NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI
(APPELLATE JURISDICTION)
Company Appeal (AT)(CH)(Ins) No.409/2022 & IA No.1001/2022
(Under Section 61 of the Insolvency and Bankruptcy Code, 2016)
(Arising out of the Impugned Order dated 02.06.2022 in IA(IBC)/196/KOB/2021 in IBA/13/KOB/2020 passed by the 'Adjudicating Authority' (National Company Law Tribunal, Kochi Bench, Kerala)

In the matter of:

1. Mr. K. N. Narayanan Namboodiripad,
Kanjirapally Mana, Lotus Lane,
Kolazi, Thrissur – 680 010,
Kerala.

2. Mr. K.R. Vasudevan Namboodiripad,
Kanjirapally Mana, Kakkor P.O.,
Koothattukulam, Ernakulam – 686 662,
Kerala.

3. Mr. K.N. Sankaran Namboodiripad,
Kanjirapally Mana, Kakkor P.O.,
Koothattukulam, Ernakulam – 686 662,
Kerala.

4. Mr. P.M. Brahmadathan,
Poomully Mana, Viyyoor,
Thrissur - 680 010,
Kerala.

5. Mr. K.S. Anil Kumar,
Kanjirapally Mana, Kakkor P.O.,
Koothattukulam, Ernakulam – 686 662,
Kerala. … Appellants

V

1. K. Parameswaran Nair,
Erstwhile Resolution Professional,
Suspended Liquidator of
M/s. Sree Bhadra Parks and Resorts Limited,
Address:
37/1736 E, Kripasagram,

K. Murali Road, Kadavanthara,
Ernakulam, Kerala – 682 020.

2. Mr. K. Subramanian,
Kizhukulathil House, Santhi Bhavan,
Kanhirammuku Post,
Malappuram – 679 584. ... Respondents

Present :

For Appellants : Mr. Mayan Jain, Advocate
For Mr. TK Bhaskar, Advocate

For Respondent No.1 /
Resolution Professional : Ms. C. Anchala, Advocate

JUDGMENT

(Virtual Mode)

Justice M. Venugopal, Member (Judicial)

Preface :

The 'Appellants' / 'Respondents' have preferred an instant Comp. App. (AT)(CH)(Ins) No.409/2022, as the 'Affected Persons', on being dissatisfied with the 'Impugned Order', dated 02.06.2022, in IA(IBC)/196/KOB/2021, in IBA/13/KOB/2020, passed by the 'Adjudicating Authority', (National Company Law Tribunal, Kochi Bench, Kerala).

2. The 'Adjudicating Authority' (National Company Law Tribunal, Kochi Bench, Kerala), while passing the 'Impugned Order' dated 02.06.2022 in IA(IBC)/196/KOB/2021 in IBA/13/KOB/2020 (Filed by the

'1st Respondent' / 'Resolution Professional') at Paragraph Nos.24 and 25 had observed the following: -

*"24. **<u>Issue Number (ii) : -</u>** It is seen from the records that this IA is filed on the basis of the report filed by the forensic auditor appointed by the Applicant. We have also gone through the report meticulously. In the report, the Forensic Auditor stated as under: -*

*a) **<u>Agreement for sale of mortgaged land by the Corporate Debtor</u>***

It is evident from the above-mentioned observations that, these transactions were deliberately entered into by the suspected Managing Director of the Corporate Debtor, for keeping assets of the Corporate Debtor beyond the reach of the Secured Creditor ie Federal Bank, as this land property was mortgaged as security with the Bank.

Furthermore, actual facts were concealed from the bank by misrepresenting that no agreements were existing for the sale of the mortgaged property, while in fact, a sale agreement of the said property was in force, and in addition, another sale agreement was also signed afterward for the sale of the same mortgaged property with the same buyer.

Mr. Vethaselvaraj, the buyer has also been deceived by the suspended Managing Director of the corporate debtor by collecting full consideration of the sale without getting consent from the Federal bank with whom the assets were mortgaged, while Mr. K.N. Narayanan Namboodiripad had offered to sell the property free from all encumbrances as per the sale agreement signed. Original agreements, General Power of Attorney, and other documents were not provided during the process of audit.

b) <u>Suspected diversion of funds accounted as advance paid for land purchase.</u>

An amount of Rs. 1,73,45,000 is outstanding as land purchase advance in the audited financial statements as on 31st March 2021. There is no evidence available in the office to prove that the payments have been made for such a purpose. Rs. 1,00,000 each have been paid continuously from 31st January 2009 to 31st March 2009, which is an unusual method of payment in a normal land sale. Moreover, all these payments have been made by cash. There is a suspected diversion of fund by accounting as advance for purchase of land. There were no land properties made for this advance paid.

c) ***<u>c) Share Purchase Agreement with M/s. Sri Ramani Resorts and Hotels Pvt. Ltd to sell 100% shares of the Company.</u>***

Based on the observations mentioned above, the Share Purchase Agreement executed by the Corporate Debtor is "void ab initio" and the intention of KN Narayanan Namboodiripad, the suspended Managing Director, and Mr. Venugopal T M, The COO of CD, for entering into such an agreement is Suspected to deceive the Corporate Debtor and the buyer.

d) ***<u>Share Purchase Agreement with M/s. Basel Products India Private Limited to sell 100% shares of the Company.</u>***

This Share Purchase Agreement executed by the Corporate Debtor is also "void ab initio" as in this agreement also the CD agreed to sell the shares not owned by it but by the shareholders of the company. Entering into another SPA when a SPA (though "void ab initio) was existing and active on the date with M/s Sri Ramani Resorts and Hotels Pvt. Ltd is an intentional violation of the clauses of the original SPA. The intention of K.N.Narayanan Namboodiripad, the suspended Managing Director for entering into such an agreement is suspected to deceive the Corporate Debtor and the buyers

> *25. From the Forensic Audit it is clear that this is a fit case to direct the Respondents to make good the losses caused to the creditors of the Corporate Debtor as the transactions referred to in the earlier paragraphs are fraudulent transactions, holding that the Respondents are personally liable for such deliberate and wilful default. The Respondents 1 to 6 are jointly and severally responsible to pay Rs. 2,94,77,269/- (Rupees Two Crore Ninety Four Lakh Seventy Seven Thousand Two Hundred and Sixty Nine Only) with interest @ 12% per annum to the account of the Resolution Professional of the Corporate Debtor within two weeks from the date of receipt of this order.*

and 'disposed of' the said 'Interlocutory Application'.

<u>Appellants' Submissions:</u>

3. Challenging the 'impugned order' dated 02.06.2022 in IA(IBC)/196/KOB/2021 in IBA/13/KOB/2020 passed by the 'Adjudicating Authority', (National Company Law Tribunal, Kochi Bench, Kerala), the Learned Counsel for the 'Appellants' submits that the the 'Adjudicating Authority', (National Company Law Tribunal, Kochi Bench, Kerala), while passing the 'impugned order' on 02.06.2022 in IA(IBC)/196/KOB/2021 in IBA/13/KOB/2020, wherein and whereby the 'Appellants' / 'Respondents' were held personally liable for the 'Fraudulent Transactions', for such deliberate and wilful 'default' and, therefore, the Respondents 1 to 6 in IA(IBC)/196/KOB/2021 in

IBA/13/KOB/2020 were directed 'jointly or severally' responsible to pay Rs.2,94,77,269/- with an interest at 12% per annum to the account of the '1st Respondent' / 'Resolution Professional' of the 'Corporate Debtor' within 'Two Weeks' from the date of 'Receipt' of the 'Order'.

