

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
Company Appeal (AT) (Ins.) No. 545 of 2022

[Arising out of order dated 13.12.2021 passed by the Adjudicating Authority, National Company Law Tribunal, New Delhi in Case No. IB-1359/(ND)/2019]

IN THE MATTER OF:

Birla Financial Distribution Ltd.
Unit No. 102, 1st Floor,
Morya Landmark II, New Link Road
Near Infinity Mall, Andheri(W), Mumbai,
Maharashtra – 400053.

....Appellant

Versus

Shri Jagdish Singh Nain
Resolution Professional of HBN Foods Limited
3rd Floor, 8/28, WEA,
Abdul Aziz Road, Karol Bagh,
New delhi – 110005.

....Respondent

Present:

For Appellant: Mr. Sunil Kumar Jain, Ms. Rishika Swarup, Advocates.

For Respondent: Mr. Abhishek Naik, Mr. Mrigank Kumar, Gulafsha Kureshi,
Advocates

J U D G M E N T

[Per: Barun Mitra, Member (Technical)]

The present appeal, filed u/s 61 of the IBC Code, 2016 (**'IBC'** in short) by the Appellant arises out of order dated 31.12.2021 (hereinafter referred to as 'Impugned Order') passed by the Adjudicating Authority (National Company Law Tribunal, Delhi Bench-II) in C.P.(IB) No. 1359(ND)/2019. By the Impugned Order, the Adjudicating Authority admitted the application filed under Sections 66, 68, 69, 70 and other provisions of IBC by the Resolution Professional, directing the Respondents (including the present Appellant) to contribute jointly and severally to the assets of the Corporate Debtor which was under Corporate Insolvency Resolution Process (**'CIRP'** in short) besides directing criminal prosecution of the Respondents (including the present Appellant) under Section 69 of IBC. Aggrieved by this impugned order, the present appeal has been preferred by Respondent No. 21, who is the present Appellant.

2. The brief facts of the case which are necessary to be noted for deciding the appeal are as follows:

- HBN Foods Ltd, the Corporate Debtor was originally incorporated as a private limited company on 01.03.2013 and later converted into a public limited company in July 2013. The main objective of the Corporate Debtor was manufacture of food products and beverages but deviating there-from, it launched a collective investment scheme in August 2013 collecting money from public sans SEBI registration.

- The Investment scheme was stopped abruptly without repayment of the deposit collected from public leading to an application being filed before Adjudicating Authority for initiation of CIRP of the Corporate Debtor by Shri Ashoksing L Rajaput, representing a group of financial creditors. The above applicant had arrayed a total of 21 respondents in the matter including the present Appellant.
- The Adjudicating Authority ordered initiation of CIRP proceedings of the Corporate debtor on 14.08.2018 and appointed an Interim Resolution Professional (**'IRP'** in short). The IRP after perusal of the balance sheet of the Corporate Debtor and its transactions, chose to appoint a chartered accountant firm for carrying out Transaction Audit (**'TA'** in short) of the accounts of the Corporate Debtor.
- The Transaction Auditor accordingly carried out audit for the period from the date of incorporation of the Corporate Debtor to the date of initiation of CIRP against the Corporate Debtor and submitted the Transaction Audit Report (**'TAR'** in short) on 21.02.2020.
- The TAR besides providing details on the schedule of related party also contain findings on preferential transactions as per Section 43 of IBC, undervalued transactions as per Section 45 of IBC, extortionate credit transactions as per Section 50 of IBC and fraudulent transactions as per Section 66 of IBC.
- Based on the TAR findings, the Resolution Professional filed IA No 2844/2022 before the Adjudicating Authority for declaring certain

transactions of the Corporate Debtor with the set of 21 respondents including the present Appellant as sham and fraudulent. The Adjudicating Authority after considering the matter passed the impugned order wherein it held that the Corporate Debtor having already come under liquidation, the proceedings under section 66 of IBC be continued against the suspended board of directors of the Corporate Debtor and other related persons including recovery of Rs. 2687.27 lakhs jointly and severally from the Respondents and directed the Resolution Professional to institute criminal prosecution against them including the present Appellant.

