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BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved : 13.9.2019
Date of Decision : 26.9.2019

Appeal No.357 of 2019

ITC Ltd.
Virginia House,
37 J.L. Nehru Road,
Kolkata 700071, India ... Appellant

Versus

1. Securities and Exchange Board of India
   SEBI Bhavan, Plot No.C4-A,
   "G" Block, Bandra Kurla Complex,
   Bandra(E), Mumbai – 400051.

2. Hotel Leelaventure Ltd.
3. Mr. Vivek Nair
4. Mr. Dinesh Nair
5. Mr. Vinay Kapadia
6. Mr. Vijay Sharma
7. Ms. Saija Nair
   The Leela Mumbai, Sahar,
   Mumbai-400 059.

8. Leela Lace Holding Pvt. Ltd.
9. Leela Lace Software Solutions Pvt. Ltd.
10. Leela Fashions Pvt. Ltd.
11. Rockfort Estate Developers Pvt. Ltd.
    Leela Baug, Andheri Kurla Road,
    Andheri East, J.B. Nagar,
    Mumbai-400 059.

12. The Krishnan Nair Leela Family Trust
    The Leela Mumbai, Sahar,
    Mumbai-400 059.

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13. Ms. Amruda Nair
14. Mrs. Lakshmi Nair
15. Mrs. Madhu Nair
16. P V Leela Amma Nair
    Leela Baug, Andheri Kurla Road,
    Andheri East, J.B. Nagar,
    Mumbai-400 059.

17. J.M. Financial Asset Reconstruction
    Company Ltd.
    7th Floor, Cnergy, Appasaheb Marathe Marg,
    Prabhadevi, Mumbai 400 025. …Respondents

Mr. Darius Khambatta, Senior Advocate with Mr. Pesi Modi, Senior Advocate, Mr. Somasekhar Sundaresan, Ms. Kalpana Desai, Ms. Sneha Jaisingh and Ms. Shreya Gupta and Mr. Tushar Hathiramani, Advocates i/b. Bharucha & Partners for the Appellant.

Mr. Kevic Setalvad, Senior Advocate with Mr. Mihir Mody, Ms. Sneha Prabhu, Mr. Ameya Kulkarni and Mr. Sushant Yadav, Advocates i/b. K. Ashar & Co. for the Respondent No.1.
Mr. Navroz Seervai, Senior Advocate with Mr. Ashish Kamat, Mr. Abhijit Joshi, Mr. Rahul Dwarkadas, Mr. Kunal Doshi, Mr. Areez Gazdar and Ms. Rohini Jaiswal, Advocates i/b. Veritas Legal for the Respondent nos.2, 5 to 7.
Mr. Ravi Kadam, Senior Advocate with Mr. Gaurav Joshi, Senior Advocate, Mr. Rohan Kadam and Mr. Hussain Dhoklawala, Advocates i/b. M/s. Ganesh & Co. for the Respondent nos.3, 4 and 8 to 15.
Mr. Janak Dwarkadas, Senior Advocate with Mr. Rohit Gupta, Mr. Tomu Francis, Mr. Manish Chhangani and Mr. Arka Saha, Advocates i/b. Khaitan & Co. for the Respondent No.17.

With
Appeal Lodging No.460 of 2019

J M Financial Asset Reconstruction Co. Ltd.
(acting in its capacity as trustee of JMFARC-

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Hotels June 2014-Trust)
7th Floor, Cnergy, Appasaheb Marathe Marg,
Prabhadevi, Mumbai – 400 025. ... Appellant

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot No.C4-A,
"G" Block, Bandra Kurla Complex,
Bandra(E), Mumbai – 400051. …Respondent

Mr. Janak Dwarkadas, Senior Advocate with Mr. Rohit Gupta, Mr. Tomu Francis, Mr. Manish Chhangani and Mr. Arka Saha, Advocates i/b. Khaitan & Co. for the Appellant.

Mr. Kevic Setalvad, Senior Advocate with Mr. Mihir Mody, Ms. Sneha Prabhu, Mr. Ameya Kulkarni and Mr. Sushant Yadav, Advocates i/b. K. Ashar & Co. for the Respondent.

CORAM: Justice Tarun Agarwala, Presiding Officer
Dr. C.K.G. Nair, Member
Justice M.T. Joshi, Judicial Member

Per : Justice M.T. Joshi

1. Both the present appeals have been filed aggrieved by the same common order of respondent Securities and Exchange Board of India (hereinafter referred to as 'SEBI') in the matter of complaint filed by the appellant ITC Ltd. making grievance against the proposed sale transaction of the substantial assets of Respondent no.2 Hotel Leelaventures Ltd. (hereinafter called as the 'Company') for which the impugned Postal Ballot Notice (hereinafter referred to as 'PB

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Notice') dated 18th March, 2019 is issued. Under the said PB notice the Company had sought shareholders approval through special resolution inter alia regarding the sale of assets of the Company to one BSREP III Indian Ballet Pte. Ltd or its affiliates (Brookfield).

In short, the appellant's grievance put before the Respondent no.1 SEBI was that through the proposed transaction Company's Directors and Promoters i.e Respondent Nos. 3 to 7 and 8 to 16 are also attempting to gain through "additional transactions" which are not part of the proposed resolution. In fact, all these transactions are part of the composite transactions and, therefore, those being related party transaction, the related parties i.e. the above respondents cannot vote to approve the same.