4. According to the Learned Counsel for the 'Appellants', the Adjudicating Authority', (National Company Law Tribunal, Kochi Bench, Kerala) had failed to appreciate the 'Statutory Provisions and Scheme of the I&B Code, 2016' and further, had not considered the 'Facts' on 'Record' and had passed the 'impugned order', without any 'application of mind'. It is represented on behalf of the 'Appellants' that the Adjudicating Authority', (National Company Law Tribunal, Kochi Bench, Kerala) had failed to appreciate that the 'Directions' may only be sought under Section 66 (1) of the I&B Code, 2016, if any, business of the 'Corporate Debtor' has been carried on with an 'intend to default the Creditors' of the 'Corporate Debtor' or for any 'Fraudulent Purpose' and 'Not Transactions', generally could be avoided, as per Section 49 or other Provisions of Part IV of the I&B Code, 2016.

5. The stand of the 'Appellants' is that the 'Adjudicating Authority', (National Company Law Tribunal, Kochi Bench, Kerala) had failed to distinguish between Section 66 (1) of the I&B Code, 2016 for 'Fraudulent Trading' and Section 66 (2) of the I&B Code, 2016 for 'Wrongful Trading', while holding the 'Directors', 'jointly or severally', liable without

reference to any particular Sub-Section of Section 66 or the 'Conditions' to be satisfied, while invoking each particular 'Sub-Section'.

6. The Learned Counsel for the 'Appellants' comes out with a 'Plea' that the 'Adjudicating Authority', (National Company Law Tribunal, Kochi Bench, Kerala) had failed to consider that even the 1st Respondent abandoned any case, it might have had under Section 66 (2) of the Code in the 'Rejoinder', due to the non-fulfilment of the 'Conditions' of Section 66 (2) (a) of the I&B Code, 2016, and as such, to the determination of 'applicability' under Section 66 (1) of the I&B Code, 2016 to the 'Facts and Circumstances' of the 'Instant Case'.

7. The Learned Counsel for the 'Appellants' submits that the 'Adjudicating Authority', (National Company Law Tribunal, Kochi Bench, Kerala) had himself interpreted the 'Decision' of this 'Tribunal' in '*Aditya Kumar Tiberwal Vs. Omprakash Pandey and Ors. (Comp. App. (AT) (Ins) No.583 of 2021)* and in any event the 'impugned order' is in violation of the 'Law' laid down by the Hon'ble Supreme Court in the matter of 'Central Board of Trustees v Indore Composite Pvt. Ltd., (2018) 8 SCC 443 is as under: -

> *"14) Indeed, in the absence of any application of judicial mind to the factual and legal controversy involved in the appeal and without there being any discussion, appreciation, reasoning and categorical findings on the issues and why the findings impugned in the writ petition deserve to be upheld or reversed, while dealing*

with the arguments of the parties in the light of legal principles applicable to the case, it is difficult for this Court to sustain such order of the Division Bench. The only expression used by the Division Bench in disposing of the appeal is "on due consideration". It is not clear to us as to what was that due consideration which persuaded the Division Bench to dispose of the writ petition because we find that in the earlier paras only facts are set out.

15) Time and again, this Court has emphasized on the Courts the need to pass reasoned order in every case which must contain the narration of the bare facts of the case of the parties to the lis, the issues arising in the case, the submissions urged by the parties, the legal principles applicable to the issues involved and the reasons in support of the findings on all the issues arising in the case and urged by the learned counsel for the parties in support of its conclusion. It is really unfortunate that the Division Bench failed to keep in mind these principles while disposing of the writ petition. Such order, in our view, has undoubtedly caused prejudice to the parties because it deprived them to know the reasons as to why one party has won and other has lost. We can never countenance the manner in which such order was passed by the High Court which has compelled us to remand the matter to the High Court for deciding the writ petition afresh on merits."

8. The Learned Counsel for the 'Appellants' points out the 'Decision' of the 'National Company Law Tribunal, Chennai Bench' in *'Ashish Rathi v. Rajiv Rathi and Others, 2022 SCC Online NCLT 21,* wherein the 'Adjudicating Authority', (National Company Law Tribunal, Chennai Bench), had discussed about the following: -

10.2 A careful perusal of Section 66 ofBC, 2016 would manifest the fact that it deals with two transaction; Section 66(1) of IBC, 2016 deals with 'Fraudulent Trading' and Section 66(2) of IBC, 2016 deals with 'Wrongful Trading'. Section 66(1) of IBC, 2016 imposes liability on 'any person' who were knowingly parties to the carrying on the business with a dishonest intention to defraud the creditors, to make contribution to the assets of the Corporate Debtor. Thus, essentially for a transaction to qualify under Section 66(1) of IBC, 2016,the following conditions should be satisfied;

(a) *Liability can be fixed upon 'any person';*

(b) *The said person should knowingly carry on the business with the Corporate Debtor;*

(c) *The said person should have a dishonest intention to defraud the creditors;*

10.3. It can be seen that Section 66(1) of BC, 2016 is pari materia to the provisions of Section 213 of UK Insolvency Act, 1986, which is extracted hereunder;

213 Fraudulent trading.

(1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, the following has effect.

(2)The court, on the application of the liquidator may declare that any persons who were knowingly parties to the carrying on of the business in

the manner above-mentioned are to be liable to make such contributions (if any) to the company's assets as the court thinks proper.

10.4 On analysing Section 66(2) of BC, 2016 it is to be seen that it deals with 'Wrongful Trading' and for a transaction to qualify under Section 66(2) the following conditions must be satisfied;

> (a) *Liability can be fixed upon only 'Director' or 'Partner';*
>
> (b) *They knew, or ought to have concluded that there was no reasonable prospect of voiding insolvency proceedings;*
>
> (c) *They did not take due diligence with a view to minimising the potential loss to the company's creditors;*

10.5 It can be seen that Section 66(1) of BC, 2016 is akin to the provisions of Section 214 of UK Insolvency Act, 1986, which is extracted hereunder;

214 Wrongful trading.

(1) Subject to subsection (3) below, if in the course of the winding up of a company it appears that subsection (2) of this section applies in relation to a person who is or has been a director of the company, the court, on the application of the liquidator, may declare that that person is to be liable to make such contribution (if any) to the company's assets as the court thinks proper.

(2) This subsection applies in relation to a person if

(a) the company has gone into insolvent liquidation,

(b) at some time before the commencement of the winding up of the company, that person knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation, and

(c) that person was a director of the company at that time; but the court shall not make a declaration under this section in any case where the time mentioned in paragraph (b) above was before 28th April 1986.

(3) The court shall not make a declaration under this section with respect to any person if it is satisfied that after the condition specified in subsection (2)(b) was first satisfied in relation to him that person took every step with a view to minimising the potential loss to the company's creditors as (on the assumption that he had knowledge of the matter mentioned in subsection (2)) he ought to have taken.

