

IN THE NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI BENCH-V

C.A. 95/C-V/ND/2019

C.A. 96/C-V/ND/2019

(IB) 419 (ND) /2017

IN THE MATTER OF:

M/S. Omni Media Communications Pvt. Ltd.Operational Creditor

Vs

M/S. Jay Polychem India Ltd.Corporate Debtor

AND

IN THE MATTER OF:

Mr. Ram Ratan Kanoongo

Resolution Professional

Of M/s. Jay polychem India Limited

C/o Headway Resolution and Insolvency Services Pvt. Ltd.

1006, Raheja Centre, 10th Floor, Nariman Point,

Mumbai-400 021

.....*Applicant*

VERSUS

1. Regional Director, New Delhi

Northern Region, B-2 Wing, 2nd floor, Paryavaran Bhawan

CGO Complex, New Delhi-110003

.....*Respondent No. 1*

2. Registrar of Companies, New Delhi

B-2 Wing, 2nd floor, Paryavaran Bhawan

CGO Complex, New Delhi-110003

.....*Respondent No. 2*

3. Ministry of Corporate Affairs,

5th Floor, A-Wing, Shastri Bhawan,

New Delhi-110001

.....*Respondent No. 3*

4. Mr. Sandeep Singh Madhok,

Suspended Director of Corporate Debtor,

Residing at D-97, Defence Colony,

New Delhi-110051

5. **Mr. Satinder Singh Madhok,**
Ex Managing Director,
Residing at D-97, Defence Colony,
New Delhi-110024

.....*Respondent No. 4*

.....*Respondent No. 5*

6. **Mr. Dheeraj Gupta,**
Company Secretary of Corporate Debtor
Residing at T-1200, Mangolpuri,
New Delhi-110083

.....*Respondent No. 6*

7. **CA Raj Kumar Arora,**
C/o Raj ARyana & Associates,
Statutory Auditor of Corporate Debtor
WZ-578 (New No. F-11), Rishi Naar, Shakur Basti
New Delhi-110034

.....*Respondent No. 7*

SECTION: U/S 9 OF IBC, 2016

Order delivered on: 12.06.2020

CORAM:

MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)

MR. K.K. VOHRA, MEMBER (TECHNICAL)

Present: Mr. Gaurav Srivastava, Mr. Shauray Krishna, Mr. Harsh Sethi,
Mr. Rishi Sood for R-4, Mr. Shailender Kumar for R-7 for the
Respondent
Mr. Rajenddra Beniwal, Mr. Chirag Gupta, Mr. Kumar Sumit
Shashwat Anand for the Liquidator

ORDER

AS PER MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)

1. The present applications, CA No. 95 of 2019 or CA No. 96 of 2019
filed on behalf of the Resolution Professional. Since in both the CA's

the prayer is to take penal action against the respondents, therefore, we would like to dispose of both the CA by this common order.

2. We have heard the Ld. Counsel appearing for the RP/Liquidators as well as the Respondent No. 7 of CA 95 of 2019 and Respondent No. 3 of CA 96 of 2019.
3. Ld. Counsel appearing for the RP/Liquidators in course of arguments submitted that he has also filed some documents by filing the additional affidavit on 23.01.2020 and enclosed the assessment order passed by the Income Tax Dept. and on the basis of that Ld. Counsel appearing for the RP submitted that the findings discussed in sub-paras of para 5 of the Assessment Order conclusively proved that the assessee had unaccounted cash of Rs. 55,90,50,000/-, which was deposited in the four bank accounts after the launch of the demonetization scheme. He further submitted that the assessee transferred entire cash in the bank account of M/S Myriad Exports and M/s Access Credit Solutions and finally RTGS were made to M/s Perpetual Inter Trade for purchase of bullion from MMTC Ltd. He further submitted that the bullion was finally collected by Sh. Mandeep Singh Suri, employee of Jay Polychem and handed over to the Directors or management of M/s Jay Polychem India Ltd. The assessee had subsequently created a bogus, farce, sham and premeditated MOU with M/s Myriad Exports and tried to justify the sales of agro products as source of cash deposits in the bank accounts, whereas, the sales had never taken place actually. There are ample evidences as discussed above, which prove that M/s

Myriad Exports and M/s Perpetual Inter Trade have no credibility and have been used as conduit in the entire process.