Additionally Respondent no.17 J.M. Financial Asset Reconstruction Co. Ltd. ought to have been barred from voting by the Respondent no.1 SEBI under Regulation 32 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (hereinafter referred to as 'Takeover Regulations') as it has obtained 26% equity in Respondent no.2 Company in breach of the Takeover Regulations.

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Respondent no.1 SEBI after hearing all the sides and after calling for necessary explanations held that the acquisition of shares by Respondent no.17 J.M. Financial Asset Reconstruction Co. Ltd. (hereinafter referred to as 'JMF ARC') is only a technical violation of the Takeover Regulations and is fit for exemption.

It further held that out of the additional transaction only one transaction relating to intellectual property assignment of trademark 'Jamavar' between the Company, identified promoters their affiliates with Brookfield would be a related party transaction. It therefore directed to exclude only the said transaction from putting to vote by Respondent no.2 Leelaventures before shareholders in case the transaction is material in terms of relevant Regulation.

As regards some of the additional transactions, it was directed that a fresh PB Notice should be issued on which the explanatory note shall give specific information identifying the transactions between the Company and Brookfield and the promoters.

Since the appellants contention that the Director and Promoters of Respondent no.2 Company and Respondent

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no.17 JMF ARC shall be precluded from voting is not accepted the present Appeal no.357 of 2019 is filed.

2. Aggrieved by the declaration that the Respondent no.17 JMF ARC had committed a technical breach of the Takeover Regulations, Appeal Lodging No.460 of 2019 is filed.

3. The facts leading to the dispute are as under:- Respondent no.2 the Company is and was under financial distress. In the circumstances, it decided to restructure its debts under the Corporate Debt Restructuring (CDR) mechanism. The majority i.e. 14 out of 17 of its lender institutes had agreed for the same. On 20th September, 2012 CDR Empowered Group had approved the CDR package of the Company. Thereafter, a Master Restructuring Agreement was executed on 25th September, 2012 between the Respondent no.2 Company on one hand and State Bank of India (SBI) and other lenders on the other hand. Under the said Master Restructuring Agreement, Respondent no.2 was to comply with certain terms and conditions. It however could not comply with the same. Therefore, in a joint meeting dated 6th June, 2014, the Joint Lenders Forum decided to declare the CDR package as failed and invoked the default clause as per the Master Restructuring Agreement.

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Thereafter, on 25th June, 2014, a Trusteeship Agreement under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (hereinafter referred to as 'SARFAESI Act') was executed between Respondent no.17 and the lenders under which a Trust was created named as JMF ARC-Hotels June 2014-Trust (hereinafter called as the 'Trust'). This Trust had issued security receipts to these Joint Lenders and also offer documents were issued for the private placement of the said receipts. Eventually, the CDR package was declared as failed. On 30th June, 2014, 14 out of the 17 lenders had assigned Rs.4150.14 crore of debt to the Trust. Respondent no.17 JMF ARC paid Rs.865 crores upfront and issued security receipt worth Rs.3200 crores. Eventually, Respondent no. 17 JMF ARC proposed to Respondent no.2 Company to allot 16.39 crore equity shares pursuant to conversion of part-debt amounting to Rs.275 crore into equity. Necessary approvals from the Board of Directors and thereafter from the shareholders were obtained and equity shares converting the debt were issued to Respondent no.17 JMF ARC on 24th October, 2017. It filed disclosures under Regulation 29(2) of the Takeover Regulations on 25th

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October, 2017. Thereafter, Respondent no.17 JMF ARC had filed a corporate insolvency resolution process before the National Company Law Tribunal Mumbai Bench (NCLT) in view of the default in payment of dues. The said proceeding is pending. In the meantime, various proposals and counter proposals were received for resolution of the assets of Respondent no.2 Company by sale etc. It is the case of Respondent no.2 Company that thought a public announcement was made in this regard and various proposals were received the entities thereafter did not revert or did not show any follow up interest.

4. In the circumstances, due to initiative of the Respondent no.17 JMF ARC a proposal was received from Brookfield for the "Asset Sale Transaction" of the Company's assets and the additional transactions between Brookfield and some of the promoters. On 18th March, 2019, the Board of Directors of Respondent no.2 Company approved the framework agreement comprising the Asset Sale Transaction and PB Notice was issued. On 22nd April, 2019, the appellant ITC filed a Company Petition before the NCLT complaining of oppression and mismanagement. Since appellant ITC holds 7.92% of the issued capital of

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Respondent no.2 Company, it sought waiver of the 10% minimum shareholding for minority shareholders to file the proceedings. The Petition is pending before the NCLT. In the meantime, in terms of PB Notice, the appellant has taken inspection of the documents related to the transactions. It is the grievance of the appellant that it was not allowed to obtain copy of the Framework Agreement but only taking of notes was allowed.