(4) For the purposes of subsections (2) and (3), the facts which a director of a company ought to know or ascertain, the conclusions which he ought to reach and the steps which he ought to take are those which would be known or ascertained, or reached or ta ken, by a reasonably diligent person having both-

(a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company, and

(b)the general knowledge, skill and experience that that director has.

(5)The reference in subsection (4) to the functions carried out in relation to a company by a director of the company includes any functions which he does not

carry out but which have been entrusted to him.

(6) For the purposes of this section a company goes into insolvent liquidation if it goes into liquidation at a time when its assets are insufficient for the payment of its debts and other liabilities and the expenses of the winding up.

(6A) For the purposes of this section a company enters insolvent administration if it enters administration at a time when its assets are insufficient for the payment of its debts and other liabilities and the expenses of the administration.

(7) In this section "director" includes a shadow director.

(8) This section is without prejudice to section 213.

*10.6 Thus, there seems to be a stark contrast in relation to Section 66(1) and 66(2) of BC, 2016. **It** is needless to say that even the scope of sub – section (1) and (2) of Section 66 of BC, 2016 are different. As to the present case, the Applicant sought the Respondents to make contribution to the Corporate Debtor, under Section 66(2) of IBC, 2016.*

10.7 The essence of sub-section (2) of Section 66 of IBC, 2016 seems to be that the Directors and Partner should have acted reasonably and responsibly in the time preceding the company's insolvency to avoid wrongful trading proceedings. They must always have put creditors' interests first, and not work for their own benefit. In other words, the Creditor could recover the money from the Director or Partner, if they have traded irresponsibly and acted without care or consideration for the creditors and in doing so, increased the debts of the Company. n short, it is where directors continue trading despite being aware that the company is insolvent.

10.8 Further, sub-section (3) of Section 66 suspends the operation of sub-section (2) till such time the period as mentioned in Section 10A of IBC, 2016 is in force. Interestingly, the UK Insolvency Act, 1986 has also suspended Section 214 which deals with Wrongful Trading for the period from 01.03.2020 till 30.09.2020. The object behind inserting sub-section (3) in Section 66 of BC,2016 seems to be that the Directors and Partners of the Company may continue their business or trading during the Covid – 19 pandemic without having the risk of being prosecuted under wrongful trading. However, it may be noted that the same benefit of suspension is not granted to 'Fraudulent Trading' defined under Section 66(1) of IBC, 2016 and also under Section 213 of UK Insolvency Act, 1986.

10.9. For a transaction to qualify under sub – section (2) of Section of IBC, 2016 the Resolution Professional has to substantiate before this Tribunal that the Director or the Partner of the Corporate Debtor is aware the company is insolvent and continues to trade and increases the debt of the Company. Further, it is to be noted that on examining Section 66(2) of IBC,2016 the element of 'Fraud', 'dishonest intention' and 'defrauding the creditor' is conspicuous by its absence, as compared to Section 66(1) of BC, 2016.

10.10. The definition of Wrongful Trading as found in Section 66(2) of BC, 2016 is somewhat seems to be exhaustive since it does not clearly delineate as to which act committed by a Director or a Partner of the Company would constitute 'Wrongful Trading'. It is to be noted here that there is no significant Judgment of the Appellate Tribunal and the Hon'ble Supreme Court in relation to the 'Wrongful Trading', in view of *the fact that the concept of 'Wrongful Trading' is being imported from the UK Insolvency Act, 1986 into the IBC, 2016 which is still at a nascent stage in this Country. Thus, it becomes imperative for this Tribunal to refer to the decision of the English Court. Thus, by taking a cue from the judgments rendered by the English Court in this regard, the following acts, but not limited to, would amount to 'Wrongful Trading';*

(i) Repaying the director loan made to the Company while other creditors were not paid;

(ii) Repayment of a loan to a family member;

(iii) A director paying his own salary whilst the salary for the employees was not paid;

(iv) Buying goods on credit when there is no means to pay for them;

(v) Using Customer deposits for cash-flow purposes with no means of supplying goods;

(vi) Repaying bank personal guarantees over other creditors;

(vii) Not keeping proper accounting records;

(viii) Falsification of company records;

(ix) Any transfer or sale of assets at anything less than a fair and reasonable commercial value;

10.11 By keeping in mind the scope of Sub-Section (2) of Section 66 of IBC, 2016, this Tribunal is required to examine as to whether the transactions as alleged by the Applicant in the present Application against the Respondents would fall within the confine of 'Wrongful Trading' that is to say that whether the Directors of the Corporate Debtor knew, or ought to have known that there was no reasonable prospect of avoiding insolvency proceedings; and that they did not take due diligence *with a view to minimising the potential loss to the Company's creditors. In this context, it is significant to refer to the decision of the Supreme Court in the matter of* ***Anuj Jain IRP for Jaypee Inrfatech Limited -Vs- Axis Bank Limited Etc.,*** *in Civil Appeal No. 8512 – 8527 of 2019;*

> *29.1. However, we are impelled to make one comment as regards the application made by RP. It is noticed that in the present case, the RP moved one composite application purportedly under Sections 43, 45 and 66 of the Code while alleging that the transactions in question were preferential as also undervalued and fraudulent. In our view, in the scheme of the Code, the parameters and the requisite enquiries as also the consequences in relation to these aspects are different and such difference is explicit in the related provisions. As noticed, the question of intent is not involved in Section 43 and by virtue of legal fiction, upon existence of the given ingredients, a transaction is deemed to be of giving preference at a relevant time. However, whether a transaction is undervalued requires a different enquiry as per Sections 45 and46 of the Code and significantly, such application can also be made by the creditor under Section 47 of the Code. The consequences of under valuation are contained in Sections 48 and 49. Per Section 49, if the undervalued transaction is referable to sub-section (2) of Section 45, the Adjudicating Authority may look at the intent to examine if such undervaluation was to defraud the creditors. On the other hand, the provisions of Section 66 related to fraudulent trading and wrongful trading entail the liabilities on the persons responsible therefor. We are not elaborating on all these aspects for being not necessary as the transactions in question are already held preferential and hence, the order for their avoidance is required to be approved; but it appears expedient to observe that the arena and scope of the*

requisite enquiries, to find if the transaction is undervalued or is intended to defraud the creditors or had been of wrongful/fraudulent trading are entirely different. Specific material facts are required to be pleaded if a transaction is sought to be brought under the mischief sought to be remedied by Sections 45/46/47 or Section 66 of the Code. As noticed, the scope of enquiry in relation to the questions as to whether a transaction is of giving preference at a relevant time, is entirely different. Hence, it would be expected of any resolution professional to keep such requirements in view while making a motion to the Adjudicating Authority.

10.12. From the above judgment of the Hon'ble Apex Court, it is to be noted that specific material fact in relation to the transaction which is sought to be challenged by the Resolution Professional is required to be pleaded in the Application. As to the present case, the Applicant sought to reverse the transactions purported to be done by the Respondents under Section 66 of BC, 2016. Also in the present case, the Applicant has not specifically pleaded as to which transactions he is sought to be reversed under Section 66(1) of BC, 2016 and which transactions falls under Section 66(2) of IBC,2016.

