

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL**  
**PRINCIPAL BENCH, NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 869 of 2022**

**[Arising out of order dated 26.04.2022 passed by the Adjudicating Authority, National Company Law Tribunal, Cuttack Bench, Cuttack in IA 276/CTB/2019 in TP No. 36/CTB/2019 connected with CP(IB) No. 1292/KB/2019]**

**With**

**Company Appeal (AT) (Insolvency) No. 850 of 2022**

**[Arising out of order dated 26.04.2022 passed by the Adjudicating Authority, National Company Law Tribunal, Cuttack Bench, Cuttack in IA 337/CB/2019 in TP No. 36/CTB/2019 connected with CP(IB) No. 1292/KB/2019]**

**IN THE MATTER OF:**

- 1. Prasant Chandra Rath**  
**(Suspended Director of Corporate Debtor)**  
**S/o Late Dhaneswar Rath**  
**R/o Kairapari, Kotsahi, Tangi,**  
**Cuttack – 754022, Odisha.** **...Appellant No. 1**
  
- 2. Lora Mitra Rath**  
**(Suspended Director of Corporate Debtor)**  
**W/o Prasant Chandra Rath**  
**R/o Kairapari, Kotsahi, Tangi,**  
**Cuttack – 754022, Odisha.** **...Appellant No. 2**
  
- 3. Pramod Chandra Rath**  
**(Suspended Director of Corporate Debtor)**  
**S/o Late Dhaneswar Rath**  
**R/o Kairapari, Kotsahi, Tangi,**  
**Cuttack – 754022, Odisha.** **...Appellant No. 3**

**Versus**

- 1. Surya Kanta Satapathy  
(Resolution Professional)  
4 Lake Gardens,  
Near Yuvak Sangha,  
Kolkata – 700045.** **...Respondent No.1**
  
- 2. Bank of India  
Ranihat Branch, Bajrakabati Road,  
Cuttack, Odisha – 751015.** **...Respondent No.2**
  
- 3. Sidharth Ranjan  
M9/103,  
Debashram, SBI SCA, Colony,  
Kesura,  
Bhubaneswar – 751002.** **...Respondent No.3**
  
- 4. MAA Durga Rice Products Pvt. Ltd.  
Kairapuri, Kotsahi,  
Tangi, Cuttack,  
Odisha-754022.** **...Respondent No. 4**
  
- 5. Srei Equipment Finance Limited  
Plot-Y-10, Block-EP,  
Saltlake, Sector-V,  
Kolkata – 700091.** **...Respondent No. 5**

**Present:**

**For Appellants: Mr. Devesh Tripathi, Mr. Abhishek Jain, Ms. Pragya,  
Ms. Anjali Bisht and Mr. Shivansh Bhatt, Advocates.**

**For Respondents: Mr. R. N. Rout and Mr. Sabyasachi Mohapatra,  
Advocates for R-1.  
Mr. Aditya Kumar, Advocate for R-2.  
Mr. R.K. Bharani, Advocate for R-4.**

**Mr. Anirban Bhattacharya and Mr. Dhruv Sachdeva,  
Advocates for R-5.**

**J U D G M E N T**

**[Per: Barun Mitra, Member (Technical)]**

**Company Appeal (AT) (Insolvency) No. 869 of 2022**

The present appeal, filed under Section 61 of the Insolvency and Bankruptcy Code, 2016 ('**IBC**' in short) by the Appellants arise out of order dated 26.04.2022 (hereinafter referred to as 'Impugned Order') passed by the Adjudicating Authority (National Company Law Tribunal, Cuttack Bench) in I.A. No. 276/CTB/2020 arising out of TP No. 36/CTB/2019 connected with CP(IB) No. 1292/KB/2019. By the impugned order, the Adjudicating Authority on an application filed by Resolution Professional (present Respondent No.1) under Section 66 of the IBC directed the present Appellants to jointly and severally pay to the Corporate Debtor certain amounts on account of having indulged in fraudulent and under-valued transactions. Aggrieved by this, the present appeal has been preferred.