However, from the submissions and counter submissions of the parties it is evident that besides the Asset Sale Transaction of the Company, additional transaction etc are also sought to be entered into by some of the promoters and their private limited companies like Respondent nos.8 to 12 with Brookfield as part of a composite proposal. The affidavits and counter affidavit would show that the transactions are not only composite but are inter dependent. The transactions are as under:-

(i) Approval for sale of the Company's Delhi Hotel Undertaking (for `1705 Crore);

(ii) Approval for sale of the Company's Bengaluru Hotel Undertaking (for `1000 Crore);

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(iii) Approval for sale of the Company's Chennai Hotel Undertaking (for `675 Crore);

(iv) Approval for sale of the Company's Udaipur Hotel Undertaking (for `320 Crore);

(v) Approval for sale of the Company's Hotel Operations Undertaking (for `135 Crore); and

(vi) Approval for sale of the Company's shareholding in Leela Palaces and Resorts Limited, a wholly owned subsidiary of the Company (for `115 Crore).

5. Besides this, for consummation of the above Asset Sale Transaction proposal between the Company and the Brookfield, additional agreements with Directors, Promoters are proposed to be entered into which are in the following terms:-

(i) An Agreement for assignment will be entered into by Leela Lace Holdings Private Limited ("LLHPL") (Respondent no.8-an entity of group of promoters of the Company) and a Purchaser Entity (Brookfield), for assignment of the intellectual property owned by LLHPL used in, held for use in or related to the

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hospitality, hotels and resorts and business, as may be mutually agreed between the Purchaser Entity and LLHPL, for a total consideration of `150 Crore.

(ii) An Agreement for the license of the right to use the name 'The Leela' with respect to the hotel operated by the Company in Mumbai and related matters and also an agreement for use of centralized services to be provided by Brookfield in this respect.

(iii) An Agreement to be entered into between Brookfield and certain Promoters/members of the Promoter Group (or their affiliates) with respect to business expansion services to be provided to Brookfield, whereby the said Promoters/members of the Promoter Group (or their affiliates) would provide services and may receive consideration up to an amount `150 Crore, subject to due performance of the terms and achievement of the milestones set out therein.

(iv) As the Bengaluru Hotel Undertaking is built partly on the land leased from LLHPL, as a part of the transfer of the Bengaluru Hotel Undertaking, there will be a Fresh Lease Deed to be executed with respect to the

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grant of leasehold rights to the Bengaluru Hotel Undertaking land, which is owned by LLHPL, initially on the same rent as currently being paid by the Company. This agreement also grants to Brookfield a right of first refusal for the acquisition of the Bengaluru Hotel land.

(v) Given that Promoters own the 'The Leela' brand inter alia in respect of real estate projects, Brookfield and certain Promoters will enter into a Joint Venture Agreement for the development of real estate projects using the said brand.

(vi) An Intellectual Property Assignment Agreement to be executed between the Promoters/ Promoter Group and their affiliates and LLHPL as may be mutually agreed between the parties and Brookfield.

(vii) An Intellectual Property Assignment Agreement between the Company and identified Promoters, and their affiliates, with respect to registrations/applications for registration of the trademark 'Jamavar', as may be mutually agreed between the parties and Brookfield.

6. The sum and substance of the objection of the appellant ITC is that all these transactions are related party transactions

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which could not be generally put for vote including the Promoters, Directors being related parties as also Respondent no.17 JMF ARC. Further, JMF ARC acting as a Merchant Banker for the Respondent no.2 Company is also to gain a remuneration of Rs.70 cores besides its resolution of debt assigned to it by the lenders.

Additionally, it is submitted that since Respondent no.17 JMF ARC has acquired 26% of the equity of Respondent no.2 Company as stated above, against the provisions of the Takeover Regulations, 2011 it should have been prohibited by the Respondent no.1 SEBI from participating in the voting under the provisions of Regulation 32 of the Takeover Regulations.

7. Respondent no.1 SEBI after hearing both the sides and after calling for material from the respondent no.2 Company, held that the transactions in question cannot be called as related party transactions. It is further found that in acquiring 26% of the equity shares of the Respondent no.2 Company by Respondent no.17 JMF ARC, only a technical breach has occurred which could be exempted. It further declared that Respondent no.17 also cannot be termed as related party or

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impugned transaction as a related party transaction qua Respondent no.17 JMF ARC.

However in view of the fact that vide additional transaction the promoters or group of promoters are also entering into transaction with Brookfield Respondent no.1 SEBI directed that in the interest of the shareholders a fresh PB Notice should be issued providing following additional disclosures in the same.

> *"A. The Company shall provide the following additional disclosures in the Postal Ballot Notice:*
>
> *i. All relevant details of each of the sale transactions including Asset Sale Transaction and Additional IP Transaction with specific information identifying the transactions between the Company and Brookfield and the Promoters and Brookfield including the amounts involved therein under separate tables with the split consideration amounts for each head, and*
>
> *ii. Details of valuation of both the Asset Sale Transaction and Additional IP Transaction including the methods adopted by the Company.*
>
> *iii. During the course of the Postal Ballot, the Valuation Reports shall be kept for inspection by the shareholders of the Company.*
>
> *iv. The Asset Sale Transaction of the Company along with the Additional IP Transaction of the Promoters/Promoters' affiliates (excluding the 'related party transaction' involving transfer of 'Jamavar' trademark) shall be put to vote by the Company before its shareholders, afresh.*

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B. The Additional IP Transaction concerning the 'related party transaction involving transfer of 'Jamavar' trademark, shall separately be put to vote by the Company before its shareholders afresh in case such valuation in respect of the 'Jamavar' trademark exceeds 10% of the annual consolidated turnover of the Company, as per the last audited financial statements. The Promoters /Promoter Group of the Company shall not participate in the aforementioned voting process.

