

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 571 of 2020

[Arising out of the Impugned Order and Judgement dated 23.03.2020 in CA No. 3/2019 in CP (IB) No. 70/Chd/Hry/2018 under section 19(2) of Insolvency and Bankruptcy Code 2016 passed by the National Company Law Tribunal, Chandigarh, Bench Chandigarh].

IN THE MATTER OF:

**Shailesh Chawla
H.No. 521, Sector-5,
Kurukshetra.**

**Ranjan Sharma
H.No. 418, Sector 13,
Kurukshetra.**

...Appellants

Versus

**Vinod Kumar Mahajan, RP,
R/O Flat No. 309, RCS Society, Sector 48-A,
Chandigarh – 160047.**

**Om Parkash Khurana
R/o H.No. 30, Sector-13,
Urban Estate,
Kurukshetra(Haryana) – 136118.**

**Rakesh Khurana
R/o H.No. 30, Sector-13,
Urban Estate,
Kurukshetra(Haryana) – 136118.**

**Rama Khurana
R/o H.No. 30, Sector-13,
Urban Estate,
Kurukshetra(Haryana) – 136118.**

**Dinesh Manchanda,
Chartered Accountant
C/o Avinash Sharma & Associates,
SCO 47, 2nd Floor, Sector 20C,
Dakshin Marg,
Chandigarh – 160020.**

...Respondents

Company Appeal (AT) (Insolvency) No. 572 of 2020

**Om Parkash Khurana
R/o H.No. 30, Sector-13,
Urban Estate,
Kurukshetra(Haryana) – 136118.**

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Shailesh Chawla
R/O H.No. 521,
Sector 5,
Kurukshetra.
Dinesh Manchanda,
Chartered Accountant
C/o Avinash Sharma & Associates,
SCO 47, 2nd Floor, Sector 20C,
Dakshin Marg,
Chandigarh – 160020.

.....Performa Respondents

Present:

For Appellant: Mr. Kamal Sehgal, Advocate for Appellant

For Respondent: Mr. Vinod Kumar Mahajan, Mr. Brijesh Kumar Tamber,
Advocates for Respondent

J U D G M E N T

Venugopal M. J

Company Appeal (AT) (Insolvency) No. 571 of 2020

Preface

The Appellants (Respondent Nos. 4 and 5) in CA 3/2019 have preferred the instant Appeal being aggrieved against the Impugned Order dated 23.03.2020 in CA 3/2019 in CP (IB) No. 70/Chd/Hry/2018 passed by the

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Company Appeal (AT) (Insolvency) No. 572 of 2020

Adjudicating Authority ('National Company Law Tribunal') Chandigarh Bench,
Chandigarh.

Company Appeal (AT) (Insolvency) No. 572 of 2020

The Appellants (Respondent Nos. 1,2,3) have filed the present Appeal being dissatisfied against the Impugned Order dated 23.03.2020 in CA 3/2019 in CP (IB) No. 70/Chd/Hry/2018 passed by the Adjudicating Authority ('National Company Law Tribunal') Chandigarh Bench, Chandigarh.

2. The 'Adjudicating Authority' ('NCLT') Chandigarh Bench while passing the impugned order dated 23.03.2020 at paragraph 13 to 16 had observed the following: -

“13 The default of the Respondents No. 1 to 5 in complying with the provisions of Section 19 of the Code is clearly evident from the affidavit filed by the Applicant vide Diary No. 6301 dated 13.11.2019 Supra and the failure of the respondents to furnish the documents / records as mentioned in para 4 of the said affidavit except the balance sheets for the years 2014-15, 2016-17 and 2016-17. The

default is accepted in the replies filed by the respondents to show cause notice. However, the respondents no. 1 to 3 have submitted that they are not in a position to provide the information required by the RP since the administrative office of the Mahabir Techno was taken over by the Union Bank of India. Respondents No. 1 to 3 have not proved that the required information was lying in the administrative office. Moreover, it was the duty and the obligation of the directors to ensure that before possession is handed over / taken by Union Bank of India, the account books and other documents relevant to Mahabir Techno are taken out and kept in the custody of the directors of the Mahabir Techno. As regards the soft data, the filing of the FIR of loss of "Dell laptop" on 07.12.2018 i.e. much after the commencement of CIRP on 30.10.2018 can only be said to be self-serving evidence and

the later proceedings by the police and their report is not brought on record.

