NATIONAL COMPANY LAW APPELLATE TRIBUNAL PRINCIPAL BENCH, NEW DELHI

Comp. App. (AT) (Ins.) No. 1025 of 2022

&

I.A. No. 2964, 2965, 2966 of 2022

IN THE MATTER OF:

Apnaghar Builders Pvt. Ltd. ...Appellant

Versus

Intense Fitness & Spa Pvt. Ltd. & Ors. ...Respondents

Present:

For Appellant : Mr. P. Nagesh, Sr. Advocate along with Ms. Devika Mahan, Ms. Geetika Sharma & Mr. Akshay Sharma, Adv.

For Respondents : Mr. Prithu Garg, Mr. Parth Bhatia, Mr. Shivam Singh, Adv. for R-2 & 3.

Mr. Utkarsh Joshi, Adv. for R-5.

J U D G M E N T

Per: Justice Rakesh Kumar Jain:

This appeal is directed against the order dated 02.08.2022, passed by the National Company Law Tribunal, New Delhi (in short 'Tribunal') in CP (IB) No. 228 / ND / 2022, registered on an application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in short 'Code') by which the said application was admitted and Jagdish Singh Nain was appointed as the Interim Resolution Professional (IRP).

2. In brief, Intense Fitness & Spa Pvt. Ltd. (Corporate Debtor)/Respondent No. 1 has alleged to have availed loan from Navayuga Engineering Company Ltd. (Navayuga) which was assigned by it to CVR Holdings Pvt. Ltd. (Financial Creditor)/Respondent No. 2 by way of an assignment agreement dated 10.02.2020 (in short 'Agreement') executed between Navayuga, Respondent No. 1 and Respondent No. 2 in respect of an outstanding loan of Rs. 11,08,94,834/-.

3. The Assignee / Respondent No. 2 filed the application under Section 7 of the Code before the Tribunal bearing CP (IB) No. 228/ND/2022 against the Corporate Debtor / Respondent No. 1 alleging that as per agreement dated 10.02.2020, the CD was to repay the loan amount by 31.12.2020 without interest with the condition that it shall pay interest @ 10% w.e.f. 01.01.2021 but latest by 30.06.2021. In part IV of the application (form 1) amount of Rs. 11,08,94,834/- was claimed as on 01.03.2022 as due and payable.

4. The Tribunal has noticed that the Corporate Debtor/Respondent No. 1, in its reply, admitted the debt and default, therefore, the IRP named by Respondent No. 2 (Financial

Creditor), namely, Jagdish Singh Nain was appointed as such and moratorium was imposed.

5. It is pertinent to mention here that the suspended director of the CD/R1 did not challenge the order dated 02.08.2022 by of way an appeal.

6. However, the impugned order has been challenged by the present Appellant who was not a party to the application before the Tribunal.

7. The Appellant is the owner of a property bearing No. C-2/10, Safdarjung Development Area, New Delhi (property) which was leased out by the Appellant to Respondent No. 1 by a registered lease agreement dated 04.01.2016. Respondent No. 1 was to pay a monthly rent in respect of the property, of a sum of Rs. 17,00,000 p.m (Rupees 18,36,000 after deducting TDS and adding GST) in advance by the 7th day of each calendar month w.e.f 01.03.2016 to 28.02.2019 and Rs. 19,55,000/- p.m (Rupees 21,11,400/- after deducting TDS and adding GST) in advance by the 7th day of each calendar month w.e.f. 01.03.2019.

8. Respondent No.1 defaulted in payment of rent and other charges w.e.f. 01.11.2018, therefore, the Appellant filed an application bearing CP No. 1754/ND/2019 for initiation of

Corporate Insolvency Resolution Process of Respondent No.1/CD but the said application was dismissed on 18.03.2020 on the ground that the lease rent does not come under the definition of operational debt and that there was a pre-existing dispute between the parties.

9. Respondent No. 1 filed a civil suit bearing CS (OS) 667/2019 before the High Court of Delhi seeking a decree against the Appellant for a sum of Rs. 7,63,08,336/- with pendente lite and future interest @18% which is otherwise not a subject matter of this appeal.

10. The Appellant filed a suit bearing CS (OS) 164/2020 against Respondent No. 1 before the Hon'ble High Court of Delhi seeking a decree of possession of the property and recovery of arrears of rent and damages and mesne profits of an amount of Rs. 4,78,85,040/-.

