

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI**

(APPELLATE JURISDICTION)

Company Appeal (AT) (CH) (INS.) No. 356 of 2022

(Under Section 61 of the Insolvency and Bankruptcy Code, 2016)

**(Arising out of the Impugned Order dated 01.07.2022 in
IA (IBC)/487(CHE)/2021 in IBA/1424/2019, passed by the
'Adjudicating Authority', National Company Law Tribunal,
Division Bench – II, Chennai)**

In the matter of:

Renuka Devi Rangaswamy,

Interim Resolution Professional
of M/s. Regen Infrastructure and
Services Pvt. Ltd.

(Now Resolution Professional)

No. 9, Arthillam, Jothi Nagar,
3rd Street, Uppillipalayam Post,
Coimbatore – 641 015, Tamilnadu, India

..... Appellant

v.

Mr. Madhusudan Khemka

Suspended Director of
M/s. Regen Infrastructure and
Services Pvt. Ltd.

Y-202, Anna Nagar, Chennai – 600 040

..... 1st Respondent

Mr. Sundaresh Ramanathan

Suspended Director of
M/s. Regen Infrastructure and
Services Pvt. Ltd.

3A 3B, Sarangapani Street,
Thiyagaraya Nagar, Chennai–600017

..... 2nd Respondent

**M/s. Lakshmiranga Perumal Renewable
Energy Private Limited**

S7, Krishna Arcade, Old No 36,

New No 10, Rajabather Street,
T. Nagar, Chennai – 600 017

..... 3rd Respondent

Mr. Ravinder Pareek

Director and Shareholder of
M/s. Lakshmiranga Perumal Renewable
Energy Private Limited
25 / 7B, Old Post Office Road,
Venkatapuram, Ambattur, Chennai – 600 053

..... 4th Respondent

Mr. Arunachalam Saravana Kumar

Director of M/s. Lakshmiranga Perumal Renewable
Energy Private Limited
No. F1, First Floor, Baba Flats,
III Cross Street, Pammal, Chennai – 600075

..... 5th Respondent

Mr. Muniaraj Kala

Director of M/s. Lakshmiranga Perumal Renewable
Energy Private Limited
No. 7, Jawahar Thenvadal 1st Street,
Chocklingapuram, Aruppukkottai,
Virudhunagar – 626 101

..... 6th Respondent

Mr. Gopinath Sellapan

Authorised Signatory of
M/s. Lakshmiranga Perumal Renewable
Energy Private Limited
Ishwaryam Apartments, Flat No. 10B,
BLN Prasad Nagar, Kaikankuppam,
Valasaravakkam, Chennai – 600 087

..... 7th Respondent

Mr. Govindaraj Narayanasamy

Ex – Director and Shareholder of
M/s. Lakshmiranga Perumal Renewable
Energy Private Limited
293, 21 Street, MGR Nagar,
Periyakuppam, Thiruvallur – 602 001

..... 8th Respondent

Present:

For Appellant : Mr. T.K. Bhaskar, Advocate

J U D G M E N T
(Virtual Mode)

Justice M. Venugopal, Member (Judicial):

Introduction:

The `Appellant / Interim Resolution Professional' (`IRP / RP') of M/s. Regen Infrastructure and Services Pvt. Ltd., has filed the instant Comp. App (AT) (CH) (INS.) No. 356 of 2022, before this `Tribunal', as an `Aggrieved Person', in respect of the `impugned order', dated 01.07.2022 in IA (IBC) / 487 (CHE) / 2021 in IBA/1424/2019, passed by the Adjudicating Authority' (`National Company Law Tribunal', Division Bench – II, Chennai).

2. The `Adjudicating Authority' (`National Company Law Tribunal', Division Bench – II, Chennai), while passing the `impugned order' in IA (IBC) / 487 (CHE) / 2021 in IBA/1424/2019, at Paragraph Nos.36 to 38, had observed the following:

36. ``From the averments and in the submissions made by the Applicant, it is seen that the Applicant has submitted that the agricultural lands at 9 locations belonging to the farmers were purchased with the funds of the Corporate Debtor during the month of February 2017 and March 2017 for a sum of Rs.1,97,97,187/-. It was submitted that the 3rd Respondent is a related party of the Corporate Debtor by virtue of having a common Directorship and

is represented by the 4th to 6th Respondent Directors. However, on the contrary the Learned Counsel for the Respondent has submitted that the money for the lands that were purchased by the 3rd Respondent were given by RPPL to the Corporate Debtor which in turn provided that money to the 3rd Respondent which is one of the SPVs created by the Regen Group. It was submitted that the RPPL has funded the Corporate Debtor for the development of the project and that the transaction has happened within the group. It is required to be noted that a transfer of assets within the group companies per se would not constitute 'fraudulent trading' as stipulated under Section 66(1) of IBC, 2016. In the present case, the reason given by the Respondent in respect to transfer of assets among its group companies appears to be plausible and cannot be brought under Section 66(1) of IBC, 2016.