4. He further submitted that the above findings have been carefully studied and analyzed in the facts of the case and in view of the above findings a show cause notice was issued by the Income Tax department as to why an amount of Rs. 55,90,50,000/- should not be treated as unexplained and added to the income of the assessee for AY 2017-18 and If you fail to provide detailed explanation along with supporting documents with regard to the above within the stipulated time provide to you, it will be assumed that you have nothing to say in the matter and assessment in your case for AY 2017-18 of the Act will be proceeded on material facts available on record as per the provisions laid down under Section 144 of the Act.
5. Ld. Counsel for the RP/Liquidators in course of argument submitted that this Adjudicating Authority vide order 13.04.2018 trigger the CIRP and appointed Mr. Rajiv Interim Resolution Professional and subsequently in pursuant to the Resolution passed by the CoC in the second meeting of the CoC Mr. Ram Ratan Kanungo was appointed as Resolution Professional and same was confirmed by this Adjudicating Authority vide its order dated 25.07.2018 and during the period of CIRP, the RP received total admitted claim of Financial Creditor to the tune of Rs. 2835.04 crores and Operational Creditor to the Tune of Rs. 205.83 crores. He further submitted that the RP requested that the Ex-Director and Statutory Auditors to provide details and documents for a smooth functioning of the CIRP however, no records pertaining to the affairs and business to the Corporate

Debtor were provided. He further submitted that vide order dated 16.10.2018, this Adjudicating Authority directed the Ex-director, who are present before the Adjudicating Authority to go with the RP from the Tribunal to the registered office to take charge of the office and books of account but the Ex-director sent his Bodyguard, who took the RP to an open premises and stated that this is the premises where all the records relating to the affairs of the Corporate Debtor are kept. He further submitted that the RP during the period of CIRP found there has been gross mis-management in the Corporate Debtor and its Financial Statement have been in consistent and in violation of statutory provision of the Companies Act 2013, which raised suspicion of a separate arrangement was being made in order to divert the funds of the Corporate Debtor. He further submitted that in this way, there is a violation of Section 128, 129, 88, 92, 94 of the Companies Act 2013.

6. He further submitted that the applicant was not provided with any books pertaining to the affairs or financial statements of the Corporate Debtor and the same were also not available at the registered office of the Corporate Debtor.
7. He further submitted that in addition to this, Mr. Sandeep Singh Madhok (Respondent No. 4), through his submissions on 16.10.2017 have pleaded that all the books of accounts were damaged and destroyed in the floods caused due to heavy rains in September 2017 at D-37, Defence Colony, New Delhi-110024, which is not even the registered office of the Corporate Debtor. There is no intimation to

the ROC that the records have been shifted from the registered office to another office.

8. He further submitted that the applicant on perusal of financial statements of the Corporate debtor found that there are missing schedules/information from the financial statements, which are filed for FY 31.03.2015, 31.03.2016 and 31.03.2017 and those information was material in nature and a statutory requirement under the provision of Companies Act. He further submitted that the applicant has come across a number of transactions, which are enumerated in CA No. 96/2018 which amounts to fraudulent trading and transaction.
9. He further submitted that the Corporate Debtor has not filed Financial Statements and Annual Returns post the year 2015 in conformity of the relevant provisions of this section and as mentioned in the Serial No. 1 of this table , no documents were found at the registered office and so the Respondents (4-11) are responsible for violations of relevant provisions Section 92 read with Section 94 of the Companies Act, 2013.
10. He further submitted that the applicant on 06.09.2018, 22.09.2018, 01.11.2018, 12.11.2018 have requested for material information during the course of CIRP, however no satisfactory response has been received from statutory auditors till date and on request of information sought from the Statutory Auditors, the response received was:
 - (a) he does not have possession of working papers since all information and documents were kept in the registered office of the



Corporate Debtor and the same has been destroyed due to heavy rains.

(b) he is unable to produce a copy of his resignation letter since was destroyed due to a minor fire in his own office.