14. The plea of respondents No. 4 and 5 is that they were merely sleeping directors. The plea is not proved by any evidence. Moreover, the extension of co-operation u/s 19 of the code is restricted to only managing directors/executive directors. The plea raised cannot be accepted.

15. We are therefore, of the prima facie view that the respondents are No. 1 to 5 have not delivered to the RP all books and papers in their control or custody and belonging to Mahabir Techno and which they were required to deliver.

16. The Registry is directed to send a copy of this order to the board for consideration for initiation of prosecution u/s 70 r/w 236 of the Code and consequently disposed of the CA No. 3/2019.”

Appellants' contentions in Comp. App. (AT) (Ins.) No. 571/2020

3. The Learned Counsel for the Appellants submits that the Adjudicating Authority (NCLT, Chandigarh) while passing the impugned order dated 23.03.2020 had not considered the circular dated 02.03.2020 issued by the Government of India whereby a clarification was given in regard to the prosecution filed or internal adjudication proceedings initiated against the 'Independent Directors', 'Non-Promoters' and 'Non-KMP', 'Non-Executive Directors' and this had resulted in miscarriage of Justice.

4. Advancing his arguments, the Learned Counsel for the Appellants contends that in view of the express provision of Section 149 (12) of the Companies Act, 2013, an 'Independent Director' 'Non-Executive Director' etc; should not be arrayed in any civil or criminal proceeding under the Act, unless the criteria specified is fulfilled. Furthermore, in the instant case the Application was filed by the Resolution Professional under Section 19(2) of the I & B Code seeking necessary directions from the 'Adjudicating Authority' in respect of the former Directors of the Company to furnish all the requisite 'Books', 'Financial Data', 'Information', 'Returns' and the Assets to the Resolution Professional.

5. It is represented on behalf of the Appellants that the Impugned Order passed by the 'Adjudicating Authority' is in violation of the 'Principles of Natural Justice'. In this connection, it is the submission of the Learned Counsel for the Appellants that against the Appellants no such specific allegations were made in

the application filed by the Resolution Professional under Section 19 (2) of the I&B Code. Also, that there was no specific averment that the first Respondent/Resolution Professional had ever contacted the Appellants. In fact, the averments in the application relating to the non-cooperation by the members of the former 'Board of Directors', were general in nature and further the First Respondent never contacted the Appellants. This is clear from the fact he had not chosen to even find out the address and the status of the Appellants from the MCA Website, while filing the Application shows that the said Application was not filed in bona fide manner. In short, in the absence of any factual foundation the prima facie opinion formed by the 'Adjudicating Authority'.

6. Expatiating his contention, the Learned Counsel for the Appellants proceeds to point out that the Appellants produced the relevant form before this Tribunal because of the reason that for the first time, the first Respondent had filed any document to deny the status of the Appellants as 'Independent Directors'. Moreover, it is the plea of the Appellants that the mitigating factors for the independent and non- executive directors have been designed to protect and prevent them from being held liable for the acts of the company which are beyond their control or not within their mandate, in their capacity as 'outside directors' who are not involved in the day to day affairs of the company. That apart, since the Appellants status as 'Independent Directors' was not considered by the 'Adjudicating Authority', the impugned order is an erroneous one.

7. Yet another submission made on behalf of the Appellants is that the first Respondent neither made any allegations against the Appellants nor any finding was rendered by the 'Adjudicating Authority'. In reality, the 'Adjudicating Authority' had failed to apply judicial mind to consider the contention projected by the Appellants.

8. The Learned Counsel for the Appellants emphatically takes a stand that after the Notice was received by the present Appellant, in the first Reply filed by them along with other directors on 04.11.2019, it was mentioned that the Appellants are 'Sleeping Directors' and have no role to play in the day to day affairs, management and conduct of the company. Besides this, in the affidavit dated 24.02.2020 filed by the Appellants, they had stated that they are the 'independent directors' and the same was neither contested by the first Respondent nor any 'rejoinder' was filed by the first Respondent before the 'Adjudicating Authority' to exhibit that the Appellants are not 'Independent Directors'.