2. Put briefly, the factual matrix of the present case, necessary for deciding the appeal are as follows:

- Maa Durga Rice Products Pvt. Ltd./Corporate Debtor having come under Corporate Insolvency Resolution Process ('**CIRP**' in short), the Interim

Resolution Professional (**'IRP'** in short) was appointed on 04.09.2019 and later confirmed as Resolution Professional on 07.11.2019.

- As part of CIRP proceedings, the Resolution Professional with the approval of Committee of Creditors (**'CoC'** in short) appointed a Transaction Auditor (**'TA'** in short) on 18.11.2019 of the Corporate Debtor, that is, on the 75<sup>th</sup> day of CIRP. The TA submitted the Transaction Audit Report (**'TAR'** in short) on 23.09.2020.
- During the CIRP process, 16 meetings of CoC were held. The CoC in its 16<sup>th</sup> meeting held on 17.11.2020 approved the Resolution plan submitted on 11.11.2020 by the Resolution applicant/Appellant no. 2 who is also the suspended Director of the Corporate Debtor.
- The application for approval of the Resolution Plan was filed by the Resolution Professional in IA No 337/2020 before the Adjudicating Authority on 11.12.2020 under Section 240-A of the IBC alongwith eligibility affidavit of Resolution Applicant under Section 29- A of the IBC and MSME certificate.
- The Resolution Professional, after examination of the TAR found four transactions to be fraudulent transactions in terms of Section 66 of IBC and 7 other transactions in the nature of avoidance of undervalued transactions in terms of Section 45 of the IBC. Hence the Resolution Professional also filed IA No 276/2020 on 09.11.2020 against the Resolution Applicant and two other suspended Directors of the Corporate

Debtor/ Appellants No. 2 & 3 under Section 66 of the IBC for indulging in fraudulent and under-valued transactions.

- In IA No 276/2020, the Adjudicating Authority on 26.04.2022 after considering the matter found the Resolution Applicant and two other suspended Directors of the Corporate Debtor to have indulged in fraudulent and under-valued transactions and directed them to jointly and severally refund an amount of Rs. 13.45 crores which was invested with sister concern of Corporate Debtor, Maa Durga Thermal Power Company Ltd. (MDTPCL); refund Rs. 89,70,000/- as interest expenses on the diversion of funds to MDTPCL; refund the two write-offs of Rs. 9,45,250 and Rs. 2,71,45,710/- declaring them as fraudulent transactions; pay Rs. 1,67,79,000/- as advances paid and return Rs. 1,39,27,875/- under-statement value amount altogether totalling an amount of Rs. 20,22,67,835/- alongwith interest if not paid up within 60 days from date of order.
- Consequent upon the orders of the Adjudicating Authority in IA no 276/2020, the Adjudicating Authority in IA No 337/2020 held the Resolution Applicant not to be eligible to submit a Resolution Plan and rejected the Resolution Plan under Section 29-A(g) of the IBC. The Adjudicating Authority also discharged the Resolution Professional on finding his conduct inconsistent and disturbing since he had moved two applications, one, for approval of the Resolution Plan and, the other, against the Resolution Applicant and two other suspended Directors of

the Corporate Debtor under Section 66 of the IBC for indulging in fraudulent transactions at the same time.

3. Aggrieved by this order of the Adjudicating Authority in IA No 276/2020, the Appellants have come up in appeal.

4. The Learned Counsel for the Appellant submitted that the Adjudicating Authority had failed to consider that the application filed on 09.11.2020 by the Resolution Professional under Section 66 of IBC was not within the time limit prescribed under Regulation 35-A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulation, 2016 (**'CIRP Regulations'** in short) and hence, not maintainable and thus liable to be rejected. It has been submitted that CIRP Regulation 35-A prescribes clear timelines. It requires the Resolution Professional to form an opinion as to whether the Corporate Debtor has been subjected to any transaction under Section 43, 45, 50 or 66 of the IBC on or before the 75<sup>th</sup> day of the Insolvency commencement date (**"ICD"** in short). It further provides that if the Resolution Professional is of the opinion that the Corporate Debtor has been subjected to any such transaction covered under the aforementioned sections of IBC, he shall make such determination on or before 115<sup>th</sup> day of ICD and shall apply to the Adjudicating Authority for relief on or before 135<sup>th</sup> day of ICD. It has also been pointed out that the time-line prescribed by the Regulation 35-A is of special

