties and perused the record. Section 29A of the I&B Code, introduced by Act 8 of 2018 with retrospective effect from 23.11.2017 deals with persons not eligible to be Resolution Applicant. It reads as under:

“29A. A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person –
(a) is an undischarged insolvent;

- (b) *is a wilful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949;*
- (c) *has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor:*

Provided that the person shall be eligible to submit a resolution plan if such person makes payment of all overdue amounts with interest thereon and charges relating to non-performing asset accounts before submission of resolution plan;

- (d) *has been convicted for any offence punishable with imprisonment for two years or more;*
- (e) *is disqualified to act as a director under the Companies Act, 2013;*
- (f) *is prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets;*
- (g) *as been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued*

transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the Adjudicating Authority under this Code

- (h) has executed an enforceable guarantee in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code*
- (i) has been subject to any disability, corresponding to clauses (a) to (h), under any law in a jurisdiction outside India; or*
- (j) has a connected person not eligible under clauses (a) to (i).*

Explanation. – For the purposes of this clause, the expression “connected person” means –

- (i) any person who is the promoter or in the management or control of the resolution applicant; or*
- (ii) any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan; or*
- (iii) the holding company, subsidiary company, associate company or related party of a person referred to in clauses (i) and (ii):*

Provided that nothing in clause (iii) of this Explanation shall apply to –

- (A) a scheduled bank; or*

- (B) *an asset reconstruction company registered with the Reserve Bank of India under section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; or*
- (C) *an Alternate Investment Fund registered with the Securities and Exchange Board of India.”*

9. This Appellate Tribunal had an occasion to consider the ambit and scope of Section 29A of the I&B Code in ‘*Numetal Ltd. Vs. Satish Kumar Gupta & Ors.*’ Company Appeal (AT) (Insolvency) No. 169 of 2018 decided on 7th September, 2018. It observed as follows:

“41. *The substantive provision of Section 29A of the ‘I&B Code’ suggests that not only a person is ineligible to submit a ‘Resolution Plan’, but also a person with any other person acting jointly or in concert with such person, if attracts any one or other ineligibility clause mentioned in clauses (a) to (i) is also ineligible. In terms of clause (j) of Section 29A, if the ‘connected person’ is not eligible under clauses (a) to (i), then also the person who submits the ‘Resolution Plan’ is not eligible.*

42. *Section 29A must be interpreted in light of the mischief it sought to curtail. The ‘Statement of Objects and Reasons’ appended to the Insolvency and Bankruptcy*

Code (Amendment) Bill, 2017 (Bill No. 280 of 2017) in Lok Sabha (ultimately passed as Act 8 of 2018), seeking the above said amendment is as under:

“2. The provisions for insolvency resolution and liquidation of a corporate person in the Code did not restrict or bar any person from submitting a resolution plan or participating in the acquisition process of the assets of a company at the time of liquidation. Concerns have been raised that **persons who, with their misconduct contributed to defaults of companies** or **are otherwise undesirable**, may misuse this situation due to lack of prohibition or restrictions to participate in the resolution or liquidation process, and gain or regain control of the corporate debtor. This may undermine the processes laid down in the Code as the unscrupulous person would be seen to be rewarded at the expense of creditors. In addition, in order to check that the undesirable persons who may have submitted their resolution plans in the absence of such a

provision, responsibility is also being entrusted on the committee of creditors to give a reasonable period to repay overdue amounts and become eligible.”

Therefore, it is to be looked into whether the persons who, with their misconduct contributed to defaults of companies’/ undesirable persons have submitted the resolution plan either in person or jointly with another person, or in concert with such person.

Therefore, while interpreting Section 29A the statement and object to achieve is required to be noticed.

43. *As per Section 29A, a person who submits a ‘Resolution Plan’, is in itself or any other person ‘acting jointly’ or ‘in concert with such person’ if attracts any of the dis-qualification under clause (a) to (h) of Section 29A will be ineligible to submit a ‘Resolution Plan’. Clause (i) of Section 29A further makes it clear that any disability corresponding to clauses (a) to (h) under any law in a jurisdiction outside India will be one of the criteria of ineligibility. Clause (j) stipulates that if any connected person is ineligible under clauses (a) to (i), the person who intend to submit, is not eligible to file ‘Resolution Plan’.*

117. *Admittedly, 'AM Netherlands' is related party of 'AM India Ltd.'. 'AM Netherlands' was the promoter of 'Uttam Galva' on the date when the 'Uttam Galva' classified as NPA in accordance with the guidelines of Reserve Bank of India and a period of one year has elapsed from the date of such classification, at the time of commencement of 'Corporate Insolvency Resolution Process' of the 'Corporate Debtor'.*