9. The Learned Counsel for the Appellants refers to the **Judgement of the Hon'ble Supreme Court in Crl. Appeal No. 2463 of 2004 'Shailendra Swarup' v. 'Deputy Director Enforcement Directorate' (decided on 27.07.2020)** wherein the it was considered that the issue of non-consideration of the Reply filed by the Director that he was part time non-executive Director, which aspect was not considered by the 'Adjudicating Authority' as well as by the **Hon'ble**

High Court under 'FERA' proceedings and that the **Hon'ble Supreme Court** while allowing the 'Appeal' had set aside the penalty imposed on the director for an alleged offence under Section 8(3) and 8(4) and Section 68 of 'FERA'. In short, the Hon'ble Supreme Court, according to the Appellants had, observed that the non-consideration of written representation makes the personal hearing and 'empty formality' and the written representation should have been considered.

10. Continuing further, the Learned Counsel for the Appellants refers to the Judgement in aforesaid '**Shailendra Swarup**' case and points out that **Hon'ble Supreme Court considered the imposition of penalty under 'FERA'** when all the Directors of the Company that the Management of the Company is to be handled, by the 'Board of Director' and hence the Appellant in that case being a Director was held guilty without considering the fact that the Appellant is part time Non-Executive Director and in fact, the Hon'ble Supreme Court held that the provisions cannot be read to mean that whosoever was the Director of the company at the relevant time, when contravention took place shall be deemed to be guilty of the contravention.

11. The Learned Counsel for the Appellants comes out with an Argument that an 'Administrative' or a 'Quasi - Judicial Authority' is bound to assign reasons while passing an order and further that reasons are the soul of the order and

this proposition of Law is reiterated in the decision of **Hon'ble Supreme 'Court Assistant Commissioner' v. 'M/s. Shukla and Brothers', 2010(4)SCC 785.**

12. The Learned Counsel for the Appellants points out that in the absence of specific powers given under the statute, the 'Adjudicating Authority' committed a patent error in presuming the Jurisdiction and referring the matter to the Central Govt./IBBI for initiating action against the Appellants. Further, it is the case of the Appellants that the I & B Code is silent on the jurisdiction of the 'Adjudicating Authority' to pass any order for recommending the matter to the 'Insolvency and Bankruptcy Code' for conserving the issue of action under Section 70 read with Section 236 of the Code.

13. The Learned Counsel for the Appellants submits that the Appellants stand is that the 'Books of Accounts' were lying in the Administrative Office of the Corporate Debtor situated in the factory premises when the factory was taken over by the Union Bank of India on 05.10.2018 is supported by the fact that ex-directors of the company were required to sign in blank 'Panchanama' which was prepared by the 'Authorised Officer' and that the directors of the company, who were called at the site were asked to sign on the blank 'Panchanama' and thereafter, they were not allowed to participate in the entire taking over process.

Appellants Submissions in Company Appeal (AT) (Ins) 572 of 2020

14. The Learned Counsel for the Appellants submits that the Appellants filed an 'Affidavit' dated 24.02.2020, to the '**Show Cause Notice**' issued to them,

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which was not properly appreciated by the 'Adjudicating Authority' and that the matter was referred to the Board to consider the issue in terms of Section 70 read with Section 236 of the 'I&B' Code for initiating Criminal Proceedings against the Appellants.

15. The Learned Counsel for the Appellants contends that the Appellants in their reply categorically mentioned that the 'Corporate Debtor' was declared as 'Non-Performing Account' by the Union Bank of India on 31.07.2015, and all the functioning of the 'Corporate Debtor' came to halt. Also, it was stated that the 'Books of Accounts' of the Company prepared up to the 31.03.2017 was already handed over to the 'Resolution Professional' by the 'Chartered Accountant' of the 'Corporate Debtor'. Furthermore, the possession of the 'Assets' was taken over by the 'Union Bank of India' on 05.10.2018, under **SARFAESI Act** and all the documents/accounts which were lying in the administrative office were also taken over etc.