significance in the present matter since here the promoters are eligible to act as  
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Resolution Applicant for the Corporate Debtor being MSME. It has been further pointed out that the Resolution Professional in the present case has filed the Section 66 application before the Adjudicating Authority after 432 days from ICD and 265 days after approval by the CoC to conduct the transaction audit and hence barred by limitation. It has also been submitted that applications for flagging such fraudulent and under-valued transactions should be made before the approval of the Resolution Plan by the CoC.

5. Challenging the impugned order, the Appellants have further submitted that the diversion of funds of the Corporate Debtor to the extent of Rs.13.45 crores to MDTPCL, a sister concern has been wrongly treated by the Resolution Professional as a fraudulent transaction. It has been contended that the said investment of funds in the sister concern was done with the knowledge of Respondent Nos 2 and 5 who are the Financial Creditors. Further, this amount has been disclosed in the audited balance sheet of the Corporate Debtor and was a commercial decision taken by the Corporate Debtor with good intentions.

6. It has also been contended that the Adjudicating Authority has wrongly held that stocks were unusually written off suddenly after initiation of CIRP of Corporate Debtor. Only damaged stock was written off and the stock damage had occurred for reasons of absorption of moisture of paddy, high temperature due to stacking, pest attack etc. Moreover, the stocks as per the books and physical position stood reconciled and, therefore, in the absence of any

discrepancy between stock register and physical stock, no charge of fraudulent transaction can be made. It has also been pointed out that the Adjudicating Authority had erred in questioning that 2352 quintals of paddy amounting to 87% of stock holding on 03.05.2019 were damaged due to arrival of storm of 'FANI'. Further it has been submitted insurance was not only claimed but claim relief also received for the damage suffered which have been adjusted against CIRP costs. The damage caused to stocks being legitimate, it was thus necessary to write off the damaged stocks.

7. As regards the advances made by the Corporate Debtor to certain persons, it has been submitted that this was done during the course of ordinary business without any malafide intention to harm the creditors. Being genuine business transactions and advances made towards purchase of paddy, such transactions have been wrongly classified as transactions defrauding creditors by the Resolution Professional.

8. Pointing out anomaly in the TAR, it has been submitted that the damaged stock of paddy has been incorrectly included in calculating the Milling Output. Since the said damaged stock was never utilized for milling purposes, it was incorrect on the part of TA to record this in 'estimation of loss' and in identifying the transaction as avoidable.

9. On the issue of undervaluation of the income of the Corporate Debtor to the extent of Rs. 2,79,18,940/-, it has been pointed out that this has happened because TAR included the market value of written off/damaged stock in calculating the revenue yield which was inappropriate. It has been further added that the TA has proceeded on certain assumptions which do not conform to business dynamics and this has led to their misplaced findings of understatement of revenue.

10. The Learned Counsel for the Appellants has submitted that the Resolution Professional had filed an application u/s 66 of the IBC before the Adjudicating Authority based on misconstrued facts and in a mechanical manner relied on the TAR without doing due diligence on his part. In support of his contention, the judgement of the Hon'ble Supreme Court in the case of **Anuj Jain, Interim Resolution Professional for Jaypee Infratech Ltd. Vs. Axis Bank Ltd.** has been cited pointing out that the Resolution Professional should have pleaded specific material facts if any transaction is sought to be brought under the mischief sought to be remedied by Sections 45, 46, 47 or 66 of the IBC. It has been further stated that the failure of the Resolution Professional in this regard is substantiated by the fact that the Adjudicating Authority had discharged the Resolution Professional for dereliction of duties.