11. It is alleged by the Appellant that in order to circumvent the proceeding initiated by the Appellant in the suit, Respondent No.2, in collusion with Respondent No. 1, filed the company petition bearing CP (IB) No. 228/ND/2022 under Section 7 of the Code for seeking a collusive initiation of CIRP.

12. It is further alleged that the suit for possession was decreed on 19.04.2022 by the Hon'ble High Court of Delhi and Respondent No. 1 was restrained from removing the equipment's/belongings currently lying in the said property.

13. It is alleged that Respondent No. 2, immediately after passing of the decree dated 19.04.2022, in order to delay the execution of the decree, filed another application bearing I.A. No. 2148 of 2022 seeking early hearing of the said CP filed under Section 7 of the Code.

14. It is alleged that the Appellant received the possession of the property on 21.07.2022 which was also recorded in the order dated 25.07.2022 passed by the High Court of Delhi in execution petition bearing EX.P. 23/2022.

15. The present appeal has been filed by the Appellant, while challenging the impugned order by which the application filed under Section 7 has been admitted, on the ground that both Respondent No. 1 and Respondent No. 2 are related parties, who in collusion and connivance with the ex-management/promotor/director/shareholder of Respondent No. 1 i.e. Respondent No. 3 to 5, for the initiation of CIRP of Respondent No. 1, filed a collusive petition under Section 7, with

malicious intent, for a purpose other than the resolution of the insolvency, which is hit by Section 65 of the Code.

16. It is also alleged that after the order of admission, when the Appellant came to know that Respondent No. 1 has gone into CIRP and IRP has made public announcement for submission of claim, the Appellant submitted its claim on Form B for an amount of Rs. 17,41,09,137/- but without prejudice to the filing of the claim, the Appellant has filed the present appeal seeking setting aside of the impugned order on the ground that it has been obtained by Respondent No. 2 in collusion with ex-management and shareholder of Respondent No. 1 by initiating the CIRP for a purpose other than the resolution to defraud the appellant and other creditors.

17. It has also been alleged that the Appellant came to know about the initiation of CIRP only on publication made by the IRP and also came to know after making enquires that it is a case of collusion between Respondent No. 1 and Respondent No. 2, therefore, there was no option but to file the appeal to set aside the order dated 02.08.2022 and to prosecute the Respondents in terms of Section 65 of the Code.

18. The Appellant has alleged that the connivance and collusion of both Respondent No. 1 and Respondent No. 2 is writ large because debt and default has been admitted by Respondent No. 1 before the Tribunal without contesting the application at all and no appeal was filed by the suspended directors of the CD. Besides the above, it is alleged that the alleged financial creditor /Respondent No. 2 is a related party of Respondent No. 1/CD. In this regard, it is submitted that the audit report dated 04.12.2020 of Respondent No. 1 shows that the default amount of Rs. 11,08,94,834/- which has been made the basis for filing the application under Section 7 of the Code is mentioned under the heading Note 3 as 'loan and advances from the related party'. It is also submitted that Respondent No. 2 is also a related party of Navayuga who has assigned its debt to Respondent No. 2 which is allegedly evident from the audit report dated 15.11.2021 of Respondent No. 2 annexed as Annexure 9. It is further alleged that all three companies i.e. R1, R2 and Navayuga are the related party and interlinked with each other through a common person i.e. R3 who is a shareholder in all three companies and the director in two of these companies, who is controlling the business of all three companies directly or indirectly.

19. It is alleged that Respondent No. 3 is the common shareholder in all three companies and has shareholding of 21.77% equity in Navayuga, shareholding of 33.34% in Respondent No. 1 since 2014 and shareholding of 66.66% in Respondent No. 2. It is further stated that Respondent No. 3 is currently serving as the director of Navayuga and Respondent No. 2.

20. The shareholding of Respondent No. 3 in all the three companies has been depicted by a chart in the grounds of appeal which is reproduced as under:-

Company	**Shareholding of Mr. Chinta Sridhar**	**Relation**
Intense Fitness & Spa Pvt. Ltd./Corporate Debtor	33.34%	
CVR Holdings Private Limited/Financial Creditor	66.66%	Director
Navayuga Engineering Company Limited	21.77%	Director

21. It is alleged that Respondent No. 2 has not demonstrated that the debt assigned by Navayuga vide agreement dated 10.02.2020 was ever disbursed by Navayuga to Respondent No.

