

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

COMPANY APPEAL (AT) (INSOLVENCY) No. 454 of 2022

(Arising out of Order dated 21.01.2022, passed by National Company Law
Tribunal, New Delhi, Bench V in IA No. 2153 of 2020 C.P. (IB) No.
2414(ND)/2019)

IN THE MATTER OF:

**1. Mr. Nitin Bharal,
Ex-Director/Promoter
A-406, Road No. 4, Street No. 8,
Mahipalpur Extension,
New Delhi – 110037.**

Also at:

**L-60, 3rd Floor, Green Park Main,
New Delhi – 110016.**

Email Id: nitin@committedcargo.com

...Appellant No. 1

**2. Mr. Narendra Singh Bisht
Ex-Director/Promoter
A-406, Road No. 4, Street No. 8,
Mahipalpur Extension,
New Delhi – 110037.**

Also at:

**A-1/46, Sector 3, Rohini
Delhi – 110085.**

Email Id: narendra@committedcargo.com

...Appellant No. 2

**3. Mr. Yaspal Arora
Ex-Director/Promoter
A-406, Road No. 4, Street No. 8,
Mahipalpur Extension,
New Delhi – 110037.**

Also at:

**54/5, 1st Floor Ashok Nagar,
New Delhi – 110018.**

Email Id: yashpal@committedcargo.com

...Appellant No. 3

**4. Mr. Rajeev Sharma
Ex-Director/Promoter
A-406, Road No. 4, Street No. 8,
Mahipalpur Extension,
New Delhi – 110037.**

Also at:
AD 116B, Pitampura,
New Delhi – 110034
Email Id: rajeev@committedcargo.com

...Appellant No. 4

Versus

Stockflow Express Private Limited
Through Liquidator, Mr. Sanjay Gupta
C4E/135, Janakpuri,
New Delhi – 110058
Email Id: sanjay@sgaindia.in

...Respondent

For Appellants: Mr. GP Madaan and Mr. Aditya Madaan,
Advocates.

For Respondent: None.

J U D G E M E N T

[Per: Shreesha Merla, Member (T)]

1. Aggrieved by the Impugned Order dated 21/01/2022 passed by the Learned Adjudicating Authority (National Company Law Tribunal, New Delhi, Bench V), in I.A. 2153 of 2020 in C.P. (IB) No.- 2414(ND)/2019, this Appeal has been preferred under Section 61 of the Insolvency and Bankruptcy Code, 2016, (hereinafter referred to as The Code), by the Ex-Director/Promoters/the Appellant herein.

2. The IRP preferred I.A.2153 of 2020 seeking directions to be issued to the Directors of the 'Corporate Debtor'/the Appellants herein to make good the losses caused on account of the fraudulent transactions entered into by them and refer the matter to IBBI in view of the provisions under Sections 236 of the Code.

3. Succinctly put, the facts in brief are that the 'Corporate Debtor' is in the courier business and was earlier known as Committed Worldwide Express Private Limited. It was averred that prior to December 2018, there were five Directors in the Company namely:

1. Mr. Nitin Bharal
2. Mr. Narendra Bisht
3. Mr. Rajeev Sharma
4. Mr. Yashpal Arora
5. Mr. Sujeet Kumar Chaudhary

4. The Directors mentioned in Sl. Nos. 1 to 4 are the Promoters who collectively owned 100% shareholding in 'Stock Flow Express Private Limited'. While so, on 27/12/2018, Mr. Shiv Kumar Chaturvedi was appointed as Director in the Company and on 31/12/2018, the Directors mentioned in Sl. No.1-4 resigned from their posts. It is stated that in the month of August 2019, Mr. Sujeet Kumar Chaudhary arrayed as a Director in Sl. No. 5 passed away and therefore effectively only Mr. Shiv Kumar Chaturvedi was the Director in the Company. As the 'Corporate Debtor' did not have any 'Financial Creditor' who is not a related party, the CoC was constituted under Regulation 16 of the IBBI (CIRP Regulations, 2016).

5. The Interim Resolution Professional who was appointed on 26/11/2019, was not ratified in the first CoC Meeting held on 26/12/2019, filed I.A. 2153/2020 contending that the ex-Directors/Promoters of the 'Corporate Debtor' have not been cooperating with the IRP; that they have not been sharing important documents and information on account of which, the Transaction Auditor was not able to submit his Report and that no supporting Report from the Transaction Auditor has been annexed only

on account of this non-cooperation; that the Report has been based on the IRP's analysis of the data and the information available.