37. Further, the Hon'ble High Court of Himachal Pradesh in the matter of `Hypine Carbons Limited -Vs- J.C. Bhatia and others'', decided on 13.11.1998, had held that;

34. Mere failure on the part of the Respondents to initiate legal steps against the debtors would not bring the case within the ambit of Section 542 of the Act, unless it is shown that the respondents had failed to do so with fraudulent intentions to defraud the creditors, or any other person(s), or for any other fraudulent purpose.

38. Thus, the Applicant has not made a case of fraud or dishonest intention on the part of the Respondents except making sweeping allegations and hence Section 66 of IBC, 2016 cannot be invoked under such circumstances. Hence for the aforestated reasons, we find no merits in the present Application.''

and resultantly, dismissed the 'Application', but without costs.

Appellant's Submissions:

3. Challenging the 'impugned order', in IA (IBC) / 487 (CHE) / 2021 in IBA/1424/2019, passed by the 'Adjudicating Authority' / 'NCLT', Division Bench – II, Chennai, the Learned Counsel for the 'Appellant' submits that the 'Adjudicating Authority', was not correct in ignoring the documented evidence, before it, such as;

(i) Sale Deeds which reflects that consideration was paid by the Corporate Debtor, towards the purchase of land (vide Page 150 to 622, Vol. II, III and IV of the Appeal Paper Book);

(ii) Bank Statements of CD showing payments made for purchase of lands by CD to the farmers (vide Pg No. 109 to 149 of the Vol. I of the Appeal Paper Book);

(iii) Financial Statement for the year 2018-2019 of R3 not reflecting any fixed assets being held in its name thereby how can the ownership of land in name of R3 is justifiable (vide Page Nos.836 to 853, Vol. VI of the Appeal Paper Book);

(iv) Financial Statement of CD revealing land held by CD which is including Gujarat and other places however Sale Deeds reflecting R3 as the owner (vide Pg No. 872 to 888, Vol VI of the Appeal Paper Book).

4. According to the Appellant, during the course of taking charge of the affairs of RISPL, she discovered that although as per the 'Audited Financial Statements', 'RISPL', had acquired 'Lands', in Morbi District,

Gujarat, none of the documents relating to the same, were available in the Offices of `RISPL`. Further, when queries were put to the Suspended Directors of `RISPL` (the Respondent Nos. 1 and 2), they simply avoided the same, without furnishing any information or documents.

5. The Learned Counsel for the Appellant points out that the `impugned order`, is a `perverse` one and further, in response to the `Fraud`, alleged against the Respondents, together with the overwhelming documentary evidence, substantiating the same, only, the Respondent Nos. 1 and 2, had filed a Counter, before the `Adjudicating Authority` / `Tribunal`, and that the Respondent Nos. 3 to 8, had not filed any Counter, before the `Adjudicating Authority`.

6. The Learned Counsel for the Appellant contends that although the Respondent Nos. 1 and 2, had filed their `Counter Affidavit`, before the `Adjudicating Authority` / `Tribunal`, no documents were filed along with the said `Affidavit`, and in fact, the only defence, projected by the Respondent Nos. 1 and 2, was that, the money for the lands, were given by `RPPL` to `RISPL`, which inturn, provided the `Funds`, to the 3rd Respondent. As a matter of fact, `not a shred of documentary evidence was produced`, to substantiate this `Claim`. Moreover, despite the fact it is claimed that the 3rd Respondent is a `Special Purpose Vehicle`, floated

by the Regen Group of Companies, but again, not a shred of documentary evidence, is furnished to substantiate this 'Claim'.

7. The grievance of the Appellant is that, the 'Adjudicating Authority', had accepted the unsubstantiated defence of the Respondent Nos. 1 and 2, inspite of the fact there was not a piece of documentary evidence to substantiate their 'Claims', and the said finding of fact was in negation of the 'Principles of Natural Justice', when the Appellant had presented 'overwhelming evidence', which indicates that the 'Fraud', was perpetrated by the 'Respondents'.