10.13. From the averments and in the submissions made by the Applicant, it is seen that the Applicant is trying to make a sweeping allegation by stating that there were impairments of assets just simply by relying upon the Report of the Auditor. However, the Learned Counsel for the Applicant has miserably failed to prove that the Respondents have paid the money with a dishonest *intention and to defraud the creditors. Further, the Applicant nowhere in the Applicant has stated as to how the Respondents was in the knowledge that the Company is going to be insolvent and the Applicant has also miserably failed to substantiate that the Respondents have not taken diligent care to minimize the potential loss to the Creditors.*

9. The Learned Counsel for the 'Appellants' refers to the 'Judgment' of the Hon'ble Supreme Court in *'Anuj Jain v. Axis Bank Ltd. and Ors., (2020) 8 SCC 401*, wherein at Paragraphs 29.1 to 29.3, it is observed as under: -

29.1. "However, we are impelled to make one comment as regards the application made by IRP. It is noticed that in the present case, the IRP moved one composite application purportedly under Sections 43, 45 and 66 of the Code while alleging that the transactions in question were preferential as also undervalued and fraudulent. In our view, in the scheme of the Code, the parameters and the requisite enquiries as also the consequences in relation to these aspects are different and such difference is explicit in the related provisions. As noticed, the question of intent is not involved in Section 43 and by virtue of legal fiction, upon existence of the given ingredients, a transaction is Anuj Jain Interim Resolution ... vs Axis Bank Limited on 26 February, 2020 deemed to be of giving preference at a relevant time. However, whether a transaction is undervalued requires a different enquiry as per Sections 45 and 46 of the Code and significantly, such application can also *be made by the creditor under Section 47 of the Code. The consequences of undervaluation are contained in Sections 48 and 49. Per Section 49, if the undervalued transaction is referable to sub-section (2) of Section 45, the Adjudicating Authority may look at the intent to examine if such undervaluation was to defraud the creditors. On the other hand, the provisions of Section 66 related to fraudulent trading and wrongful trading entail the liabilities on the persons responsible therefor. We are not elaborating on all these aspects for being not necessary as the transactions in question are already held preferential and hence, the order for their avoidance is required to be approved; but it appears expedient to observe that the arena and scope of the requisite enquiries, to find if the transaction is undervalued or is intended to defraud the creditors or had been of wrongful/fraudulent trading are entirely different. Specific material facts are required to be pleaded if a transaction is sought to be brought under the mischief sought to be remedied by Sections 45/46/47 or Section 66 of the Code. As noticed, the scope of enquiry in relation to the questions as to whether a transaction is of giving preference at a relevant time, is entirely different. Hence, it would be expected of any resolution professional to keep such requirements in view while making a motion to the Adjudicating Authority.*

29.2. In the present case, it is noticed that NCLT in its detailed and considered order essentially dealt with the features of the transaction in question being preferential at a relevant time but recorded combined findings on all these three aspects that the *impugned transactions were preferential, undervalued and fraudulent. Appropriate it would have been to deal with all these aspects separately and distinctively.*

29.3. We are conscious of the fact that IBC is comparatively a new legislation and various aspects expected therein are in the progression of taking proper shape, particularly in the adjudicatory processes envisaged. Having said so, we would leave this aspect at that only, while expecting all the concerned to be more attentive to the scheme, object and requirements of the provisions contained in the Code."

10. The Learned Counsel for the 'Appellants' contends that the 'impugned order', passed by the 'Adjudicating Authority', (National Company Law Tribunal, Kochi Bench, Kerala) in IA(IBC)/196/KOB/2021 in IBA/13/KOB/2020 is nothing but a 'Non-Speaking Order', and also an 'unreasonable one', in 'negation' of the principles of 'Natural Justice'.

11. The Learned Counsel for the 'Appellants' points out that the 'Transactions', which were consummated 'Nine to Sixteen Years', before the 'Insolvency Commencement Date', should not have been considered by the 'Adjudicating Authority' (National Company Law Tribunal, Kochi Bench, Kerala), at all.

12. The Learned Counsel for the 'Appellants' takes an 'emphatic plea' that the Provisions of 'Wrongful Trading', as per Section 66 (2) of the I&B Code, 2016 are 'inapplicable' to the facts of the present 'Case'.

13. The Learned Counsel for the 'Appellants' raises an 'Argument' that the finding of *Mens Rea* intention to 'Defraud' the 'Creditors' of the 'Corporate Debtor' or any knowledge of the 'Transactions', is to be found against each person, upon whom liability is ought to be fastened under Section 66 of the I&B Code, 2016.

14. The Learned Counsel for the 'Appellants' seeks aid of the 'Decision' of this 'Tribunal' in Regent Powertech Pvt. Ltd. v. M/s. Wind Construction Private Limited in Comp. App. (AT) (CH) (Ins.) No.349/2022, wherein at Paragraphs 34 to 38, it is observed as under: -

> *"34. One cannot remain 'oblivious' of the candid fact that, if the 'Directors' of a 'Company' had acted on a 'bonafide belief' that the 'Company' would 'recover' from its 'Financial Problems' / 'Difficulties', then, they will not be held liable for the 'act' / 'offence' of 'Fraudulent Trading'.*
>
> *35. As a matter of fact, the 'aspect' of 'Fraudulent Trading' requires a very 'High Degree of proof', which is attached to the 'Fraudulent Intent'. To put it emphatically, a more compelling 'Material' / 'Evidence' is required to satisfy the conscience of this 'Tribunal', 'on a preponderance of probability'. Apart from that, an 'isolated' / 'solo fraud' case, against the person, then, action in 'tort' can be resorted to, as opined by this 'Tribunal'. No wonder, a 'Creditor', who was defrauded, will have 'recourse' to an 'alternative remedy', under 'Civil Law'.*
>
> *36. In the instant Case 'on hand', the 'Appellant' / 'Applicant' before the 'Adjudicating Authority' (National*

Company Law Tribunal, Division Bench – II, Chennai) had filed IA(IBC)/489(CHE)/2021 in IBA/1099/2019 under Section 66 (1) of the Insolvency and Bankruptcy Code, 2016. In this connection, this 'Tribunal' significantly points out that in respect of an 'Application' (Filed under Section 66 of the Insolvency and Bankruptcy Code, 2016) 'Fraudulent Trading' / 'Wrongful Trading', by the 'Applicant' / 'Resolution Professional' is concerned, 'Tangible Materials' / 'Relevant Facts' are to be pleaded in an 'Unambiguous and Unequivocal Terms', by supplying the necessary details / facts as the case may be.

37. It transpires that the 'Appellant' / 'Applicant' in IA(IBC)/489(CHE)/2021 in IBA/1099/2019 that the 'Appellant' / 'Applicant' had prayed for issuance of 'Direction' to the Respondent 'jointly' and 'severally' to contribute to the 'Assets' of the 'Corporate Debtor', by paying a sum of Rs.75.63 Crore along with 18% interest from 05.06.2018, till the date of 'Realisation' in 'Full' and sought for a 'relief' of 'Declaration' that the 'Appellant' / 'Applicant' has got an 'unpaid vendor's Lien' over the 'Assets' of the 1st Respondent, supplied by the 'Corporate Debtor' for a sum of Rs.75.63 Crore along with 18% interest from 05.06.2018 till the date of 'Realisation' in 'Full'.