16. The Learned Counsel for the Appellants takes a plea that the Appellants had taken specific stand in their Affidavit that there was no 'deliberate intention' on their part not to co-operate with the 'Resolution Professional' and in fact, the 'Adjudicating Authority' was duty bound to consider the submissions and render a proper reasoning for not accepting the same, especially in the light of the fact that these averments made in the Affidavit were not repudiated by the first

Respondent, by filing any rejoinder. As such, the impugned order suffers from legal infirmity.

17. The Learned Counsel for the Appellants brings it to the notice of this Tribunal that the 'Union Bank of India' was not impleaded as a necessary party before the 'Adjudicating Authority' in CA. No. 3/2019 and in view of the fact that the premises of the 'Corporate Debtor' are in complete control and possession of the 'Union Bank of India', which took complete possession of the mortgaged 'Assets/Premises' of the 'Corporate Debtor' under **SARFAESI Act** on 05.10.2018, the Appellants were not in a position to provide the documents.

18. The Learned Counsel for the Appellants takes a stand that the 'Adjudicating Authority' had committed a patent error by not taking into account the separate replies dated 04.11.2019, and the reply dated 24.02.2020 filed by the Appellants and the non-consideration of the reply of the Appellants is a grave error on the part of the 'Adjudicating Authority' and in fact the 'Adjudication Process' was 'farce' exercise. In short though all the Appellants had not committed any offence as all the documents as available with them were provided to the 'Resolution Professional'. And that the Appellants No. 2 & 3 are not at all liable for any action on another ground that in the reply dated 04.11.2019, it was mentioned that Sh. O.P. Khurana who Chairman-cum-Managing Director of the company was running the affairs solely and the remaining 'Suspended Directors' are 'Sleeping Directors' have no role to play in day to day affairs, management and conduct of

the company hence, the impugned order forming an opinion against all the 'Appellants' is an unjustified one.

19. The 1st Respondent had made general averments in the application projected before the Adjudicating Authority in regard to the non-cooperation by members of ex-board of Directors. A perusal of the application shows that the 1st Respondent had contacted the 1st Respondent and requested him to supply the documents, whereas the 'Resolution Professional' never contacted the Appellants no. 2 and 3 nor any such averments made in the application. Besides these, in the application, there was neither any averment in the application filed by the 1st Respondent u/s 19(2) of the Code that the Appellants are in possession of books of accounts and statements and they are not deliberately providing the same to the 'Resolution Professional' nor any malafides were attributed to the Appellants.

20. The Adjudicating Authority had clearly brushed aside the contention raised by the instant Appellants that they are not in a position to give the documents except the balance sheet for the year 2014-2015, 2015-2016, 2016-2017 on account of the fact that the administrative office of the 'Corporate Debtor' by the Union Bank of India. The ingredients of the 'I&B' Code are silent on the jurisdiction of the 'Adjudicating Authority' to pass any order for recommending the matter to the 'Insolvency & Bankruptcy Board' to consider the matter in initiating the criminal action u/s 70 r/w Section 236 of the Code.

21. The stand of the Appellants that the books of accounts were lying in the administrative office of the 'Corporate Debtor' situated in the factory premises when the factory was taken over by 'Union Bank of India' on 05.10.2018 is supported by the fact that ex-directors of the company were made to sign blank panchanama.

The Pleas of the Respondent No. 1 – (In Both Appeals)

22. The first Respondent was appointed as an 'Interim Resolution Professional' by the Adjudicating Authority and later, the first Respondent was appointed as the 'Resolution Professional' by the 'Committee of Creditors' as per resolution dated 29.11.2018. As a matter of fact, the 'Corporate Insolvency Resolution Process' resulted in the order for liquidation of the 'Corporate Debtor' passed by the Adjudicating Authority on 22.02.2019, wherein the first Respondent was appointed as a 'Liquidator'.

23. During the 'Corporate Insolvency Resolution Process' as well as the 'Liquidation Process' the first Respondent, on numerous occasions called up on the 'Suspended Directors' of the 'Corporate Debtor' to furnish requisite information and financial records. Because of the continued reluctance and failure of the 'Suspended Directors' in furnishing the information, the first Respondent filed CA. No. 3/2019 before the 'Adjudicating Authority' under Section 19 (2) read with Section 60 (5) of the I &B Code, wherein a relief was

sought for against the 'Suspended Directors' for furnishing the requisite information and records.

