IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH

I.A.No.446 of 2018 in
CP (IB) No.122/BB/2017
U/s 66R/w Section 25(2), 69,70 and other applicable
Sections of the I&B Code 2016

In the matter of:

Smt.RamanathanBhuvaneshwari,
Resolution Professional,
M/s. Bhuvana Infra Projects Private Limited
Flat No.528, K.R.Garden, First Floor,
6th Block, Koramangala,
Bangalore - Applicant

Versus

Mr.PratapKunda,
Ex-shareholder and 'Related party
Of all the group Companies
As per Forensic Audit Report& others - Respondents

Date of Order: 16th April, 2019

Coram: 1) Hon'ble Shri Rajeswara Rao Vittanala, Member (Judicial)

2) Hon'ble Dr.Ashok Kumar Mishra, Member (Technical)

Counsel/Parties Present:

For the Applicant	:	Shri G.S Kannur, Senior Counsel Smt. RamanathanBhuvaneshwari, RP
For the Respondent No.6	:	Shri Deepak
For Respondent No. 9	:	Shri Tarun Surana-9

ORDER

Per: Rajeswara Rao Vittanala, Member (J)

1. I.A No.446 of 2018 in CP(IB) No.122 of 2017 is filed by Smt. R Bhuvaneshwari, (Resolution Professional) U/s 66 of the Code, R/w Section 25(2), 69, 70 and other applicable sections of the I&B Code, by inter alia seeking to attach the personal assets of the Mr.PratapKunda (Respondent No.1),Mr.Sanjay Raj (Respondent No.2), Mr.Srinivas (Respondent No.3), who are responsible for

defrauding the creditors, in order to recover the total dues of Rs.461,163,402/- by exercising powers conferred on this Adjudicating Authority u/s 60 of the Code.

2. Brief facts of the case, as mentioned in the Application, which are relevant to the issue in question, are as follows:

1) The Corporate Debtor M/s.Bhuvana Infra projects is incorporated in the year 2011 and it is the sub -contracting Arm of its Group Companies and undertakes work contracts exclusively for its group Companies. The Group consists of M/s.Golden Gate Properties Ltd., (GGPL), M/s.Prisha Properties India Pvt. Ltd.(PPIL)and M/s.Commune Properties Pvt. Ltd., (CPIL) New Age Properties LLP and other Companies.

This is visible from the complete Turnover of the Corporate Debtor with billing breakup to the Group is as below:

Sl. No.	*Year*	*Respondent 7 M/s. Prisha Properties India Pvt. Ltd. (Rs.)*	*Respondent 6 M/s. Commune Properties (Rs.)*	*Respondent 8 M/s. Golden Gate Properties (Rs.)*	*Total as per Audited Financials (Rs.)*
1.	2011-12	39,178,307	Nil	Nil	39,178,307
2.	2012-13	177,757,510	Nil	Nil	177,757,510
3.	2013-14	368,183,037	43,211,743	46,021,782	457,416,562
4.	2014-15	500,076,670	155,746,475	344,831,376	1,000,654,522
5.	2015-16	95,241,321	210,422,005	470,192,235	775,855,561
6.	2016-17	23,739,714	29,576,977	347,863,430	414,855,234
7.	2017-18	21,945,758	65,117,153	37,681,398	124,744,309
	Total	**1,226,122,317**	**504,074,353**	**1,246,590,221**	**2,990,462,005**

2) RP also observes that the Corporate Debtor presently does notcarry any business activity and hence the company is made a ShellCompany with no employees, no business and no assets. All theassets of the Company have been diverted to the Group entities.

3) Under Section 25(2) of the Code, the Resolution Professional has to take control and custody of all the assets of the

Corporate Debtor. As there are no other assets available with the Corporate Debtor, except receivables from the Group Companies, the Resolution Plan has to come out of the Assets diverted to Group Companies and Receivables which are overdue from the group Companies.

4) *Earlier IA No. 269/18 was filed u/s 66 of the Code.*with prayer to pass orders to recover Rs.46 crores from the Group Company and its Directors. Since the Tribunal finds that RP has not submitted any Investigation Report, like Forensic Audit Report etc., to prove the fraudulent transactionsshown in the Application, RP took it up with COC.

5) *Accordingly, CoC* in its meeting held on 29th October 2018 appointed BDO India as the Forensic Auditor to conduct Forensic Audit from the period 2011 to September 2018.*Credibility of the Forensic Auditors:* BDO India LLP is one of the IBA (Indian Banks Association) empanelled Forensic Auditors. BDO India has undertaken several Forensic audit assignments including, Punjab National BankNirav Modi Group of Companies, Forensic Audit of Gitanjali Group of Companies. Also, conducted Forensic Review under IBC related requirements in Jyoti Structure Limited, Bhushan Power & Steel Limited, ABG Shipyard Limited, Educomp Solutions Limited, etc.