6. It was stated that the ex-Directors assisted by one Mr. Manish Kumar Gupta and one Ms. Eva Srivastava sold their shareholding to defraud the Creditors; that the share sale details and the correct address of the new Shareholders were not being shared with the IRP; that Mr. Shiv Kumar Chaturvedi, the new Director, has not been making any transactions and was the only Director on the board; that the four Promoters sold their 100% shareholding to a related concern namely Committed Cargo Care Limited on 20/10/2017; the four Promoters are also the Promoters/Directors of this Committed Cargo Care Limited and that on 31/03/2018, about five months later, Committed Cargo Care Limited sold a part of its shareholding in the 'Corporate Debtor', (Stock Flow Express Private Limited), back to these four Promoters/Directors and that despite repeated enquiries, the ex-Directors of the 'Corporate Debtor' had failed to explain the objective of making these circuitous share sales transactions between Companies in which they were common Promoters.

7. It was stated by the IRP in the Application filed before the Adjudicating Authority that the Balance Sheet of the 'Corporate Debtor' as on 31/03/2017 showed that the receivables which were more than six months old amounted to Rs.2,53,62,176/- and the bad debts written off during the year 2017-18 was of Rs.6,36,143/-; however as on 31/03/2018, the receivables which were more than six months old were at zero level, and the bad debts written off was Rs.1,25,37,262/- and it is stated that the

Respondents 1 to 4 were the Directors at that point of time when these amounts were written off.

8. It was further stated in the Affidavit that 'Committed Cargo Care Private Limited' has started operating in the courier business and the CoC Members advised the IRP that since the COC Members (other 'Operational Creditors' who are the CoC Members) are operating in the same market they have come to know that the Promoters were doing courier business in the related entity. It was averred that this business to the related entity was done to influence the Debtors of the 'Corporate Debtor' and misuse the amount receivable for the benefit of the related parties. It is also stated that the IRP approached Debtors YK Logistics and YK International who owes Rs.20,12,383/- and Rs.22,20,651/-, as per the books of the 'Corporate Debtor', for recovery of the due amounts and was informed by the Debtors for an amount of Rs.3 lakhs was received by the 'Corporate Debtor' in cash as full and final settlement, while Mr. Shiv Kumar Chaturvedi, the current Director claims that the signature on the NOC was forged. Another Director by name RJ Logistics Services LLP owed Rs.10,71,250/- to the 'Corporate Debtor' which was also written off apart from other debts. It was averred that the IRP received cash from these debtors, issued large amount of credit notes, written off debts to cause harm to the interests of the Creditors.

9. The IRP had also filed a Supplementary Affidavit in compliance of the Order of the Adjudicating Authority dated 10/12/2020 stating that he had written to the three Banks namely Yes Bank, ICICI Bank and Axis Bank. Yes Bank had shared copies of the cheques issued between 08/01/2019 and

29/06/2019 subsequent to 31/12/2018, though the Appellants herein claimed that they did not have any control of the Corporate Debtor Company and denied issuing any cheques after 31/12/2018. It was stated by the IRP that the signatures on the cheques matched those with the letters of resignation of the four Promoters. It was stated that the IRP sought information from ICICI Bank which Bank informed that during 02/04/2019 and 19/10/2019, similar cheque transactions had taken place.

10. The Appellants had in their reply dated 29/09/2020 before the Adjudicating Authority denied that they had indulged in any such fraudulent transaction; that the sale of the shareholding does not fall within Section 66 of the Code; that they had resigned from the Company on 31/12/2018 itself and the management and control of the 'Corporate Debtor' was under the control of Mr. Sujeet Kumar Choudhary (now deceased) and Mr. Shiv Kumar Chaturvedi. It was further stated that the IRP had not brought on record any Report or document to substantiate that they had been issuing cheques after the Company was taken over by Mr. Sujeet Kumar Chaudhary. It was also observed that there was no restriction imposed on them from conducting any business and that they have surrendered their authorisation as signing authority in the Bank Transaction even after selling their shareholding.

11. It was defended by Mr. Shiv Kumar Chaturvedi that he had joined the Company only on 27/12/2018 and that he was not the Shareholder of the Company and was only an employee and that he was not having any documents of the Company. The debts which had become bad were written

off as there was no chance of recovery and that the IRP was making only vague allegations against him.

12. Ms. Simmi Chopra, Mr. Rahul Jasoria and Mr. Rohit Jasoria arrayed as Respondents 8, 9 & 10 in the Application had filed their Reply denying that they had entered into any commercial business transactions with the Corporate Debtor Company.