11. He further submitted that above facts shows that despite strict directions given by this Adjudicating Authority, the Ex-Director have failed to provide details and this Adjudicating Authority is empowered to take action upon violation of the provision of Companies Act by the director as well as statutory auditors of the Company in addition of the every officers of the Company responsible for necessary compliance as required and So action may be taken against the respondents, who are the Ex-Directors and the Statutory Auditor of the Corporate Debtor.
12. On the other hand, Ld. Counsel appearing for the respondent no. 7 of CA No. 95 submitted that the application filed by the RP is not maintainable and liable to be dismissed because it is based upon the Forensic Audit Report which itself private confidential based on hearsay. He further submitted that the application under section 66 (5) of the IB Code read with Section 424 of the Companies Act for direction under Section 88, 92, 94, 128, 129 and 210 (2) of the Companies Act is applicable to those who are Officer in default and responsible for the FIR's of the Companies like Managers, Company Secretary and Directors and Statutory Auditor is not responsible for any act or omission of the Corporate Debtors. He further submitted that without investigation and trial of the charge, the RP has leveled the charge. He further submitted that the Statutory Auditor



cooperated with the RP and whatever information and documents were in his possession was handed over to the RP and so RP has made a false statement. He further submitted that as there was no Cooperation from the Jay Polychem India Pvt. Ltd. in providing the documents for audit therefore, they were facing difficulties in finalization of the returns for the FY 2015-16 and FY 2016-17 and tax audit for the years 2016-17 was not conducted for the reasons as stated above. He further submitted since the fee was not paid to the statutory auditor, therefore, the Statutory auditor tendered their resignation on 28.11.2017 on the email ID of satinder.madhok@jaypolychem, sandeep.madhok@jaypolychem, chauhanks113@jaypolychem, whereas, the resignation sent by post was return unserved. He further submitted that last year there was some minor fire broken in the office of statutory auditor therefore, some papers including postal receipts and envelopes were burnt. He further submitted that the RP has fails to explain how the statutory auditor is responsible for this Act.

13. The Respondent No. 3 of CA 96 has also raised almost same argument as of raised by the respondent no. 7 of the CA 95 of 2019. He further submitted that the Resolution Professional reiterates his serious concerns over the veracity and sanctity of the financial statements audited by Respondent no. 3, being the Statutory Auditor of the Corporate Debtor for the years under review. On perusal of the Forensic Audit Report. Below are highlight of the few findings of the forensic Report;



A. The status of few of the Companies holding equity share of the Corporate Debtor reflects "strike-off" as per MCA records. Attention is drawn to internal page 17 of Forensic Audit Report. More specifically, status of Jay Madhok Holdings Private Limited which actually holds 44.35% equity in Corporate Debtor is "Strike-off" as per MCA records.

B. Internal page 20 and 21 of the Forensic Audit Report Shows list of Companies in which Respondent Nos. 1 and 2 hold directorships, status of most of these group companies is also shown as "strike-off".

14. An overview of the financial statements based on the findings of the Forensic Audit Report further proves that modus operandi of Respondent Nos. 1 to 4, who acted to defraud the financial creditors of the Corporate Debtor through a planned scheme of financial arrangements with its related parties, executed over a period of past 5 to 7 years. Following are few instances and summary of the findings of the Forensic Audit Report;
15. In the light of submissions raised on behalf of the parties, we have gone through the averment made in CA 95-96 of 2019 and we find that both the CA is based on the forensic audit report and in both the CA, the prayer is made to take penal actions against Ex-Director as well as the statutory auditor of the Corporate Debtor. Now the question is whether this Adjudicating Authority itself competent to take the penal action against the Ex-Director and the Statutory Auditor of the Company, therefore, at this juncture, we would like to refer the decisions upon which both the parties have placed reliance.

16. We have gone through the decisions referred by us in the aforementioned para and on careful consideration of the same, we find that the similar matter had come up before the Hon'ble NCLAT for the first time in the case of *Lagadapati Ramesh Vs. Ramanathan Bhuvaneshwari in Company Appeal no. 574 of 2019 decided on 20.09.2019* in which the Hon'ble NCLAT held that:

“18. Section 66 of the ‘I&B Code’ relates to ‘fraudulent trading or wrongful trading’, if found during the ‘Resolution Process’ or ‘Liquidation Process’ in regard to the business of the ‘Corporate Debtor’, which reads as under:

“66. Fraudulent trading or wrongful trading –

(1) If during the corporate insolvency resolution process or a liquidation process, it is found that any business of the corporate debtor has been carried on with intent to defraud creditors of the corporate debtor or for any fraudulent purpose, the Adjudicating Authority may on the application of the resolution professional pass an order that any persons who were knowingly parties to the carrying on of the business in such manner shall be liable to make such contributions to the assets of the corporate debtor as it may deem fit.