24. The 'Adjudicating Authority' on 04.10.2019 in CA. No. 3/2019 among other things had passed an order by making an observation that the respondent Nos. 1 to 5 were misconducting themselves in the course of 'Corporate Insolvency Resolution Process' by not extending their Corporation and Assistance to the Resolution and were withholding and not disclosing the information supposed to be furnished by them and not furnishing the books and documents belonging to the 'Corporate Debtor' which were supposed to be maintained by them at the relevant point of time.

25. Even while admitting the CP(IB) No. 70/Chd/Hry/2018, the 'Adjudicating Authority' to provide a last opportunity to the Respondents therein, had directed the 'Resolution Professional' to issue a fresh notice immediately to the Respondents specifically indicating what information/books/assets are still to be furnished by their Respondents and same shall be furnished by the Respondents to the 'Resolution Professional' within three weeks' from the date of the receipt of the said notice etc.

26. The First Respondent issue a notice dated 12.10.2019, to the 'Directors of the Corporate Debtor' requiring specific information's like (a) All Books of Accounts, Financial Statements, Returns w.e.f. 01.04.2014 till date. (b) Computer Systems containing accounting records along with the software being

used w.e.f. 01.04.2014 till date etc. In fact, in the said notice dated 12.10.2019, an information was sought relating to the 'Stocks that were removed from the factory premises of the 'Corporate Debtor'. In response to the aforesaid notice, the Appellants had failed to furnish any records and as per letter dated 04.11.2019 furnished a reply stating that 'the management and control of 'Corporate Debtor'/Company was in complete charge of Sh. O.P. Khurana was the Chairman-cum-Managing Director of the Company and was running the show solely and the remaining 'Suspended Directors' were merely 'Sleeping Directors' have no role or say in the day to day affairs, management and conduct of the company. In short, the Appellants in the reply dated 04.11.2019, had proceeded to state that they were not in capacity to provide the documents, information sought for in the notice dated 12.10.2019, but to pursue with Sh. O.P. Khurana to provide the same.

27. The 'Adjudicating Authority' on 03.02.2020, had issued notice to all the Respondents to show cause why the matter shall not be referred to the 'Insolvency and Bankruptcy Board of India' to enable the Board, to act in terms of Section 236 read with Section 70 of the Code. Further, the Respondents No. 1 to 5, were given the option to file any further reply in response to the show cause notice issued within two weeks after service on the other side. Indeed, the Appellants, had filed a reply mentioning that the possession of the Assets of the company were taken over by the Union Bank of India on 05.10.2018, under the provision of **SARFAESI Act**, etc.

28. The possession of the factory premises of the 'Corporate Debtor' situated at village Umari District Kurukshetra, Haryana was taken over and at that time, a 'Panchanama' was prepared by the Authorized Officer together with Naib Tehsildar, Kanoongo as well as Advocate of District Court, Kurukshetra and endorsed and accepted by Sh. O.P. Khurana and Sh. Rakesh Khurana (Directors of the 'Corporate Debtor'). In fact the 'Panchanama' shows that at the time of possession, there was no machinery and any other inventory found in the factory premise and the premise was totally empty and this points out that the defense of the documents being locked in the premises is 'Sham' and an afterthought the resorted to by the Appellants to justify its non-compliance with the 'CIRP' Process as well as the directions of the 'Adjudicating Authority'.

29. In regard to the lodging of 'NCR' for the loss of 'Laptop' is nothing but self-serving evidence, created as an afterthought, in as much as the said complaint was made more than forty days after the date of alleged loss of 'Laptop' and after the commencement of the 'CIRP'. Further, as per report filed with local police, the 'Laptop' was allegedly lost on 03.10.2018, whereas, the possession was taken over by the Union Bank of India on 05.10.2018, on which date as per the Appellants version, the Bank suddenly appeared with police, without any prior intimation. Hence, the question of the 'Laptop' being in the said premises or having been lost during the 'Handing Over Process' does not arise.

