

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Insolvency) No. 543 - 544 of 2018

IN THE MATTER OF:

Mrs. Ramanathan Bhuvaneshwari **...Appellant**

Versus

Vipin Kumar & Ors. **...Respondents**

Present:

For Appellant : **Mr. Mustapha, Advocate for R.P.**

For 1st Respondent: **Mr. Omprakash K. V., Advocate**

For 2nd Respondent : **Mr. Arun Kathpalia, Senior Advocate assisted by
Ms. Shyel Trehan and Mr. Aman Shukla, Advocates**

For 3rd Respondent : **Mr. Jatin Mongia and Ms. Mayanka Dhawan,
Advocates**

For 4th Respondent : **Mr. Ashim sood, CGSC along with Ms. Payal
Chandra, Advocate
Mr. Hari Kishan, Prosecutor (SFIO)**

WITH

Company Appeal (AT) (Insolvency) No. 571 of 2018

IN THE MATTER OF:

Zuventus Healthcare Ltd. **...Appellant**

Versus

Mrs. Ramanathan Bhuvaneshwari& anr. **...Respondents**

For Appellant : **Mr. Arun Kathpalia, Senior Advocate assisted by
Ms. Shyel Trehan and Mr. Aman Shukla, Advocates**

For 1st Respondent: Mr. Omprakash K. V., Advocate

**Ms. R. Bhuvaneshwari, Resolution Professional
Mr. Mustapha, Advocate for R.P.**

WITH

Company Appeal (AT) (Insolvency) No. 598 of 2018

IN THE MATTER OF:

Vipin Kumar

...Appellant

Versus

**Ramanathan Bhuvaneshwari, R.P. for
Tejkamal Pharmaceuticals Pvt. Ltd.**

...Respondent

Present:

For Appellant :

For 1st Respondent: Mr. Omprakash K.V., Advocate

**For 2nd Respondent : Mr. Arun Kathpalia, Senior Advocate assisted by
Ms. Shyel Trehan and Mr. Aman Shukla, Advocates**

**Ms. R. Bhuvaneshwari, Resolution Professional
Mr. Mustapha, Advocate for R.P.**

ORDER

04.02.2019 These appeals were preferred against the common order dated 20th August, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Bengaluru Bench whereby the Adjudicating Authority taking into the consideration the allegations made by the 'Resolution Professional' with regard to fraud and misappropriation etc. disposed of the applications directing the

Central Government to refer the matter to SFIO for investigation into the allegation of fraud.

2. For disposal of the appeals, it is not necessary to go into the merit of the allegations and counter-allegations made by the parties or the defence taken by the appellants. 'Corporate Insolvency Resolution Process' was initiated against the '*Tejkamal Pharmaceuticals Pvt. Ltd.*' in which Mrs. Ramanathan Bhuvaneshwari' was appointed as 'Resolution Professional' during the 'corporate insolvency resolution process'. The transactions came to the notice of the 'Resolution Professional'. Therefore, she filed an application under Section 66 of the I&B Code wherein the impugned order was passed on 20th August, 2018 directing the Central Government to make investigation through SFIO. It was in this background the appellant suggests as to whether with regard to the whole transactions which was not covered by Section 43 r/w Sections 44 & 45, in an application under Section 66 can be entertained and whether the Adjudicating Authority had a jurisdiction to direct the Central Government in terms of Section 213 of the Companies Act. The appellants also challenged the impugned order in the light of the decision of this Appellate Tribunal in '*R.S. India Wind Energy Private Ltd. vs. PTC India Financial Services Ltd. & Ors.*' – '*Company Appeal (AT) No. 15 of 2016*' wherein this Appellate Tribunal by judgment dated 23rd December, 2016 dealing with Section 213 of the Companies Act and observed as follows:

“48. *The basic principle of justice delivery system involving offence resulting punishment is that if*

*any allegation is made by any person before a court of law or Tribunal such person is required to support the allegation by bringing on record some evidence to suggest that a prima facie case is made out and there are good reasons for seeking an order. Therefore the sentence **“supported by such evidence as may be necessary for the purpose of showing that applicants have good reasons for seeking an order for conducting an investigation into the affairs of the company”**, as mentioned below clause (a) of Section 213 is applicable in all cases and the applicant(s), whoever prefers application under Section 213, whether they belong to category as mentioned in clause (a) or clause (b), such evidence is required to be relied upon not only to justify the allegations, but also to show that there is a good reason for seeking an order, to enable the Tribunal to form its opinion.”*

