

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH

Company Appeal (AT) (Ins.) No. 534 OF 2022

[Arising out of Order dated 22.12.2021 passed by the Adjudicating Authority/National Company Law Tribunal, Cuttack Bench in I.A. No. 25/CB/2021 in C.P. (IB) No. 168/ CTB/ 2019.]

IN THE MATTER OF:

1. Indian Overseas Bank

Through Debesh Kumar Nanda s/o Bansidhar
Nanda
Aged About 47 years Working as Chief
Manager,
Indian Overseas Bank, Regional Office B/2
West Sahid Nagar Bhubaneswar, Odisha –
751007, Financial Creditor.

...Appellant No. 1

2. Odisha Gramya Bank

Through Smt. Dibyasuchi Mallik W/o
Prasanta Kumar Sahoo
Aged About 35 years Working as Branch
Manager Odisha Gramya Bank Khurda
Branch At Town Hall Po. Distt. Khurda,
Odisha – 752055
Financial Creditor.

...Appellant No. 2

Versus

1. Ramesh Chandra Swain

R/o Flat No. 604, Block – L, Lomani Villa,
Gothapatr A, Malipada Near Times Gurukul
School, Khandagir I, Mahpada,
Khorda - 751029.

...Respondent No. 1

2. Sakuntala Behura,

R/o Flat No. 604, Block- L, Loman Villa,
Gothapatna, Malipada Near Times Gurukul
School,
Bhubaneswar – 751029.

...Respondent No. 2

3. Santanu Kumar Swain,

R/o 3, Apama Nagar,
Near Apama Mandir Chauhiagani, Cuttack
Sadas, Nayabazar, Cuttack 753004

...Respondent No. 3

4. Soumya Samarpita Swain,
R/o Block – L, Lomani Villa, Malipada
Khandagiri Bhubaneswar,
Odisha – 751029.

...Respondent No. 4

5. Binay Kumar Singhania,
Erstwhile Resolution Professional having office
at BKS & Co., Diamond Heritage, 16 Strand
Road, Unit – 519, 5th Floor,
Kolkata, West Bengal – 700001.

...Respondent No. 5

Present:

For Appellants : Ms. Mayuri Raghuvanshi, Ms. Akanksha Rathore & Mr. Vyom Raghuvanshi, Advocates.

For Respondents : Mr. Kiran Kumar Patra & Mr. Debarshi Bhadra, Advocates.

J U D G M E N T
(21.02.2023)

NARESH SALECHA, MEMBER (TECHNICAL)

The Present Appeal is filed against the ‘impugned order’ dated 22.12.2021 passed in I.A. No. 25/CB/2021 in C.P. (IB) No. 168/ CTB/ 2019 by the ‘Adjudicating Authority’ (National Company Law Tribunal, Cuttack Bench), whereby, the ‘Adjudicating Authority’ has dismissed I.A. No. 25/CB/2021 in C.P. (IB) No. 168/ CTB/ 2019.

Brief Facts:

2. Swain Aluminium Private Limited (Corporate Debtor) filed an application under Section 10 of the I & B Code, 2016 before the Adjudicating Authority (National Company Law Tribunal, Cuttack Bench). The Adjudicating Authority vide order dated 20.02.2020 admitted the application, initiation of CIRP and moratorium was imposed. Mr. Saradindu

Jena was appointed as Interim Resolution Professional on suggestion made by Swain Aluminium Private Limited. Swain Aluminium Private Limited was incorporated on 20.03.2009 and was in the business of manufacturing all kinds of aluminium rerolled sections and producing alloys, ingots, billets etc.

Indian Overseas Bank (Appellant No. 1) and Odisha Gramya, Bank (Appellant No. 2) gave loan of Rs. 28,86,51,000/- against mortgage/hypothecation of factory premises and machinery. The loan account was classified as NPA on 31.12.2014. Since, Swain Aluminium Private Limited did not have adequate cash flow to run operations and was unable to revive the company, they themselves filed an application under Section 10.

3. In the first meeting of the Committee of Creditors held on 19.03.2020, Mr. Binay Kumar Singhania, Erstwhile Resolution Professional, Respondent No. 5 herein/ Appellant therein was appointed as Resolution Professional and the same was confirmed by the Adjudicating Authority on 15.07.2020. Mr. Binay Kumar Singhania, Erstwhile Resolution Professional, Respondent No. 5 herein/ Appellant therein appointed M/s SK Agarwal & Company Chartered Accountants to conduct transaction audit of the books of Corporate Debtor who submitted 'Transaction Audit Report' on 17.12.2020.

4. Mr. Binay Kumar Singhania, Erstwhile Resolution Professional, Respondent No. 5 herein/ Appellant therein filed I.A. No. 25/CB/2021 in CP (IB) No. 168/CTB/2019 before the Adjudicating Authority for declaration of some transactions made by Respondent Nos. 1 to 4 as fraudulent and for determination that money belonging to the Corporate Debtor was siphoned off by Respondent Nos. 1 to 4 for their personal benefit. However, the

Adjudicating Authority vide 'impugned order' dated 22.12.2021 dismissed I.A. No. 25/CB/2021 denying following relief sought for under Section 66 r/w 60(5) of the I & B Code, 2016.