C. The Company shall make all material disclosures including the litigation relating to the claim of AAI with respect to the Leela Hotel, Mumbai, in the Postal Ballot Notice and in the financial statements in the Annual Report."

8. Aggrieved by the said order of not restraining Promoters/Directors of the Respondent no.2 Company and Respondent no.17 JMF ARC from voting ITC has filed Appeal no.357 of 2019.

9. Aggrieved by decision that Respondent no.17 JMF ARC had committed a technical breach of the Takeover Regulation, it has filed separate Appeal Lodging no.460 of 2019.

10. Both the sides tried to represent before us the motive/intention of the other party qua the dispute. Respondent no.2 and other respondents submitted that appellant infact is a rival Company which is trying to scuttle

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the transaction only to compel the Respondent no.2 Company to undergo the debt resolution under the Insolvency and Bankruptcy Code. The appellant on the other hand submitted that infact the Directors and the Promoters of Respondent no.2 Company are pushing ahead with their personal agenda of pocketing an amount of Rs.300 crores through additional transaction and certain intangible benefits as well. The appellant further submitted that the Respondent no.17 JMF ARC would pocket remuneration for the transaction and also would gain in the nature of repayment of debt assigned to it, eventually causing Respondent no.2 Company with negative networth. Both the sides made submissions and counter submissions before us about the viability or otherwise of the transactions in relation to the interest of the investors. Learned Senior Counsel Mr. Seervai added another angle of continuation of large number of employees in case the assets of the Company are transferred as a going concern, which otherwise is facing threat of closure of operations due to continuous losses.

11. Ultimately, however Mr. Khambata and Mr. P.N. Modi, the learned Senior counsels appearing for the appellant ITC Ltd agreed that since the transactions are to be put before the

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shareholders, the only question that would remain is as to whether the disputed transactions are related party transactions limiting the voting rights of the directors, promoters of the Company and of Respondent no.17 JMF ARC and as to whether Respondent no.17 JMF ARC can be completely prevented from voting in view of the Takeover Regulations. He submits that though the appellant has wrongly sought relief of preventing Respondents no.3,4 and 8 also in voting, the same can be modified by the Tribunal in accordance with the relevant Regulations.

In our view this Tribunal is not required to asses the proposed transaction to find as to whether it is in the interest of the investors. It is to be noted that the same is being put to vote before the shareholders to take a decision. Our exercise would be limited to verification that sufficient information is provided to them to facilitate them to take an informed decision.

Further in view of objection to the voting rights or limitations on the voting rights of the directors/promoters of the Company i.e. Respondents no.3 to 16, the reliefs can be modified in terms of the relevant regulations (dealt

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hereinafter in extenso) in the event, the objection is accepted by us.

12. We have extensively heard the learned Senior Counsels for the respective parties. In our considered view Appeal no.357 of 2019 filed by ITC Ltd. deserves to be dismissed while Appeal Lodging No.460 of 2019 filed by JMF ARC deserved to be allowed for the reasons to follow:-

1. As described already the objection of appellant ITC is to be considered in the context of the provisions of Takeover Regulations and the provisions regarding the related party transactions as found in Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 (hereinafter referred as 'LODR Regulations). We first propose to examine the case as regards the breach of the Takeover Regulations.

Takeover Regulations

a. In view of the Takeover Regulations of 2011 an acquirer acquiring 25% or more shares, voting rights or control in a listed Company has to adopt the route as provided by the Takeover Regulations subject to certain exemptions. Respondent no.17 JMF ARC

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has acquired 26% of the shares of the Company by claiming exemption as provided by Regulation 10 of the Takeover Regulations. Respondent no.1 SEBI in the impugned order held that the said acquisition is only a technical breach of the Regulations fit for exemption and did not exercise its power to issue directions as provided by Regulation 32 of the Takeover Regulations. The provisions of Regulation 32 as are relevant to decide the present issue are extracted as under:

> *"**Power to issue directions.***
>
> *32.(1) Without prejudice to its powers under Chapter VIA and section 24 of the Act, the Board may, in the interest of investors in securities and the securities market, issue such directions [or any other order] as it deems fit under section 11 or section 11B or section 11D of the Act, including,—*
> *(a) directing divestment of shares acquired in violation of these regulations, whether through public auction or in the open market, or through an offer for sale under the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009, and directing the appointment of a merchant banker for such divestiture;*
>
> *(b) directing transfer of the shares, or any proceeds of a directed sale of shares acquired in violation of these regulations to the Investor Protection and Education Fund established under the Securities and Exchange Board of India*

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(Investor Protection and Education Fund) Regulations, 2009;

(c) directing the target company or any depository not to give effect to any transfer of shares acquired in violation of these regulations;

(d) directing the acquirer or any person acting in concert, or any nominee or proxy not to exercise any voting or other rights attached to shares acquired in violation of these regulations;