118. *Once the stigma of "classification of the account as NPA" has been labelled on the promoter of the 'Uttam Galva', even after sale of shares by 'AM Netherlands' it ceased to be a member or promoter of the 'Uttam Galva', but stigma as was attached with it will continue for the purpose of ineligibility under clause (c) of Section 29A, till payment of all overdue amount with interest and charges relating to NPA account of the 'Uttam Galva' is paid."*

10. Adverting to the factual matrix of the instant case, be it seen that upon evaluation of the financial matrix, feasibility and viability by the Committee of Creditors, the Appellant -'SREI Infrastructure Finance Ltd.' emerged as the highest evaluated Resolution Applicant. However, tables

were turned on it when BPSL approached the Adjudicating Authority (National Company Law Tribunal) Kolkata Bench through the medium of CA No. 289 of 2018. During its hearing BPSL submitted representations alleging that the Appellant was ineligible in terms of Section 29A of the I&B Code as it had been held so in the DCHL Case by the Adjudicating Authority (National Company Law Tribunal) Hyderabad Bench on the ground that the Appellant was holding more than 24% of equity shares in DCHL and thereby falling under the scope and ambit of a '*related party*' of DCHL. It is on the basis of the finding recorded by the Adjudicating Authority (National Company Law Tribunal) Hyderabad Bench in DCHL Case that the Resolution Professional held the Appellant to be ineligible under Section 29A of the Code. The Resolution Professional placed his opinion before the CoC which decided to negotiate with the H2 bidder – BPSL only. In utter desperation the Appellant appears to have approached the Adjudicating Authority against the decision of Resolution Professional and the Committee of Creditors to reject its resolution plan and go ahead with the resolution plan submitted by BPSL. The Adjudicating Authority appears to have directed the CoC to consider the question of eligibility of the Resolution Applicant under Section 29A of the Code independently, if not already done. This happened on 07.05.2018. CoC appears to have convened its 14th Meeting to consider the eligibility aspect of the Appellant. However, the CoC was of the view that on account of the finding given by the Adjudicating Authority in DCHL Case, the Appellant was at the moment ineligible under

Section 29A of the Code. Thus, it declined to consider the resolution plan submitted by the Appellant on ground of ineligibility of the Appellant. Meanwhile the Appellant appears to have approached this Appellate Tribunal assailing the order rendered by the Adjudicating Authority in DCHL Case. This Appellate Tribunal passed interim direction on 9th May, 2018 directing the CoC to take a call in regard to the acceptability of the Resolution Plans and keep the same in a sealed cover. It further emerges from record that in pursuance of directions of this Appellate Tribunal the CoC voted upon the BPSL resolution plan and the same was approved by 100% voting. Resolution Professional placed the BPSL resolution plan as approved by CoC before the Adjudicating Authority. Same was done in pursuance of interim directions passed by this Appellate Tribunal. The Adjudicating Authority was permitted to consider the same for approval subject to the outcome of the appeal. The Resolution Professional appears to have approached the Adjudicating Authority for approval of the BPSL Resolution Plan. The matter is said to be pending consideration before the Adjudicating Authority.

11. Whether the judgment rendered by this Appellate Tribunal on 20.07.2018 in the matter of '*SREI Infrastructure Finance Ltd. Vs. Canara Bank & Ors.*', Company Appeal (AT) (Insolvency) No. 316 & 317 of 2018 overturning the finding of Adjudicating Authority (National Company Law Tribunal), Hyderabad Bench with regard to Appellants ineligibility on the

ground of being a related party of DCHL would operate as *res judicata* is the primary question for consideration.

12. As has been noticed elsewhere in this judgment, a person will be ineligible to submit a resolution plan if such person or any other person acting jointly or in concert with such person attracts any of the disqualifications enumerated under clause (a) to (h) of Section 29A. The disqualification, in terms of clause (i) would also be attracted if such person suffers from any disability corresponding to clauses (a) to (h) under any law in a jurisdiction outside India. Clause (j) embraces within its sweep 'connected persons' including 'related party' of any person who is the Promoter or in the Management or control of the Resolution Applicant whether at the time of commencement of the Corporate Insolvency Resolution Process or during the implementation of the Resolution Plan. The expression 'person', defined under Section 3(23) of I&B Code includes an individual, Hindu Undivided Family, a company, a trust, a partnership, a limited liability partnership and any other statutory entity. Besides, it includes a person resident outside India. The term 'related party in relation to a Corporate Debtor' defined under Section 5(24), *inter alia* means a private company in which a Director, Partner or Manager of the Corporate Debtor is a Director and holds alongwith his relatives more than 2% of its share capital. 'Related Party' also means any person who controls more than 20% of voting rights in the Corporate Debtor or in whom the Corporate Debtor controls more than 20% of voting rights on account of ownership or