(2) On an application made by a resolution professional during the corporate insolvency resolution process, the Adjudicating Authority may by an order direct that a director or partner of the corporate debtor, as the case may be, shall be liable to

make such contribution to the assets of the corporate debtor as it may deem fit, if—

(a) before the insolvency commencement date, such director or partner knew or ought to have known that there was no reasonable prospect of avoiding the commencement of a corporate insolvency resolution process in respect of such corporate debtor; and

(b) such director or partner did not exercise due diligence in minimising the potential loss to the creditors of the corporate debtor. *Explanation.— For the purposes of this section a director or partner of the corporate debtor, as the case may be, shall be deemed to have exercised due diligence if such diligence was reasonably expected of a person carrying out the same functions as are carried out by such director or partner, as the case may be, in relation to the corporate debtor.”*

19. From bare perusal of Section 66, it is clear that if during the ‘Corporate Insolvency Resolution Process’ or ‘Liquidation Process’, it is found that any business of the ‘Corporate Debtor’ has been carried on with intent to defraud creditors of the ‘Corporate Debtor’ or for any fraudulent purpose, it is always open to the Adjudicating Authority to pass appropriate orders in terms of the said provisions on the application filed by the ‘Resolution Professional’.

20. Part II, Chapter VII deals with “offences and penalties”. Section 68 deals with ‘punishment for concealment of property’ by any officer of the ‘Corporate Debtor’, including the

Promoters within the twelve months immediately preceding the insolvency commencement date, as follows: “68. Punishment for concealment of property.— Where any officer of the corporate debtor has,—

(i) within the twelve months immediately preceding the insolvency commencement date,—

(a) wilfully concealed any property or part of such property of the corporate debtor or concealed any debt due to, or from, the corporate debtor, of the value of ten thousand rupees or more; or

(b) fraudulently removed any part of the property of the corporate debtor of the value of ten thousand rupees or more; or (c) wilfully concealed, destroyed, mutilated or falsified any book or paper affecting or relating to the property of the corporate debtor or its affairs, or

(d) wilfully made any false entry in any book or paper affecting or relating to the property of the corporate debtor or its affairs; or

(e) fraudulently parted with, altered or made any omission in any document affecting or relating to the property of the corporate debtor or its affairs; or

(f) wilfully created any security interest over, transferred or disposed of any property of the corporate debtor which has been obtained on credit and has not been paid for unless such creation, transfer or disposal was in the ordinary course of the business of the corporate debtor; or



(g) wilfully concealed the knowledge of the doing by others of any of the acts mentioned in clauses (c), (d) or clause (e); or (ii) at any time after the insolvency commencement date, committed any of the acts mentioned in sub-clause (a) to (f) of clause (i) or has the knowledge of the doing by others of any of the things mentioned in sub-clauses (c) to (e) of clause (i); or (iii) at any time after the insolvency commencement date, taken in pawn or pledge, or otherwise received the property knowing it to be so secured, transferred or disposed, such officer shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to five years, or with fine, which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both: Provided that nothing in this section shall render a person liable to any punishment under this section if he proves that he had no intent to defraud or to conceal the state of affairs of the corporate debtor.”

21. Section 69 prescribes ‘punishment for transactions defrauding creditors’ by an officer and Promoter(s) of the ‘Corporate Debtor’, which reads as follows:

“69. Punishment for transactions defrauding creditors.— [If] an officer of the corporate debtor or the corporate debtor— (a) has made or caused to be made any gift or transfer of, or charge on, or has caused or connived in the execution of a decree or order against, the property of the corporate debtor; (b) has concealed or removed any part of the property of the corporate

debtor within two months before the date of any unsatisfied judgment, decree or order for payment of money obtained against the corporate debtor, such officer of the corporate debtor or the corporate debtor, as the case may be, shall be punishable with imprisonment for a term which shall not be less than one year, but which may extend to five years, or with fine, which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both: Provided that a person shall not be punishable under this section if the acts mentioned in clause (a) were committed more than five years before the insolvency commencement date; or if he proves that, at the time of commission of those acts, he had no intent to defraud the creditors of the corporate debtor.”