……"

b. Respondent no.17 JMF ARC who is appellant also in Appeal Lodging No.460 of 2019 however contends that there is not even a technical breach of the Takeover Regulations in view of the expemption as provided by Regulation 10(1)(i) as it stood at the time of conversion of the debt into equity. The relevant provision as on 24th October, 2017 is as under:

"General exemption

10. (1) The following acquisitions shall be exempt from the obligation to make an open offer under regulation 3 and regulation 4 subject to fulfillment of the conditions stipulated therefor,— ……

……

(i) Conversion of debt into equity under Strategic Debt Restructuring Scheme -

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Acquisition of equity shares by the consortium of banks, financial institutions and other secured lenders pursuant to conversion of their debt as part of the Strategic Debt Restructuring Scheme in accordance with the guidelines specified by the Reserve Bank of India:

Provided that the conditions specified under sub-regulation (5) or (6) of regulation 70 of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009, as may be applicable, are complied with." ……..

c. Regulation 10(6) in the circumstances provides as under:

"(6) In respect of any acquisition made pursuant to exemption provided for in this regulation, the acquirer shall file a report with the stock exchanges where the shares of the target company are listed, in such form as may be specified not later than four working days from the acquisition, and the stock exchange shall forthwith disseminate such information to the public."

d. Learned Senior counsel for Respondent no.17 JMF ARC Mr. Janak Dwarkadas submitted as under:- That in pursuance of the circulars issued by the Reserve Bank of India from time to time 14 out of 17 lenders of the Company agreed to restructure the debt of the appellant Company of approximately Rs.4112 crore being 96% of the total CDR debt. The

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Debt Restructuring Mechanism was termed as Corporate Debt Restructuring Package which was lateron reframed as Strategic Debt Restructuring Scheme. Master Restructuring Agreement was entered between the lenders and the Company dated 20th September, 2012 annexed to affidavit in reply of Respondent no.1 SEBI. The Empowered Group of CDR had approved the CDR package. The Company however could not adhere to the plan of restructuring therefore the CDR scheme was declared as failed. Trust was already created under the CDR scheme. In the circumstances, in terms of clause 7.2(e) of the Master Restructuring Agreement Respondent no.17 issued notice on 10th April, 2017 to the Company seeking conversion of part of debts approximately amount to Rs.275 crores representing approximately 25.999% of the paid up share capital of the Company. The Company's AGM sought approval of the shareholders of the same and in the month of September, 2017 the said proposal was accepted. The appellant had very well participated in the process and upon approval, the Respondent

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no.17 is holding 25.999 shares of the Company. Since the conversion of part of debt into equity amounted to acquisition of equity shares pursuant to the conversion of debt in accordance with the CDR scheme, the same is exempt as per Regulation 10 (1)(i) (as reproduced supra). There is no breach of the Takeover Regulations. Mr. Dwarkadas therefore submits that the finding of the Respondent no.1 SEBI in the impugned order that the acquisition is a technical breach of the Takeover Regulations is not correct.

e. On the other hand, the learned Senior Counsel Mr. Setalvad, for Respondent no.1 SEBI, submitted as under:- That the conversion has taken place not in pursuance of the CDR scheme but after failure of same. Therefore the acquisition of the shares has taken place in breach of the Takeover Regulations.

While Mr. Khambatta described it as a breach simpliciter, Mr. Setalvad supports the reasons as found in the impugned order and submits that it is a technical breach.

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f. Clause 7.2 of Master Restructuring Agreement provides for remedies upon the occurrence and continuation of the event of default from the side of the Company generally. Relevant provisions of Clause 7.2 (e) is as under:

"(e) Conversion Right

(i) In the event the Borrower defaults in repayment/payment of any installment of principal amount of the Facilities or any interest thereon as the Applicable Interest Rate or any combination thereof, then the CDR Lenders shall have the right to convert (which right is hereinafter referred to as the "conversion right") at its option the whole or part of the Outstandings (whether then due and payable or not) into fully paid-up Equity Shares, at a price as determined in accordance with the Applicable Law from the date (which date is hereinafter referred to as the "date of conversion") and in the manner specified in a notice in writing to be given by the CDR Lenders to the Borrower (which notice is hereinafter referred to as the "conversion notice").

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(ii) Any conversion in terms of this Section 7.2 shall be subject to applicable guidelines issued under the Companies Act, 1956, and by SEBI.

(iii) The Borrower shall, at all times, maintain sufficient un-issued equity shares for the above purpose and obtain all requisite corporate approvals and authorizations as may be required in this regard.

(iv) The CDR Lenders may exercise the above conversion right on one or more occasions in the manner specified above till the Final Settlement Date.

(v) On receipt of a conversion notice, the Borrower shall allot and issue the requisite number of fully paid-up equity shares (such shares referred to as the "conversion shares") to the CDR Lenders and upon such issuance of the conversion shares, the CDR Lenders shall accept the same in satisfaction of the part of the facilities so converted on and from the date of conversion…

……..”

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g. We find that the corporate debt restructuring scheme was announced by the Reserve Bank of India vide various circulars from time to time for the purpose of restructuring the debt of financially distressed Companies in an attempt to revive such Companies. The circulars provided basic framework. Specific plans were to be worked out for a Company inter alia regarding interest moratorium, plans of payment etc. to be worked out in the agreement which would be approved by the Empowered Group of CDR scheme. In the event of default, the agreement can provide for certain contingencies.