38. Barring the aforesaid 'Reliefs' / 'Directions' being sought for, by the 'Appellant' / 'Applicant' in IA(IBC)/489(CHE)/2021 in IBA/1099/2019, there are no 'Convincing Tangible' / 'Documentary Materials' to fortify the 'Plea' of the 'Appellant' / 'Applicant' that the 'Business' of the 'Corporate Debtor' was carried out by the Respondents with a

'Dishonest Intention' and, especially, to 'Defraud' the 'Creditors'. To put it precisely, the averments projected by the 'Appellant' / 'Applicant' in IA(IBC)/489(CHE)/2021 in IBA/1099/2019 do not come within the 'Four Parameters', of the ingredients of Section 66 of the Insolvency and Bankruptcy Code, 2016). Viewed in that perspective, the 'Impugned Order' dated 01.07.2022 in IA(IBC)/489(CHE)/2021 in IBA/1099/2019 passed by the 'Adjudicating Authority' (National Company Law Tribunal, Division Bench – II) in 'dismissing' the 'Application', without Costs, is 'free from any 'Legal error'. Consequently, the 'Appeal' fails."

Discussions:

15. Before the 'Adjudicating Authority', (National Company Law Tribunal, Kochi Bench, Kerala), the '1st Respondent' / 'Petitioner' / 'Resolution Professional' in IA(IBC)/196/KOB/2021 in BA/13/KOB/2020 had prayed for passing an order against the 1st to 6th Respondents therein, to 'jointly' and 'severally' to contribute Rs.10,74,654/- obtained from the 'Sale Agreement' executed by the 'Respondents' to sell the 3.63893 Acres of Land with interest of 15% per annum, till the date of payment.

16. Added further, the '1st Respondent' / 'Petitioner' / 'Resolution Professional' had prayed for an 'Order', against the Respondents 1 to 6 each, to furnish an 'indemnity bond' for Rs.3.64 Crore to the 'Corporate Debtor', towards the 'Market Value' of the 'Land', as a 'Security', till

disposal of all pending ‘Liquidation’, arising out of the ‘Bogus Sales Agreement’ and ‘Power of Attorney’, with respect to 3.63893 Acres of ‘Land’ owned by the ‘Corporate Debtor’.

17. In addition to the aforesaid prayers, the ‘1st Respondent’ / ‘Petitioner’ / ‘Resolution Professional’, had sought a ‘Relief’ before the ‘Adjudicating Authority’, (National Company Law Tribunal, Kochi Bench, Kerala) to pass an ‘Order’ against the ‘Respondents 1 to 6 therein, ‘jointly’ and ‘severally’ to contribute Rs.66,70,200/-, being the ‘amount’ ‘withdrawn’ from the ‘Corporate Debtor’, by the ‘Directors’, from the ‘amount’ received, against the ‘Share Purchase Agreement’, executed with Sri Ramani Resorts and Hotels Private Limited with an interest at the rate of 24% per annum for the entire consideration of Rs.1,00,00,000/-, from the date of ‘Receipt’, till the date of ‘Payment’. Besides this, the ‘1st Respondent’ / ‘Petitioner’ / ‘Resolution Professional’ had sought ‘Relief’ against the Respondent Nos.1 to 6 therein, to ‘jointly’ and ‘severally’ to contribute Rs.43,87,415/-, being the ‘Amount’ ‘withdrawn’ by the ‘Directors’ from the ‘Corporate Debtor’, received against the ‘Share Purchase Agreement’, executed with ‘Basel Products India Private Limited’, with an ‘interest’, at the rate of 24% per annum, for the ‘entire consideration’ of Rs.1,00,00,000/-, from the date of ‘Receipt’ till the ‘date of payment’.

18. The stand of the '1st Respondent' / 'Petitioner' / 'Resolution Professional' is that the 'Respondents' in IA(IBC)/196/KOB/2021 in IBA/13/KOB/2020 had committed 'fraudulent transactions', attracting the ingredients of Section 66 of the I&B Code, 2016.

19. The '1st Appellant' / '1st Respondent' in his 'Reply', to IA(IBC)/196/KOB/2021 in IBA/13/KOB/2020 had averred that there was only one 'allegation', after 2012 i.e., 'A Share Purchase Agreement' entered into with 'Basel Products India Private Limited', on 03.09.2018 and, in fact, all the 'purported transactions' decided the 'Limitation of Lookback Period' (Limitation), as contemplated, under Section 66 read with Sections 43, 45, 48 and 50 of the I&B Code, 2016, and as such, 'barred by Limitation'.

20. It is the stand of the '1st Appellant' / '1st Respondent' that the 'Lookback Period', being 'Two Years', in respect of 'Related Period Transactions' (under Sections 43, 45 and 49 of the I&B Code, 2016) and 'Extortionate Credit Transactions' under Section 50 of the I&B Code, 2016, and 'One Year', in case of any person other than the 'Related Party' under Sections 43,45 and 49 of the I&B Code, 2016. The 'categorical plea' of the '1st Appellant' / '1st Respondent' before the 'Adjudicating Authority' (National Company Law Tribunal, Kochi Bench, Kerala) was that given to the extent of 'Equity Financing' in India, of recoveries from such

'Transactions' will become the 'property of the Trustees' and will be 'distributed', as described within the 'waterfall of liabilities'.

21. It is represented on behalf of the '1st Appellant' / '1st Respondent' that an 'Application' is not to be filed by the 'Petitioner' / 'Resolution Professional', in an 'indefinite manner' and in the 'instant Case', the 'unamended Application' itself was filed '225 Days', after the 'Insolvency commencement date' and, therefore, the 'Application' projected by the 'Petitioner' / 'Resolution Professional', cannot be entertained by the 'Adjudicating Authority' (National Company Law Tribunal, Kochi Bench, Kerala). Continuing further, according to the '1st Appellant' / '1st Respondent', the ingredients of Section 67 of the I&B Code, 2016 is 'applicable to the Proceedings' under Section 66 of the I&B Code, 2016, does not provide for 'Contingent Funds and Liabilities', as prayed for, by the 'Petitioner' / 'Resolution Professional'.

22. The Learned Counsel for the '1st Appellant' / '1st Respondent' projects a 'Plea', that the 'allegations of Fraud', against the '1st Appellant' / '1st Respondent' in IA(IBC)/196/KOB/2021 in IBA/13/KOB/2020 are 'baseless' and 'contrary' to the fact on 'Record'. Moreover, the 'Share Purchase Agreement' with Sri Ramani Resorts and Hotels Private Limited dated 21.11.2022 had not created 'any Debt', upon the Company. Further, the facts on 'Record' indicate that Section 66 of the I&B Code, 2016 is not fulfilled and that the 'Directors' had endeavoured their best, to avoid the

‘Insolvency Resolution Process’, and continued to ‘Litigate’ the matter before the ‘Hon’ble Supreme Court, on their own risk.

