NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Ins) No.871/2020

[Arising out of Order dated 09.08.2019 passed by National Company Law Tribunal, Bengaluru Bench in IA No.457/2018 and IA No.256 of 2019 in CP(IB) No.06/PB/2018]

IN THE MATTER OF:	**Before NCLT**	**Before NCLAT**
Ministry of Corporate Affairs Represented by Registrar of Companies, Karnataka II Floor, 'e' Wing, Kendriya Sadan Koramangala, Bangalore – 560 034	…	Appellant
Versus		
1. Shri Amit Chandrakant Shah Resolution Professional of BCIL, Red Earth Developers India Private Limited BDO Restructuring Advisory LLP, The Ruby-Level 9, New Wing, Senapati Bapat Marg, Dadar (West), Mumbai – 400 028	Applicant/RP	Respondent No.1
2. Shri Hariharan Chandrashekar, No.252, RMV, 2nd Stage, Corner Of 5th Course, 2nd B Main Road, Raj Mahal Vilas Second, Bangalore – 560 094	Respondent	Respondent No.2

3. Smt. Kanchan Kaur, … Respondent No.3
No.252, RMV,
2nd Stage, Corner
Of 5th Course, 2nd B
Main Road, Raj Mahal
Vilas Second,
Bangalore – 560 094

4. Shri Sanjay Ramanujam … Respondent No.4
3 FC, East of NGEF
Layout,
Kasthuri Nagar,
Bangalore – 560 016

5. Shri Promptech … Respondent No.5
Incorporated,
#436/20, 1st A Cross,
2nd Main, Mathikere,
Bangalore – 560 054

6. Shri Biodiversity … Respondent No.6
Conservation India
Private Limited,
No.37-1/,
R.K. Chambers,
Ground Floor,
Aga Abbas Ali Road,
Bangalore – 560 042

For Appellant: **Shri Vishal Mittal, Sr. Penal Counsel**

For Respondents: **Ms. Chaitra Bhat and Shri Sanjay Gupta, Advocates (R-1)**
Ms. Puja Priyadarshini Thakur, Advocate (R -5)

O R D E R
(Virtual Mode)

15.04.2021 Heard.

2. This Appeal has been filed by the Ministry of Corporate Affairs against part of the Order passed by the Adjudicating Authority (National Company

Law Tribunal, Bengaluru Bench) in IA No.457/2018 and IA No.256 of 2019 in CP(IB) No.06/PB/2018 under Section 66 of Insolvency and Bankruptcy Code, 2016 (IBC – in short).

3. It is stated that Respondent No.1 – Shri Amit Chandrakant Shah – Resolution Professional filed Application under Section 66 of IBC, inter alia, seeking Orders and directions that Respondents Nos.1 to 3 in the Application before Adjudicating Authority wrote off amount of Rs.1,25,45,046/- receivables from Respondent No.4 in that Application. The Resolution Professional laid particulars before the Adjudicating Authority seeking investigation into the matter. The Adjudicating Authority appears to have heard the Resolution Professional and Respondent No.1 and 4 as arrayed before it and after hearing the parties, gave directions in para – 12 as under:-

> "12. In the result, by exercising powers conferred on this Adjudicating Authority, which being NCLT, U/s 213 of Companies Act, 2013, I.A. No.457 of 2018 and I.A. No.256 of 2019 in C.P.(IB) No.06/BB/2018 are disposed of with the following directions:
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> (1) Learned Resolution Professional is directed to forward all material documents, which is connected to the present case including a Review Report prepared by S.P.R. & CO. (Chartered Accountant), copies of instant Interim Applications to the Central Government, within a period of three weeks from the receipt of the copy of the order with a copy to all concerned parties duly following principles of natural justice.
>
> (2) The Central Government is directed to refer the matter to the SFIO for further investigation into the Affairs of the Corporate Debtor namely M/s. BCIL Red Earth Developers India Private Limited, Shri Hariharan Chandrashekhar, Ms.

Kanchan Kaur, Shri Sanjay Ramanujam and M/s. Promptech Incorporated and other related Persons and Companies including Director of Companies of Corporate Debtor & related Companies, basing on the Review Report, as expeditiously as possible.

(3) The parties are at liberty to take appropriate legal course of action basing on the ultimate findings given by the SFIO in this case. No order as to costs."

