

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.104 of 2024

(Arising out of Order dated 02.01.2024 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench-I in IA No.430 of 2023 in C.P. (IB) No.1981/MB/2019)

IN THE MATTER OF:

Sangeeta Jatinder Mehta & Anr.

...Appellants

Versus

Kailash Shah RP of New Empire
Textile Processor Pvt. Ltd.

...Respondent

Present:

For Appellants : Ms. Sowmya Saikumar, Mr. Siddharth Praveen Acharya, Mr. Surya Kant Vyas and Mr. Siddharth Vaid, Advocates

For Respondent : Mr. Gaurav Mitra, Ms. Honey Satpal, Ms. Aishwarya Modi, Mr. Kanishk Khullar, Ms. Pooja Singh, Mr. Akash Agarwalla, Advocates.

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal has been filed by two Appellants challenging order dated 02.01.2024 passed by National Company Law Tribunal, Mumbai Bench-I in IA No.430 of 2023. By the impugned order, the Adjudicating Authority has declared transfer of two Flats in favour of the Appellants (Flat Nos.903 and 904 of Tirupati Apartment), void and subject to charge. The Adjudicating Authority further directed that Appellants shall be jointly liable to contribute to the assets of the Corporate Debtor (“**CD**”) to the extent of amount involved in satisfaction of charge, if any, created in favour of the Lenders of Appellants (Respondent No.3 and 4 to the Application). The Appellants aggrieved by this order has filed this Appeal.

2. Brief facts necessary to be noticed for deciding the Appeal are:
- i. New Empire Textile Processor Private Limited owned the Flat Nos.903 and 904 in Tirupati Apartment, Thane (West). The Flats were purchased by Registered Sale Deed dated 21.08.2017 for consideration of Rs.69,00,000/- for each flats. Both, Appellant Nos.1 and 2 in order to purchase the Flats availed a loan facility from Bharat Co-operative Bank, Mumbai of an amount of Rs.55,20,000/-. The amount was sanctioned and disbursed to the account of the CD. The loan installments along with interest are being paid by the Appellants till date.
 - ii. The CD – New Empire Textile Processor Pvt. Ltd. was admitted to Corporate Insolvency Resolution Process (“**CIRP**”) on 26.08.2019. The Respondent – Kailash Shah was appointed as Resolution Professional (“**RP**”). Another Company – Sangeeta Tex Dyes Pvt. Ltd. was also admitted to CIRP on 29.01.2020.
 - iii. Shri Kailash Shah – RP of New Empire Textile Processor Pvt. Ltd. filed an Application being IA No.822 of 2023 for treating the preferential transaction with regard to an amount of Rs.1,10,40,000/-. The Respondent claimed to be an unsecured Financial Creditor of Sangeeta Tex Dyes Pvt. Ltd., which Application was rejected on 18.07.2023. The RP filed Application under Section 66 being IA No.430 of 2023 in the CIRP of New Empire Textile Processor Pvt. Ltd. alleging that transaction of sale of Flat Nos.903 and 904 are fraudulent

transactions and relief under Section 66 be allowed. In the Application, Appellant No.1 – Sangeeta Jatinder Mehta was impleaded as Respondent No.3 and Appellant No.2 – Divyank Jatinder Mehta was impleaded as Respondent No.4.

- iv. The Adjudicating Authority allowed the Application by the impugned order and issued direction under paragraphs 15 and 16. Aggrieved by which order, this Appeal has been filed.

3. Challenging the impugned order, learned Counsel for the Appellant submits that the Flats were purchased after taking loan from the Lenders and the loan amount of Rs.55,20,000/- out of consideration of Rs.69,00,000/- was directly paid to the account of the CD and the loan having been taken by the Appellants for purchase of the Flats, the transaction cannot be said to be fraudulent. It is submitted that Adjudicating Authority has expressed doubts with regard to consultancy charges, which were adjusted towards the sale consideration and at best the order could have been passed for contribution of the said consultancy charges of Rs.13,74,000/- by Appellant No.1 and Rs.13,80,000/- by Appellant No.2. The RP has filed claims in the CIRP of another CD, where according to the RP the amounts received in the account of CD were transferred to a Company, which was company of husband of Appellant No.1 and father of Appellant No.2, in which RP failed to prove its claim. Hence, after the RP having failed to prove its claim in the CIRP of another Company, he belatedly filed the Application under Section 66. The Appellants after purchase of the Flats are residing in the Flats since 2017.

Learned Counsel for the Appellant has also placed reliance on the judgment of Tripura High Court in **Writ Petition (C) (PIL) No.04 of 2023** in the matter of **Mrs. Sudipa Nath vs. Union of India** and judgment of the Hon'ble Supreme Court in the case of **Gluckrich Capital Pvt. Ltd. vs. The State of West Bengal** in **Miscellaneous Application No.1302 of 2023** in Special Leave Petition (Cr.) No.____ of 2023 (Diary No.6732 of 2023).