1. It is further alleged that the agreement dated 10.02.2020 is not registered and is under stamped. It is alleged that if the debt is outstanding for more than three months then the stamp duty of 0.5% of the amount is to be affixed whereas the agreement has been executed on a stamp paper of Rs. 100. It is also alleged that if the outstanding loan of Rs. 11,08,94,834/- assigned to Respondent No. 2 by agreement dated 10.02.2020 then why Navayuga in its financial statement of the year 2018-19 and 2019 to 2020 did not reflect the loan amount as the loan given to Respondent No. 1 under loan and advances.

22. The Respondent No. 2 & 3 have filed their joint reply. It is alleged that tripartite agreement was executed between Respondent No. 1, 2 and Navayuga as alleged by the Appellant. As per clause 1.4 of the agreement, the repayment by Respondent No. 1 was to be made by way of issuance of Non-convertible Debentures (NDC), Optionally Convertible Debentures (OCD) or such other instrument acceptable to Respondent No. 2 within two months from the date of the agreement but later on, vide letter 04.05.2020 signed by both parties, it was decided that CD shall repay the principal sum of Rs. 11,08,94,834/- on or before 31.12.2020 and in the event of any delay, Respondent No. 1 shall

pay interest on the aforesaid sum at 9% per annum w.e.f. 01.01.2021, shall ensure the entire repayment latest by 30.06.2021 and the requirement of issuance of NCDs, OCDs or other instrument(s) as mentioned in Clause 1.4 of the agreement was done away with. It is alleged that Respondent No. 2 issued various letters and reminders to Respondent No. 1 to clear the outstanding dues on or before 31.12.2021 but no satisfactory response was received and thus filed the application under Section 7 of the Code.

23. It is further alleged that the Appellant itself had filed its petition under Section 9 of the Code bearing CP No. 1754/ND/2019 which was dismissed by the Tribunal on 18.03.2020 and having failed in its own attempt to initiate CIRP against the CD, it does not lie in the mouth of the appellant to contend that the CD is being pushed into insolvency in collusion and connivance of Respondent No. 1 and R2 because at one stage the Appellant itself wanted to drive CD into CIRP but now want to create prejudice in an attempt to extract money from the CD in supersession of the rights of the other creditors of the CD. It is also alleged that since the Appellant had already filed its claim in Form B to the IRP, it has acquiesced to the

commencement of the CIRP and is barred from assailing the same in the present appeal. It is further alleged that the answering respondents are not the related parties of Respondent No. 1 as provided under Section 5(24) of the Code and merely, there is a common shareholder of Respondent No. 1 and Respondent No. 2 will not make it a case of related party. It is also submitted that merely because the CD chose to include the debt owed by Respondent No. 2 under the heading 'Note 3, Loan and advances from related party' in its audited books will not attract Section 5(24) of the Code automatically. It is also alleged that Navayuga had disbursed the loan on different dates between financial year 2009-10 and 2016-17 which has been mentioned in its books of accounts

24. Respondent No. 1 has also filed the reply in which he has alleged that after his appointment as IRP, in terms of Section 15 of the Code, issued public announcement on Form A on 03.08.2022 to invite claims from creditors Form A was published on 04.08.2022 in Financial Express (English Edition) and Jansatta (Hindi edition), having circulation in Delhi & NCR. The public announcement was also uploaded on the website of IBBI and submitted with IPA of ICAI. It is alleged

that pursuant to the public announcement dated 03.08.2022, he received two claims which were subsequently collated, verified and provisionally admitted upto 17.08.2022, i.e. the last date for filing claim as per public announcement and in terms of Section 21 of the Code the CoC was constituted on 22.08.2022 and report for constitution of CoC was filed with the NCLT on 24.08.2022 which is prior to the order dated 25.08.2022 passed by this Tribunal.