13. The Adjudicating Authority while allowing the Application preferred by the IRP, concluded as follows:

“28. In view of the discussion made above, we are of the considered view that the cash transactions and the written off debt made with respondent Nos. 9 and 10 comes under the category of fraudulent transaction and same was done during the tenure of Respondent No. 1 to 4 and even after their resignation, they were having financial control in the affairs of the corporate debtor, therefore they are liable for these transactions. So far respondent No. 5 is concerned, since he is paid director and appointed on 27.12.2018, therefore, he is not responsible for any act or omission made by or on behalf of the Corporate Debtor. Similarly, respondent Nos. 6, 7 and 8 are also not held liable under Section 66 of the IBC.

29. Therefore, we find and hold the respondent Nos. 1 to 4, the Suspended Board of Directors/Promoters of the Corporate Debtor have been carried on business with intent to de-fraud the creditors of the Corporate Debtor or with fraudulent purpose and in this way, they have written off the debt of respondent No. 9 & 10 and also settled the amount on the payment of Rs. 3 lakhs against the total debt of Rs.42,33,304/-. Hence, they are liable to make contributions the amount which was misuse or misappropriated by the Suspended Board of Directors/Promoters with intent to de-fraud the Creditors. Accordingly, the respondent Nos. 1 to 4 are directed to make the contribution of Rs.13368262/- (12537262+636143+194857), the amount which were written off during the financial year 2016-17, 2017-18 and 2018-19, the respondent no. 9 is directed contribute Rs.2377952/-

(2012383+2220651) and respondent no. 10 is directed to contribute Rs. 2377952/- (1071250+1306702) and if the amount shown in the order is not paid by the respondent Nos. 9 and 10, in that case same shall be recovered from the respondent Nos. 1 to 4 jointly or severally. The Respondent No. 1 to 4, 9 and 10 are directed to contribute the aforesaid amount in the account of Corporate Debtor through the Liquidator within 3 months from the date of order, failing which same shall be realised through the process of Court. Apart from that the applicant is also directed to institute a prosecution under Section 69 of the IBC, 2016 in accordance with the provision of law against respondent Nos. 1 to 4, 9 and 10.”

14. Learned Counsel for the Appellant strenuously contended that the Adjudicating Authority has erroneously allowed the Application in the absence of any Transaction Audit Report as no Audit was ever conducted on any of the alleged transactions of the ‘Corporate Debtor’; and that the Appellants have been held liable under Section 66 of the Code solely on the basis of the IRP's own analysis. Learned Counsel further contended that the IRP has failed to establish that the sale of the shareholding by the Appellants was done with an intention to defraud the Creditors. It is also the case of the Appellants that the Appellants were not the Directors of the ‘Corporate Debtor’ when the debts of an amount of Rs.1,25,37,262/- was written off in the Financial Statement for the Financial Year 2018-19. Learned Counsel vehemently argued that the operation of the Bank Accounts of the ‘Corporate Debtor’ post the resignation of the Appellants has absolutely no relevance for the purpose of determining whether the writing off the bad debts was done with an intention to defraud the Creditors. At, this juncture, it is relevant to reproduce Sections 66 & 67 of the Code:

“66. Fraudulent trading or wrongful trading.—

(1) If during the corporate insolvency resolution process or a liquidation process, it is found that any business of the corporate debtor has been carried on with intent to defraud creditors of the corporate debtor or for any fraudulent purpose, the Adjudicating Authority may on the application of the resolution professional pass an order that any persons who were knowingly parties to the carrying on of the business in such manner shall be liable to make such contributions to the assets of the corporate debtor as it may deem fit.

(2) On an application made by a resolution professional during the corporate insolvency resolution process, the Adjudicating Authority may by an order direct that a director or partner of the corporate debtor, as the case may be, shall be liable to make such contribution to the assets of the corporate debtor as it may deem fit, if—

(a) before the insolvency commencement date, such director or partner knew or ought to have known that there was no reasonable prospect of avoiding the commencement of a corporate insolvency resolution process in respect of such corporate debtor; and

(b) such director or partner did not exercise due diligence in minimising the potential loss to the creditors of the corporate debtor.

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

67. Proceedings under section 66.—*(1) Where the Adjudicating Authority has passed an order under sub-section (1) or sub-section (2) of section 66, as the case may be, it may give such further directions as it may deem appropriate for giving effect to the order, and in particular, the Adjudicating Authority may—*

(a) provide for the liability of any person under the order to be a charge on any debt or obligation due from the corporate debtor to him, or on any mortgage or charge or any interest in a mortgage or charge on assets of the corporate debtor held by or vested in him, or any person on his behalf, or any person claiming as assignee from or through the person liable or any person acting on his behalf; and

(b) from time to time, make such further directions as may be necessary for enforcing any charge imposed under this section.