- Aggrieved by the impugned order, the present Appellant, Birla Financial Distribution Ltd (Respondent No. 21 in IA No 2844/2020) has preferred this appeal.

3. Making his submissions, elucidating on the contents of TAR, the Learned Counsel for the Appellant stated that the TAR noted that Rs.1527.82 lakhs had been transferred to 14 related parties; around Rs.982.12 lakhs was withdrawn by 6 erstwhile/suspended Board of Directors; various other transactions were entered with independent/unidentified parties and Rs.1.25 crores worth transaction made with the Appellant being the only identifiable independent party. It was further asserted that the TAR while holding that these transactions between the Corporate Debtor and other parties including the Appellant during FY 2013-14 to 2018-19 were sham and fraudulent also observed that the veracity of the transfer transactions with related parties cannot be ascertained as they

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were not supported by documents. Similarly, the withdrawals made by erstwhile/suspended Board of Directors were also not ascertainable in the absence of any documents/information. It is also submitted that the TAR noted that the nature and purpose of transaction amounting Rs.1.25 crores with present Appellant could not be identified/ascertained in the absence of documents.

4. Contesting the findings of the IRP and the TAR in respect of transactions entered into between the Corporate Debtor and the Appellant, it was contended by the Learned counsel that the Appellant, Birla Financial Distribution Ltd (**'BFDL'** in short) had sent two letters dated 27.06.2015 and 24.08.2015 to HBN Dairies and Allied Ltd. (**'HBND'** in short) which were contractual agreements to provide "Advisory Services" in relation to reverse merger of HBND. While sending these letters, the Appellant claims to have been unaware of the Corporate Debtor having any financial disputes with the financial creditors. Further pointing out that as per their 'Legal Service Mandate', the Appellant provided advisory legal services to HBND for which fees was levied and for this purpose invoices were raised for Rs.1.25 crores. While admitting that this sum was paid to them not by HBND but by HBN Foods Ltd., it was argued that there was nothing improper in this arrangement as HBND was a holding company of the HBN Foods Ltd. Moreover, the fact that these payments can be evidenced through banking transactions, hence it is wrong on part of the TAR and IRP to view the transactions as fraudulent withdrawal to defraud creditors.

5. The Learned counsel for the Appellant admitted delay on the part of the Appellant in furnishing their response before the NCLT on the aforesaid transactions. It was however urged that the delay was because their Director having been diagnosed with COVID-19 had to undergo isolation and undergo prolonged rest due to post-Covid complications. It has also been submitted that due to COVID, the office premises of the Appellant was closed and hence not possible to file a reply before the Adjudicating Authority. Pointing out that the Adjudicating Authority held that since the Appellant did not deny or contradict the averments made against them, it tantamount to admission thereof, the Learned counsel for the Appellant stated that with the right to file their reply having been closed by the Adjudicating Authority on 13.07.2021, it has caused great prejudice to their interests.

6. Refuting these submissions, it has been contended by the Learned counsel for the Respondent that payment of Rs.1.25 crores was received by the Appellant from HBN Foods Ltd. though there was no supporting legal contract between the Appellant and HBN Foods Ltd. Advancing further arguments, it was stated that the Appellant failed to explain that while advisory services were provided by them to HBND, why they raised invoices for payment against HBN Foods Ltd. Furthermore, when there was no Board Resolution of HBN Foods Ltd. permitting the payment of fees by them to the Appellant for providing services to HBND, it was pressed by the Learned Counsel for the Respondent that these transactions

were sham and fraudulent in nature with the intent of siphoning off the money of the Corporate Debtor to defraud the creditors.

7. The Learned counsel of the Respondent also added that the Adjudicating Authority had justifiably closed the right to file reply by the Appellant after noticing that even after the matter was listed on multiple dates and several adjournments given, no reply had still been filed by them. It was also argued that it is settled law that failure to make specific denial of averments made and documents produced against any party amounts to admission. Rebutting the defence of Covid raised by the Appellant in this regard, it was submitted that Covid could have at best affected the Director only for a month, but in this case, the absence has been for far too long and that this was a case of deliberate evasion since the Appellant had no valid grounds to counter the Avoidance Transaction application.