23. It is the version of the ‘1st Appellant’ / ‘1st Respondent’ that in the ‘Financial Year 2020-2021’ viz., immediately, before the ‘Insolvency commencement’ date of the ‘Corporate Debtor’, the Directors had infused their own funds into the ‘Company’. It is clear from the ‘Record’ that the ‘Agreement’ with ‘Basel Products India Private Limited’ was concluded on 03.09.2018 and by this time, the ‘Agreement’ with Sri Ramani Resorts and Hotels Private Limited had already expired and that the ‘Respondents’ were invoked the ‘Appellant’ to protect the ‘Financial Interest’ of Sri Ramani Resorts and Hotels Private Limited and pay any ‘amounts’ due to Sri Ramani Resorts and Hotels Private Limited through the ‘proposed sale’ to ‘Basel Products India Private Limited’

24. In short, the stand of the ‘1st Appellant’ / ‘1st Respondent’ in its ‘Reply’ is that the ‘allegation’ of ‘Fraudulent’ and ‘Avoidable Transactions’, for each ‘liabilities’ are ought to be fastened under Section 66 of the I&B Code, 2016 is an ‘untenable’ and ‘impermissible’ one, under the I&B Code, and hence prays for ‘dismissal’ of IA(IBC)/196/KOB/2021 in IBA/13/KOB/2020.

25. At the outset, this ‘Tribunal’, pertinently points out that IA(IBC)/196/KOB/2021 in IBA/13/KOB/2020 was filed by the ‘1st Respondent’ / ‘Petitioner’ / ‘Resolution Professional’, before the

‘Adjudicating Authority’, (National Company Law Tribunal, Kochi Bench, Kerala) under Section 66 of the I&B Code, 2016, resting upon the ‘Report’ filed by the ‘Forensic Auditor’, appointed by the ‘Resolution Professional’, in fact, the ‘Liquidator’ had made a determination that

1) Bogus Lands Deal;

2) Advance Paid toward ‘Purchase of Lands’;

3) Sale Purchase Agreement (entered into, to sell the ‘Shares of the Company’ with ‘Sri Ramani Resorts and Hotels Private Limited’);

4) ‘Sale Purchase Agreement’ (entered into, to sell the ‘Shares of the Company’ with ‘Basel Products India Private Limited’)

are ‘Fraudulent Transactions’, attracting Section 66 of the I&B Code, 2016.

26. It must be borne in mind that Section 66 of the I&B Code, 2016 does not specify any ‘time limit’ of ‘Two Years’, for the ‘Resolution Professional’, to examine the ‘Fraudulent Transactions’, and filing a ‘Petition’, before the ‘Adjudicating Authority’ (National Company Law Tribunal, Kochi Bench, Kerala). The ‘1st Respondent’ / ‘Petitioner’ / ‘Resolution Professional’ had relied on the ‘Judgment’, of this ‘Tribunal’ in Comp. App. (AT) (Ins) 583/2021 in ‘Aditya Kumar Tibrewal v Om Prakash Pandey & Oths., wherein it is held that: -

> *“Answer III Application questioning the transactions covered by Section 49 and 66 of the Code are not to be rejected on the ground that Application has been filed beyond the period*

prescribed under Section 46 of the Code. The timeline prescribed for transactions under Section 46 does not cover the transactions covered by Section 49 and 66 of the Code.”

27. It comes to be known that IA(IBC)/196/KOB/2021 in IBA/13/KOB/2020 was filed on 09.11.2021, well within the ‘permissible time limit’ of ‘135 Days’, as per Regulation 35 (3) of the IBBI (Insolvency Regulation for Corporate Persons), Regulations, 2016. In fact, as on 09.11.2021, the ‘number of days’ of the ‘CIRP’ was ‘224 days’ and after excluding ‘90 days’, from the CIRP period, by virtue of an ‘Order’, passed by the ‘Adjudicating Authority’ (National Company Law Tribunal, Kochi Bench, Kerala), in IA(IBC)/129/KOB/2021 in IBA/13/KOB/2020 and IA(IBC)/196/KOB/2021 in IBA/13/KOB/2020 are in time. Besides this, the ‘time limit’ specified under the ‘Regulation’ is not a ‘mandatory one’ and it is only a ‘Directory’ in ‘character’.

28. According to the ‘1st Respondent’ / ‘Petitioner’ (before the ‘Adjudicating Authority’ - National Company Law Tribunal, Kochi Bench, Kerala) that the ‘6th Respondent’ in IA(IBC)/196/KOB/2021 in IBA/13/KOB/2020 was a ‘Director’ of the Company for 19 years, since 21.10.2003 and further he is liable for the ‘act(s)’ committed during his tenure, especially, when he had not denied any of the ‘Transactions’. Apart from that the ‘Claim’ that the 6th Respondent (to IA(IBC)/196/KOB/2021 in IBA/13/KOB/2020) had made before the ‘Resolution Professional’,

does not relieve him from the 'Fraudulent Transactions' done by him, in its capacity as the 'Director'.

Status Report of the 1st Respondent / Resolution Professional

29. The '1st Respondent' / 'the Resolution Professional' in his 'Status Report', before this 'Tribunal', points out that the 'Corporate Debtor' had availed a 'Loan' from the 'Federal Bank Limited' since 30.05.2022 and 'mortgaged' the 'Land' including 3.63893 acres of 'Land' at Agasteeswaram Village, Kanyakumari District, owned by the 'Corporate Debtor' and, in fact, the 'Federal Bank Limited' had assigned the said 'Debt' in favour of Phoenix ARC Private Limited on 14.07.2017. As a matter of fact, has totally admitted claim of Phoenix ARC Private Limited is Rs.31,16,92,846/-.

30. It comes to be known that there should 'subsistence of mortgage', the 1st Respondent (in IA(IBC)/196/KOB/2021 in IBA/13/KOB/2020) had entered into an 'Agreement' to sell the above property to Mr. Vethaselvaraj on 25.10.2005 for Rs.30,74,654/-, which was renewed on 11.09.2009, as per the 'Sale Agreement', the 'entire consideration' was paid to the 'Corporate Debtor'. But as per the 'Records' only Rs.20,00,000/- was accounted in the name of the 'Corporate Debtor'. There is no 'evidence' of 'Receipt of Balance' of Rs.10,74,654/- from Mr. Vethaselvaraj to the 'Company'. Also, that a sum of Rs.5 Lakh was credited to one of the

Directors Mr. K.R. Vasudevan Namboodiripad, which later he had withdrawn.

31. According to the '1st Respondent' / 'Applicant', the 'Respondents had not denied the 'Execution of the Agreement' and the 'Payment Terms' of the said 'Agreement' and also not denied the fact that only Rs.20 Lakh was accounted in the 'Corporate Debtor'. As such, the 'Respondents' according to the '1st Respondent' / 'Applicant', are liable to compensate the 'Corporate Debtor' for Rs.10,74,654/-, siphoned off from the 'Corporate Debtor'.