11. The Learned Counsel for the Resolution Professional refuting these submissions stated that the delay in the filing of the avoidance application beyond  
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135 days from the date of initiation of CIRP was due to the fact that a proposal of One Time Settlement (**'OTS'** in short) of the Appellants with the Respondent No. 2 had led to stalling of CoC proceedings besides non-cooperation on the part of Appellants in timely submission of the accounts. It was therefore strenuously contended that the issue of delay raised by the Appellants against the Resolution Professional in filing the avoidance application needs to be disregarded as it amounts to their taking undue advantage of their own mistake.

12. It was also pointed out that the malafide and fraudulent intention of the Appellants is clearly established from the diversion of funds to the tune of Rs. 13.45 crores of the Corporate Debtor to the sister concern which also led to further loss due to incurring of interest. It was further stated that when the Corporate Debtor did not have sufficient reserve funds of its own to invest in another company, diversion of part loan amount received from the Financial Creditors to any other Company and that too for a purpose which was not approved by the Creditor amounted to wrongful diversion of funds to defraud creditors and fraudulent trade practice. It was also pointed out that the Appellants had indulged in the fraudulent act of unusual write off of inventory particularly the write-off of 2352 quintals of paddy on a single day by attributing it to the storm 'FANI', though this storm had landed 70 kms. away from the godown location. It was also stated that the Resolution Professional had arrived at these conclusions of fraudulent and undervalued transactions after study and appreciation of the TAR and that the Adjudicating Authority had also affirmed these findings.

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13. We have heard the submission and rival contentions of Learned Counsel for both the parties and perused the records carefully.

14. The main points which need to be addressed for determination are:-

- (i) Whether the application filed by the Resolution Professional under Section 66 of the IBC before the Adjudicating Authority was barred by limitation; and
- (ii) Whether the Appellants had indulged in fraudulent trade transactions and certain avoidance transactions and in the light of the findings thereon whether the Adjudicating Authority had committed any error while passing the impugned order dated 26.04.2022.

**Point no 1.**

15. To analyse this issue it would be in order to go through the provisions contained in Section 66 of the IBC and Rule 35-A of the CIRP Regulations.

Section 66 of IBC reads as follows:

**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 reasonable expected of 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.*

*(3) Notwithstanding anything contained in this section, no application shall be filed by a resolution professional under subsection (2), in respect of such default against which initiation of corporate insolvency resolution process is suspended as per section 10A.*

Regulation 35-A of IBC reads as follows: -

**35-A Preferential and other transactions –**

*(1) On or before the seventy-fifth day of the insolvency commencement date, the resolution professional shall form an opinion whether the corporate debtor has been subjected to any transaction covered under section 43,50 or 66.*

*(2) Where the resolution professional is of the opinion that the corporate debtor has been subjected to any transactions covered under sections 43,45, 50 or 66, he shall make a determination on or before the one hundred and fifteenth day of the insolvency commencement date,*

*(3) Where the resolution professional make a determination under sub-regulation (2), he shall apply to the Adjudicating Authority for appropriate relief on or before the one hundred and thirty-fifth day of the insolvency commencement date, whichever is earlier.*

16. A reading of Regulation 35-A cited above shows that the Resolution Professional “**shall make a determination**” on whether the Corporate Debtor had been subjected to any transaction covered under Section 43, 45, 50 and 66 of the IBC on or before 115<sup>th</sup> day of ICD during and “**shall apply to the Adjudicating Authority**” on or before 135<sup>th</sup> day of ICD for appropriate relief. The Learned Counsel for the Appellant has contended that the Adjudicating Authority had committed a mistake in allowing the Section 66 application to be filed beyond 135 days as the application was already time-barred. Having regard to the use of the expression “shall” and stipulation of time period of number of days from ICD for the Resolution Professional while undertaking any of the actions permitted under the said Regulation, it is necessary for us to address whether there is any scope for the Resolution Professional to take any action beyond the time-line stipulated under Regulation 35-A.