22. During the ‘Corporate Insolvency Resolution Process’, if the Officer/ Promoter of the ‘Corporate Debtor’ does not disclose to the ‘Resolution Professional’ all the details of property of the ‘Corporate Debtor’ and details of transactions thereof, or any such other information as the ‘Resolution Professional’ may require and does not deliver to the ‘Resolution Professional’ all or part of the property of the ‘Corporate Debtor’ in his control or custody and does not deliver to the ‘Resolution Professional’ all books and papers in his control or custody belonging to the ‘Corporate Debtor’ and fails to inform the resolution professional the information in his knowledge that a debt has been falsely proved by any person during the ‘Corporate Insolvency Resolution Process’ or prevents the production of

any book or paper affecting or relating to the property or affairs of the 'Corporate Debtor' etc., such person is punishable with imprisonment for a term which shall not be less than three years, but which may extend to five years, or with fine, which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both, which is apparent from Section 70 and reads as follows: "70. Punishment for misconduct in course of corporate insolvency resolution process.— (1) On or after the insolvency commencement date, where an officer of the corporate debtor—

(a) does not disclose to the resolution professional all the details of property of the corporate debtor, and details of transactions thereof, or any such other information as the resolution professional may require; or

(b) does not deliver to the resolution professional all or part of the property of the corporate debtor in his control or custody and which he is required to deliver; or

(c) does not deliver to the resolution professional all books and papers in his control or custody belonging to the corporate debtor and which he is required to deliver; or

(d) fails to inform the resolution professional the information in his knowledge that a debt has been falsely proved by any person during the corporate insolvency resolution process; or

(e) prevents the production of any book or paper affecting or relating to the property or affairs of the corporate debtor; or



(f) accounts for any part of the property of the corporate debtor by fictitious losses or expenses, or if he has so attempted at any meeting of the creditors of the corporate debtor within the twelve months immediately preceding the insolvency commencement date, he shall be punishable with imprisonment for a term which shall not be less than three years, but which may extend to five years, or with fine, which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both: Provided that nothing in this section shall render a person liable to any punishment under this section if he proves that he had no intent to do so in relation to the state of affairs of the corporate debtor.

(2) If an insolvency professional deliberately contravenes the provisions of this Part the shall be punishable with imprisonment for a term which may extend to six months, or with fine which shall not be less than one lakh rupees, but may extend to five lakhs rupees, or with both.”

23. Section 71 while relates to ‘punishment for falsification of books of corporate debtor’ whereas Section 72 deals with ‘punishment for wilful and material omissions from statements relating to affairs of corporate debtor’, as quoted below: “71. Punishment for falsification of books of corporate debtor.— On and after the insolvency commencement date, where any person destroys, mutilates, alters or falsifies any books, papers or securities, or makes or is in the knowledge of making of any false or fraudulent entry in any register, books of account or



document belonging to the corporate debtor with intent to defraud or deceive any person, he shall be punishable with imprisonment for a term which shall not be less than three years, but which may extend to five years, or with fine which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both.”

“72. Punishment for wilful and material omissions from statements relating to affairs of corporate debtor. – Where an officer of the corporate debtor makes any material and wilful omission in any statement relating to the affairs of the corporate debtor, he shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to five years, or with fine which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both.” 24. On the other hand, Section 73 prescribes for ‘punishment for false representations to creditors’ by any officer of the ‘Corporate Debtor’, including the Promoters on or after the insolvency commencement date, as quoted below: *“73. Punishment for false representation to creditors.— Where any officer of the corporate debtor— (a) on or after the insolvency commencement date, makes a false representation or commits any fraud for the purpose of obtaining the consent of the creditors of the corporate debtor or any of them to an agreement with reference to the affairs of the corporate debtor, during the corporate insolvency resolution process, or the liquidation process; (b) prior to the insolvency commencement*

date, has made any false representation, or committed any fraud, for that purpose, he shall be punishable with imprisonment for a term which shall not be less than three years, but may extend to five years or with fine which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both.” 25. The allegations as levelled by the ‘Resolution Professional’, prima facie attracts not only to the provisions of Section 66, but also all the aforesaid provisions such as Section 68 ‘punishment for concealment of property’; Section 69 ‘punishment for transactions defrauding creditors’; Section 70 ‘punishment for misconduct in course of corporate insolvency resolution process’; Section 71 ‘punishment for falsification of books of corporate debtor’; Section 72 ‘punishment for wilful and material omissions from statements relating to affairs of corporate debtor’ and Section 73 ‘punishment for false representations to creditors’, if found prove.

26. No punishment for imprisonment can be imposed by the Adjudicating Authority (National Company Law Tribunal) except to pass order in terms of Section 66 of the ‘I&B Code’.