30. The Learned Counsel for the 1st Respondent submits that the ingredients of Section 19 of the I & B Code are not limited to the Directors of the 'Corporate Debtor' but extends even to a person associated with the management of the 'Corporate Debtor'. Furthermore, there is no concept of a 'Sleeping Director' under the 'Companies Act' or under the I & B Code.

31. The Learned Counsel for the 1st Respondent contends that impugned order passed by the 'Adjudicating Authority' is well within its 'Powers' and the 'Authority' had neither exceeded its jurisdiction nor usurped the jurisdiction vested in the 'IBBI' or the 'Central Government', as the case may be. Apart from that, only an information was submitted, upon which 'IBBI' has to act independently and the impugned order was passed after providing due opportunity and consideration of all relevant material on record.

32. The Learned Counsel for the 1st Respondent while summing up points out that the instant 'Appeals' are devoid of any merits and the same is liable to be dismissed.

Discussions

33. It comes to be known that the 1st Respondent / Resolution Professional filed CA No. 3/2019 in CP (IB) No. 70/Chd/Hry/2018(under Section 19 of the 'I&B' Code) r/w relevant Rules and Regulations seeking directions to the 'effect' that the 'Members of the Suspended Board of Directors' of the 'Corporate Debtor' and their 'Associates' be directed to submit / hand over all the requisite books,

financial debtor, returns and assets to the 'Resolution Professional' immediately and also provide necessary assistance/cooperation in smooth conduct of 'Corporate Insolvency Resolution Process'.

34. It is the stand of the 1st Respondent that in the 1st meeting of the 'Committee of Creditors' the 'Minutes' were recorded as under: -

“Resolved that in case the requisite books, financial debtor, information, return etc. are not handed over by promoters/members, suspended board of directors to the RP by 06.12.2018, Sh. Saurabh Bhardwaj, Advocate to file petition u/s 19(2) of the IB Code with Hon'ble NCLT, Chandigarh requesting necessary directions in this regard to the promoters / members of the suspended Board of Directors of the 'Corporate Debtor'.

35. The 1st Respondent / Resolution Professional in CA 3/2019 before the Adjudicating Authority had stated that the 'Corporate Debtor' is a public limited company with its shares closely held within family members and that sufficient time was given to the members suspended Board of Directors of the 'Corporate

Debtor' to provide all necessary Books, Financial Data, Information and Returns. However, they had failed to comply with the directions given by the 1st Respondent / Interim Resolution Professional in this regard and hence the said application was filed.

I&B Code

36. It is to be pointed out that Section 19 of the 'I&B' Code imposes an obligation on the personnel and promoters of the 'Corporate Debtor' to extend all assistance and cooperation with the 'Interim Resolution Professional' may require the management of the affairs of the 'Corporate Debtor', 'Personnel' refers to directors, managers, key managerial personnel, designated partners and employees, if any of the 'Corporate Debtor' by means of Section 5(23) of the Code. The burden of establishing a case is on the office holder and is required to satisfy the 'Authority' concerned that the information he seeks is reasonably required.

37. It cannot be lost sight of that where any personnel of the 'Corporate Debtor' does not render assistance or cooperation to the 'Interim Resolution Professional', the 'National Company Law Tribunal' / 'Adjudicating Authority' on the application projected by the 'Interim Resolution Professional' is empowered to pass an order and direct the person(s) to comply with the instructions of the 'Interim Resolution Professional' and cooperate with him in the collection of information and management of the 'Corporate Debtor'.

38. As a matter of fact, Section 70 specify punishment for ‘misconduct’ by the officer of a ‘Corporate Debtor’ during CIRP. Also, it prescribes punishment for deliberate mis-conduct by the ‘Insolvency Resolution Professional’. An officer of the ‘Corporate Debtor’ is not to be punished u/s 70(1) of the ‘I&B’ code, if he establishes that he had no intention to do so pertaining to the state of affairs of the ‘Corporate Debtor’. A determination of guilt must depend on a conclusion arrived at by balancing the consideration of a presumption of innocence and a reverse onus of proof as per decision **‘R’ v. ‘Richmond Magistrates’ Court reported in (2008) 3 All England Reporter page 274 (ChD)**.