17. We find that this issue has been deliberated at length by this Tribunal in Company Appeal (AT)Insolvency No. 583 of 2021 as to whether the time-period prescribed in Regulation 35-A is mandatory or directory. This Tribunal held therein that the rules of statutory interpretation for finding out true nature of statutory provisions, whether the mandatory or directory, are well settled, and in doing so, relied on the observations of the Hon’ble Supreme Court in ‘**State of Uttar Pradesh Vs. Manbodhan Lal Shrivastava**’ AIR 1957 SC 912 at page 917 as under:-

*“...Hence, the use of the word ‘shall’ in a statute, though generally taken in a mandatory sense, does not necessarily mean that in every case it shall have that effect, that is to say, that unless the words of the statute are punctiliously followed, the proceeding, or the outcome of the proceeding, would be invalid. On the other hand, it is not always correct to say that where the word “may” has been used, the statute is only permissive or directory in the sense that non-compliance with those provision will not render the proceeding invalid. In that connection, the following quotation from Crawford on ‘Statutory Construction’.art.261 at p. 516, is pertinent:*

*“The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provisions but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other.....”*

Going further, this Tribunal in the same judgment also relied on the observations of the Hon’ble Apex Court in (2016) 11 SCC 31 in **“Lalaram Vs. Jaipur Development Authority”** as below:

*“106. As noticed hereinabove, it is affirmatively*

*acknowledged as well that where provisions of a statute*

*relate to the performance of a public duty and where the invalidation of acts done in neglect of these have the potential of resulting in serious general inconvenience or injustice to persons who have no control over those entrusted with duty and at the same time would not promote the main object of the legislature, such prescriptions are generally understood as mere instructions of the guidance of those on which the duty is imposed and are regarded as directory. It has been the practice to hold such provisions to be directory only, neglect of those, though punishable, should not, however, affect the validity of the acts done. At the same time where however, a power or authority is conferred with a direction that certain regulation or formality shall be complied with, it would neither be unjust nor incorrect to exact a rigorous observance of it as essential to the acquisition of the right of authority.”*

Thereafter drawing further support from the judgment of the Hon’ble Supreme Court in (2017) 16 SCC 143 in “**Surendra Trading Company vs Juggilal Kamalapat Jute Mills Company Limited and Ors**”, the Tribunal has held that timeline prescribed in Regulation 35-A of CIRP is directory and not mandatory. The relevant extracts are as reproduced below:

**“11. Questions I & II**

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..... One of the objective of the Code is to maximize the assets of the Corporate Debtor. In event the actions taken by the Resolution Professional after the timeline prescribed in Regulation 35A of the CIRP regulations are to be annulled, the undervalued and fraudulent transactions will go out of the reach of the Resolution Process, reach of the Court and shall cause great inconvenience and injustice to Corporate Debtor. Hence, we are of the view that timeline prescribed in Regulation 35A of the CIRP Regulations is only directory and any action taken by the Resolution Professional beyond the time prescribed under Regulation 35A of the CIRP Regulations cannot be held to be non-est or void only on the ground that it is beyond the period prescribed under Regulation 35A of the CIRP Regulations. There may be genuine and valid reasons for Resolution Professional not to file application for avoiding the transactions within time prescribed which are question relating to each case and has to be examined on case to case basis and if there are reasons due to which Resolution Professional could not file the Application within time the same has to be examined on merit.”