Clause 7.2 of the Master Restructuring Agreement in the present case provides for remedy upon default. More specifically Clause (e) of the same as reproduced supra has granted right to the CDR lenders of conversion of their outstanding debt into fully paid equity shares as detailed supra.

h. It is thus, clear that the covenant regarding conversion right would come into picture only when the CDR scheme fails i.e. a default is made by the borrower in pursuance of the CDR scheme.

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i. In such circumstances, the submissions of Mr. Khambatta or for that matter of Mr. Setalvad, learned Senior Counsels that as CDR scheme has failed, there could not have been any conversion of debt into equity in pursuance of the scheme cannot be accepted. Therefore in our considered view the conversion of the part of the debt by the Trust of Respondent no.17 JMF ARC in terms of Clause 7.2(e) is in fact in pursuance of CDR scheme and, therefore, fit for exemption under Regulation 10 read with sub-Regulation 6 as reproduced supra.

j. It is the case of Respondent no.17 JMF ARC that necessary disclosures were made and in such circumstances in our view there is not even a technical breach of the Takeover Regulations. The case of the appellant that Respondent no.1 SEBI should have given direction to the Respondent no.17 JMF ARC under Regulation 32 to desist from voting in the disputed resolution process cannot be accepted. In this scenario reliance of the appellant in the ratio of Karvy Financial Services Ltd., Appeal

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nos.479 of 2016 and 349 of 2017 decided on 26.4.2018 that the exemption should be sought before acquisition is not applicable to the present case as in Karvy, this Tribunal was not dealing with statutory exemption under Regulation 10, but was on the grant of discretionary exemption under Regulation 11 of the Takeover Regulations.

Similar is the case of the Regaliaa Realty Ltd. (2016) SCC Online SEBI 302 decided by Whole Time Member of SEBI. Laurel Energetics Pvt. Ltd. (2017) 8 SCC 541 relied in by the appellant was on interpretation of the Regulation 10(1) of the Takeover Regulations providing exemption in case of interse transfer of shares between promoters of a Company and their immediate relatives. The ratio is that plain language of a statue normally needs no interpretation. There cannot be any dispute to the proposition

LODR Regulations: Related Party Transactions

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a. The appellant had objected the exercise of PB Notice asking all the shareholders including the respondents who are the promoters/directors of the Company as well as Respondent no.17 JMF ARC, in view of the fact that the proposed Asset Sale Transaction of the Company with Brookfield is a composite transaction to be consummated only when additional transactions with the promoters personally are also agreed. It was submitted that as the nature of the transaction is composite in which the promoters would get Rs.300 crores definitely from two tangible additional transactions and certain intangible profits from other additional transactions as described above, the same would be a related party transaction attracting the provisions of Regulation 23 of the LODR Regulations. It is also submitted that Respondent no.17 JMF ARC would obtain Rs.70 crores as its remuneration for working out the present transaction. Not only this under the present transaction it is expected to realize an amount of Rs.2815.67 crores which shall be distributed to the security holders of the Trust including Respondent

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no.17 JMF ARC itself in the amount of Rs.165.85 crores.

Since explanatory statement to the notice itself explain that for consummation of the Asset Sale Transaction of the Company with Brookfield additional agreements as detailed, between directors/promoters of the Company with Brookfield are also proposed, in our view, there is no hitch in accepting the entire transaction as a composite transaction.

b. It was however urged on behalf of the promoters Respondent Nos. 3 to 7 and 8 to 16 and Respondent no.17 JMF ARC that the transactions in question are not related party transactions. The additional transaction between Brookfield and promoter ITC cannot also be termed as related party transactions and, therefore, the provisions of Regulation 23 of the LODR Regulations would not be attracted.

c. Before embarking upon consideration of this issue it would be worthwhile to place on record the relevant provisions:

"***Related party transactions.***

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23. (1) The listed entity shall formulate a policy on materiality of related party transactions and on dealing with related party transactions including clear threshold limits duly approved by the board of directors and such policy shall be reviewed by the board of directors at least once every three years and updated accordingly.

Explanation.- A transaction with a related party shall be considered material if the transaction(s) to be entered into individually or taken together with previous transactions during a financial year, exceeds ten percent of the annual consolidated turnover of the listed entity as per the last audited financial statements of the listed entity.

(1A) Notwithstanding the above, with effect from July 01, 2019, a transaction involving payments made to a related party with respect to brand usage or royalty shall be considered material if the transaction(s) to be entered into individually or taken together with previous transactions during a financial year, exceed two per cent of the annual consolidated turnover of the listed entity as per the last audited financial statements of the listed entity.

(2) All related party transactions shall require prior approval of the audit committee.

(3) Audit committee may grant omnibus approval for related party transactions proposed to be entered into by the listed entity subject to the following conditions, namely-

- *(a) the audit committee shall lay down the criteria for granting the omnibus approval in line with the policy on related party transactions of the listed entity and such approval shall be applicable in respect of transactions which are repetitive in nature;*
- *(b) the audit committee shall satisfy itself regarding the need for such omnibus*

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approval and that such approval is in the interest of the listed entity;

(c) the omnibus approval shall specify:

(i) the name(s) of the related party, nature of transaction, period of transaction, maximum amount of transactions that shall be entered into,

(ii) the indicative base price / current contracted price and the formula for variation in the price if any; and

(iii) such other conditions as the audit committee may deem fit:

Provided that where the need for related party transaction cannot be foreseen and aforesaid details are not available, audit committee may grant omnibus approval for such transactions subject to their value not exceeding rupees one crore per transaction.