32. The 'Appellants' / 'Respondents' had entered into an 'Agreement' to sell for sale of 3.64 Acres of 'Land' to a 'Third Party' Mr. Vethaselvaraj for Rs.30.74 lakh, when the 'Market Price' was above Rs.3.64 Crores and this 'Transaction', was made without the knowledge and concealing the said fact from the 'Financial Creditor'. Moreover, the said 'Bogus Transactions' resulted in transferring the total of 3.64 Acres of 'Land' to one Mr. Alexander for a meagre sum of Rs.30.74 lakh. Subsequently, the 'Corporate Debtor' filed a 'Civil Suit OS 127 of 2011 before the Learned District Munsiff Court, Nagercoil, to cancel the said 'Transaction' and the matter is pending. Unless the said 'Transactions' are reversed, the 'Appellants' / 'Respondents' are liable to 'indemnify' the 'Corporate Debtor', for such losses.

33. The stand of the '1st Respondent' / 'Applicant' is that after cancellation of 'Power of Attorney' and when the 'Financial Creditor' had enquired into the matter, the 'Appellants' / 'Respondents' had entered into an 'Agreement' and in fact the 'Appellants' / 'Respondents' had stated that no such 'Transactions' were executed and, therefore, the 'Transactions' are 'Fraudulent' in nature, the same being entered into with an intention to deceive the 'Creditors', etc., in reality, the 'Appellants' / 'Respondents' had not denied any of the 'Execution of the Documents', 'Deeds' and 'Transactions'.

34. Apart from that, the 'present Claim' of 'Ramani Resorts' admitted by the 'Resolution Professional' is Rs.5,65,98,301/- and, therefore, the 'Director' with an intention to 'cheat' the 'Creditors' had entered into such 'Agreement' and moreover, the money received were 'siphoned off', creating 'Liability' on the Company. It is evident that when the 'Company' had mortgaged and availed 'Loan' from 'Banks', without paying the 'Banks' had executed a 'Memorandum of Understanding' to sell 100% share of the Company to the 'Third Party' and without 'paying' any money to the 'Creditors', siphoned off Rs.66.70 Lakh from the 'Company'. Hence, the 'Appellants' / 'Respondents' are liable to 'compensate' the 'Corporate Debtor' for Rs.66,70,200/-, being the 'Amount', 'siphoned off' and the 'Interest' at the rate of 24% per annum

for Rs.1,00,00,000/-, being the ‘Advance’ received from the date of ‘Receipt’ i.e., 21.11.2012, till the date of ‘Payment’.

35. According to the ‘1st Respondent’ / ‘Resolution Professional’, when the said ‘Share Purchase Agreement’ was in existence, the ‘Corporate Debtor’ through the ‘1st Appellant’ / ‘1st Respondent’ had entered into a ‘Share Purchase Agreement’ with ‘Basal Products India Private Limited’ for the sale of 100% shares of the ‘Corporate Debtor’, for a ‘Total Consideration’ of Rs.31,00,00,000/- and the ‘Corporate Debtor’ had received an ‘Advance’ of Rs.1,00,00,000/-, against the said ‘Share Agreement’ on 03.09.2018 through a ‘Bank Transfer’. The ‘Corporate Debtor’ had paid a sum of Rs.10,00,000/- as ‘Commission’ to one Mr. Baby Mathew and Rs.43,87,415/- were withdrawn by the ‘Directors’.

36. To the ‘1st Respondent’ / ‘Resolution Professional’, ‘Basal’ had made a ‘Claim’ of Rs.1,53,58,675/- and a sum of Rs.1,22,48,320/- was ‘admitted’, claimed by Mr. Basal. In fact, the ‘Corporate Debtor’ is ‘liable’ to refund all money received from ‘Basal’ and is ‘liable’ for all the ‘compensation’ for ‘Losses’ suffered and, therefore, the ‘Appellants’ / ‘Respondents’ are ‘jointly’ and ‘severally’ to contribute not only Rs.43,87,415/- withdrawn from the ‘Corporate Debtor’ and also ‘Commission’ paid, amounting to Rs.10,00,000/- to Baby Mathew and interest at the rate of 24%, for the whole amount of Rs.1,00,00,000/-, from 04.09.2018, the date of ‘Receipt’ from Basal, till the date of ‘Payment’.

37. The 'forceful stand' of the '1st Respondent' / 'the Resolution Professional' is that Rs.10,00,000/- commission was paid before the 'conclusion of sale' and that the 'Appellants' had entered into a 'Share Purchase Agreement' for 'sale of shares' which the 'Company' does not 'Possess the Share' and, therefore, the 'entire Transactions', are 'Fraudulent', which created a 'huge liability' on the 'Corporate Debtor'.

Burden of Proof :

38. It is pertinently pointed out by this 'Tribunal' that the 'Resolution Professional', is empowered to 'file' / 'initiate' proceedings for 'Fraudulent' or 'Wrongful Trading'. Furthermore, if the 'Whole Business of Company', is to 'Defraud', then, the ingredients of Section '66' of the I&B Code, 2016 are fulfilled. Undoubtedly, the 'Resolution Professional' is to prove that the 'Business' of the 'Corporate Debtor' was carried out with an 'intent' to 'Defraud' the 'Creditors' of the 'Corporate Debtor' or for any 'Fraudulent Purposes'. In fact, the 'intent' to 'Defraud', is to be 'judged' by its 'effect on the individual', who is an 'object of conduct', in question. To attract the ingredients of Section 66 of the I&B Code, 2016, it is not an 'essential factor', that there should be a 'Debtor' and 'Creditor', relationship.

39. Be it noted, that the expression 'party' to the carrying on of a 'Business', indicates taking positive steps in carrying on the Company's Business in a 'Fraudulent Manner'. In this connection, this 'Tribunal'

aptly points out the ‘Decision’ in ‘South India Paper Mills v Sree Rama Vilasam Press Publications reported in (1982) 52 Company Cases 145 Kerala, wherein it is held that the ‘litmus test’ viz., determination of ‘Solvency’, must be undertaken at the time, the liability was incurred, there was ‘no reasonable prospect of repayment’, at all.

40. Also, this ‘Tribunal’, worth recalls and recollects the ‘Decision’ of the Hon’ble High Court of Kerala, in K. Nagendra Prabhu v Popular Bank Ltd., reported in AIR 1970 Ker at Page 120, wherein it is observed that, if on the ‘Assessment’ of all ‘Facts and Circumstances’, the ‘Fraudulent Intent’ or ‘Fraudulent Purpose’ is made out, ‘liability’ must follow.

41. More importantly, ‘words’ (party to the carrying on of a Business) are quite wide, enough to include, within its ambit’, a ‘person’, other than the ‘Management’, ‘Employees’ and ‘Consultant of the Company’. Suffice, it for this ‘Tribunal’, to make a significant mention, that the ‘Adjudicating Authority’, (‘Tribunal’) is to be subjectively satisfied that the ‘Directors’, took all ‘reasonable steps’, to minimise the ‘Company’s Loss’.

42. No wonder, a ‘Company’ / ‘Other Entity’, which is involved in or assists, and derived ‘Benefits’ from the ‘Offending Business’ or ‘Benefits’ in an ‘Offending Manner’, and does so knowingly, and hence, Dishonesty can be ascertained and held liable for a ‘Fraudulent Trading’. Besides this, an action, will also lie, when there is a ‘Fraudulent Purpose’.