6) Fraudulent Trading of the business of the Business of theCorporate Debtor: The Forensic auditors have submitted a 110page Report, which has been submitted to the Hon'ble Tribunal ina sealed cover. This Forensic Audit Report has observed severalirregularities in the business of the Corporate Debtor. Some ofthe irregularities are highlighted below:

7) Following are the irregularities pointed out in the Forensic Audit Report:

    a. Related Parties' and Individuals behind these Companies:

i. Corporate Debtor M/s.Bhuvana Infra Projects (BIPPL). M/s.Golden Gate Properties Ltd. (GGPL), M/s Prisha Properties India Pvt. Ltd. (PPIL) and M/s Commune Properties Pvt. Ltd.(CPIL), New Age Properties LLP arepart of the 56 Group Companies, which are 'Related Parties'.

ii. Mr.PratapKunda and Mr.Sanjay Raj are the individuals related to all the above Group / Related Entities.

iii. Loan from HDB Financial Services being serviced by GGPL and PPIPL, also showing Group Company relationship between the entities and Corporate Debtor.

iv. Mr.Sanjay Raj is the 'Benami' Individual in whose names the properties are being purchased by the Group Companies.

b. Loans availed from Bank of Maharashtra (BOM) in a fraudulent manner and mis-utilisation of Cc facility:

i. *Few months Directorship to impress the Bank with Credentials of Group Entities:*Mr.Sanjay Raj, the Director cumKMP of the Group became director of Corporate Debtor (BIPPL) for a period of five months only during which period the first tranche of CC limit of INR 500 Lakhs was availed from BoM, by also providing personal guarantee and had hypothecated land in his name as collateral security.

ii. *Mis-use of CC facility from BoM against the terms of sanction:* The Cash Credit facility, meant for working capital, was mis-utilised by transfer to other bank accounts of BIPPL and in turn used for purchase of fixed assets for INR 79.50 Lakhs in contravention to the conditions of CC limit sanction. As per the loan sanction, the facility can be called back if there is violation in the utilization of funds.

iii. *Enhancing bank CC facility from Rs. 5 crores to Rs.10 crores to accommodate Fixed assets purchase in violation of Loan sanction Terms:* BIPPL had applied for a term loan of INR 450 Lakhs with BoM in relation to setting up of a pre-cast plant for the Commune 1 project under CPIPL in FY 2015-16. However, the term loan was rejected due to issues with the property pledged as collateral and the bank requesting additional security which BIPPL was not willing to give. Thus, it appears that during FY 2014-15, the CC facility from BoM was enhanced from INR 500 Lakhs to INR 1,000 Lakhs in order to potentially accommodate the setting up of Precast Plant which is in violation of the restrictive covenant of the loan.

iv. Further Issue of shares from ICD from the group: During FY 2015-16, the Inter Corporate Deposit ("ICD") from PPIPL was used to allot an additional 37,00,000 shares to M. Srinivas taking

the subscribed share capital to 50,00,000 shares.

Therefore, RP is of the view that this done primarily to meet the capital adequacy ratio and the requirement of promoters' contribution for the enhanced CC facility.

v. *Inflating Revenue to avail CC limit enhancement:* Revenue for FY 2014-15 inflated by INR 2,300.49 Lakhs through year-end adjustment entry. It may be noted that CC limit enhanced by BoM from 500 Lakhs to 1,000 Lakhs in FY 2015- 16, apparently based on the financial for 2014-15.

vi. *Surge in Financials in 2014-15 to facilitate Cenhancement:* The auditors observed in FY 2014-15, when then hancement of the CC facility from INR 500 Lakhs to INR 1,000Lakhs, a surge in revenue, profit, and inventory and a reduction in debtors.

c. **Financial Irregularities in the conduct of business ofCD:**

i. Identified cash deposits of INR 171.95 Lakhs into and cash withdrawals of INR 165.81 Lakhs from the bank accounts of BIPPL. The transactions pattern indicates that these could potentially be diversion of funds for generation of unaccounted cash.

ii. Identified purchases of INR 1,881.55 Lakhs from non-OEM, small time vendors and traders, which appears to be suspicious.

iii. Parking of funds of INR 346.66 Lakhs with contractors through potentially fictitious suspense account in FY 2013-14 and subsequently written-off the books of accounts of BIPPL in FY 2016-17.