a voting agreement. Whether the Appellant was ineligible to submit a Resolution Plan for the Corporate Debtor on the ground of being a related party is to be determined with reference to the status of Appellant qua the Deccan Chronicle Holdings Limited (DCHL), which has admittedly been declared as a Non-performing Asset (NPA) for more than a period of one year before insolvency commencement date of the Corporate Debtor. In view of this admitted position there would be no difficulty in holding that in the event of DCHL being a resolution applicant for the respondent corporate debtor, it would have been disqualified under Section 29A(c). Admittedly, DCHL, declared as NPA and suffering the ignominy of being a defaulter at the relevant time has not jumped in the fray to submit a Resolution Plan for the Corporate Debtor. However, the Appellant, which initially emerged as H1 relegating BPSL to second slot was stripped of H1 status at the instance of BPSL, which alleged ineligibility of Appellant on the ground of the Appellant holding more than 24% of shares in DCHL which had been declared NPA thereby bringing the Appellant within the ambit of a 'related party' of DCHL. It appears that the allegation of ineligibility of the Appellant relating to its capacity as a '*related party*' of DCHL emanated from BPSL on the strength of order dated 16th November, 2017 passed by Adjudicating Authority, Hyderabad Bench in the matter of '*SREI Infrastructure Finance Ltd. Vs. Canara Bank and Ors.*', which turned tables on the Appellant forcing its ouster from the Resolution Process of the Corporate Debtor. Admittedly, the aforesaid order passed by Adjudicating Authority,

Hyderabad Bench has been set aside in appeal by this Appellate Tribunal. It is therefore a question of vital importance to determine whether the allegation of ineligibility of the Appellant under Section 29A of I&B Code founded on the edifice of finding in regard to its being a related party of DCHL stands effaced on account of setting aside of the order of Adjudicating Authority, Hyderabad Bench.

13. Learned counsel for Respondent No. 9 (BPSL) submits that admission on the part of the Appellant in regard to its status as shareholder of DCHL in its various statutory filings and pleadings coupled with its conversion notice dated 14th December, 2013 operates as an estoppel against the Appellant. He further submits that these equity shares were allotted to the Appellant. Reference is made to the share certificate issued by DCHL in favour of the Appellant. It is further submitted that without a formal order of Tribunal cancelling such shares, the shareholding of Appellant continues to exist. Stress is also laid on the fact that the name of Appellant continues to appear in register of members of DCHL. Learned counsel for Appellant, on the other hand submits that the judgment rendered by this Appellate Tribunal setting aside the order of Adjudicating Authority, Hyderabad Bench sets at rest the controversy in regard to status of Appellant qua DCHL and the finding of being a related party having been overturned has the effect of rendering the Appellant eligible as Resolution Applicant of the Corporate Debtor.

14. The question for determination is whether judgment rendered by the Appellate Tribunal in appeal in DCHL matter operates as res judicata?

The Hon'ble Apex Court while dealing with doctrines of 'issue estoppel'/ 'estoppel by judgment' and 'res judicata' in '*Satyendra Kumar & Ors. Vs. Rajnath Dubey and Ors.*' reported in (2016) 14 Supreme Court Cases 49 held that 'estoppel by judgment' operates as a bar which precludes the parties after final judgment to re-agitate and re-litigate the same cause of action or ground of defense or any fact determined by the judgment. The principle of estoppel operates as a bar against the party and not the court. Nothing comes in the way of a competent court to decide a question of law differently if it is so warranted. However, the issues of fact, once finally determined, will stare at the parties and bind them. Erroneous determination of a pure question of law in a previous judgment will not operate as res judicata in the subsequent proceeding for different property though between the same parties.

15. Admittedly, R-9 was not a party to the decision rendered by this Appellate Tribunal on 20.07.2018 in the matter of '*SREI Infrastructure Finance Ltd. Vs. Canara Bank and Ors.*' in which it was held that the Appellant could not be treated to be a 'related party' in relation to DCHL. However, the fact remains that the issue of Appellant being in control of DCHL by virtue of holding more than 20 per cent shares and thereby attracting ineligibility as a 'related party' was involved in DCHL matter.