8. According to the Appellant, none of the documents produced by her, were considered and no specific finding, was rendered as to its contents. However, the 'Adjudicating Authority', had proceeded on the footing the assertion of the Respondent Nos. 1 and 2 that the '3rd Respondent', is a 'Special Purpose Vehicle', floated by the 'Regen Group of Companies', but again, not a shred of documentary evidence, is produced to substantiate this 'Claim'.

9. The Learned Counsel for the Appellant, adverts to the Judgment of the Hon'ble Supreme Court of India in Maria Margarida Sequeria Fernandes & Ors. v. Erasmo Jack de Sequeria (Dead) through LRs (AIR 2012 SC 1727), wherein, at Paragraphs 71 and 72, it is observed as under:

71. ``Apart from these pleadings, the Court must insist on documentary proof in support of the pleadings. All those documents would be relevant which come into existence after the transfer of title or possession or the encumbrance as is claimed. While dealing with the civil suits, at the threshold, the Court must carefully and critically examine pleadings and documents.

72. The Court will examine the pleadings for specificity as also the supporting material for sufficiency and then pass appropriate orders.’’

10. The Learned Counsel for the Appellant submits that the ‘impugned order’, fails to appreciate the voluminous material evidence produced, which clearly points out that the lands in question, were purchased in the name of the 3rd Respondent, utilising the Funds of ‘RISPL’, which was not in the ordinary course of business, and provided ‘no profit’ or ‘gain’, to ‘RISPL’.

11. The version of the Appellant is that, a mere perusal of the ‘Memorandum of Association’ of the ‘3rd Respondent / Company’, would reveal that there are ‘Two Subscribers’, to the ‘Memorandum of Association’, which are not related, either to ‘RPPL’ or ‘RISPL’, and the ‘Board Report’, for the year 2018-2019, filed by the ‘3rd Respondent / Company’, will show that there are ‘Three Directors’, in the ‘3rd

Respondent / Company’, who are also not related to ‘RISPL’ or ‘RPPL’, in any manner, whatsoever.

12. According to the Appellant, the ‘RISPL’ and the ‘3rd Respondent’, do not form a ‘Group Company’, since the facts of the present case, do not satisfy the ‘threshold’, specified in ‘Explanation (b) to Section 5 (b) of the Competition Act, 2002, which runs as under:

“(b) group means two or more enterprises which, directly or indirectly, are in a position to-

- (i) exercise twenty-six per cent or more of the voting rights in the other enterprise; or*
- (ii) appoint more than fifty per cent of the members of the board of directors in the other enterprise; or*
- (iii) control the management or affairs of the other enterprise.’’*

13. It is the plea of the Appellant that even assuming without admitting that the ‘3rd Respondent’, is a ‘Related Party’ / ‘Group Company’ of ‘RPPL’ and ‘RISPL’, it is mandatory for a ‘Board Resolution’, to be passed under ‘Section 188 of the Companies Act, 2013’, before the lands, belonging to ‘RISPL’, could be sold to a ‘Related Party’. In fact, the ‘Transactions’, impugned by the ‘Appellant’, are not on arms length basis, as ‘RISPL’, received ‘no consideration’ or other ‘benefits’, for paying for the lands registered in the name of the ‘3rd Respondent’.

14. The Learned Counsel for the Appellant points out that 'no audit', was conducted by 'RPPL' from the year 2017 to 2021, till the 'Resolution Plan', was 'approved', and as a matter of fact, the Audit of 'RPPL', was conducted much later and uploaded in the 'MCA Website', only on 24.03.2022. Besides this, the 3rd Respondent, had filed the 'Audited Financials', until 2019, neither does the 'Financials' nor the 'Annual Report' of the 3rd Respondent, contain any details, regarding 'Loans', taken from 'RISPL', to acquire 'land parcels'.