d. **Round Tripping Transaction:**

i. Identified round tripping transactions from the bank accounts of BIPPL for INR 779.00 Lakhs which could potentially be accommodation entries.

e. **Asset Stripping:**

i. Inventory worth INR 941.23 Lakhs written-off during FY 2017-18 without any documentation and/ or revenue being recognized.

ii. Fixed assets sold to scrap dealers, resulting in INR 579.00 Lakhs of fixed assets being written-off in the books of BIPPL during FY 2016-17.

f. Anomalies in Accounting and Audited Financial Statements:

i. *Revenue for FY 2014-15 inflated* by INR 2,300.49 Lakhs through year-end adjustment entry. It may be noted that CC limit enhanced by BoM from 500 Lakhs to 1,000 Lakhs in FY 2015- 16, apparently based on the financial for 2014-15.

ii. *Revenue for FY 2015-16 written-off* to the extent of INR 2,437.24 Lakhs through year-end adjustment entry. However BOM enhanced CC limit from 1,000 Lakhs to 1,250 Lakhs in FY 2016-17.

iii. *Revenue for FY 2016-17 written-off* to the extent of INR 2,706.26 Lakhs through year end adjustment entry.

iv. *Undue Benefit to the Statutory Auditor:* Outstanding balance of INR 8.82 Lakhs of statutory auditor settled through transfer of plots worth Rs. 26 Lakhs to Miracle Pools Private Limited, an entity registered by the Auditor.

v. *Variance in accounts receivable* between financial statements of BIPPL and payables in the financial statements of customers of BIPPL.

vi. Revenue, cost and advances recognized for Golden Serenity project with no work order.

vii. Cost recognized and advances given in relation to Golden County project with no work order with no revenue recognized.

viii. Cash and other receipts of INR 44.91 Lakhs associated with ledger "GMD - Golden Days" in relation to work execution, with no work order and no revenue recognized; and

ix. Arm's length pricing not assessed while estimating costs and revenue for projects.

x. Inflated value of work orders issued to BIPPL by customers of BIPPL in relation to projects Commune and Orchids.

8) **Modus Operandi Adopted:**From the above observations of the Forensic audit Report, RP submits the following fraudulent intensions and actions:

a. *The Corporate Debtor was set-up for fraudulent purposeand to defraud the creditors:* This Golden Gate Group ofCompanies with a fraudulent intention set up the CD forvarious fraudulent transactions, namely, to somehow avail bank loans, to generate unaccounted cash, to manage roundtripping of funds with respect to group Companiesbusinesses, for diversion of funds amounting to fraud, etc.

b. *Wrong-Purpose shown to ensure loan sanction:* The CDand its Directors applied for enhancement of CC facility for working capital with a fraudulent intention to use the same for purchase of Fixed Assets as the Term loan applied for Capex was rejected by Bank.

c. *Manipulated Financials to ensure loan sanction*

d. *Increased the losses in 2016-17* through fictitioustransactions to reduce the statutory liability and also to justify default to banks.

e. *Liquidated Assets/Inventory* in a planned manner in2016-17 to make the Company a Shell.

f. *Facilitated to file u/s 7 of the Code with the sole aim to liquidate the CD:*Mr.Sanjay Raj, one of the common Directors in all the groupCompanies resigned from directorship of all the customers of BIPPL i.e. GGPL, PPIPL, CPIPIL and from New Age PropertiesLLP in 2017, the year when New Age Properties LLP filedanapplication on BIPPL under Section 7 of the IBC.

Planned Resignation of original Shareholder cumDirectors: To avoid responsibility on loans becoming NPAall Directors of CD resign around the same time in Feb/March2017 and Dummy Directors were brought in to meet MCA requirement.

g. *Statutory Auditors of the Group-Companies used for the entire Modus Operandi:* The Director cum Statutory Auditorof the Group Companies Mr.Rajashekar and Mr.Jayatheertha, the Statutory Auditor have been used for their expertise to facilitate the entire modus operandi.