18. We may now proceed to examine the present case on merit. The salient time mile-stones of this case are herein noted. The CIRP was initiated on 04.09.2019. The TA was appointed on 18.11.2019 which was the 75th day of CIRP. The TA submitted the TAR on 23.09.2020. Prior to submission, the draft TAR was shared by the TA with the Appellants on 26.07.2020 and 08.08.2020 as at pages 346-347 of Appeal Paperbook. The Resolution Professional filed the Section 66 application on 09.11.2020. There is, therefore, a clear delay beyond 135 days in filing the Section 66 application from the date of initiation of CIRP. From material on record, we have reasons to believe that some part of this delay was on account of the CIRP proceedings having been stalled on the ground of the Appellants entering into OTS with one of the creditors, Bank of India. The creditor had informed the Resolution Professional on 09.12.2019 during the 3rd CoC meeting asking the Resolution Professional not to proceed further in the transaction audit as they were going to file withdrawal application having entered into OTS. On 17.12.2019, a letter was also issued by them to hold back the said audit work. The Resolution Professional was permitted to recommence transaction audit on 18.02.2020. It is also noted that the Appellants/Suspended Board of Directors of Corporate Debtor had taken time to provide reconciled account. There was lack of cooperation by the Suspended Directors as documents and registers were not handed over on time. The tallied accounts were submitted on 03.12.2019 which was the 90<sup>th</sup> day of CIRP and hence constituted another factor for delay. There has been delay on the part of the Corporate Debtor to also furnish requisite documents/registers to the TA to complete his appraisal as may be seen from pages 328-345 of Appeal paperbook.

The Adjudicating Authority has also noted that another reason attributed for delay has been the Covid pandemic. The Adjudicating Authority in the present case also took a view that the time-line mentioned in Regulation 35-A of CIRP Regulations is directory in nature because no consequential effect is mentioned therein for non-compliance of time limit and has relied on **Madras High Court Judgement in Shahji Purushutom Vs. UOI**. Adjudicating Authority has therefore held that the Appellants themselves took time to provide accounts and gained time on the pretext of OTS proposal which led to the delay and hence the Appellants should not be allowed to take advantage of their own wrong-doing. The delay has therefore been condoned by the Adjudicating Authority on the ground that the delay is properly and satisfactorily explained by the Resolution Professional even though there is no formal application for delay condonation. Given the above facts, and also the law laid down by the Hon'ble Supreme Court, we find no reason to interfere with the delay condonation allowed by the Adjudicating Authority in filing of the application beyond 135 days by the Resolution Professional. We hold that Regulation 35-A is directory and in the present case the application filed by the Resolution Professional cannot be rejected only on the ground of delay in filing beyond 135 days of ICD in view of explanation offered before the Adjudicating Authority justifying the delay.

## **Point No. 2**

19. We begin with the issue of diversion of funds to the sister concern by the Corporate Debtor. We find that it is an undisputed fact that the Corporate Debtor had invested an amount of Rs.13.45 crores in its sister concern MDTPCL. The  
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Learned counsel for the Appellant has, however, argued that it cannot be termed as a fraudulent act since it was a commercial decision taken by the Corporate Debtor with good intention. It has also been stated that the bonafide of the transaction is validated by the fact that the investment of funds in the sister concern was done with the knowledge of the Financial Creditors and that it has been reflected in the audited balance sheet of the Corporate Debtor. On the other hand, the TA has furnished detailed reasoning for holding the above transaction to be a case of diversion of funds for the reason that the Corporate Debtor not having sufficient surplus funds of its own and having borrowed a loan along with interest, diverted such borrowed funds which is not permitted under the Companies Act and amounts to violation of bank lending norms. The TAR further mentions that such diversion of funds is against prudent business practice as instead of yielding better returns, it saddled the Corporate Debtor with huge interest loss.

20. Given the above facts, on balance of consideration, we are inclined to agree with the Adjudicating Authority that the defence taken by the Appellants cannot detract from the plain truth that the Appellants had wrongfully diverted funds which in turn had aggravated the financial liability of the Corporate Debtor and thus an unethical act to defraud creditor tantamounting to fraudulent trade practice.

21. The other fraudulent transaction, which the Resolution Professional had pointed based on the TAR was the unusual write-off of inventory of Rs.