4. In Appeal, the learned Counsel for the Appellant has grievance with regard to Direction No.2 where Central Government is directed to refer the matter to SFIO for further investigation. It is argued that the Adjudicating Authority could not have directly asked the Central Government to refer the matter to SFIO as there is a procedure required to be followed under Section 213(b) of the Companies Act, 2013 which requires that the Central Government on an Application made by any other person or otherwise "if it is satisfied that there are circumstances suggesting" requirements as mentioned in the Sub-Section exist after giving reasonable opportunity of being heard to the parties, may direct investigation by Inspector or Inspectors appointed by Central Government. It is argued that after following the necessary procedure which includes principles of natural justice, if the Central Government finds that the matter needs to go to SFIO, it would be at a subsequent stage.

5. It is also argued by the learned Counsel for the Appellant that the Respondent No.1 has instead of sending the matter and material to the Central Government in terms of Directions 1 and 2, sent the material directly to SFIO, which is also not correct. The Learned Counsel for the Respondent

No.1 submits that his instructions are that the Resolution Professional has sent the matter directly to SFIO.

6. The learned Counsel for Respondent No.5 is present and she submits that she has no objection if the present Appeal is allowed. Other Respondents are stated to be served but none present.

7. The Learned Counsel for the Appellant has relied on the Judgement in the matter of **"Mr. Lagadapati Ramesh Vs. Mrs. Ramanathan Bhuvaneshwari"** in Company Appeal (AT) (Insolvency) No.574 of 2019 dated 20th September, 2019 where this Tribunal had in similar matter, observed in Paragraphs – 42 and 43 as under:-

> "42. In view of the aforesaid position of law, we are of the view that the Adjudicating Authority was not competent to straight away direct any investigation to be conducted by the 'Serious Fraud Investigation Office'. However, the Adjudicating Authority (Tribunal) being competent to pass order under Section 213 of the Companies Act, 2013, it was always open to the Adjudicating Authority/Tribunal to give a notice with regard to the aforesaid charges to the Promoters and others, including the Appellants herein and after following the procedure as laid down in Section 213, if *prima facie* case was made out, it could refer the matter to the Central Government for investigation by the Inspector or Inspectors and on such investigation, if any, actionable material is made out and if the Central Government feels that the matter requires investigation through the 'Serious Fraud Investigation', it can proceed in accordance with the provisions as discussed above. Impugned order shows parties have been heard on the charges claimed by the 'Resolution Professional'.
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> 43. We, accordingly, modify the impugned order dated 16th April, 2019 and refer the matter to the Central Government for investigation through any Inspector or Inspectors."

8. The Learned Counsel for the Appellant seeks similar modification in the present directions.

9. In spite of Notice in the present Appeal, only Respondent No.1 and Respondent No.5 have appeared. We have heard the Appellant and Respondents Nos.1 and 5.

10 Section 213 reads as under:-

> "**213. Investigation into company's affairs in other cases.**—The Tribunal may,—
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> (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
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> (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,
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> 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."

11. Considering the above Section as well as the Judgement relied on by the Learned Counsel for the Appellant, it appears to us that an error has occurred when Adjudicating Authority gave directions to send matter to SFIO which needs to be corrected so that the proper procedure as required under Section 213 of the Companies Act, is followed.

12(A). For the above reasons, we allow the Appeal. In the Impugned Order, we modify sub-para - (2) of para - 12 of the Impugned Order as under:-

> "(2) The Central Government is directed to adopt procedure under Section 213(b) of The Companies Act, 2013 and Central Government may get the affairs of the Companies investigated by an Inspector or Inspectors appointed by the Central Government and take further necessary steps as per law, with regard to the investigation into the affairs of the Corporate Debtor namely, M/s. BCIL, Red Earth Developers India Private Limited, Shri Hariharan Chandrashekhar, Ms. Kanchan Kaur, Shri Sanjay Ramanujam and M/s. Promptech Incorporated and other related Persons and Companies including Director of Companies of Corporate Debtor & related Companies, basing on the Review Report, as expeditiously as possible.

(B) Resolution Professional will call back matter sent to SFIO.

The Appeal is disposed accordingly.

[Justice A.I.S. Cheema]
Member (Judicial)

[Dr. Alok Srivastava]
Member (Technical)

rs/md