9) Total Dues to the CD:

As per the Audited Results as on 31st March 2018, The Corporate Debtorhas overdues from its Group Companies, in the form of Receivable of Rs. 33.72 crores and dues towards Assets worth Rs.1.52 Crores which were distributed to the Group Companies. Details are below:

Group Company Name	*Net Receivables Rs.*	*Assets of CD distributed to the Group Rs.*	*Total Dues (Rs.)*
M/s. Commune Properties India Pvt. Ltd. (Respondent 6)	46,322,665	13,375,380	59,698,045
M/s. Golden Gate Properties Ltd. (Respondent 8)	41,804,526	1,801,180	43,605,706
M/s. Prisha Properties India Pvt. Ltd. (Respondent 7)	233,937,377		233,937,377
Total	**322,064,568**	**15,176,560**	**337,241,128**

10) Also, as per Audited results for 2017-18, the rest of the assets shown in the books have been distributed to the Group Companies to the extent of Rs.1,51,76,560/- (Rs.1.52 Crores), duly confirmed by the Director of the Company and the rest of the assets worth Rs. 7,441,849 is not found physically. Also, as pointed out in the audit report 2017/18and also confirmed in the forensic audit report, the inventory of amountRs.941,23,192/- have been written off without any revenue recognized/no invoice raised.

Hence, the minimum amount due from the Group to the Corporate Debtor amounts to:

Sl. No.	*Details*	*Amount overdue from Group (Rs.)*	*To be recovered from the Directors of CD (Rs.)*	*Total amount due (Rs.)*
1.	Receivables overdue	322,064,568		322,064,568
2.	Assets with Group	15,176,560		15,176,560
3.	Assets not found		7,441,849	7,441,849
4.	WDV of Assets sold to scrap dealers and money siphoned off		22,357,233	22,357,233
5.	Inventory consumed, not invoiced		94,123,192	94,123,192
	Total dues from Group	**337,241,128**	**123,922,274**	**461,163,403**

11) The way the business was conducted right from the inception in2011 to till date as shown in the forensic audit report clearly shows the fraudulent intention and actions of the parties to defraud the creditors, justifying the application u/s 66, seeking orders directing the Group Companies/other Related partieswho are individuals, to remit the overdues, consisting of the Receivables and value of Assets and Inventory distributed to the Group Companies, to pave way for the Resolution Plan underCIRP.

3. The application is opposed by the Respondent No.3 by filing separate reply dated 20.03.2019 by inter alia contending as follows:

1) The instantapplication is not maintainable either in law or on facts, and thus it is liable to be dismissed in limine on this ground alone.
2) It is true that the Company M/s. Bhuvana Infra Projects was incorporated in the year 2011. However, it is not correct to state that it is a sub-contracting arm of its group Companies. The Companies has its own objects and functions within the ambit of objects as stated in the Memorandum & Article of Association. Hence, it is denied that the Company M/s.Bhuvana Infra Projects (herein after referred to as Company for brevity) exclusive for the group Companies obviously RP has not looked into the records and has made bald and frivolous allegations. It is asserted that the Applicant is the New Age Properties LLP itself is not a Group Company belied this claim. However, the RP is put to strict proof of the allegations made in this paragraph.
3) It is admitted that the RP has to take control of all the assets of the Corporate Debtor but it is false to state that there are receivables overdue from the Group Companies. It is pointed out that the Tribunal rejected earlier I.A No.269/2018 with an observation that the appropriate from for initiating fraudulent actions is Criminal Court and also granted liberty to RP to initiate Criminal Proceedings in accordance with law.

4. The Respondent No.4 has also opposed the application by filing reply dated 20.03.2019 by inter alia contenting as follows:
   1) The instant Application filed by the Applicant i.e the RP is a blatant abuse of process of law and is squarely hit by the doctrine of Res-Judicata. And the same is not maintainable either on law or on facts and it is liable to be dismissed at the threshold without going into the merits of the case.
   2) The Tribunal has passed an order dated 24.10.2018, by inter alia observing as under:

"As stated supra, the COC in its meeting dated 06.10.2018 has taken a decision, authorizing RP to initiate Criminal Proceedings for the alleged recovery or dues amounting of Rs.46 Crores defrauded by the group Company of the Corporate Debtor. The learned RP has not made out any prima facie case so as to take cognizance of the alleged discrepancies under Section 66. There cannot be parallelproceedings before the Tribunal and Criminal Court. Moreover, appropriate forum for initiating fraudulent actions is Criminal Court. Therefore, it is for the RP to initiate appropriate Criminal Proceedings as per the decisions of COC as states supra.

Therefore, it is contended that the order has passed by the Tribunal has reached its finality as the same was not questioned before the Hon'ble NCLAT."

3) It is alleged that the Resolution Professional, who is expected to have at least the basic knowledge of Law participate before the NCLT, is completely ignorant of the basic provisions. It is contended that once an application/petition is decided and disposed of by the Tribunal, a subsequent application under the same provisions seeking the same relief cannot be filed. Therefore, it reflects the casual, incompetent and lackadaisical approach of the Resolution Professional but also expressly manifests her utter disregard to the orders passed by the Hon'ble Adjudicating Authority.