Determination of the question as to whether the Appellant held 24.6% shareholding in DCHL at the relevant time thereby attracting ineligibility in terms of provisions of Section 29A of I&B Code is relevant notwithstanding the fact that R-9 was not a party to the DCHL matter. The finding recorded in DCHL matter in regard to status of Appellant as a 'related party' qua DCHL stands dislodged in appeal. The edifice upon which rested the plea of R-9 in regard to alleged ineligibility of Appellant stands demolished. It is not in controversy that the judgment rendered by this Appellate Tribunal in appeal stands unassailed and has attained finality. In view of the same the finding in appeal that the Appellant was not a related party of DCHL would be binding though it may liberally not fall within the contours of 'Res Judicata'.

16. Next question for consideration is whether the aforesaid finding is a finding on a pure question of law and if so, whether the same is erroneous so as to warrant interference in these appeal proceedings. A bare look at the judgment lays bare that this Appellate Tribunal was of the view that the finding of Resolution Professional and the Adjudicating Authority that the Appellant was a 'related party' in relation to DCHL was not based on the records of DCHL. This Appellate Court further found that even after triggering of Corporate Insolvency Resolution Process the amount of Rs.20 crores out of Rs.240 crores investment had not been legally approved as equity share nor recognized by the Registrar of Companies and the Stock Exchange. Based on these findings of fact this Appellate Tribunal held that

the Appellant could not be treated to be a 'related party' in relation to Corporate Debtor. It is unmistakably clear that the finding arrived at by this Appellate Tribunal was on a mixed question of law and fact. That being so, it would not be open to question such finding. Finding on a question of fact or a mixed question of law and fact, howsoever erroneous, even if recorded in a different proceedings cannot be subject to review in these appeal proceedings. However, that does not bring the controversy to its logical conclusion as it is contended on behalf of R-9 that the Appellant has admitted the factum of being a shareholder of DCHL in statutory filings and pleadings. It appears from record that the documents and pleadings relied upon by R-9 in this regard formed annexures to the affidavit filed in Company Appeal (AT) (Insolvency) No. 316 and 317 of 2017 and were considered by this Appellate Tribunal while rendering judgment dated 20.07.2018. R-9 has not been able to demonstrate as to how the judgment rendered in appeal is irrelevant. The fact of the matter is that the allegation emanating from R-9 in regard to ineligibility of Appellant as Resolution Applicant on account of it being a person in control of DCHL by virtue of owning 24.6% shareholding stands refuted by the judgment rendered by this Appellate Tribunal in DCHL matter. R-9 appears to have raised the issue of ineligibility of the Appellant for the first time only after the Appellant emerged as H-1 Bidder on the basis of evaluation matrix as decided upon by the Committee of Creditors. The Appellant came to be held as ineligible on the strength of order passed by Adjudicating Authority (National Company

Law Tribunal) Hyderabad Bench on 16.11.2017 paving way for approval of Resolution Plan submitted by R-9 who figured as H-2 Bidder. Since the allegation in regard to ineligibility of the Appellant was founded upon the order passed by Adjudicating Authority, Hyderabad Bench in DCHL matter which has since been reversed by this Appellate Tribunal, it would not be open to R-9 to insist on fresh consideration in regard to the issue of ineligibility of Appellant, which was based solely on order passed in DCHL matter. Corporate Insolvency Resolution Process being a time bound exercise, would not allow such indulgence.

17. The legal impediment in the form of ineligibility alleged against the Appellant having been removed by process of law, the BPSL Resolution Plan pending approval before the Adjudicating Authority under Section 31(1) of the I&B Code no more survives for consideration. The Resolution Professional shall now be required to place the Resolution Plan submitted by the Appellant and approved by the CoC before the Adjudicating Authority for its approval in terms of provisions of Section 30(6) of the Code. The Adjudicating Authority shall accord consideration thereto in accordance with law except for the issue in regard to eligibility of Appellant as a Resolution Applicant which stands settled.

18. The appeal is allowed in the aforesaid terms. Since the extended period of 270 days for conclusion of the Corporate Insolvency Resolution Process has expired on 18th May, 2018, the period for which this appeal has

remained pending shall be excluded. The Resolution Professional is granted seven days' time from date of pronouncement of this judgment to submit the resolution plan of Appellant as approved by CoC, before the Adjudicating Authority for approval. There shall be no orders as to costs.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

NEW DELHI

30th October, 2018

AM