15. The Learned Counsel for the Appellant, refers to the Judgment of this 'Tribunal', in Mrs. Renuka Devi Rangaswamy v. M/s. Regen Powertech Private Limited and 2 Ors., (vide Comp. App (AT) (CH) (INS.) No. 357 of 2022), wherein, at Paragraph 39, it is observed as under:

39. ``..... comes to a 'Resultant Conclusion' that the 'Transfer of Assets' among the 'Group Companies', ex-facie is not a 'Fraudulent Trading', as per Section 66(1) of the Insolvency & Bankruptcy Code, 2016. Moreover, because of the fact that all 'Transactions' between the Companies as well as the 'Asset' details were maintained in a 'Transparent Manner', on an 'SAP System' (including the 'Fixed Assets Register') and further the 'Transactions' of the 'Corporate Debtor' and the '1st Respondent' were 'Audited' every year, the 'Plea' of 'Fraudulent Trading' as projected by the 'Appellant' / 'Applicant', is not proved, to the subjective satisfaction of this 'Tribunal', in a 'convincing manner'.'''

and points out that the aforesaid Judgment, will not apply to the facts and circumstances of the instant Comp. App (AT) (CH) (INS.) No. 356 of 2022.

16. While rounding up, the Learned Counsel for the Appellant prays for allowing the instant 'Appeal' or in the alternative, to remand the matter to the 'Adjudicating Authority' / 'Tribunal', for fresh consideration on 'merits', by considering all the materials placed on record.

Appraisal:

17. Before the 'Adjudicating Authority' / 'Tribunal', the Appellant / Petitioner, had preferred IA(IBC)/487(CHE)/2021, in IBA / 1424 / 2019 (filed under Section 25 & 66 of the I & B Code, 2016, read with Rule 11 of the NCLT Rules, 2016), and sought the undermentioned reliefs, were prayed for:

(i) To declare the following Sale of Immovable Properties for a total extent of 16.02 Acres in favour of the 3 Respondent M/s. Lakshmiranga Perumal Renewable Energy (P) Ltd., (LPREPL) as fraudulent, null and void and consequently, direct that the said Immovable Properties as detailed below are transferred and vested with the Corporate Debtor M/s. Regen Infrastructure and Services (P) Ltd.,

(a) Sale Deed Doc. No.174 / 2017 dated 30.03.2017 executed by Shri. Jayantilal Amarshibhai Kaila in respect of 1.65 Acres (00.66.77 Hectares) in Location PVKH61, S.No.92 / 1, Part 1,

Khakharechi Village, Maliya (MI) Taluk, Morbi Registration District in Gujarat State.

(b) Sale Deed Doc. No. 163 / 2017 dated 28.03.2017 executed by Shri. Hardasbhai Manjibhai Tentiya in respect of 2.90 Acres (1.17.36 Hectares) in Location PVKH64, S.No.106/1, Part 1, Khakharechi Village, Maliya (MI) Taluk, Morbi Registration District in Gujarat State.

(c) Sale Deed Doc. No. 162 / 2017 dated 28.03.2017 executed by Shri. Labhuben Maganbhai and Shri. Kantaben Maganbhai in respect of 1.65 Acres (00.66.77 Hectares) in Location PVKH65, S.No.1102, Part 1, Khakharechi Village, Maliya (MI) Taluk, Morbi Registration District in Gujarat State.

(d) Sale Deed Doc. No. 172 / 2017 dated 30.03.2017 executed by Shri. Nanjibhai Jeevabhai Ghaghania and Shri. Sukkhabhai Jeevabhai Ghaghania, in respect of 2.60 Acres (1.05.37 Hectares) in Location PVKH53, S.Nos. 915 Part 4 & 915 Part 5 resp., Khakharechi Village, Maliya (MI) Taluk, Morbi Registration District in Gujarat State.

(e) Sale Deed Doc. No. 173 / 2017 dated 30.03.2017, executed by Shri. Dineshbhai Thakarshibhai Saravadiya, in respect of 2.47 Acres (1.00.16 Hectares) in Location PVKUM12, S.No. 303 Part 3, Kumbhariya Village, Maliya (MI) Taluk, Morbi Registration District in Gujarat State.

(f) Sale Deed Doc. No. 1519 / 2017 dated 24.03.2017 executed by Shri. Vasubhai Manjibhai Kobi, in respect of 2.18 Acres (0.58.94 Hectares & 0.29.34 Hectares) in Location PVS18, S.Nos.11/1 & 11/2, Rayadhra Village, Halvad Taluk, Morbi Registration District in Gujarat State.

(g) Sale Deed Doc. No. 2089 / 2017 dated 16.03.2017 executed by Shri. Rahulbhai Ranchhodbhai Kobi, in respect of 2.57 Acres (0.23.26 Hectares & 0.80.94 Hectares) in Location PVS40, S.Nos.337 / 3 / Part 1 / Part 1 & 337 / 3 / Part 2, Ranchhodgarh

Village, Halvad Taluk, Morbi Registration District in Gujarat State.