4) The Learned Counsel for Respondent No.4 has relied upon the judgements given by the Apex court in *Arcelor Mittal Vss. Satish Kumar Gupta and Ors.,Rajputana Properties Private Limited Vs. Ultratech Cement Limited &Ors., Swiss Ribbons Pvt. Ltd. &Anr. Vs. Union of India &Ors., K.SashidharVs. Indian Overseas Bank &Ors., Innovations Private Limited Vs. Kirusa Software Private Limited. And the*

object of the Code is to maximize the value of the Corporate Debtor. It shall be the endeavour of the RP to conduct the entire process with a view to find a resolution and maximize the value of the Corporate Debtor. However, in the instant case, the effort, focus and sole objective of the RP was to witch hunt the erstwhile promoters of the Corporate Debtor.

5) The RP has miserably failed to perform the acts and take the steps as required under the CIRP Regulations within the prescribed timelines. The RP has not taken a single step which can be seen as a step towards insolvency resolution of the Corporate Debtor. Therefore, they sought to dismiss this Application.

5. The Respondent No.6 has filed objection in this application dated 11.04.2019, by inter alia contending as follows:

1) The above Application is not maintainable either in law or on facts and it is liable to be dismissed in limine on this ground alone.

2) It is true that the Company M/s. Bhuvana Infra Projects was incorporated in the year 2011. However, it is not correct to state that it is a sub-contracting arm of its group Companies. The Companies has its own objects and functions within the ambit of objects as stated in the Memorandum & Article of Association. Hence, it is denied that the Company M/s.Bhuvana Infra Projects (herein after referred to as Company for brevity) exclusive for the group Companies obviously RP has not looked into the records and has made bald and frivolous allegations. It is further stated that the fact that the Applicant is the New Age Properties LLP itself is not a Group Company belied this claim. However, the RP is put to strict proof of the allegations made in this regard. It is true that the RP has to take control of all the assets of the

Corporate Debtor but it is false to state that there are receivables overdue from the Group Companies.

3) It is denied that the Forensic Audit Report has observed several irregularities in the business of the Corporate Debtor. The Audit report made without calling for any clarifications from the Respondents is per se unacceptable in the eye of law. While conducting a Forensic Audit Report it is important that the Auditor should approach the case from both the perspectives. Whereas, the Audit report submitted to this Hon'ble Tribunal is a one sided report and therefore, does not hold good in the eye of law and the entire exercise of appointing the Forensic Auditor BDO by the COC is orchestrated by the RP only to protect the interest of Lender namely, Bank of Maharashtra from its failure to comply with the terms of sanction before the release of Loan Funds. It is further allegedthat the Resolution Professional had hidden the fact from the Tribunal that Forensic Audit Report has made 6 Disclaimers in Page No.111 of their Report.

4) It is further alleged that taking into consideration disclaimers of the BDO India LLP in Forensic Audit Report dated 14.12.2018, the claims made by the RP are solely dependent on Forensic Audit Report turn out to be assumptions and presumptions. It is alleged that time and again the Resolution Professional is making false allegations and also false representations.

6. The Respondent No.9 has filed statement of objections dated 16.02.2019, by inter alia contending as follows:

1) The present application is filed with the sole intention of harassing the Respondent No.9. It lacks bonafides and is liable to be dismissed in limine.

2) The present application has been filed seeking reliefs attachment of assets of Respondent No.1,2,3,6,7 and 8 under section 66 of the I&BC, 2016 and thus no relief was asked for against him.

3) The Forensic Auditor has relied upon data, documentations, information and explanation that has been provided till 30th November, 2018 whereas substantial discussion and replies were given to the queries of the Auditor on 4th of December 2018 by this Respondent which has been ignored by the Auditor and finds no reference in the FAR. The FAR was conducted based on the information provided by alleged information provided by the Resolution Professional and the alleged information has not been verified independently or based on any documentation. The FAR is completely based on hearsay information and is inconclusive due to absence of adequate supporting documents. Thus, an application filed on an audit conducted without any material or records is liable to be dismissed.

4) On account of the aforesaid limitations and disclaimers the present application has been filed on assumptions and presumptions of the Resolution Professional. The claims made in the Application are not affirmative as the conclusions drawn by the Resolution Professional are based on the so called accounting anomalies allegedly carried out by this Respondent.