39. In so far as Section 236 of the ‘I&B’ Code is concerned, it speaks of ‘Trial Of Offences’ by ‘Special Court’. In reality, no ‘Court’ shall take cognisance of any offence punishable under this Act save on a complaint made by the ‘IBBI’ or the Central Government or any person authorised by the Central Government in this behalf. To put it precisely, for prosecution of offences under the ‘I&B’ Code, lodging of complaint by the ‘IBBI’, the Central Government or any other officer authorised by the Central Government in this behalf is required.

Independent Director

40. In so far as the ‘Independent Director’ is concerned, the burden of proof to establish that act of commission or omission by a company which are contrary to Law was carried out without his knowledge lies on the ‘Independent Director’. Continuing further, an ‘Independent Director’ and a non-executive Director other

than promoter or key managerial personnel shall be held liable for such acts of commission(s) or omission(s) in relation to any actions of the company, which is within its knowledge and could be attributed to him through Board Processes.

41. Also, that the defence of not possessing the knowledge of acts done in violation of Law is available to the 'Independent Directors' only under the Companies Act, 2013. The 'Independent Directors' are part of 'Board of Directors' and have similar duties and responsibilities as other directors. It is to be remembered that a Company may even constitute different committees for an efficient conduct of its affairs and the said 'Committee' is to carry out those functions and report its decisions. Indeed, some 'Committees' have important statutory functions and must include 'Independent Directors' as per Law. Also, that, 'Independent Directors' are an integral part of the 'Board' and, therefore, their duties and functions should be read in conjunction with statutory provision mentioned in Section 166 of the Companies Act, 2013 which speaks of 'Duties of Directors' and not in isolation.

42. In the instant case on hand, it cannot be said that the Appellant(s) (in both the Appeals) were not provided with the opportunities relating to furnishing of information in respect of books and assets, financial data, returns etc. to the 'Resolution Professional'. To put it succinctly, on 12.10.2019 a notice was issued by the 1st Respondent / Resolution Professional to the Directors of 'Corporate Debtor' wherein specific information was sought for in respect of (i)

all books of accounts, financial statements, returns w.e.f. 01.04.2014 till date (ii) computer systems containing accounting records along with software being used w.e.f. 01.04.2014 till date etc.

43. On 04.11.2019 the Appellants No. 2 and 3 in Company Appeal (AT) (Insolvency) No. 572 of 2020 had failed to furnish any records but pursued with O.P. Khurana (1st Appellant) in Company Appeal (AT) (Insolvency) No. 572 of 2020 to provide the same, who shall provide it to the satisfaction of the 1st Respondent / 'Resolution Professional'. On 03.02.2020 the 'Adjudicating Authority' taking note of the non-cooperation of the Appellants along with other suspended directors of the 'Corporate Debtor' had passed an order by issuing notice to all the Respondents, to show-cause as to why the matter shall not be referred to the IBBI to enable the Board to act in terms of Section 236 r/w 70 of the 'I&B' Code. The Respondents 1 to 5 CA No. 03/2019 were given the opportunity to file any further reply in response to the show-cause notice within two weeks after service to the other side.

44. The Appellants, to the show-cause notice had filed a reply reiterating that on 05.10.2018 the possession of the assets of the Company were taken over by the Union Bank of India under **SARFAESI Act** etc. Further, the reply of the Appellant(s) proceeded to state that the administrative office of the 'Corporate Debtor' / Company was within the premises which was taken over by the Bank, and hence, they were left with nothing much to hand over to the 'Resolution

Professional' etc. Only after providing adequate opportunities to the Appellant(s) the impugned order, in the considered opinion of this Tribunal came to be passed by the Adjudicating Authority'. As such, the contra pleas taken on behalf of the Appellant(s) is not accepted by this Tribunal.

45. In regard to the plea taken on behalf of the Appellants that the general circular no. 01 of 2020 dated 02.03.2020 issued by the Govt. of India, Ministry of Corporate Affairs on the subject of clarification or prosecutions filed o internal adjudication proceedings initiated against 'Independent Directors', non-promoters and non-KMP non-executive directors. It is relevantly pointed out that the said ingredients of clarification issued by the Govt. of India, Ministry of Corporate Affairs through general circular 1/2020 dated 02.03.2020 can be taken advantage of by the 'Independent Directors' only under the Companies Act, 2013, as per Section 149(12)(ii) of the Act because of the reason that under most of the other Laws applicable in our country, the 'Directors' are at the first instance deemed to be aware of the offence committed by the Company and resultantly held liable for default, as opined by this Tribunal.