(d) the audit committee shall review, atleast on a quarterly basis, the details of related party transactions entered into by the listed entity pursuant to each of the omnibus approvals given.

(e) such omnibus approvals shall be valid for a period not exceeding one year and shall require fresh approvals after the expiry of one year:

(4) <u>All material related party transactions shall require approval of the shareholders through resolution and no related parties shall vote to approve such resolutions whether the entity is a related party to the particular transaction or not"</u>……(Emphasis supplied)

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d. From the above provisions, it is clear, that in case of a material related party transaction a prior approval of the Audit Committee is required thereafter such transaction requires approval of the shareholders through resolution. However, related parties cannot vote to approve such resolution irrespective of the fact as to whether the entity is a related party to the particular transaction or not. Thus, all the related parties are prohibited to vote to approve such related party transaction irrespective of the fact that a particular related party may not be a party to a particular transaction.

e. In order to attract the provisions of sub-regulation 4 of Regulation 23 as quoted above it is necessary that

(1) It shall be a related party transaction.

(2) It should be material.

(3) It shall be put for approval to the shareholders through resolution.

(4) None of the related party can vote to approve irrespective of the fact as to whether a specific

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related party would be involved in the particular transaction or not.

f. The definition of related party under Section 2(zb) of the LODR Regulation reads as under:-

> *"2(zb)—related party means a related party as defined under sub-section (76) of section 2 of the Companies Act, 2013 or under the applicable accounting standards:*
>
> *Provided that any person or entity belonging to the promoter or promoter group of the listed entity and holding 20% or more of shareholding in the listed entity shall be deemed to be a related party:*
>
> *Provided further that this definition shall not be applicable for the units issued by mutual funds which are listed on a recognised stock exchange(s);"*

g. Thus, Regulation 2(zb) adopts provision of sub-section (76) of Section 2 of the Companies Act, 2013 or of the applicable accounting standard alongwith an addition that the promoter or promoter group of the listed entity holding 20% or more of the shareholding in the listed entity shall be deemed to be a related party.

h. The definition as provided by sub-section (76) of section 2 of the Companies Act reads as under:-

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"(76) "related party", with reference to a company, means—

(i) a director or his relative;

(ii) a key managerial personnel or his relative;

(iii) a firm, in which a director, manager or his relative is a partner;

(iv) a private company in which a director or manager is a member or director;

(v) a public company in which a director or manager is a director or holds along with his relatives, more than two per cent. of its paid-up share capital;

(vi) any body corporate whose Board of Directors, managing director or manager is accustomed to act in accordance with the advice, directions or instructions of a director or manager;

(vii) any person on whose advice, directions or instructions a director or manager is accustomed to act:

Provided that nothing in sub-clauses (vi) and (vii) shall apply to the advice, directions or instructions given in a professional capacity;

(viii) any company which is—

(A) a holding, subsidiary or an associate company of such company; or

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> *(B) a subsidiary of a holding company to which it is also a subsidiary;*
>
> *(ix) such other person as may be prescribed;"*

i. Item no.(viii) of the above definition provides that an associate Company of such Company shall also be termed as related party. This takes us to the definition of 'Associate Company' as provided by sub-section (6) of Section 2 of the Companies Act, 2003 which reads as under:-

> *"(6) "associate company", in relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence and includes a joint venture company.*
>
> *Explanation.—For the purposes of this clause, "significant influence" means control of at least twenty per cent of total share capital, or of business decisions under an agreement;*

j. The first of the ingredient of the Regulation 23 of the LODR Regulation naturally is that the prohibition would be attracted to the related party transactions. The definition of the same is found in

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sub-regulation 2(zc) of the LODR Regulations which reads as under:-

> *"2(zc) "related party transaction" means a transfer of resources, services or obligations between a listed entity and a related party, regardless of whether a price is charged and a "transaction" with a related party shall be construed to include a single transaction or a group of transactions in a contract:"*
>
> *Provided that this definition shall not be applicable for the units issued by mutual funds which are listed on a recognised stock exchange(s);"*

k. In this connection, it would be beneficial to advert attention to the similar definition found in Section 188 of the Companies Act, 2013. The relevant provisions is as under:

> *"188.* ***Related party transactions.***
>
> *(1) Except with the consent of the Board of Directors given by a resolution at a meeting of the Board and subject to such conditions as may be prescribed, no company shall enter into any contract or arrangement with a related party with respect to*
>
> > *(a) sale, purchase or supply of any goods or materials;*
> >
> > *(b) selling or otherwise disposing of, or buying, property of any kind;*

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(c) leasing of property of any kind;

(d) availing or rendering of any services;

(e) appointment of any agent for purchase or sale of goods, materials, services or property;

(f) such related party's appointment to any office or place of profit in the company, its subsidiary company or associate company; and

(g) underwriting the subscription of any securities or derivatives thereof, of the company: ……..”