Explanation.—For the purposes of this section, “assignee” includes a person to whom or in whose favour, by the directions of the person held liable under clause (a) the debt, obligation, mortgage or charge was created, issued or transferred or the interest created, but does not include an assignee for valuable consideration given in good faith and without notice of any of the grounds on which the directions have been made.

(2) Where the Adjudicating Authority has passed an order under sub-section (1) or sub-section (2) of section 66, as the case may be, in relation to a person who is a creditor of the corporate debtor, it may, by an order, direct that the whole or any part of any debt owed by the corporate debtor to that person and any interest thereon shall rank in the order of priority of payment under section 53 after all other debts owed by the corporate debtor.”

15. A brief perusal of the material on record shows that the IRP had consistently stated that there was absolutely no cooperation on behalf of the ex-Directors/Promoters i.e., the Appellants herein, in providing any sort of information and that is the sole reason for the Transaction Auditor not to have prepared the Report. It is also deposed by the IRP in his Affidavit, filed before the Adjudicating Authority in compliance of the Order dated 21/10/2020 that it was only on account of complete non-cooperation from

the Appellants herein that conscious efforts were made by the IRP to ascertain the nature of transactions that were entered into by the Appellants herein.

16. Section 18 of the Code deals with duties of the IRP:

“18. Duties of interim resolution professional.—
The interim resolution professional shall perform the following duties, namely:—

(a) collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to—

(i) business operations for the previous two years;

(ii) financial and operational payments for the previous two years;

(iii) list of assets and liabilities as on the initiation date; and

(iv) such other matters as may be specified;

(b) receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under sections 13 and 15;

(c) constitute a committee of creditors;

(d) monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors;

(e) file information collected with the information utility, if necessary; and

(f) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including—

- (i) assets over which the corporate debtor has ownership rights which may be located in a foreign country;*
- (ii) assets that may or may not be in possession of the corporate debtor;*
- (iii) tangible assets, whether movable or immovable;*
- (iv) intangible assets including intellectual property;*
- (v) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;*
- (vi) assets subject to the determination of ownership by a court or authority;*
- (g) to perform such other duties as may be specified by the Board.*

Explanation.—For the purposes of this [section], the term “assets” shall not include the following, namely:—

- (a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;*
- (b) assets of any Indian or foreign subsidiary of the corporate debtor; and*
- (c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator.”*

17. Section 18(1)(a) clearly specifies that the IRP shall collect all information relating to the assets, finances and operations of the ‘Corporate Debtor’. Section 18(9) to perform other duties as specified by the Board. In fact, in this case the appointment of the IRP was not ratified in the first CoC and he continued to function as IRP. Viewed from the provisions under the

Code, in the event of suspicion of any fraudulent transaction, it cannot be said that the IRP did not have the power to collect information and furnish a detailed analysis to the Adjudicating Authority.

18. It is an admitted fact that the four Directors Mr. Nitin Bharal, Mr. Narendra Bisht, Mr. Rajeev Sharma and Mr. Yashpal Arora had resigned as Directors on 31/12/2018 and the fifth Director Mr. Sujeet Kumar Chaudhary has since deceased and only one Mr. Shiv Kumar Chaturvedi was appointed as the sole Director to manage the affairs of the Company. It is significant to mention that Mr. Shiv Kumar Chaturvedi was appointed *only three days prior to their resignation*, i.e., on 28/12/2018. There are no substantial reasons given for the share sales transactions, whereby the four Promoters sold their 100% shareholding to a related concern namely Committed Cargo Care Limited on 20/10/2017 when the Appellants were the Directors and subsequent to the resignation on 31/03/2018, i.e., about five months later, the same Committed Cargo Care Limited sold a part of its shareholding in the Corporate Debtor Company i.e., (Stock Flow Express Private Limited Company) to the four Promoter/Directors. In the absence of any relevant grounds, raised in this Appeal, we concur with the findings of the Adjudicating Authority that the four Promoters/ex-Directors of the 'Corporate Debtor' failed to explain the objective of making the circuitous share transactions between the Companies where they were all common Directors.