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3,65,90,960/- by the Appellants. The TA also raised question marks on the write-off of 2352 quintals of paddy on a single day due to the storm 'FANI' since the cyclone had made its fall at Puri which was 70 kms. away from the rice mill. Moreover, the godown was a fully covered one and there being prior prediction of the arrival of the cyclone, doubts have been raised on the version of cyclone related stock damages. In their defence, the Appellants have submitted that only damaged stock were written off and that the stocks as per the books and the physical position stood reconciled. The stock write-off, according to them, was done to present the true and fair view of the financial statements. It has been further stated that the Corporate Debtor had claimed insurance on damaged stock on account of 'FANI' storm and even received claim relief and hence it is a legitimate write-off. On the other hand, the TAR raised suspicion about the write-offs on the ground that the damaged stock was not shown separately in stock register and that the write-off started all of a sudden coinciding with the beginning of CIRP. Moreover, it has been noted that the carry over the damaged stocks/inventory have not been done across the years which was warranted by the accounting standards. Hence, the write-off was held to be unusual in nature.

22. Given the above facts, we are however inclined to agree with the Adjudicating Authority that there has been an unusual write-off of inventory as a fraudulent act and that such huge losses should have been reflected in a proper register for damaged stock. The impropriety of simply reducing the stock opening balance in the stock register to write off such staggering inventory loss is glaring. We also find

credence in the TAR that there is convergence in the timing of the loss of inventory and the initiation of CIRP and cannot be viewed as mere coincidence. Coupled with this, the Adjudicating Authority has also observed that the Appellants have failed to record the outputs from milling of raw paddy and to add them to the finished product inventory. This also finds mention in the TAR which has particularly noted that this particular trend saw its beginning since October 2018. The TAR further notes that due to this understatement, the loss estimation is to the tune of Rs. 1,39,27,875/- and that such suppression of information with regard to finished product in the inventory is a fraudulent trade practice aimed at defrauding the creditors. In sum, we agree that the Adjudicating Authority has not erred in coming to the conclusion that the Appellants had indulged in this fraudulent act to siphon off the amount and defraud the creditors of the Corporate Debtor.

23. The Learned Counsel for the Appellant has also held that the under-valuation of the income of the Corporate Debtor to the extent of Rs. 2,79,18,940/- is not correct as the TA while calculating the revenue had also included the market value of written off stocks/damage stocks and this is not a correct accounting principle. It is found that the TA in its report has found that the Corporate Debtor during the period 2009-2013 clocked a gross profit ratio of around 20% which fell precipitously to a negative figure except for financial year 2017-2018. The Adjudicating Authority has not accepted the contention of the Corporate Debtor that decrease in profit margin was due to changes in the fixed cost like increased cost of paddy, increased

tariffs etc. The sudden fall in the gross profit from around 20% to a negative figure has been found to be unreasonable.

24. On the issue of undervalued transactions, it has been admitted by the Appellants that advances were made to nine parties including one related party amounting to Rs 1,68,29,280/-. It has, however, been contended by them that these transactions were made during the course of ordinary business and included advances made towards purchase of paddy. The TAR, however, finds that these advances were made at a time when the Corporate Debtor was completely eroded with hardly any turnover/business and hence these transactions cannot be perceived to have been made in the usual course of business. Moreover, keeping in mind the fact that the Appellants failed to furnish detailed particulars of such entities to whom advances were made inspite of the TA having sought it repeatedly and that no records were submitted to establish regular business transactions with these parties in the past, there is not much to substantiate by the Appellants that these transactions of routing advances were part of an undistinguished and undisputed common flow of business. The upshot of the above is that we find that the Adjudicating Authority had sufficient and valid reasons to hold that these undervalued transactions were done with the intent to siphon off the amounts on the false pretext of advance.

25. We now summarise our findings on the two issues which we had delineated for our consideration. On the first issue, we are of the considered opinion that CIRP  
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Regulations 35-A is not mandatory and the requirement for approaching the Adjudicating Authority for appropriate relief on or before 135th day of the ICD is only directory. Keeping in view the facts of this case, we hold that there were sufficient and genuine reasons, for the application under Section 66 to be considered by the Adjudicating Authority, even though it was filed beyond 135th day of ICD. As regards the second issue, we find that the Resolution Professional having appraised the TAR, through his detailed and specific pleadings before the Adjudicating Authority has made out a proper case substantiating that the appellants have carried out certain fraudulent and under-valued transactions for fraudulent purposes and to defraud the creditors of the corporate debtor. In such circumstances, the IBC empowers the Adjudicating Authority to take decisions to maximise the assets of the Corporate debtor and in the present case, the Adjudicating Authority having been satisfied that the assets of the Corporate Debtor have been subjected to undervalued transactions/fraudulent transactions/ transactions to defraud the creditors, it has rightly issued directions for recovery of amounts from the Appellants jointly and severally for the benefit of the corporate debtor.