5) The Respondent No.9 has been made a party in the present Application as he was the statutory auditor of the Company. It is contended that the Statutory Auditor has no responsibility other than Auditing the Books of the Company and does not render any Advisory Services as alleged. It is alleged that the Statutory Auditor's expertise was used by the Borrower in seeking enhancement of loan

the alleged "modus Operandi". The Statutory Auditor does not render any advisory services, Statutory Auditor does not run the Company, nor its affairs and the Role of the Statutory Auditor does not run the Company, nor its affairs and the Role of the Statutory Auditor comes only at the end of the year when the Final Accounts of the Company are adopted by the Board of Directors for his Review and Report. The Statutory Auditor accordingly has confined his role only to Audit the books of the Company for the Financial Year 2014-15 and 2015-16. The Statutory Auditor has not rendered any Service other than the Statutory Audit. The Statutory Auditor was at no point of time was involved either in preparing the CMA data or in preparing the project report nor was involved in any other Bank finance relating activity. The Respondent No.9 is not aware of the alleged loan transactions with Bank of Maharashtra and its subsequent enhancement. The Resolution Professional has made uncalled allegations against the Respondent to protect the bank official who have sanctioned the loan and its subsequent enhancement. It is evident that the Resolution Professional has provided selective information to the forensic auditor and hence the FAR does not disclose the role of the Bank officials in sanctioning of loans and its subsequent enhancement.

7. Heard Shri G.S.Kannur, learned Senior Counsel for the Applicant along with Ms.R.Bhuvaneshwari, learned Resolution Professional and Shri Deepak, learned Counsel for Respondent No.6, Shri TarunnSurana, and learned Counsel for Respondent No.9. We have carefully perused the pleadings of the parties along with extant provisions of Code and the law on the issue.

8. Shri G.S.Kannur, the Learned Senior Counsel for the Applicant,while reiterating the various averments made in the

pleadings and also relied upon the following judgements in support of his case:

- Bikram Chatterji and others Vs. Union of India and others[1]
- Bikram Chatterji and others Vs. Union of India and others[2]
- PushpakRanjeetmalSinghvi Vs. M/s.Icon Builders and developers and others[3]
- SubrataChattoraj Vs. Union of India[4]
- IDBI Bank Limited Vs. JaypeeInfratech Limited[5]
- Mr.AjithKunimalVenugopal and others Vs. Oil Tools International Services Private Limited[6]
- Birla Cotsyn (India) Limited Vs. BSE Limited[7]
- UCO Bank Vs. M.VenuRanganath[8]
- VaishAggrawal Panchayat Vs. Inder Kumar and others[9]

He has further contended that the case is not barred by principles of res-judicata as alleged by the Respondent on the ground that criminal case and Section 66 of the Code is totally different. Since the decisions in earlier IA was not decided on section 66, the present application is maintainable.

9. I.A No.446 of 2019 is listed for hearing on various dates viz. 19.12.2018, 20.12.2018, 04.01.2019, 08.01.2019, 06.02.2019, 27.02.2019, 20.03.2019, 01.04.2019, 12.04.2019, & 16.04.2019, andit was adjourned on these dates at the request of parties on one ground and the other.

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1 2018 SCC Online SC 1371

2 2018 SCC Online SC 3132

3 2017 SCC Online BOM 2571

4 Manu/SC/0453/2014: (2014)8 SCC 768

5 CA No.26 of 2018

6 Company Appeal (AT) No.338 of 2017

7 Appeal No.228/2018

8 (2007) 13 SCC 251

9 2015 SCC Online SC 751

10. By perusal of the pleadings of the parties, the following issues arise for consideration:

(1) Whether the instant application petition is maintainable U/s 66R/w Section 25(2), 69,70 I&B Code 2016 ;

(2) Whether the evidence produced by the Applicant like Forensic Report is sufficient evidence to order to recover the alleged fraud stated to have been committed by the Respondents;

(3) Whether proceedings under Code, which are admittedly summary in nature , can enter into complicated issues like fraudulent transactions , irregularities etcso as to fix the quantum of amount to be recovered from those transactins;

(4) Whether transactions like fraudulent trading or wrongful trading as contemplated U/s 66 of Code and other provisions can be invoked under the existing provisions of Code without further discreet enquiry to be made by institutions like SFIO.