4. Learned Counsel for the Respondent refuting the submissions of the Appellants contends that no sale consideration was received in the account of the CD by transfer of Flat Nos.903 and 904. The loan amount of Rs.55,20,000/- was transferred in to M/s Sangeeta Tex Dyes Pvt. Ltd., where husband of Appellant No.1 and father of Appellant No.2 is Director. Further, consideration was adjusted towards the consultancy charges. However, there is no material brought on record that what consultancy was provided by the Appellant to the CD to claim any consultancy charges. It is submitted that sale of Flats were void and Adjudicating Authority had ample jurisdiction under Sections 66 and 67 to issue appropriate directions. Learned Counsel for the Respondent relying on Section 66 sub-section (1) submits that Adjudicating Authority may pass an order that any person 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 CD. It is submitted that the Appellant should be looked at with the lens of 'related party' and their actions should be monitored with the same perspective. The claim rejection by the RP in Sangeeta Tex Dyes Pvt. Ltd. has no bearing and it does not debar the RP

to take action under Sections 66 and 67. Learned Counsel for the RP relied on judgments of this Tribunal in ***Royal India Corporation Ltd. vs. Mr. Nandkishore Visnupant Deshpande – Company Appeal (AT) (Ins.) No.137 of 2021*** decided on 06.05.2024 and ***Tridhaatu Kiriti Developers LLP vs. Mr. Arihant Nenawati, Liquidator of Royal Refinery Pvt. Ltd. - Company Appeal (AT) (Ins.) No.95 of 2021*** decided on 02.01.2023.

5. We have considered the submissions of learned Counsel for the parties and perused the records.

6. The Application was filed by the RP under Section 66 of the IBC. Section 66 provides 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.

(3) Notwithstanding anything contained in this section, no application shall be filed by a resolution professional under sub-

section (2), in respect of such default against which initiation of corporate insolvency resolution process is suspended as per section 10A.

Explanation. – For the purposes of this section a director or partner of the corporate debtor, as the case may be, shall be deemed to have exercised due diligence if such diligence was reasonably expected of a person carrying out the same functions as are carried out by such director or partner, as the case may be, in relation to the corporate debtor.”

7. Section 66, sub-section (1) provides that if 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 RP 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. The sale of Flats were made in favour of the Appellants on consideration. Both the Appellants had also taken loan of Rs.55,20,000/- for payment and consideration of which amount was transferred by the Bank in the account of the CD. Loans were taken by the Appellants and the charge was created on the assets. It is the case of the Appellants that Appellants are paying the loan and liability to pay the loan was on the Appellants. Learned Counsel for the Respondent has submitted that the amount after receiving in the account of the CD was immediately transferred to a Company - Sangeeta Tex Dyes Pvt. Ltd. in which husband of Appellant No.1 and father of Appellant No.2 was Director. This cannot lead to a conclusion that sale in favour of the Appellants of the Flats were fraudulent. The sale was made and consideration amount was received in the account of the CD and after receiving the amount, it was transferred.

The Appellants deposited the earnest money and TDS of Rs.69,000/- was also deposited on 21.08.2017. The balance amounts were paid in 2017, 2018 and 2019. The Adjudicating Authority has expressed doubts with regard to consultancy charges, which have been paid to the Appellants by the CD and have been credited towards payment of the balance consideration. Learned Counsel for the Respondent has submitted that no materials were brought on the record to indicate that any consultancy was provided by the Appellants, hence, the payment towards the consultancy charges to the Appellants were fraudulent transaction entered into by the CD. Thus, the Adjudicating Authority in paragraph 14.4 has held that Respondent Nos.3 and 4 (Appellants herein) have not pleaded in the reply what services were rendered by them to the CD to earn such consultancy charges. Hence, to the extent of consultancy charges of Rs.13,74,000/- to Appellant No.1 and Rs.13,80,000/- to Appellant No.2, cannot be said to be a bona-fide transaction. In paragraph 14.4, following findings have been returned by the Adjudicating Authority:

“14.4. As regards payment of consultancy charges to Respondent No. 3 & 4 and purchases made from Respondent No. 5 & 6, the Applicant has not pleaded that no benefit accrued to the Corporate Debtor from these services or purchase of goods. The Applicant has simply pleaded that the consulting charges to Respondent No. 3 & 4 came to be paid after the transaction of sale of flats. To this extent, we can find substance of the Applicant that booking of such consultancy charges may have taken place merely to set off the balance consideration receivable from Respondent No. 3 & 4 as the payments made by the Corporate Debtor has come back to Corporate Debtor as payment towards part consideration of flat.

The Respondent No. 3 & 4 have also not pleaded in the reply what services were rendered by them to the Corporate Debtor to earn such consultancy charges. Accordingly, to the extent of consultancy charges of Rs. 13,74,000/- to Mrs. Sangeeta Mehta i.e. Respondent No. 3 and Rs. 13,80,000/- to Mr. Divyank Jatinder Mehta i.e. Respondent No. 4 can not be said to be a bona-fide transaction.