8. We have duly considered the detailed arguments and submissions advanced by the Learned Counsel for both the parties and perused the records.

9. It is seen at pages 60-71 of the Appeal Paper Book that in the TAR, the Transaction Auditor has put in the disclaimer that **“our work was constrained on account of limited/inadequate/incomplete information and non-receivable data made available by IRP and available in the public domain.”**

In respect of their findings on cash withdrawal by the Corporate Debtor, it has

been qualified in the TAR that the “utilisation of cash withdrawal could not be ascertained due to non-availability of information and hence cannot be commented upon.” In respect of related party transactions, it has been stated in the TAR that “in absence of availability of any agreement, document or information, audited financial statement, we are unable to comment upon the commercial aspect of these transactions or whether these transactions have taken place in the ordinary course of business of the Corporate Debtor or not. However, looking to the volume and frequency of these transactions, these transactions seems to be of suspicion nature of loan entries by Corporate Debtor to its group concerns. Since no record or document was available with us that’s why we cannot comment whether the provisions of Companies Act, 2017 relating to loans and investments by the Company have been complied or not.” Similarly, in respect of preferential transactions and avoidance of undervalued transactions, the TAR notes that in the absence of information or records or limited information available in public domain, we are not able to identify and comment upon the transactions. As regards fraudulent transaction, TAR clearly notes that while their **“observations provides the possible fabrication/diversion of money collected from the public at large, in the absence of any specific information/documents or agreements or discussion with Corporate Debtor, we cannot give a conclusive opinion and treat this as a matter of further investigation subject to availability of information.”**

10. Thus on going through the TAR, it is more than amply clear that Transaction Auditor has admitted inability to comment on the transactions falling under Sections 43, 45 and 50 of IBC. Even in respect of fraudulent transactions under Section 66 of IBC, the Transaction Auditor has admitted that they are not in a position to give a conclusive opinion and that this matter requires further investigation.

11. We therefore feel that at this juncture it would be useful to study the analysis and findings of the Adjudicating Authority. That these transactions requires further investigation has also been acknowledged in no uncertain terms by the Adjudicating Authority at paras 22-28 of the impugned order, the relevant excerpts of which is as reproduced below:

“22. On perusal of the Audit Report, we observe that so far the preferential transactions under section 43, avoidance of undervalued transaction under section 45 and section 50 are concerned, in the absence of the relevant documents and information, the Auditor has shows their inability to comment on these transactions, but so far the transactions under section 66 i.e. fraudulent transactions are concerned, the Auditor at the internal page 21 and page

53 of the Auditor's Report has given a finding "in our opinion falsification/diversion of the money collected from the public at large. However, in the absence of any specific information documents for agreement for discussion with the corporate debtor we cannot give a conclusive opinion that it as is a matter of further investigation is subject to availability of the information.

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23. *When we consider the findings of the Auditor, in the light of the conduct of the respondents, who failed to file the reply, despite several adjournments then we are of the considered view that by not filing the reply the respondents number 2 to 21 have accepted the averments made in the application as well as the finding given by the auditors.*

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24. *A perusal of the provision shows that if during the corporate insolvency resolution process or liquidation process, it is found that any business of the corporate debtor has been carried out 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 or liquidator as the case may be pass an order.

25. *In terms of the provisions and the Transaction Audit Report, when we consider the submissions of the applicant then we are of the considered view that the transactions referred to in the Transactions Audit Report, comes under the purview of section 66 of the IBC.*

26. *In sequential to above, we are, therefore, of the considered view that the respondents no. 2 to 21, the suspended board of directors of the corporate debtor and other related persons were carrying on business with intent to defraud the creditors of the corporate debtor or with fraudulent purpose and accordingly, they misappropriated Rs.2687.27 lakhs and diverted to their own use with intent to defraud the creditors. Therefore, they are liable to make such contribution to the assets of the corporate debtor.*

27. *Accordingly, we direct the Respondents number 2 to 21 to make contribution of Rs. 2687.27 Lakhs (Two Thousand*

Six Hundred Eighty Seven Lakhs and Twenty Seven Thousand) jointly or severally to the assets of the corporate debtor within a period of maximum 02 (two months from the date of this order. And if they fail to pay the aforesaid amount within the prescribed period, then same shall be realized from their property/properties.