25. It is pertinent to mention that at the time of preliminary hearing of this appeal, this Court had passed the following order dated 25.08.2022 which read as under:-

> "Learned counsel for the Appellant submits that the application under Section 7 was filed by the Financial Creditor in collusion with the Corporate Debtor to defeat the rights of the Appellant. It is submitted that a decree in favour of the Appellant has been passed by Hon'ble Delhi High Court on 19.04.2022. He further submits that the Financial Creditor and the Corporate Debtor both are related parties and the Adjudicating Authority Committed error in admitting Section 7 application which was collusively filed. Submission needs scrutiny. Issue notice. Learned counsel appearing for Respondent No. 2 accepts notice. Issue notice on other Respondents. Respondents may file reply within two weeks. Rejoinder be filed within two weeks thereafter. List this Appeal on 28.09.2022. In the meantime, in pursuance of order dated 02.08.2022, the IRP shall ensure that the

Corporate Debtor is run as a going concern but shall not constitute the Committee of Creditors till the next date."

26. Counsel for the Appellant has argued that in this case obtaining the order of CIRP of Respondent No. 1 by Respondent No. 2 is an act of collusion and for a purpose other than for the resolution of the insolvency. In this regard, it is argued that collusion between the parties is evident from the fact that Respondent No. 3 was controlling all the three companies, namely, Navayuga, Respondent No. 1 and Respondent No. 2 because in Navayuga he is a director and 21.77% shareholder and in Respondent No. 1 he was a promotor and director and 33.34% shareholder and in Respondent No. 2 he is a director & 66.66% shareholder, therefore, it is argued that Respondent No. 1 and Respondent No. 2 are the related parties in terms of Section 5(24)(m)(i)and (iii) of the Code as Respondent No. 3 is controlling more than 20% of the voting share of these companies and also the assignor. Counsel for the Appellant has submitted that in the case of Hindalco Industries Ltd. Vs. Hirakund Industrial Works Ltd., CA (AT) (Ins) No. 42 of 2022 it has been held that the common shareholding is required to be looked into to ascertain the true purpose of the CD and the Hon'ble Supreme Court in the case of Phoenix ARC (P) Ltd. Vs.

Spade Financial Services Ltd, (2021) 3 SCC 475 has held that amount disbursed to third parties that too by the related party will not qualify as a financial debt under the Code. He has further argued that spirit of the Code is to balance the acts of all the stakeholders in the insolvency resolution of the CD and any action which goes against the spirit of the Code raises serious doubt about the CIRP which should be looked into deeply to examine element of fraud or gaming.

27. Counsel for the Appellant has further argued that the ledger statement of the CD maintained by Navayuga reflects that the said amount was not directly disbursed to CD but was paid towards miscellaneous expenses of the CD to various third parties over a period 8 years from 03.07.2009 to 12.01.2017. It is submitted that Respondent No. 5, suspended director of CD, also filed ledger of Navayuga maintained by CD which reflects that the said amount which is paid to third parties is treated as Share Application Money in the ledger books of the CD from 01.04.2009 to 31.03.2016 but on 31.03.2016 the amount of Rs. 6.25 Cr. towards the share application money is transferred to loan account, therefore, it is a collusive and sham transaction. It is submitted that the amount was

disbursed to third party was collusive and no demand was ever made by Navayuga for repayment of the said amount. The amount was reflected as share application money in the ledger book of CD for a period of 7 years from 01.04.2009 to 31.03.2016 and the share application money is not a financial debt under the Code as held in the case of Parmod Sharma Vs. Karanaya Heartcare Pvt. Ltd., CA (AT) (Ins) No. 426 of 2022. It is also submitted that the Financial Creditor shall mean a person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to but if the original debt itself is not a financial debt then the assignee cannot have a better right than the assignor himself. It is further submitted that the Tribunal has not recorded any such finding as to how it is a case of financial debt and R2 is a financial creditor because the debt and default were admitted by Respondent No. 1 in order to escape from the said scrutiny/investigation by the Tribunal.

28. It is further argued that it was at the most an interest free loan which was made payable with interest by creating back dated document like letter dated 04.05.2020 and that agreement itself was not registered and cannot be relied upon having been

insufficiently stamped etc. Counsel for the Appellant has also argued that the amount in question has clearly been mentioned in the audit report of Respondent No. 1 under heading Note 31 that it is a loan from the related parties.