(h) To direct the Respondents 1 to 8 to jointly and severally contribute to the assets of the Corporate Debtor by paying a sum of Rs.1,12,70,700/- into the Bank Account of the Corporate Debtor under CIRP.’’

18. According to the Appellant / Petitioner, in exercise of the ‘Power and Duties’, as an ‘Interim Resolution Professional’ / ‘Resolution Professional’, in the context of collecting information, about the ‘Assets’ of the ‘Corporate Debtor’ / ‘M/s. Regen Infrastructure Services Pvt. Ltd.’ (‘RISPL’), brought to the notice of the ‘Adjudicating Authority’, that IA /1040 / 2021, was filed under Section 19(2) of the I & B Code, 2016, in that Application, a direction was sought from the Respondents, to comply with the numerous requirements of the Appellant / Petitioner, including;

“(i) RISPL Assets as on the Insolvency Commencement Date (19/02/2020) classified into appropriate categories for easy identification, with estimated values assigned to each category along with Copy of the Register of Fixed Assets (FA);

(ii) Original Land Documents of RISPL and its Wholly Owned Subsidiaries with Index of Land Description including Leased Land, Survey No., Registered Document No., Name in which registered, Name / Address and Related Document of the Power of Attorney if the Land is not yet registered in Companies Name, Book Value, Details of Right to Way with documents;

(iii) Lands in Inventory and Manual – Assets of RISPL and its Wholly Owned Subsidiaries – Original Documents.’’

19. On behalf of the Appellant / Resolution Professional, it is pointed out before this `Tribunal' that the `Balance Sheet' of the Corporate Debtor, as on 31.03.2019, reflects the details of Land Assets of the Corporate Debtor as (i) Land in Fixed Assets Category at Rs.7,71,98,398/- (ii) Land in Inventory and Manual Category at Rs.44,11,76,094/- and that the break up for the Lands in Inventory and Manual reveal that numerous lands situated within the different locations of Tamil Nadu, Gujarat, Maharashtra and Madhya Pradesh, were purchased by the `Corporate Debtor'.

20. It is the version of the Appellant that in the Registration District of Morbi, in Gujarat, the Corporate Debtor, had purchased lands at 9 Locations from the Farmers and in fact, 21.35 Acres of Land, was purchased with the funds of the Corporate Debtor of Rs.1,97,97,187/- (inclusive of Stamp Duty, Registration Charges and Other Expenses), which funds were paid to the Farmers in February and March 2017.

21. According to the Appellant, `no documents', were available in the records of the Corporate Debtor and the Assets could not be traced and that the Respondent Nos. 1 and 2, had never furnished these details, despite her attempts to get the `Asset Details', of the `Corporate Debtor'. Also that, the Appellant, had identified that though the `Funds', were paid

to the `Sellers' / `Farmers', directly, from the `Account' of the `Corporate Debtor' / `M/s. Regen Infrastructure and Services (P) Ltd.' (`RISPL'), all the `Sale Deeds', were registered in the name of the `3rd Respondent' / `M/s. Lakshmiranga Perumal Renewable Energy (P) Ltd.', instead of the Registered, in the name of the `Corporate Debtor'.

22. The Learned Counsel for the Appellant points out that the `3rd Respondent', being a `Related Party' of the `Corporate Debtor', having `common Directorship', and is represented by the `4th to 6th Respondents Directors'. In reality, the `4th Respondent', who is the `Director' of the `3rd Respondent', is the `Director' of `two Wholly Owned Subsidiaries' of the `Corporate Debtor', Viz. (a) M/s. Marthanda Wind Power AP (P) Ltd., and (b) M/s. Varshini Wind Power (P) Ltd., and is an Ex-Employee of M/s. Regen Powertech (P) Ltd., (`RPPL'), which is the `Holding Company' of the Corporate Debtor.

23. It is the stance of the Appellant / Applicant that, through an email dated 07.01.2021, she had informed the `Committee of Creditors Members', pertaining to the lands described in Inventory and Manual Category, as they were purchased with the `Funds' of the `Corporate Debtor', and registered in the name of the `3rd Respondent / M/s. Lakshmiranga Perumal Renewable Energy Private Limited'. Moreover,

the said illegal 'Asset Transfer', in 'Related Parties Name', was made with the knowledge of the Respondents. Later, through an email dated 08.01.2021, the Appellant / Applicant, brought to the fore in respect of a 'Letter of Authority', dated 10.10.2019, by the 7th Respondent in his capacity as the 'Authorised Signatory' of the '3rd Respondent'.