11. Before adverting to fundamental issues raised in the case, it is necessary to advert to casual applications being filed by the Learned Resolution Professional filedwithout raising any substantial questions of law and facts. As stated supra, the Learned Resolution professional has earlier filed IA No.269 of 2018 against three Ex Directors namely C.D.Sanjay Raj, M.Srinivas, L.Ramesh ,B.S.Rajasekhar and three other Companies, U/s 66 R/w 25(2) of Code by inter alia seeking to attach personnel properties of Respondent No. 1 to 4, who are personal guarantors for defrauding Creditors to the tune of Rs. 46,11,63, 402/The Tribunal disposed of said IA vide an order dated 24.10.2018, by inter alia stating as follows;

"As stated supra, the COC in its meeting dated 06.10.2018 has taken a decision, authorizing RP to initiate Criminal Proceedings for the alleged recovery or dues amounting of Rs.46 Crores defrauded by the group Company of the Corporate Debtor. The learned RP has not made out any

prima facie case so as to take cognizance of the alleged discrepancies under Section 66. There cannot be parallel proceedings before the Tribunal and Criminal Court. Moreover, appropriate forum for initiating fraudulent actions is Criminal Court. Therefore, it is for the RP to initiate appropriate Criminal Proceedings as per the decisions of COC as states supra."

The above order stated to become final as it was not carried to Hon'ble NCLAT. However, again the present application is filed stated to be revised Application of earlier IA No. 269 of 18 dated 5thSeptember, 2018, under same Sections by seeking same relief, after adding some other respondents, by interalia seeking to attach personal assets of Respondent No. 1 to 3 without disclosing as what are properties to be attached basing the finding of Forensic Audit report.

12. It is true that once an application/petition is disposed of finally, normally another application /petition is not maintainable on the same issue basing on the principles of Res judicata. However, basing on the material evidence like Forensic Audit Report submitted by the Applicant, we are not inclined to throw the application on technical grounds and to decide the matter on merits of the case. This Application is mainly basing on the forensic audit report dated 14.12.2018. In order to rely upon the findings given in the Report, we have carefully perused it and the following are shortcomings are noticed in the report:

1) Please note that the ensuing pages in the report are a version of the final deliverable/report and should not be construed as a final deliverable/report from BDO India. This report is subject to internal quality and risk review of BDO India LLP
2) The receivable as per the Forensic Audit Report are in excess in INR 70 Crores. Why is only amount of INR 46,11,63,402/- being claimed? Further the calculation as provided in Page 15 of the IA 446 of 2018 state receivables due as INR

322,064,568/- whereas the Forensic Audit Report states that the total amount receivable from group Companies is INR 3,172.25 Lakhs.

3) Page 2 of the Forensic Audit Report states:

"This Report is prepared solely for the client information. The Report is intended for distribution only to the Bank of Maharashtra and may not be relied upon by other parties ("Third Party"). Neither this deliverable nor its contents may be distributed to, discussed with, or otherwise disclosed to any third party without prior written consent of BDO India. We accept no responsibility or liability to a Third Party to whom our report may be shown or in whose hands it may come. The report should not be published or reproduced in part or whole without prior written consent from us."

4) Page 10 of the Forensic Audit Report states:

"in respect of the bank accounts statement provided by BoM for loan account of BIPPL, the information appearing against certain transactions were not sufficient to ascertain the name of the payee and nature or transaction. We are not able to ascertain the beneficiary details for 750 transactions out of total 33,858 transactions appearing in loan account of BIPPL in BoM books. The 750 transactions aggregates to total credits (receipts) of INR 817.77 Lakhs and to total debit (payment).

5) Moreover, principles of natural justice demands that concerned party/parties should be put on notice before passing any order/finding on the allegations. Admittedly, the concerned parties are not involved except one or so, which cannot be taken to be granted that concerned parties are given sufficient opportunity to defend themselves. Therefore, we are of the primafacie view that Forensic Audit Report in question cannot be taken as conclusive evidence to order recovery of the alleged amount involved in the impugned transactions.

13. It is also to be noted that it is M/s New Age Real Properties, which has initiated CIRP proceedings against Corporate Debtor on the ground that it had committed default for Rs. 65,00,000. Surprisingly, Bank of Maharashtra, which is leading member of COC by holding 93%, has not come forward on its own with any details of investigation report on the alleged irregularities stated to have been committed by the Respondents. Bank of Maharashtra is thus only encouraging and assisting the learned Resolution professional to take action sitting on back seat. Therefore, it is also further necessary to investigate the role of Bank of Maharashtra in sanctioning the loan in question and its failure to detect the alleged diversion of funds bythe Corporate Debtor.

14. The Learned Resolution professional has not placed any substantial material before the Tribunal to show as what course of action she has taken in pursuance to the order dated 24thOctober, 2018 passed in IA No. 269 of 2018 except merely contending that that Criminal action is separate and Section 66 proceedings are different and thus there is no bar for the applicant to file an another application in view of new material i.e Forensic Audit Report available. It is true Section 60(4) of Code confers powers on the Adjudicating Authority with all the powers of Debt Recovery Tribunal for the purpose of CIRP, Liquidation or Bankruptcy etc. However, basing on various

allegations of fraud on the part of the Ex- Directors of Corporate Debtors since the year 2011, the matter requires further investigation basing on the Forensic Audit Report.