29. On the other hand, Counsel for the contesting Respondent No. 2 and 3 has vehemently argued that the contention of the Appellant that Respondent No. 2 is a related party of Respondent No. 1, on the basis, that there is a common shareholder is totally erroneous. It is submitted that Respondent No. 3 had resigned from the board of directors of the CD in 2015 and Respondent No. 2 was not a related party as on the date of filing of the Section 7 petition. It is submitted that the related party is defined under Section 5(24) of the Code in Clause (a) to (m) which prescribes the requirements for considering a person to be a related party of the CD whereas Respondent No. 1 and 2 do not fall within that clause. It is also submitted that total sum of Rs. 11,08,94,834/- were advanced by Navayuga to Respondent No. 1 and /or to third party on behalf of CD between July, 2009 and January, 2017. These sums did not carry any interest and were treated as Inter Corporate Deposit in Navayuga's books of accounts. The entries

in the said books of accounts show that the sums advanced by Navayuga were treated as loan. It is argued that in the books of Navayuga there is no mention whatsoever of Share Application Money nor there is any agreement or contract between the parties for treating the sums advanced as Share Application Money as submitted by the Appellant. It is further submitted that the obligation to pay by way of agreement and letter dated 04.05.2020 that the debt has the commercial effect of borrowing within the meaning of Section 5(8) of the Code and submitted that sum advanced by the financial creditor to third party towards working capital requirements, business expenses, etc. do constitute financial debt. In this regard, a reference has been made to a case of this Tribunal in the case of Rajeev Kumar Jain Vs. Uno Minda Limited, CA (AT) (Ins) No. 947 of 2022. It is further submitted that Navayuga and Respondent No. 2 do not exercise any control over the business or affairs of Respondent No. 1.

30. In the end, it is argued that the appeal itself was not maintainable in this Court. It is submitted that the Appellant cannot be permitted to raise allegation of collusion for the first time before this Tribunal which is required to be agitated before the Adjudicating Authority under Section 65 of the Code as held

by the Hon'ble Supreme Court in the case of Beacon Trusteeship Limited Vs. Earthcon Infracon Pvt. Ltd. Civil Appeal No. 7641 of 2019.

31. In rebuttal argument, Counsel for the Appellant has submitted that for the purpose of collusion and malicious prosecution, the Appellant has to only show that as to whether Respondent No. 1 and Respondent No. 2 are the related party. It is submitted that the case is covered by Section 5(24) (m)(i) to (iii). It is submitted that Respondent No. 3 who is the director in all three companies, namely, Navayuga, Respondent No. 1 and Respondent No. 2, therefore, he is controlling more than 20% of the voting share of these companies and also the assignor. It is reiterated that in Note 3 of the audit report it has clearly been mentioned that the amount of loan is taken from the related party.

32. As far as the maintainability of the appeal is concerned, Counsel for the Appellant has also relied upon a decision of the Hon'ble Supreme Court in the case of Embassy Property Developments Pvt. Ltd. Vs. State of Karnataka, (2020) 13 SCC 308 in which it has been held that NCLT and NCLAT will have jurisdiction to decide the issue of collusion under Section 65 of the Code. It is also submitted that appeal is maintainable

because Section 61 of the Code permits any aggrieved party to file the appeal wherein the Appellant has taken all the objections under Section 65 of the Code. He has also submitted that in the case of Hindalco Industries (Supra) and Hytone Merchants Pvt. Ltd. Vs. Satabadi Investment Consultants Pvt. Ltd., CA (AT) (Ins) No. 258 of 2021 it has been held that if Section 7 of the Code ingredients is fulfilled then also if collusion is proved then CIRP can be set aside.

33. We have heard Counsel for the parties and perused the record with their able assistance.

34. Admitted facts of the case are that the Appellant had let out its premise to Respondent No. 1 on a rent of Rs. 17,00,000/- p.m for a period of three years from 01.03.2016 to 28.02.2019 which was increased from 01.03.2019 to the tune of Rs. 19,55,000.

35. When Respondent No. 1 defaulted in payment of the rent and other charges it filed a petition under Section 9 of the Code for the resolution of an amount of Rs. 1,13,57,341/- outstanding as on 19.03.2019. The said application was dismissed on 18.03.2020, inter alia, on the ground that outstanding rent does not fall within the definition of operational debt and that there was a pre-existing dispute between the parties.

36. There is no denial to the fact that the Appellant has recovered the possession of the premise let out to Respondent No. 1 through a suit filed before the Hon'ble High Court of Delhi.