24. The contention of the Appellant is that, some of the Properties which were transferred by the 3rd Respondent to other Parties (third parties), at a higher price than at which, it was purchased, and that the later Sales, were brought to the notice of the 'Committee of Creditors', in its 6th Meeting dated 02.02.2021.

25. The Learned Counsel for the Appellant points out that the 1st Respondent through email dated 19.02.2021, had stated that a sum of Rs.9,12,49,999/- was received from M/s. Regen Powertech Private Limited ('RPPL'), the Holding Company of the Corporate Debtor, to pay the Farmers, in regard to the purchase of land and the lands so purchased are held by one of the Special Purpose Vehicle ('SPV') of 'RPPL', but no evidence / proof, was produced by the 1st Respondent, for such transfers.

26. The other plea taken on behalf of the Appellant is that, no explanation was offered on the side of the 1st and 2nd Respondents, as to

why the said `Assets`, are reflected in the Corporate Debtor's Books, when the Assets are in the 3rd Respondent's name. Also that, the 3rd Respondent's Balance Sheet for the Financial Year ended 2018-2019, had not reflected, any `Land Fixed Assets`.

27. The Learned Counsel for the Appellant projects an argument that the `Onus of Proof`, to substantiate a `Plea of Fraud`, is upon the shoulders of a `Resolution Professional`, especially when an `Application`, was filed before an Adjudicating Authority, under Section 66 of the I & B Code, 2016. In reality, the `Resolution Professional`, is to form an opinion and to go before the `Adjudicating Authority` / `Tribunal`.

28. The Learned Counsel for the Appellant, adverts to the `Order` dated 26.11.2020 of the Hon'ble High Court of Delhi in the matter of M/s. Venus Recruiter Private Limited v. Union of India and Ors. in W.P.(C) 8705 / 2019 & CM APPL. 36026 / 2019, wherein at Paragraph 84, it is observed as under:

84. ``The manner in which it is sought to be interpreted by the Petitioner and by the Respondents is in stark contrast. The Respondents rely heavily on this provision to argue that avoidance applications would not affect the CIRP. This is because under the scheme of the IBC, insofar as avoidance applications are concerned, the RP has to collect the details, form an opinion, make a determination and submit the same to the NCLT within the

prescribed timelines. This is independent of the various other steps which are part of the CIRP. The activities in respect of objectionable transactions, which the RP has to conduct, would run parallelly with the other steps of the CIRP. However, finally, the RP would submit all the details to the NCLT along with the Resolution Plans. That is the purpose of the provision. The provision cannot be interpreted in a manner so as to say that the applications can survive the CIRP itself. Section 26 of the IBC also cannot be read in a manner so as to mean that an application for avoidance of transactions under Section 25(2)(j) can survive after the CIRP process. Once the CIRP process Signature Not Verified Digitally Signed By:PRATHIBA M SINGH Signing Date:26.11.2020 10:00 Signature Not Verified Digitally Signed By:DINESH SINGH NAYAL Signing Date:26.11.2020 11:10:56 itself comes to an end, an application for avoidance of transactions cannot be adjudicated. The purpose of avoidance of transactions is clearly for the benefit of the creditors of the Corporate Debtor. No benefit would come to the creditors after the Plan is approved. Thus, Form H cannot come to the aid of avoidance applications to remain pending beyond the CIRP process.’

29. The submission of the Learned Counsel for the Appellant is that, the ‘Resolution Professional’, has a duty, under the I & B Code, 2016, to make an opinion instead of ‘Corroborating a Transaction’, to push it under Section 66 of the Code. In this connection, the Learned Counsel for the Appellant falls back upon the Judgment dated 04.05.2022 in Comp. App (AT) (INS.) No. 454 of 2022, between Mr. Nitin Bharal (Ex-Director / Promoter, New Delhi) and 3 Ors., v. Stockflow Express Private Limited,

through Liquidator Mr. Sanjay Gupta, New Delhi, wherein at Paragraphs 22 and 23, it is observed as under:

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 Company Appeal (AT) (Insolvency) No. 454 of 2022 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.’*