8. The judgment, which has been relied by learned Counsel for the Respondent in **Royal India Corporation Ltd.** (supra) of this Tribunal supports the submission of Respondent that action under Section 66, sub-section (1) can be taken against any person. The judgment of this Tribunal in **Tridhaatu Kirti Developers LLPi** also supports the submission of learned Counsel for the Respondent. We, thus, do not find any error in the judgment of Adjudicating Authority insofar as it has held that transaction of payment of consultancy charges to Appellant Nos.1 and 2 were not bona-fide transaction.

9. The judgment of Tripura High Court in **Smt. Sudipa Nath** (supra) has been relied by the Appellant. In paragraph 19 of the judgment, following was laid down:

“(19) Therefore, in legislature wisdom and as apparent from the text of 66(1) it is clear that firstly it confers no jurisdiction but declaring any transaction as void, even if fraudulent, but confers jurisdiction on NCLT to fix the liabilities on the persons responsible for conducting business of corporate debtor which is fraudulent or wrongful. Secondly section 66(1) contemplates an application thereunder only by the resolution professional and by none other. Thirdly section 66 (1) also restricts the power of NCLT subject to being satisfy with pre-requisite that any business of the corporate debtor has been carried on with intent to defraud creditors or the

corporate debtors or for any fraudulent purpose and if satisfied it powers to pass an order is only against such person who are responsible for the conduct of such fraudulent business of the corporate debtor with *mens rea* to make them personally liable to make such contributions to the assets of the corporate debtor as it may deem fit.”

10. learned Counsel for the Appellants has also relied on the judgment of Hon’ble Supreme Court in **Gluckrich Capital Pvt. Ltd.** (supra), which proceedings arose out of interim order dated 30.11.2022 passed by Delhi High Court in Criminal M.C. No.6408 of 2022 extending the transit anticipatory bail granted to the Respondent, who were stated to be Suspended Directors of CD. Vide judgment dated 24.02.2023, Special Leave Petition (Criminal) filed by the Applicant was rejected holding that it has no *locus*, it being neither the informant nor a party to the proceedings. Subsequently, an Application for clarification was filed, which ultimately was rejected. In paragraph-7 of the judgment, the Hon’ble Supreme Court in **Gluckrich Capital Pvt. Ltd.** laid down following:

“7. In our considered opinion, in the name of seeking a clarification, the endeavor of the applicant herein is to indirectly get over with the judgment and order dated 18.01.2023 in WP(C) (PIL) 04 of 2023 passed by Tripura High Court. Such an endeavor, in the guise of a clarification, cannot be permitted.”

11. The Hon’ble Supreme Court also referring to the judgment of the Tripura High in Smt. Sudipa Nath vs. Union of India & Ors., referred to the judgment in the case of **Usha Ananthasubramanian vs. Union of India** , which pertained to matter under Section 339(1) of the Companies

Act, 2013, which has been noted in paragraph-8 and ultimately in paragraph-10 the Hon'ble Supreme Court has rejected the Application filed by the Applicant. The Hon'ble Supreme Court observed following in paragraph-10:

“**10.** We are of the considered opinion that in such circumstances, it is for the Resolution Professional or the successful resolution applicant, as the case may be, to take such civil remedies against third party, for recovery of dues payable to corporate debtor, which may be available in law. The remedy against third party, however, is not available under Section 66 of IBC, and the civil remedies which may be available in law, are independent of the said Section.”

12. The present is a case where Adjudicating Authority has also held that payments of consultancy charges to the Appellants is fraudulent and in exercise of power under Section 66(1) has directed the said contribution void. We, however, relying on the judgment of Tripura High Court in **Smt. Sudipa Nath** agree with the submission of the Appellant that Adjudicating Authority could not have declared the Sale Deed in favour of the Appellants dated 21.08.2017, as void. As observed above, the Sale Deed was obtained by the Appellants of two Flats by payment of consideration of Rs.69,00,000/- each, out of which Rs.55,20,000/- was obtained by loans, and the Lenders, transferred the said amount in the account of the CD and loans having been taken by the Appellants, the Appellants are still discharging the liabilities of the loans. We, thus, are of the view that sale transaction in favour of the Appellants could not have been declared void.

13. In result, we partly allow the Appeal and set-aside the direction of the Adjudicating Authority in the impugned order, insofar as it declared the transfer of Flats by CD in favour of the Appellants, void. We, however, uphold the direction of the Adjudicating Authority with respect to consultancy charges of Rs.13.74 lakhs with respect to Appellant No.1 and Rs.13.80 lakhs with respect to Appellant No.2. We direct Appellant Nos.1 and 2 to deposit the aforesaid amount in the account of CD within a period of 30 days from today. The impugned order of the Adjudicating Authority dated 02.01.2024, is modified to the above extent. The Appeal is partly allowed to the above extent. Parties shall bear there own costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

NEW DELHI

23rd April, 2025

Ashwani