27. The ‘offences and penalties’ as prescribed and dealt with in Chapter VII and appropriate order of punishment can be passed only by way of trial of offences by a Special Court in terms of Section 236 of the ‘I&B Code’. However, no such Court can take cognizance of any offence punishable under the Act, save on a complaint made by the ‘Insolvency and Bankruptcy Board of

India' (IBBI) or the Central Government or any person authorised by the Central Government in this behalf. This will be apparent from the relevant provisions of Section 236 as quoted below: "236. Trial of offences by Special Court.— (1) Notwithstanding anything in the Code of Criminal Procedure, 1973, offences under this Code shall be tried by the Special Court established under Chapter XXVIII of the Companies Act, 2013. (2) No Court shall take cognizance of any offence punishable under this Act, save on a complaint made by the Board or the Central Government or any person authorised by the Central Government in this behalf.

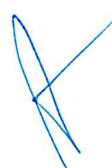
(3) The provisions of the Code of Criminal Procedure, 1973 shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session and the person conducting a prosecution before a Special Court shall be deemed to be a Public Prosecutor. (4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, in case of a complaint under sub-section (2), the presence of the person authorised by the Central Government or the Board before the Court trying the offences shall not be necessary unless the Court requires his personal attendance at the trial."

28. Normally, the 'IBBI' or the 'Central Government' are not party to a 'Corporate Insolvency Resolution Process'. Even if the matter is referred to 'IBBI', it cannot file straightaway a compliant before the Special Court without any investigation

and only if a prima facie case is made out. Therefore, the question arises as to how in such cases the matter can be referred to by the 'Adjudicating Authority' to the 'IBBI' or the 'Central Government' for trial of offences by Special Court under Section 236 of the 'I&B Code'.

29. In terms of sub-section (1) of Section 60, the 'National Company Law Tribunal' is the 'Adjudicating Authority' for the purpose of 'I&B Code'. It is having concurrent jurisdiction as the 'National Company Law Tribunal' under the Companies Act, as also as the Adjudicating Authority under the 'I&B Code'.

30. Section 212 of the Companies Act, 2013 though relates to 'investigation into the affairs of company by Serious Fraud Investigation Office' and such investigation can be made only if the Central Government is of the opinion that it is necessary to investigate into the affairs of a company by the 'Serious Fraud Investigation Office', as detailed below: "212. Investigation into affairs of Company by Serious Fraud Investigation Office.— (1) Without prejudice to the provisions of section 210, where the Central Government is of the opinion, that it is necessary to investigate into the affairs of a company by the Serious Fraud Investigation Office— (a) on receipt of a report of the Registrar or inspector under section 208; (b) on intimation of a special resolution passed by a company that its affairs are required to be investigated; (c) in the public interest; or (d) on request from any Department of the Central Government or a State Government, the Central Government may, by order, assign the



investigation into the affairs of the said company to the Serious Fraud Investigation Office and its Director, may designate such number of inspectors, as he may consider necessary for the purpose of such investigation. (2) Where any case has been assigned by the Central Government to the Serious Fraud Investigation Office for investigation under this Act, no other investigating agency of Central Government or any State Government shall proceed with investigation in such case in respect of any offence under this Act and in case any such investigation has already been initiated, it shall not be proceeded further with and the concerned agency shall transfer the relevant documents and records in respect of such offences under this Act to Serious Fraud Investigation Office. (3) Where the investigation into the affairs of a company has been assigned by the Central Government to Serious Fraud Investigation Office, it shall conduct the investigation in the manner and follow the procedure provided in this Chapter; and submit its report to the Central Government within such period as may be specified in the order. (4) The Director, Serious Fraud Investigation Office shall cause the affairs of the company to be investigated by an Investigating Officer who shall have the power of the inspector under section 217. (5) The company and its officers and employees, who are or have been in employment of the company shall be responsible to provide all information, explanation, documents and assistance to the Investigating Officer as he may require for conduct of the investigation. (6)

Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), [offence covered under section 447] of this Act shall be cognizable and no person accused of any offence under those sections shall be released on bail or on his own bond unless— (i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and (ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail: Provided that a person, who, is under the age of sixteen years or is a woman or is sick or infirm, may be released on bail, if the Special Court so directs: Provided further that the Special Court shall not take cognizance of any offence referred to this subsection except upon a complaint in writing made by— (i) the Director, Serious Fraud Investigation Office; or (ii) any officer of the Central Government authorised, by a general or special order in writing in this behalf by that Government. (7) The limitation on granting of bail specified in subsection (6) is in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail. (8) If the Director, Additional Director or Assistant Director of Serious Fraud Investigation Office authorised in this behalf by the Central Government by general or special order, has on the basis of material in his possession reason to believe (the reason for such belief to be recorded in writing) that



any person has been guilty of any offence punishable under sections referred to in sub-section (6), he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest. (9) The Director, Additional Director or Assistant Director of Serious Fraud Investigation Office shall, immediately after arrest of such person under subsection (8), forward a copy of the order, along with the material in his possession, referred to in that sub-section, to the Serious Fraud Investigation Office in a sealed envelope, in such manner as may be prescribed and the Serious Fraud Investigation Office shall keep such order and material for such period as may be prescribed. (10) Every person arrested under sub-section (8) shall within twenty-four hours, be taken to a Judicial Magistrate or a Metropolitan Magistrate, as the case may be, having jurisdiction: Provided that the period of twenty-four hours shall exclude the time necessary for the journey from the place of arrest to the Magistrate's court. (11) The Central Government if so directs, the Serious Fraud Investigation Office shall submit an interim report to the Central Government. (12) On completion of the investigation, the Serious Fraud Investigation Office shall submit the investigation report to the Central Government. (13) Notwithstanding anything contained in this Act or in any other law for the time being in force, a copy of the investigation report may be obtained by any person concerned by making an application in this regard to the court. (14) On receipt of the investigation report, the Central



Government may, after examination of the report (and after taking such legal advice, as it may think fit), direct the Serious Fraud Investigation Office to initiate prosecution against the company and its officers or employees, who are or have been in employment of the company or any other person directly or indirectly connected with the affairs of the company. (15) Notwithstanding anything contained in this Act or in any other law for the time being in force, the investigation report filed with the Special Court for framing of charges shall be deemed to be a report filed by a police officer under section 173 of the Code of Criminal Procedure, 1973 (2 of 1974). (16) Notwithstanding anything contained in this Act, any investigation or other action taken or initiated by Serious Fraud Investigation Office under the provisions of the Companies Act, 1956 (1 of 1956) shall continue to be proceeded with under that Act as if this Act had not been passed. (17) (a) In case Serious Fraud Investigation Office has been investigating any offence under this Act, any other investigating agency, State Government, police authority, income-tax authorities having any information or documents in respect of such offence shall provide all such information or documents available with it to the Serious Fraud Investigation Office; (b) The Serious Fraud Investigation Office shall share any information or documents available with it, with any investigating agency, State Government, police authority or income-tax authorities, which may be relevant or useful for



such investigating agency, State Government, police authority or income-tax authorities in respect of any offence or matter being investigated or examined by it under any other law.”

31. From bare perusal of Section 212 of the Companies Act, 2013, it will be evident that such investigation into affairs of company can be made only on receipt of a report of the Registrar or Inspector under Section 208 of the Companies Act, 2013 or on intimation of a special resolution passed by a company that its affairs are required to be investigated; or in the public interest; or on request from any Department of the Central Government or a State Government.

32. Section 212 does not empower the National Company Law Tribunal or the Adjudicating Authority to refer the matter to the Central Government for investigation by the ‘Serious Fraud Investigation Office’ even if it notices the affairs of the Company of defrauding the creditors and others.

33. However, investigation into affairs of company at the instance of the Tribunal has been prescribed under Section 213 and reads as follows: “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.”

34. In terms of clause (b) of Section 213, on an application made to it by any other person ('Resolution Professional') or otherwise (suo motu), if the National Company Law Tribunal 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 as alleged by the 'Resolution Professional' in the present case and or by; (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 etc., (which is also the allegation made by the 'Resolution Professional'), in such case,



the Tribunal 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, in such case, the Central Government is bound to 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.

35. 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.

36. For punishment of fraud in a manner as prescribed in Section 447 of the Companies Act, 2013, the matter is required to be tried by a Special Court as established under Section 435 which requires speedy trial for offences under the Companies Act, 2013. The same Court i.e. Special Court established under



Section 435 is the Court empowered under Section 236 of the 'I&B Code' for trial of such offence under the 'I&B Code' also.