30. The Learned Counsel for the Appellant points out that, the Appellant took endeavours to produce (a) the Balance Sheet of the Corporate Debtor for the Financial year 2019-20, which shows that the Assets are reflected in the Books of the Corporate Debtor, (b) the Balance Sheet of the Respondent 3 for the Financial Year 2018-19 to show that the said Assets and few Assets sold to others by the 3rd Respondent are not reflected in the Books of the 3rd Respondent, (c) the specific Sale Deeds which expressly shows that the land assets are registered in the name of the 3rd Respondent – these are sale deeds which was obtained by the Appellant through her own efforts without the assistance or aid of the 1st and 2nd Respondents, and (d) the Extract of Transaction Audit Report submitted in IA(IBC)/591(CHE)/2021 in IBA/1424/2019, to establish the ‘Fraudulent’ basis of the whole transaction and the basis of such an opinion, before the ‘Adjudicating Authority’, and the Adjudicating Authority, had committed an ‘error’, in arriving at a conclusion that the ‘Appellant’ / ‘Applicant’, was making sweeping allegations.

31. The pith and substance of the Appellant’s contention is that, the ‘Lands’, in question are capable to ‘generate Wind Energy’, a ‘vital crucial element’, in sustaining the ‘Corporate Debtor’s Operations’, as a ‘Going Concern’, and the very fact, that these ‘Assets’, are sold at a

`Higher Amount' than at which, the same was purchased, indicate, that the Respondent Nos. 1 and 2, were carrying on the `Corporate Debtor's business', with the main intent of `defrauding', its `Creditors', with the `Respondent Nos. 3 to 8', colluding and being a `Beneficiary' of the same.

32. Before the `Adjudicating Authority', the Respondent Nos. 1 and 2, took a stand that they had not gained personally anything, from any transaction, with the `1st Respondent' and the `Appellant / Applicant', had not produced any material / proof, to substantiate the allegations, so made.

33. To be noted that, the expression `Party to the carrying on business', indicates `taking positive steps', in carrying on `company's business', in a `fraudulent manner'. The intent to `defraud', is to be judged, by its `effect' on a `Person', who is the `object of conduct', in question.

34. A `preponderance of probability suffices', but the degree of probability must be such that the `Tribunal', is satisfied and further that under Section 66 of the I & B Code, 2016, it is not essential to attract that there ought to be a `Debtor' and a `Creditor' relationship.

35. It must be borne in mind that for proving a 'Fraudulent Trading' needs meeting the 'High Standard of Proof', which is attached to a 'Fraudulent Intent'. A 'Director', of a 'Company', may be proceeded against for a 'Wrongful Trading', because of the reason of 'Negligent Failure of Management'. Besides this, 'a person', knowingly a 'Party' to a 'Fraudulent Trading', by the 'Company' concerned, may be subject to the proceedings.

36. A 'Single Fraud', against 'a person', may result in Civil Action in the 'Realm of Tort'. It does not lie in the mouth of 'Directors of a Company', being accused of 'Fraudulent Trading', to allege that the 'Company's Claim', for recovery in Civil Action is barred.

37. 'Dishonesty', is an essential ingredient of 'Fraudulent Trading'. The 'Aspect of Dishonesty', is to be established and it cannot be inferred in any manner. Whether a 'Director', had exercised his skill, experience and general knowledge, to be expected of a person, in carrying out the 'duties of his functions', is to be determined for a 'Liability', in the considered opinion of this 'Tribunal'.

38. The Appellant has a 'duty', to establish to the satisfaction of this 'Tribunal', that a 'person', is knowingly carrying on the business with the 'Corporate Debtor', with an 'dishonest intention', to 'defraud', the

`Creditors'. For a `Fraudulent Trading' / `Wrongful Trading', necessary materials are to be pleaded by a `Litigant' / `Stakeholder', by furnishing `Requisite Facts', so as to come within the purview of the ingredients of Section 66 of the I & B Code, 2016. Suffice it, for this `Tribunal', to pertinently point out that the ingredients of Section 66 (1) and 66 (2) of the I & B Code, 2016, operate in a different arena.