37. The allegation of the Appellant is that in order to circumvent the proceedings initiated by the Appellant in the suit, a collusive application bearing CP (IB) No. 228/ND/2022 under Section 7 of the Code has been filed in which the impugned order has been passed to which the Appellant was not a party but as soon as the Appellant came to know, form public announcement made by the IRP about the CIRP of the CD, it filed the claim on Form B for an a mount of Rs. 17,41,09,137/- and without prejudice to the filing of the claim, the Appellant has also filed the present appeal because the Appellant is aggrieved against the admission of the application under Section 7 of the Code which is according to it an act of collusion to defraud the Appellant and other creditors.

38. The collusion between Respondent No. 1 and Respondent No. 2 can be ascertained if it is found that both are related parties. In this regard, the first evidence which has been referred to by the Appellant is from the audit report of Respondent No. 1 in which Note 3, pertaining to long term borrowings, recorded as under:-

Note No. 3 Long-term borrowings ₹ in rupees

Particulars	As at 31st March 2020			As at 31st March 2019		
	Non-Current	Current Maturities	Total	Non-Current	Current Maturities	Total
Term Loan - From Others						
Rupee term loans others secured	1,12,85,417.00	0.00	1,12,85,417.00	1,07,62,265.00	0.00	1,07,62,265.00
	1,12,85,417.00	0.00	1,12,85,417.00	1,07,62,265.00	0.00	1,07,62,265.00
Deposits						
Security deposits payable unsecured	1,66,845.00	0.00	1,66,845.00	1,66,845.00	0.00	1,66,845.00
	1,66,845.00	0.00	1,66,845.00	1,66,845.00	0.00	1,66,845.00
Loans and advances from related parties						
Loans and advances from others unsecured	17,00,000.00	0.00	17,00,000.00	17,00,000.00	0.00	17,00,000.00
Loans and advances from others unsecured	11,08,94,834.00	0.00	11,08,94,834.00	11,08,94,834.00	0.00	11,08,94,834.00

Which shows that 'loans and advances from related parties' is Rs. 11,08,94,834/- which is the amount in question for which the application has been filed by Respondent No. 2. This amount has been assigned by way of an agreement dated 10.02.2020 on the basis of which the application under Section 7 has been filed, however, Respondent No. 3 who happened to be a director and shareholder in all three companies, namely, Navayuga, Respondent No. 1 and Respondent No. 2. In Navyuga he is director and 21.77% shareholder, in Respondent No. 1 he was a Promotor and director till 2015 and 33.34 % shareholder and in Respondent No. 2 he is a director & 66.66% shareholder which shows that this case shall come within Section 5(24)(m)(i) and (iii) of the Code as Respondent No. 3 is controlling more than 20% of the voting share of these companies and also the assignor. It has been held by the Hon'ble Supreme Court in the case of Phoenix

ARC (P) Ltd. that amount disbursed to third party that too by the related party will not qualify as a financial debt under the Code. It has also been held in the case of Hytone Merchants Pvt. Ltd. (Supra) that even if Section 7 of the Code ingredients are fulfilled then also if collusion is proved CIRP can be set aside. The Appellant has specifically averred in para 33 of the appeal paper book about the presence of Respondent No. 3 in all three companies as shareholder and director which has not been denied by Respondent No. 2 and 3 in their reply, firstly, there is no parawise reply filed and secondly in the reply the emphasis is more on the issue as to how the provision of Section 5(24) is attracted about which an inference can be drawn that the allegation of the Appellant about Respondent No. 3 is correct and once he was the director/promotor 33.34% shareholder in Respondent No. 1 and Director in both Navayuga and Respondent No. 2 with 21.77% and 66.66% shareholder, it cannot be said that he was not a related party especially when it is incorporated in the financial statement of the CD much less Note 3 of the audit report that long term borrowings the amount in question, is taken from the related parties. The collusion between Respondent No. 1 and Respondent No. 2 can be ascertained from such circumstances.

39. Moreover, neither the application under Section 7 was contested by Respondent No. 1 nor any appeal has been filed against the impugned order which means that it was just an eyewash.