3. During the pendency of the appeal, an application was moved before the ‘Committee of Creditors’ under Section 12A through ‘Resolution Professional’ which was approved by more than 90% voting share of the ‘Committee of Creditors’. The ‘Resolution Professional’ on the request of the applicant filed an

application for withdrawal of the company petition itself. The Adjudicating Authority by order dated 19th November, 2018 allowed the application under Section 12A and allowed the appellant to withdraw the application taking into consideration the terms of payment with the following direction:

“11. In the result, I.A. No. 378 of 2018 is disposed of with the following directions:

- (1) Hereby disposed of I.A No. 378 of 2018 by permitting the Resolution Professional to withdraw the C.P. No.255 of 2016 (T.P.No.106 of 2017). Accordingly, C.P No.255 of 2016 (T.P.No.106 of 2017) is hereby dismissed.*
- (2) The status of the Corporate Debtor is restored back prior to the initiation of winding up/CIRP proceedings. However, this restoration of Company would not exempt the company from any violation(s)/offence, if any committed by it prior or during the process of CIRP in the case;*
- (3) This order is also subject to the final orders to be passed by the Hon’ble NCLAT in Company Appeal (AT) (insolvency) Nos. 543-*

544 of 2018 and Appeal (AT) (Insolvency) No.571 and 598 of 2018 are filed by Juventus Healthcare Ltd. and Vipin Kumar respectively.

(4) All pending IAs including IA No. 378 of 2018 stands disposed of accordingly.

(5) No order as to costs.”

4. It is in this circumstance the counsel for the appellant and others submit that the main application has become infructuous except with prayer to set aside the direction as the company petition has already been dismissed as withdrawn. On the other hand learned counsel for the Central Government submits that liberty should be given to the Central Government to proceed with the matter independent of the order passed by the Appellate Tribunal.

5. We have heard the learned counsel for the parties, perused the impugned order and also the subsequent development as noticed and referred to above.

6. There is nothing to suggest that the Adjudicating Authority after taking into consideration certain evidence came to a *prima facie* conclusion that it is a fit case for order under Section 213 of the Companies Act. In fact it is under Section 213 that the SFIO can be directed to go for investigation, as apparent from the provisions and reads as under :

“213. Investigation into company’s affairs in other cases

The Tribunal may,—

(a) on an application made by—

- (i) not less than one hundred members or members holding not less than one-tenth of the total voting power, in the case of a company having a share capital; or*
 - (ii) not less than one-fifth of the persons on the company's register of members, in the case of a company having no share capital, and supported by such evidence as may be necessary for the purpose of showing that the applicants have good reasons for seeking an order for conducting an investigation into the affairs of the company; or*
- (b) on an application made to it by any other person or otherwise, if it is satisfied that there are circumstances suggesting that—*
 - (i) the business of the company is being conducted with intent to defraud its creditors, members or any other person or otherwise for a fraudulent or unlawful purpose, or in a manner oppressive to any of its members or that the company was*

formed for any fraudulent or unlawful purpose;

(ii) persons concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards the company or towards any of its members; or

(iii) the members of the company have not been given all the information with respect to its affairs which they might reasonably expect, including information relating to the calculation of the commission payable to a managing or other director, or the manager, of the company, order, after giving a reasonable opportunity of being heard to the parties concerned, that the affairs of the company ought to be investigated by an inspector or inspectors appointed by the Central Government and where such an order is passed, the Central Government shall appoint one or more competent persons as inspectors to investigate into the

affairs of the company in respect of such matters and to report thereupon to it in such manner as the Central Government may direct:

Provided that if after investigation it is proved that—

- (i) the business of the company is being conducted with intent to defraud its creditors, members or any other persons or otherwise for a fraudulent or unlawful purpose, or that the company was formed for any fraudulent or unlawful purpose; or*
- (ii) any person concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud,*

then, every officer of the company who is in default and the person or persons concerned in the formation of the company or the management of its affairs shall be punishable for fraud in the manner as provided in section 447.”

7. In the circumstances, we are of the view that the impugned order dated 20th August, 2018 was uncalled for and in view of the development it has no relevance.

8. Learned counsel appearing on behalf of the SFIO submits that Section 212 of the Companies Act is independent to Section 213 of the Companies Act. Even if such submission is accepted that the Central Government order for SFIO enquiry, the Adjudicating Authority cannot direct the same, except in terms of Section 213 of the Companies Act.

9. This apart, in the present case we find that the Adjudicating Authority has not given any reason to form opinion whether it is a case for investigation by SFIO or not. The appellant and others were also not given notice, asking them to state as to why the matter be investigated through SFIO. Merely on the request of the 'Resolution Professional' Impugned order has been passed.

10. For the reasons aforesaid and in view of the development as noticed above, we set aside the impugned order. However, it is made clear that we have not gone into the question as to whether transaction in question was proper or not. The question of law is left open for determination in an appropriate case. The appeal is allowed with aforesaid observations.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

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