39. At this stage, this `Tribunal', aptly points out the decision of the Hon'ble High Court of Kerala, in *South India Paper Mills Pvt. Ltd. v. Sree Rama Vilasam Publications (P) Ltd.*, reported in (1982) 52 Comp. Cas. 145 Ker., wherein, at Paragraph 10, it is observed as follows:

10. "This is a far cry from the "false representations" or the "false pretence" alleged in the affidavit, and I have not been referred to any authority to hold that the carrying on of business after the presentation of a winding-up petition, without disclosing the pendency of the proceedings, should by itself be presumed to be fraudulent. Mr. Vyasani Potti argued that where such presentation is actually followed by a winding-up order, even if it be nearly four years later as in this case, the effect of it is to hold that the company was unable to pay its debts at the time the petition was presented, and that the directors should be presumed to know even at that time that there was no reasonable prospect of repayment. A proposition so wide has not received judicial recognition so far. A company may actually be insolvent at a given time; but its directors may bona fide hold a different view. Even in a case where they are aware of the true position, they may still think that all was not lost and that they would be able to stem the rot by further borrowings and improving the business. In re F.L.E. Holdings Ltd. [1967] 1 WLR 1409 ; [1968] 38 Comp Cas 214 (Ch D) is a case in point.

Mr. Brown who was in de facto control of the company had borrowed some amounts from a bank in July, 1965, by deposit of title deeds. But the mortgage was not registered. By September, 1965, two other creditors had obtained decrees against the company and it was fairly clear that it had become insolvent. Thereafter, he gave a legal mortgage to the bank by registering the charge and this transaction was attacked as a fraudulent preference. Pennycuick J. held that there was no fraud at all because Mr. Brown had faint hopes that by keeping good faith with the bank he could get further advances from it to revive the company. As already seen from Exs. A-1 and A-2, the company was indebted to the applicant to the tune of Rs. 28,000 even before winding up had commenced in January, 1973. During the year 1973, the company purchased paper worth Rs. 9,496 but paid Rs. 15,486 to the applicant. That is, during the first year after the commencement of winding-up, it paid not only the full value of its purchases, but something more. Exhibit A-4 indicates that paper was supplied to the company only once during 1974, i.e., in the month of June; and by that time the outstandings had been brought down to around Rs. 11,000. No supply was made at all in 1975, but still the company paid Rs. 7,760 during that year. These facts do not fit in with a presumption that the directors of the company were aware, at the time the purchases were made, that there was no reasonable prospect of repayment at all. The inference referred to by Maugham J. in William C. Leitch Bros.' case [1932] 2 Ch 71 (Ch D) is one to be drawn when knowledge on the part of the directors is shown to exist; it is not an inference to be drawn about such knowledge itself.''

40. As far as the present case is concerned, the Sum, for the 'Purchase of Lands', by the '3rd Respondent', was provided by 'RPPL', to the 'Corporate Debtor', who in turn, provided that money to the 3rd Respondent, one of the 'Special Purpose Vehicles', created by the 'Regen

Group'. In this connection, this 'Tribunal', points out that the 'Respondent Nos. 1 and 2', before the 'Adjudicating Authority', came out with a stand that the 'RPPL', had funded the 'Corporate Debtor', towards the 'Development of the Project', and the said act / transaction, took place within the 'Group'.

41. In the light of the above, it is crystalline clear that the transaction of 'Transfer of Assets', among / within the 'Group Companies', 'ex-facie', will not come within the umbrage of the 'Fraudulent Trading', as per Section 66 (1) of the Code, as opined by this 'Tribunal'. Furthermore, in the instant case, the 'Appellant / Applicant', has made an fervent endeavour, to converse the transactions, allegedly made by the 'Respondents', as per Section 66 of the Code.

42. Be that as it may, in the light of qualitative and quantitative discussions, this 'Tribunal', on a careful consideration of the contentions, advanced on behalf of the 'Appellant', and keeping in mind of the facts and circumstances of the case, in an integral manner, and also on going through the 'impugned order' of 'dismissal', in IA(IBC)/487(CHE)/2021 in IBA/1424/2019, passed by the 'Adjudicating Authority' ('National Company Law Tribunal', Division Bench – II, Chennai), comes to a conclusion that the 'Appellant / Applicant', had not established the

`Aspect of Fraud' or `Dishonest Intent', on the Respondents' side, to the subjective satisfaction of this `Tribunal'. As such, the view taken by the `Adjudicating Authority' (`National Company Law Tribunal', Division Bench – II, Chennai), preferred by the `Appellant / Applicant', in `dismissing' the IA(IBC)/487(CHE)/2021 in IBA/1424/2019. is free from any `legal errors'. Consequently, the `Appeal', fails.

Result:

In fine, the instant Comp. App (AT) (CH) (INS.) No. 356 of 2022, is dismissed. No costs.

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

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

05/06/2023

SR / TM