40. In so far as the maintainability of the appeal and the application under Section 65 of the Code is concerned, reference has been made by Respondent to the case of Beacon Treusteeship Limited (Supra) in which the Hon'ble Supreme Court by way of two members bench has observed as under:-

> "5. Mr. Gopal Jain, learned senior counsel appearing on behalf of the appellant raised manifold submissions that as per agreement it was necessary to give notice to the appellant before initiating the proceedings before the NCLT which was not given. The three invoices on the basis of which the proceedings have been initiated are vague and prima facie proceedings have been initiated in collusive manner by Respondent Nos. 1 and 2. Reliance has been placed on the provisions contained in Section 65 of the IBC and a decision of this Court in Embassy Property Development Pvt. Ltd. v. State of Karnataka and Others, (2019) SCC Online SC 1542 (C.A. No.9170/2019 etc. decided on 03.12.2019), in which this Court has observed as under:-
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> > "52. Even fraudulent tradings carried on by the Corporate Debtor during the insolvency resolution, can be inquired into by the

> Adjudicating Authority under Section 66. Section 69 makes an officer of the corporate debtor and the corporate debtor liable for punishment, for carrying on transactions with a view to defraud creditors. Therefore, NCLT is vested with the power to inquire into (i) fraudulent initiation of proceedings as well as (ii) fraudulent transactions. It is significant to note that Section 65(1) deals with a situation where CIRP is initiated fraudulently "for any purpose other than for the resolution of insolvency or liquidation".

6. We have also heard learned counsel for the IRP and Respondent No.2. It was submitted by the learned counsel appearing for Respondent No.2 that allegation of collusion is unfounded and has no merit. Learned counsel appearing for the IRP has stated that this aspect has to be considered by the IRP, whether the proceedings have been initiated in collusion or not while submitting a report to the Adjudicating Authority. The provisions contained in Section 65 of the IBC are extracted hereunder:-

> "65. Fraudulent or malicious initiation of proceedings. - (1) if, any person initiates the insolvency resolution process or liquidation proceedings fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, as the case may be, the adjudicating authority may

> impose upon such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees. 3 (2) If, any person initiates voluntary liquidation proceedings with the intent to defraud any person, the adjudicating authority may impose upon such person a penalty which shall not be less than one lakh rupees but may extend to one crore rupees."
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> 7. Considering the provision of Section 65 of the IBC, it is necessary for the Adjudicating Authority in case such an allegation is raised to go into the same. In case, such an objection is raised or application is filed before the Adjudicating Authority, obviously, it has to be dealt with in accordance with law. The plea of collusion could not have been raised for the first time in the appeal before the NCLAT or before this Court in this appeal. Thus, we relegate the appellant to the remedy before the Adjudicating Authority."

41. However, in the case of M/s Embassy Property Development Pvt. Ltd. (Supra) the Hon'ble Supreme Court by way of three members bench has specifically framed a question "ii. whether questions of fraud can be inquired into by the NCLT/NCLAT in the proceedings initiated under the Insolvency and Bankruptcy Code, 2016". This question has been answered as under:-

> "Question No. 2

46. The second question that arises for our consideration is as to whether NCLT is competent to enquire into allegations of fraud, especially in the matter of the very initiation of CIRP.

47. This question has arisen, in view of the stand taken by the Government of Karnataka before the High Court that they chose to challenge the order of the NCLT before the High Court, instead of before NCLAT, due to the fraudulent and collusive manner in which the CIRP was initiated by one of the related parties of the Corporate Debtor themselves. In the writ petition filed by the Government of Karnataka before the High Court, it was specifically pleaded (i) that the Managing Director of the Corporate Debtor entered into an agreement on 06.02.2011 with one M/s. D. P. Exports, for carrying out mining operations on behalf of the Corporate Debtor and also for managing its affairs and selling 100% of the extracted iron ore; (ii) that the said M/s. D. P. Exports was a partnership firm of which one Mr. M. Poobalan and his wife were partners; (iii) that another agreement dated 11.12.2012 was entered into between the Corporate Debtor and a proprietary concern by name M/s. P. & D. Enterprises, of which the very same person namely, Mr. M. Poobalan was the sole proprietor; (iv) that the said agreement was for hiring of machinery and equipment: (v) that a finance agreement was also entered into on 12.12.2012 between the Corporate Debtor and a company by name M/s. Udhyaman Investments Pvt. Ltd., represented by its authorized signatory Mr. M. Poobalan; (vi) that there were a few communications sent by the said Mr. Poobalan to various authorities, claiming himself to be the authorized signatory of the Corporate Debtor; (vii) that an MOU was entered into on 16.04.2016 between the Corporate Debtor and M/s. Udhyaman Investments Pvt. Ltd., represented by the said Mr. Poobalan, whereby the Corporate Debtor agreed to pay Rs. 11.5 crores; (viii)