28. *Apart from that the applicant is also directed to institute a criminal prosecution against the Respondents numbers 2 to 21 under section 69 of IBC 2016 in accordance with the provision of law.”*

12. In sum, Transaction Auditor has admitted inability to comment on the transactions falling under Sections 43, 45 and 50 of IBC and in respect of fraudulent transactions under Section 66 of IBC also did not give a conclusive opinion and opined need of further investigation. This aspect was also emphatically asserted by the Learned counsel for the Appellant while making his pleadings. We find that the Adjudicating Authority has also taken due cognisance of the observations made in the TAR that in respect of the alleged fraudulent transactions under Section 66 of IBC, no conclusive opinion could be given by them and that the matter required further investigation. There is clear convergence of opinion between the Transaction Auditor and the Adjudicating Authority that further investigation was warranted in the matter. Viewed against

this backdrop, we also note that the Adjudicating Authority had indeed given several opportunities to the Appellant to deny/contravene the findings of the TAR. Be that as it may, we may not lose sight of the fact that the Appellant has explained his inability to send a response as he was Covid stricken for nearly a month and that post-Covid complications had prolonged the recuperation period. The Appellant has also pointed out that even his office set-up faced work disruption due to Covid and hence the inability to send a timely response. The abnormal situation caused by the Covid pandemic at that point of time is well recognised and benefit of doubt could well have been extended to the Appellant. The plea of indisposition due to Covid as taken by the Appellant did not quite deserve to be brushed aside and ignored. In the light of these facts we feel that the foreclosure of the Appellant's right to file reply by the Adjudicating Authority on 13.07.2021 could have been pretty well avoided to enable proper and objective examination of the issue at hand so as to arrive at a conclusive determination on the nature of transactions. We also note that inspite of the fact that TAR had clearly suggested further investigation, we do not find any steps having been taken by the Resolution Professional after receipt of the TAR to conduct further investigations into the said transactions so as to conclusively determine the fraudulent nature of transactions and establish the possible diversion of funds with the intent to defraud the creditors of the corporate debtor.

13. Given the aforesaid discussion and in the face of the given facts and circumstances, we are of the considered opinion that the real nature of

transactions in question requires deeper examination and the matter be put to rest only after the true character of the transactions is unravelled. The need for unearthing the true nature and character of these transactions has acquired special relevance in the present matter since the Adjudicating Authority has ordered initiation of criminal prosecution of the Appellant under Section 69 of IBC besides directing recovery of Rs. 2687.27 lakhs jointly and severally including from the present Appellant while fore-closing his right to reply, which prima-facie militates against the principles of natural justice.

14. For the foregoing reasons, we therefore set aside the impugned order and remand the matter back to the Adjudicating Authority for taking appropriate steps to conduct a detailed and in-depth investigation of the transactions in dispute to arrive at a conclusive opinion whether they fall within the bracket of Section 66 of the IBC without getting influenced by any comments made in this judgment and decide on merits in accordance with law. We also restore the right of the Appellant to furnish his reply/clarifications on the transactions in question in the interest of justice. However, while allowing one more opportunity to the Appellant to be heard, the Adjudicating Authority may like to fix the timeline to obviate the scope of dragging the matter any further by the Appellant. Until further investigation is completed, no further steps be taken to institute criminal prosecution against the Appellant nor enforce the recovery of any amount

towards these transactions. The appeal is disposed of on the above terms.

No order as to costs.

**[Justice Ashok Bhushan]
Chairperson**

**[Dr. Alok Srivastava]
Member (Technical)**

**[Mr. Barun Mitra]
Member (Technical)**

Place: New Delhi

Date: 02.11.2022

Shashi