43. As a matter of fact, in respect of 'Fraudulent Trading', the 'whole period of Trading', is significantly 'relevant'. It is to be remembered that 'Dishonesty' is a salient feature and ingredients of a 'Fraudulent Trading'.

44. It must be borne in mind that the 'Proceedings' for 'Wrongful Trading', are purely 'Civil' in 'Nature' and the 'way out' is that an 'Order', requiring the 'Director(s)' concerned, to contribute to the 'Company's Assets' and 'Disqualification', for being concerned in the 'Management of Company'. In reality, the 'compelling materials' / 'evidence' are required to satisfy the 'Adjudicating Authority', (Tribunal) on a preponderance of probability, in a given 'Case', brought before it. However, it is for the 'Adjudicating Authority', ('Tribunal') to take a 'Final Call' in the matter. It is pointed out that the 'Yardstick' / 'Tape' employed, to determine the 'Liability', is whether the 'Director' had exercised 'General Knowledge', 'Skill' and 'Experience', to be expected of a 'Person', carrying out the 'Functions'. The 'Foundation' for the 'Liability', is to whether the 'Concerned' knew or should have known, from the reasonable, and prudent Homo sapiens' perspective.

45. It is brought to the fore that IA(IBC)/196/KOB/2021 in IBA/13/KOB/2020 was filed by the '1st Respondent' / 'Resolution Professional' as 'Petitioner', based on the 'Report' filed by the 'Forensic Auditor', appointed by the 'Resolution Professional'.

46. In the instant case, at this juncture, it is worthwhile for this 'Tribunal' to advert to the 'contents' of the 'Forensic Auditor's Report' as made mention of by the 'Adjudicating Authority', ('Tribunal') in the 'impugned order', which runs as under:-

a) "Agreement for sale of mortgaged land by the Corporate Debtor.

It is evident from the above-mentioned observations that, these transactions were deliberately entered into by the suspended Managing Director of the Corporate Debtor, for keeping assets of the Corporate Debtor beyond the reach of the Secured Creditor ie Federal Bank, as this land property was mortgaged as security with the Bank.

Furthermore, actual facts were concealed from the bank by misrepresenting that no agreements were existing for the sale of the mortgaged property, while in fact, a sale agreement of the said property was in force, and in addition, another sale agreement was also signed afterward for the sale of the same mortgaged property with the same buyer.

Mr. Vethaselvaraj, the buyer has also been deceived by the suspended Managing Director of the corporate debtor by collecting full consideration of the sale without getting consent from the Federal bank with whom the assets were mortgaged, while Mr. K.N. Narayanan Namboodiripad had offered to sell the property free from all encumbrances as per the sale agreement signed. Original agreements, General Power of Attorney, and other documents were not provided during the process of audit.

b) Suspected diversion of funds accounted as advance paid for land purchase.

An amount of Rs. 1,73,45,000 is outstanding as land purchase advance in the audited financial statements as on 31st March 2021. There is no *evidence available in the office to prove that the payments have been made for such a purpose. Rs. 1,00,000 each have been paid continuously from 31st January 2009 to 31st March 2009, which is an unusual method of payment in a normal land sale. Moreover, all these payments have been made by cash. There is a suspected diversion of fund by accounting as advance for purchase of land. There were no land properties made for this advance paid.*

c) Share Purchase Agreement with M/s. Sri Ramani Resorts and Hotels Pvt. Ltd to sell 100% shares of the Company.

Based on the observations mentioned above, the Share Purchase Agreement executed by the Corporate Debtor is "void ab initio" and the intention of KN Narayanan Namboodiripad, the suspended Managing Director, and Mr. Venugopal T M, The COO of CD, for entering into such an agreement is Suspected to deceive the Corporate Debtor and the buyer.

d) Share Purchase Agreement with M/s. Basel Products India Private Limited to sell 100% shares of the Company.

This Share Purchase Agreement executed by the Corporate Debtor is also "void ab initio" as in this agreement also the CD agreed to sell the shares not owned by it but by the shareholders of the company. Entering into another SPA when a SPA (though "void ab initio) was existing and active on the date with M/s Sri Ramani Resorts and Hotels Pvt. Ltd is an intentional violation of the clauses of the original SPA. The intention of K.N.Narayanan Namboodiripad, the suspended Managing Director for entering into such an agreement is suspected to deceive the Corporate Debtor and the buyers.

25. From the Forensic Audit it is clear that this is a fit case to direct the Respondents to make good the losses caused to the creditors of the Corporate Debtor as the transactions referred to in the earlier paragraphs are fraudulent transactions, holding that the Respondents are personally liable for such deliberate and wilful default. The

Respondents 1 to 6 are jointly and severally responsible to pay Rs. 2,94,77,269/- (Rupees Two Crore Ninety Four Lakh Seventy Seven Thousand Two Hundred and Sixty Nine Only) with interest @ 12% per annum to the account of the Resolution Professional of the Corporate Debtor within two weeks from the date of receipt of this order."

47. From the contents of the 'Forensic Auditor's Report', the 'Status Report' filed by the '1st Respondent' / 'the Resolution Professional', as aforementioned, and also on the 'basis' of 'facts and circumstances' of the instant Case, it is latently and patently evident that 'Appellants' / 'Respondents' had indulged in carrying on the 'Business' of the 'Corporate Debtor' in a 'dishonest' and 'fraudulent manner', with a view to 'Defraud' the 'Creditors' and because of the 'Fraudulent Transactions' in the subject matter, in issue,, the 'Appellants' / 'Respondents are responsible in a 'Joint' and 'Several Manner', to pay a sum of Rs.2,94,77,269/- only with an 'interest' at 12% per annum, in respect of the 'Resolution Professional's Account' of the 'Corporate Debtor', of course, within 'Six Weeks', from the date of passing of this 'Judgment'. Viewed in that perspective, the conclusion arrived at by the 'Adjudicating Authority', (National Company Law Tribunal, Kochi Bench, Kerala) in IA(IBC)/196/KOB/2021 in IBA/13/KOB/2020 dated 02.06.2022, holding that the 'Appellants' / 'Respondents' are required to make 'good' the 'Loss', caused to the 'Creditors' of the 'Corporate Debtor', because of the fact that the

‘Transactions’, mentioned in the ‘Forensic Auditor’s Report’, as detailed in this ‘Judgment’ are without ‘any simmering doubt’, partake the character of ‘Fraudulent Transaction’ and, as such, the ‘Appellants’ / ‘Respondents’, are personally liable to pay for ‘Knowingly’ and ‘Dishonestly’, committing this ‘malevolent acts’ / ‘misdeeds’, are free from any ‘Legal Flaw’. Consequently, the instant Comp. App. (AT)(CH)(Ins) No.409/2022 fails.

In fine, the instant Comp. App. (AT)(CH)(Ins) No.409/2022 is ‘dismissed’. No Costs. The connected IA/1001/2022 (For ‘Stay) is Closed.

[Justice M. Venugopal]
Member (Judicial)

[Naresh Salecha]
Member (Technical)

05/12/2022

ghk/tm