that the said agreement was purportedly executed at Florida, but witnessed at Chennai; (ix) that Mr. Poobalan even communicated to the Director. Department of Mines & Geology as well as the Monitoring Committee, taking up the cause of the Corporate Debtor as its authorized signatory: (x) that the CIRP was initiated by M/s. Udhyaman Investments Pvt. Ltd, represented by its authorized signatory. Mr. Poobalan: (xi) that the Resolution Applicant namely, M/. Embassy Property Development Pvt. Ltd. as well as the Financial Creditor who initiated CIRP namely, M/s. Udhyaman Investments Pvt. Ltd. are all related parties and (xii) that Mr. Poobalan had not only acted on behalf of the Corporate Debtor before the statutory authorities, but also happened to be the authorized signatory of the Financial Creditor who initiated the CIRP, eventually for the benefit of the Resolution Applicant which is a related party of the Financial Creditor.

48. In the light of the above averments, the Government of Karnataka thought fit to invoke the jurisdiction of the High Court under Article 226 without taking recourse to the statutory alternative remedy of appeal before the NCLAT. But the contention of the appellants herein is that allegations of fraud and collusion can also be inquired into by NCLT and NCLAT and that therefore the Government could not have bypassed the statutory remedy.

49. The objection of the appellants in this regard is well founded. Section 65 specifically deals with fraudulent or malicious initiation of proceedings. It reads as follows:

65. Fraudulent or malicious initiation of proceedings (1) If any person initiates the insolvency resolution process or liquidation proceedings fraudulently or with malicious intent for any purpose other than for the resolution of insolvency or liquidation, as the case may be the adjudicating authority may impose upon such

person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.

2 If any person initiates voluntary liquidation proceedings with the intent to defraud any person the adjudicating authority may impose upon such person a penalty which shall not be less than one lakh rupees but may extend to one crore rupees."

50. Even fraudulent tradings carried on by the Corporate Debtor during the insolvency resolution, can be inquired into by the Adjudicating Authority under Section 66. Section 69 makes an officer of the corporate debtor and the corporate debtor liable for punishment, for carrying on transactions with a view to defraud creditors. Therefore, NCLT is vested with the power to inquire into (i) fraudulent initiation of proceedings as well as (ii) fraudulent transactions. It is significant to note that Section 65(1) deals with a situation where CIRP is initiated fraudulently "for any purpose other than for the resolution of insolvency or liquidation".

51. Therefore, if, as contended by the Government of Karnataka, the CIRP had been initiated by one and the same person taking different avatars, not for the genuine purpose of resolution of insolvency or liquidation, but for the collateral purpose of cornering the mine and the mining lease, the same would fall squarely within the mischief addressed by Section 65(1). Therefore, it is clear that NCLT has jurisdiction to enquire into allegations of fraud. As a corollary, NCLAT will also have jurisdiction. Hence, fraudulent initiation of CIRP cannot be a ground to bypass the alternative remedy of appeal provided in Section 61.

Conclusion

52. The upshot of the above discussion is that though NCLT and NCLAT would have Jurisdiction to enquire into questions of fraud, they would not have jurisdiction

> to adjudicate upon disputes such as those arising under MMDR Act, 1957 and the rules issued thereunder, especially when the disputes revolve around decisions of statutory or quasi- Judicial authorities, which can be corrected only by way of judicial review of administrative action. Hence, the High Court was justified in entertaining the writ petition and we see no reason to interfere with the decision of the High Court. Therefore, the appeals are dismissed. There will be no order as to costs."

42. In view thereof, we have no doubt in our mind that the petition filed by Respondent No. 2 against Respondent No. 1 was collusive and for a purpose other than for the resolution of insolvency and hence the impugned order by which Respondent No. 2 has pushed Respondent No. 1 into CIRP is hereby set aside. Appeal allowed. No costs.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

[Mr. Indevar Pandey]
Member (Technical)

New Delhi
28th November, 2024
Sheetal