37. In view of the aforesaid position of law, we hold that the Tribunal/ Adjudicating Authority, on receipt of application/complaint of alleged violation of the aforesaid provisions and on such consideration and being satisfied that there are circumstances suggesting that defraud etc. has been committed, may refer the matter to the Central Government for investigation by an Inspector or Inspectors as may be appointed by the Central Government. On such investigation, if the investigating authority reports that a person has committed any offence punishable under Section 213 read with Section 447 of the Companies Act, 2013 or Sections 68, 69, 70, 71, 72 and 73 of the 'I&B Code', in such case, the Central Government is competent to refer the matter to the Special Court itself or may ask the Insolvency and Bankruptcy Board of India or may authorise any person in terms of sub-section (2) of Section 236 of the 'I&B Code' to file complaint.

38. The National Company Law Tribunal is the Adjudicating Authority under Part-II of the 'I&B Code' in terms of sub-section (1) of Section 60, which reads as follows: "60. Adjudicating Authority for corporate persons.— (1) The Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law



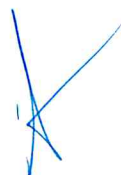
Tribunal having territorial jurisdiction over the place where the registered office of the corporate person is located.....”

39. The Civil Procedure Code is not applicable for any proceeding before the Tribunal and in terms of Section 424, the Tribunal is guided by principle of natural justice and subject to other provisions under the Companies Act, 2013 or the ‘I&B Code’ or any Rule made thereunder. The Tribunal and the Adjudicating Authority have also been empowered to regulate their own procedure.

40. In view of the aforesaid position of law also, the procedure laid down under Section 213 of the Companies Act, 2013 can be exercised by the Tribunal/ Adjudicating Authority, as held above.

41. Further, after the investigation by the Inspector, if case is made out and the Central Government feels that the matter also requires investigation by the ‘Serious Fraud Investigation Office’ under Section 212 of the Companies Act, 2013, it is open to the Central Government to decide whether in such case the matter may be referred to the ‘Serious Fraud Investigation Office’ or not. This will depend on the gravity of charges as may be found during the investigation by the Inspector.

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'.

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."

17. This decision is also followed by the Honble NCLAT in the case of *Company Appeal no. 964 of 2019 in the case of Union Bank of India through SFIO Vs. Maharashtra Tourism Development Corporation & Anr.* and in *Company Appeal No. 949 of 2019 in the matter of Vijay Pal Garg & Ors. Vs. Pooja Bahry.*

18. Now in the light of the aforesaid decisions, when we shall consider the submissions of RP then We find the submissions of RP is based on the forensic audit report and on the basis of that the RP submitted that there is financial irregularities and misappropriations

of the funds of the Corporate Debtor committed by the respondent no. 1 to 4 of CA 96 and Respondent no. 4 to 7 of CA 95 of 2019. We have gone through the averment made in the CA 95-96 of 2019 as well as the written submissions filed on behalf of the RP and respondent no. 3 and 7 of CA 95 and 96 respectively and on the basis of that, we are of the considered view that in view of the decisions, which we have referred in the aforementioned para, the Adjudicating Authority is not competent to straightway direct that the investigation to be conducted by the serious fraud investigation officer. *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 in the decisions referred in the aforementioned para.* In the light of that facts, when we have gone through the averments made in the applications filed on behalf of the RP then we find Forensic Audit Report shows that there is a indication of penal diversion of funds at page 47 of forensic audit report. Similarly there are other adverse finding given in its report which show that a prima facie case is made

out which require further investigation, therefore, in our considered view the case in hand is fully covered with the decision of Hon'ble NCLAT referred above , hence without making any comment on the merits of the facts referred in the application as well as the forensic audit reports, we think it proper to refer the matter to the Central Government for investigation of the matters by the Inspector or Inspectors to find out whether 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 any person who is involved in the formation of the Company or the Management of its including the statutory auditors have violated any of the provision of the Company Act referred and based on the facts mentioned in the application and accordingly is liable to be punished under any of the penal section of the IB Code .

19. Accordingly, we hereby refer the matter to the Secretary, Ministry of Corporate Affairs with a request to get the matter investigated by inspector or inspectors under section 66, 68, 69 71, 72, 73 and if after investigation, the Investigating Authority came to a conclusion that offence under section 213 read with section 447 of the Companies Act 68, 69, 70, 71, 72, 73 of the IB Code is/are made out then take step in accordance with the provision of law. With this both the CA stand disposed of.



20.

Let a copy of the order be sent to the Secretary, Ministry of Corporate Affairs, New Delhi, for information and needful.

Sd/-

K. K. VOHRA
Member (T)

Sd/-

ABNI RANJAN KUMAR SINHA
Member (J)