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26. The present appeal, filed under Section 61 of the IBC by the Appellants arise out of order dated 26.04.2022 passed by the Adjudicating Authority in I.A. No. 337/CB/2020 arising out of TP No. 36/CTB/2019 connected with CP(IB) No.

1292/KB/2019. By the said order, the Adjudicating Authority on an application  
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filed by Resolution Professional under Section 30(6) of the IBC rejected the Resolution Plan of the Resolution Applicant in view of the bar provided under Section 29-A(g) of the IBC and, inter-alia, ordered liquidation of the Corporate Debtor, which has been challenged.

27. The factual matrix of IA No. 850/2022 is the same as in IA No. 869/2022 which has been outlined at Para 2 above. Recapitulating the salient points therefrom in the context of this appeal, the Resolution Applicant submitted a Resolution Plan under Section 240-A of the IBC along with eligibility affidavit under section 29-A of IBC. The said Resolution Plan was placed before the Adjudicating Authority by the Resolution Professional under Section 30(6) of the IBC. However, the Adjudicating Authority having come to the conclusion in IA No. 276/2020 that this Resolution Applicant along with two other directors of the Corporate Debtor had indulged in fraudulent and undervalued transactions, it held that the Resolution Applicant is not eligible to submit resolution plan in view of the bar placed by Section 29-A (g) of IBC and further ordered the Corporate Debtor to be liquidated.

28. For better appreciation, we may now refer to Section 29-A (g) of IBC which reads as follows:

***“29-A. Persons not eligible to be resolution applicant – A***  
*person shall not be eligible to submit a resolution plan, if such*

*person, or any other person acting jointly or in concert with such person –*

*\*\*\*\*\**

*\*\*\*\*\**

*\*\*\*\*\**

*(g) has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the Adjudicating Authority under this Code:*

*[Provided that this clause shall not apply if a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place prior to the acquisition of the corporate debtor by the resolution applicant pursuant to a resolution plan approved under the Code or pursuant to a scheme or plan approved by a financial sector regulator or a Court, and such resolution applicant has not otherwise contributed to the preferential transaction, undervalued transaction, extortionate credit transaction and fraudulent transaction;]”.*

29. We have already concurred in the findings of the Adjudicating Authority and upheld the impugned order in IA No. 276/2020 holding that the Corporate Debtor had been subjected to undervalued transactions/fraudulent transactions/transactions to defraud the creditors by the Resolution Applicant and two other directors of the Corporate Debtor. Thus, we find no merit in the Company Appeal (AT) (Insolvency) No. 850 of 2022  
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contention of the Appellants and no reasons to disagree with the findings of the Adjudicating Authority that the Resolution Applicant is not eligible for approval of Resolution Plan in view of the bar provided under section 29-A (g) of IBC and for directing the liquidation of the Corporate Debtor.

30. In view of the above discussions, facts and circumstances, we therefore affirm the findings of the Adjudicating Authority and are of the considered opinion that there are no convincing reasons to interfere with the impugned orders in IA Nos. 276/2020 and 337/2020. We are, thus, unable to accept the contention of the Appellants. In the result, both the appeals having no merit are dismissed. No Costs.

**(Justice Ashok Bhushan)**  
**Chairperson**

**(Justice M. Satyanarayana Murthy)**  
**Member(Judicial)**

**(Barun Mitra)**  
**Member(Technical)**

**Place: New Delhi**  
**Date: 30.09.2022**  
*shashi*