15. In the instant context, it would relevant to refer similar case decided by the Adjudicating Authority vide order dated 20.08.2018 passed in I.A No.134 and 31 of 2018 CP (IB) No. 255/BB/2016(TP No. 106 of 2017 is filed by same Smt. R.Bhuvaneshwari, Resolution Professional against Shri Vipin Kumar Promoter of Tejkamal Pharmaceuticals Pvt. Ltd, U/s 66, R/w Rule 25(2) of the I&B Code, 2016, by inter alia seeking to quash impugned sale transactions as null and void as its violates all related laws of the land and is opposed to public policy etc. The Adjudicating Authority, after considering the matter, has disposed of the said IAs, by referring the matter to SFIO to test the veracity of allegations and counter-allegations made by the parties.

16. Aggrieved by the said common order dated 20th August, 2019 of the of Tribunal to refer the matter to SFIO, the parties have preferred Company Appeal (AT) (Insolvency) Nos.543-544 of 2018. While the Appeals are pending,the learned Resolution Professional aftercompromising the fraudulent transactions in questions,has filed I.A No. 378 of 2018 U/s 12A of the Code R/w Regulation 30A of the IBBI (IRP for Corporate Persons) Regulations, 2016, by inter alia seeking to withdraw the main Application/Petition on the ground that CIRP process was completed by settling claims of all creditors of the Corporate Debtor. Therefore, the Tribunal has disposed of the C.P No.255 of 2016 (T.P No.106 of 2017), by an order dated 19th November, 2018 by permitting the Resolution Professional to withdraw the main Company petition.

17. By taking into consideration of the above issues, the Hon'ble NCLAT allowed the said Appeals by setting aside the impugned order dated 04.02.2019 with following observations:

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

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

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

18. As stated supra, the learned RP has made several allegations of fraudulent transactions basing Forensic Audit report. Similarly, the Respondents also have raised several objections and strongly denied the allegations made by the learned RP. However, in order to adjudicate the issue by this Tribunal, it is necessary to refer to matter to SFIO, to test the veracity of allegations and counter allegations made by the parties. The Central Government established SFIO to investigate frauds relating to Company. As per Section 212, the Central Government is empowered to cause to investigate into the affairs of the Company by SFIO, basing on the receipt of report of Registrar or inspector u/s 208 in public interest or on request from any department of the Central Government or a

State Government. Section 213 also empowers the Tribunal to order investigation, if it is of the opinion that the business of the Company is being conducted with intent to defraud its Creditor, members, or any other person etc. Therefore, we are of the prima facie view that findings given in Forensic Audit Report only prima established the fraudulent transactions in question. Therefore, it is necessary to conduct further investigation by SFIO in the affairs of Company basing on the findings given in Forensic Audit Report, after affording proper opportunity to concern opposite parties to defend them. Hence, we are inclined to refer the matter to SFIO for further investigation by invoking powers conferred U/s 212/213 of the Companies Act, 2013 and thereafter, aggrieved party can take appropriate legal course of action.

19. In the result by exercising powers conferred on this Adjudicating Authority, which being NCLT, U/s 213 of Companies Act, 2013, I.A No.446/2018 in C.P(IB) No.122/BB/2017 is disposed with the following directions :

1) Learned Resolution Professional is directed to forward all material documents, which is connected to the present case including the Forensic Audit Report dated 14.12.2018, the Central Government, within a period of three weeks from the receipt of the copy of the order.
2) Learned Resolution Professional is also directed to furnish all the documents forwarded to the Central Government, to all parties/other side duly following principles of natural justice.
3) The Central Government is directed to refer the matter to the SFIO for further investigation into the Affairs of the Corporate Debtor, Bank of Maharashtra and other related Companies including Director of Companies of Corporate Debtor & related Companies and officials of Bank of Maharashtra basing on the Report of Forensic Audit Report, as expeditiously as possible.
4) Bank of Maharashtra is also directed to extend full assistance to the SFIO to complete the investigation as expeditiously as possible.

5) The parties are at liberty to take appropriate legal course of action basing on the ultimate findings given by the SFIO in this case.
6) The prayer as sought for in the application stand disposed of in the light of above directions.
7) No order as to costs.

(ASHOK KUMAR MISHRA)
MEMBER, TECHNICAL

(RAJESWARA RAO VITTANALA)
MEMBER, JUDICIAL

Raushan