l. Reading of these two definitions of the term related party transactions would show that to attract the rigors of the terms as per sub-regulation 2(zc) of the LODR Regulations the transactions should be ‘between a listed entity and a related party’. As per the provisions of Section 188 of the Companies Act, 1956 the transaction would be termed as related party transactions when it is a transaction, contract etc. “of a Company with a related party”.

m. Mr. Khambatta and thereafter Mr. P.N. Modi however submitted that Respondent nos.3 to 7 and 13 to 16 i.e. the promoters etc of the Company

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would personally stand to gain from the additional transactions with Brookfield. They would gain Rs.300 crores from two transactions i.e. sale of the trademark and from offering services in expansion program of Brookfield. They further submitted that Respondent no.17 JMF ARC would stand benefitted as it would gain Rs.70 crores as remuneration for working out the transaction and debts for which the Trust is created would also be squared off.

n. Therefore according to them as these respondents would personally stand to gain through this composite agreement in which the Company's property/assets are involved, the entire transactions should be held as a related party transaction.

o. On the other hand, Mr. Setalvad and Mr. Ravi Kadam submitted that the plain language of the definition/provision as quoted above would show that a specific transaction would be a related party transaction only when the transaction is between a specific Company and a related party. They submitted that in the present case each and every

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transaction i.e. whether asset sale transaction of the Company or additional transactions are between either the Company and Brookfield or the promoter and Brookfield. None of the transactions is "between related party and the listed entities" or "of the Company with a related party."

p. Mr. Khambatta and thereafter Mr. P.N. Modi in rejoinder strenuously submitted that the additional transfer is nothing but benefits to be derived by promoter in composite agreement and Respondent no.17 would also gain from the entire transaction. Therefore they submitted that narrow interpretation could infact stifle the purpose of the provisions.

q. Upon hearing both sides, in our view, the language of the provisions needs no interpretation as the language of the same is plain. While SEBI as a regulator define related party transaction as a transaction "between a listed entity (Company) and a related party" the Parliament define the term as per Section 188 of the Companies Act, 2013 as "a transaction of a Company with a related party". None of the provisions leave any scope for

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interpretation of the same as suggested by Mr. Khambatta and Mr. Modi. Through the interpretation, the scope of the definition cannot be widened to bring in it's scope any transaction in which the directors etc would have some real or perceived interest. The Parliament as well as the regulator SEBI did not intend to bring such transactions within the scope of the restrictions put on the related party transactions. Considering all these aspects on record we find that the transaction cannot be termed as related party transaction.

r. Therefore, the rigors of Regulations 23 of LODR Regulations will not be attracted. Neither Respondent nos.3 to 7 and 13 to 16 can be directed not to vote to approve the resolution nor can Respondent no.17 either be completely prevented from participating in the voting or restricted to vote in a particular manner.

s. Mr. Khambata additionally submitted that even the trademark is the registered trademark of the Company and not of the promoters or group of promoters. As regards the ownership of the

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trademark Mr. Seervai, learned Senior Counsel for the Company as well as Mr. Ravi Kadam, learned Senior Counsel for the promoters submitted that the group of promoters of the Company is the owner of the trademark which is licensed to Respondent no.2 Company and as a licensee the registration stands in its name. It is, thus, clear that the ownership of the trademark is with a group of promoters. In our view interference on this count is not required.

t. In view of the above finding, we find that there is no merit in Appeal no.357 of 2019 filed by ITC Ltd. On the other hand Appeal Lodging No.460 of 2019 by J.M. Financial Asset Reconstruction Co. Ltd. will have to be allowed.

13. During the pendency of the appeal, in view of the directions of Respondent no.1 SEBI in the impugned order, Respondent Company had issued fresh PB Notice adding the explanatory note further explaining the additional transactions. We were told at the Bar that the process of voting is complete and the date of declaration of the result was scheduled as 18th September, 2019. Therefore, vide order dated 13th September, 2019 we directed Respondent

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no.2 Company not to declare the results of the postal ballot in question till we deliver the judgement. In view of the dismissal of Appeal no.357 of 2019 the interim order will have to be vacated. Hence the following order.

14. In the result, Appeal bearing no.357 of 2019 filed by ITC Ltd. fails while Appeal Lodging No.460 of 2019 filed by JMF ARC is allowed. The interim order dated 13th September, 2019 is hereby vacated.

Sd/-
Justice Tarun Agarwala
Presiding Officer

Sd/-
Dr. C. K. G. Nair
Member

Sd/-
Justice M.T. Joshi
Judicial Member

26.9.2019
Prepared and compared by
RHN

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After the judgment was pronounced, a prayer was made by Shri Somasekhar Sundaresan, the learned counsel for the appellant ITC Limited for suspension of our order to enable them to file a Civil Appeal before the Supreme Court of India. This plea was vehemently opposed by the learned counsel appearing for the opposite parties. Considering the circumstances, we do not find any substantial questions of law arising in the matter requiring us to suspend our order. The oral request is, thus, rejected.

Sd/-
Justice Tarun Agarwala
Presiding Officer

Sd/-
Dr. C.K.G. Nair
Member

Sd/-
Justice M.T. Joshi
Judicial Member

26.09.2019
Prepared and compared by
msb