46. A mere running of the eye of the ingredients of Section 19 of the Code latently and patently imposes an obligation on the personnel and promoters of the 'Corporate Debtor' to extend all assistance and cooperation which the 'Interim Resolution Professional' will require in running / managing the affairs of the CD. In fact, the term 'personnel' is defined to mean the employees,

directors, managers, key managerial personnel etc., if any of the 'Corporate Debtor' and this is meant to render assistance to the 'Interim Resolution Professional' in carrying out his duties in an effective and efficacious manner.

47. Dealing with the aspect of R4 and R5 (Appellants No. 1 and 2) in Company Appeal (AT) (Insolvency) No. 572 of 2020 were 'Sleeping Directors'. It is to be pointed out that Section 19 of the Code is not only restricted to the Managing Directors / Executive Directors it also to other key managerial personnel Directors, managers, employees and designated partners and any of the 'Corporate Debtor'. In fact, one cannot find the term 'Sleeping Directors' either under the Companies Act, 2013 or under the 'I&B' code, 2016. Therefore, the *contra* contentions advanced on behalf of the Appellants is unworthy of acceptance and the same is negated by this Tribunal.

48. Coming to the plea of the Appellants that the ex-Directors of the company were made to sign in blank 'panchanama', in the Reply filed on behalf of the 1st Respondent / 'Resolution Professional' in Company Appeal (AT) (Insolvency) No. 571 of 2020 it was categorically stated that the 'panchanama' was prepared by the authorised officer along with Naib Tehsildar, Kanoongo as well as the Advocate of the District Court, Kurukshetra and endorsed and accepted by Sh. O.P. Khurana (the 1st Appellant) in Company Appeal (AT) (Insolvency) No. 572 of 2020 and Sh. Rakesh Khurana (2nd Appellant)(Directors of the 'Corporate Debtor'). In fact, at the time of possession taken by the authorised officer of the Union Bank of India, there was no machinery and any other inventory found in

the factory premise and that the premise was totally empty and that the borrower and Sh. J.S. Ranga, Naib Tehsildar etc. Thanesar Kurukshetra had affixed their signature on 25/10/018 (vide page 13 of the Reply wherein the xerox copy of possession letter details are seen).

49. Be that as it may, in the light of qualitative and quantitative aforesaid discussions, this Tribunal, on going through the Impugned Order dated 23.03.2020 passed by the 'Adjudicating Authority' in CA No. 3/2019 in CP (IB) No. 70/Chd/Hry/2018 comes to a resultant conclusion that the 'Adjudicating Authority' in Law, is well within its ambit to make a recommendation for considering the aspect of commencement of proceedings and not a recommendation for initiation of criminal proceedings and in this regard it is for the 'Insolvency Bankruptcy Board of India' to take a final call, of course, after applying its independent overall assessment in an objective and dispassionate manner and to act accordingly, in the subject matter in issue. To put it differently, the 'Adjudicating Authority' while passing the impugned order had not exceeded its jurisdiction. Viewed from any angle, the impugned order passed by the 'Adjudicating Authority' does not suffer from any patent illegality in the eye of Law. Resultantly, the present Appeals fail.

Conclusion

In fine, the instant Appeals are dismissed. No costs.

I.A. No. 1571 of 2020 and I.A. No. 1573 of 2020 seeking permission to place on record the general circular 1/2020 dated 2.3.2020 of the Govt. of India,

Ministry of Corporate Affairs are allowed. I.A. No. 1572/2020 and I.A. No. 1574/2020 seeking exemption to file the certified copy of the circular dated 02.03.2020 issued by the Govt. of India, Ministry of Corporate Affairs are closed. I.A. No. 1475/2020, I.A. No. 1477/2020 and I.A. No. 1476/2020 are closed.

**[Justice Venugopal. M]
Member (Judicial)**

**[Balvinder Singh]
Member (Technical)**

NEW DELHI

23rd September, 2020

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