19. The Adjudicating Authority has also reproduced the bad debts which were written off during the year 2017-18, the period when the Appellants

herein were the Promoters/Directors. The said summary is detailed as hereunder:

Date/receivable category	31-03-2019	31-03-2018	31-03-2017	31-03-2016
<i>Less than 6 months</i>		47749407	12816088	
<i>More than 6 months</i>			25632177	
<i>Total receivables</i>	24470625	47749407	38448265	34757837
<i>Bad debts written off</i>	12537262	636143	194857	

20. The Adjudicating Authority has given noted detail the Bank Transactions done by the ex-Directors/Promoters ‘after’ resigning as Directors. It appears from the material on record that the total transactions done ‘after’ the Directors resigned on 31/12/2018 upto 26/07/2019 is Rs.19,98,602/-. It is further seen from the record that as per the reply sent by the ICICI Bank to the IRP, it is recorded that during 02/04/2019 till 19/10/2019, authorised signatories were none other than the Appellants themselves. Therefore, the contention of the Learned Counsel for the Appellant that the Appellants herein did not operate the Bank Account or were not involved in any Bank Transaction, post their resignation, is untenable. These Bank Transactions post resignation, squarely fall within the ambit of Section 66(1) i.e., ‘it is found that the business of the ‘Corporate Debtor’ has been carried on with an intent to defraud Creditors’.

21. Now we address ourselves to the contention of the Appellant Counsel that the amounts were written off as bad debts only because they could not be recovered. The Adjudicating Authority after discussing in detail the Bank

Account Statements (for the sake of brevity, the same is not being reproduced here) of Yes Bank, ICICI Bank and Axis Bank has observed as follows:

“27. Now coming to the third point, the cash transactions receiving cash from debtors admittedly Vyke Logistics and Vyke International, the respondent No. 9 owes the debts and they have debtors of the Corporate Debtor, as per the books of Corporate Debtor, total amount is of Rs.20,12,383/- and Rs.22,20,651/- and the claim of these respondents are they have settled the amount on full and final payment after making payment of Rs. 3 lakhs as cash. A total debt of Rs. 42,33,034/- was settled only after making payment of Rs. 3 lakhs that has not been disclosed either by the respondent Nos. 1 to 4 and respondent No. 9. We further notice that there is another Creditor as per the averments made in the Application that is respondent no. 10 RJ Logistics Services LLP with Mr. Rohit Jasoria as the designated partner and RJ brother with Mr. Rohit Jasoria owes the debt of Rs.10,71,250/- and Rs.13,06,702/- respectively and their debts are also written off. The respondent No.9 and 10 by filing their reply claimed that they never owe any debt and they are not the debtor of the Corporate Debtor. The respondent No. 9 further claimed that the amount had already been settled after making the payment of Rs.3 lakhs. We failed to understand how the Rs.42,33,304/- will be settled only on the payment of Rs. 3 lakhs. Therefore, we are of the considered view these transactions also comes under the category of the fraudulent transactions.

(Emphasis Supplied)

22. A perusal of the scanned copy of the Bank Statement evidences that the Adjudicating Authority has rightly concluded that there are no reasons given for how an amount of Rs.42,33,304/- has been settled for a mere payment of Rs.3 Lakhs/-. This fraudulent transaction took place during the

time the Appellants were Directors of the 'Corporate Debtor' and squarely falls within the ambit of Section 66 of the Code.

23. Keeping in view, the copy of the Bank Statements, amounts written off as bad debts during the Financial Year when the Appellant/Promoters were the Directors, the circuitous sale of shares, this Tribunal is of the earnest view that the contention of the Learned Counsel for the Appellant that there was no Transaction Audit and hence the Adjudicating Authority ought not to have given a finding of fraudulent transaction under Section 66 of the Code is unsustainable. If the IRP/RP has *prima facie* suspicion of any fraudulent transactions, as defined under the Code, have a recourse to approach the Adjudicating Authority for necessary action. At the cost of repetition, it is specifically averred by the IRP that there was no cooperation from the Appellant/Promoters and hence an Affidavit was filed by him with a detailed analysis. We find merit in the submission that not having cooperated in giving information to the IRP, the contention of the Appellants that the Adjudicating Authority has in the absence of any Audit Report, has given these findings, which cannot be relied upon, has no legs to stand. To reiterate, the debts written off to defraud the Creditors, the cash transaction post their resignation evidencing their financial control in the affairs of the 'Corporate Debtor', clearly establish that they are 'fraudulent transactions' done with a wilful intention of financial gain at the cost of negatively affecting the Creditors.

24. For all the aforementioned reasons we do not see any illegality or infirmity in the well-considered Order of the Adjudicating Authority. Hence, this Appeal fails and is accordingly dismissed. No order as to costs.

**[Justice Ashok Bhushan]
Chairperson**

**[Ms. Shreesha Merla]
Member (Technical)**

**New Delhi
04th May, 2022**

himanshu