"a. To direct the respondents to make a deposit of a sum of Rs. 4,30,43, 884/- being the stock value, which has been illegally wiped out by the suspended board of directors in the financial statement for the year ending 31 March 2017 in the account of the Corporate Debtor, being the account no. 0873002000001183 maintained with Indian Overseas Bank.

b. To direct the respondents to make a deposit of Rs. 3,64,00,356/- being the differential amount as per the closing stock mentioned in books of accounts and as per the financial statement of the Corporate Debtor Company for the financial year of 2015-16 in the account of the Corporate Debtor, being the account no. 0873002000001183 maintained with Indian Overseas Bank.

c. To direct the respondents to make a deposit of Rs. 72,81,578/- reported to have fraudulently siphoned off from the account of the Corporate Debtor to the newly opened account being account no. 1659102000000408 maintained with IDBI Bank.

d. An order be passed attaching the bank account of the respondent to the extent for a sum of Rs. 8,67,25,818/- as siphoned of by them and the respondents may be restrained from operating their bank account till, they secured such money with the Registry of this Court in the interregnum period where the instant application is pending.

e. An order be passed directing the respondents to disclose their bank account before this Tribunal.”

5. In the meanwhile, an Application for approval of Resolution Plan was filed on 26.06.2021 as I.A. 55/CB/2021 before the Adjudicating Authority which was allowed on 01.11.2021.

6. Aggrieved by the ‘impugned order’ dated 22.12.2021, the financial creditors i.e. Appellant No 1 and 2 have preferred this appeal.

Appellants Submission:-

7. Counsel for the Appellants gave the facts of the case and elaborated circumstances which led to this appeal. Appellant No. 1 i.e. Indian Overseas Bank is holding 69.51% shareholding in the Committee of Creditors (**in short ‘CoC’**) and Appellant No. 2 Odisha Gramya Bank is holding 30.49% shareholding in the Committee of Creditors. Counsel for the Appellants stated that Respondent Nos. 1 to 4 are Suspended Directors of the Corporate Debtor and Respondent No. 5 is the Erstwhile Resolution Professional who filed I.A. No. 25/CB/ 2021 in CP (IB) 168/CTB/2019 which was dismissed and the ‘impugned order’ under challenge in the present appeal was pronounced on 22.12.2021 by the Adjudicating Authority.

8. Counsel for the Appellants brought out that in the 6th CoC Meeting held on 04.11.2020, Respondent Nos. 1 to 4 were called to explain about depletion of stock subsequent to loan account being classified as NPA without corresponding income thereto which could not be explained by Respondent Nos. 1 to 4. Counsel for the Appellants further submitted that

the Respondent No. 1 replied on behalf of Respondent Nos. 1 to 4 stating that since bank has taken possession, stocks were not physically verified and therefore earlier figure was reported and in the financial statement of 2016-2017 they reported 'NIL', stock as chemical and other raw material had been damaged due to expiry of its self-life.

9. Counsel for the Appellants explained the highlights of the 'Transaction Audit Report' submitted by M/s SK Agarwal Chartered Accountants which are as under :-

(a) Short term source of finance were used to purchase fixed assets.

(b) Bank account with commercial bank other than Appellant lender banks was opened after the loan account was classified as NPA and the funds were routed through new bank account.

(c) The gross margin for financial year 2012-13 and 2013-14 were more than 50% and was reduced to margin of -50% in the year 2014 whereas no such variation in margin was observed in the Aluminium Extraction Industry.

(d) Books of accounts were maintained in accounting software different from audited financial statements and stock statement submitted to the bank.

(e) The losses were underreported in the financial and stock statement sent to the banks and were different from the accounting software.

(f) Entire stock of Rs. 4,30,43,884/- was written off from the books of account during financial year 2016-17 with the note that stock were unsalable even though metal product like aluminium do not fall under such category.

10. Counsel for the Appellants stated that the Respondent No. 5- Erstwhile Resolution Professional also affirmed above facts of transaction audit based on the Financial Statement of financial year 2014-15, 2015-16, 2016-17.

11. Counsel for the Appellants also mentioned that there have been diversion of funds in form of utilization of short term working capital for long term purpose in violation of terms of sanction of credit facilities as well as Clause 2.2.1 of Master Circular issued by Reserve Bank of India on 01.07.2015.

12. Counsel for the Appellants further mentioned that the Respondent Nos. 1 to 4 opened another bank account in IDBI on 29.01.2015 and between 29.01.2015 to 19.12.2017, Respondent Nos. 1 to 4 deposited Rs. 72.81 lakhs with intent to siphoning of funds of the Corporate Debtor which was done without giving any notice or with the consent of the Appellants. No documentary evidence is available to establish that even this fund was used for payment to actual creditors.

13. Counsel for the Appellants refuted the plea taken by the Respondent Nos. 1 to 4 herein about maintainability of the Appeal considering Appellants were not being parties in the I.A. 25/CB/2021 based on which the 'impugned order' was issued. Counsel for the Appellants stated that the Appellants are

the only Financial Creditor holding 100% shareholding of the CoC and it is their huge money which is at stake and they are aggrieved by the effect of 'impugned order' dated 22.12.2021 and hence are eligible to file the present application under Section 61(1) of the I & B Code, 2016.

14. Counsel for the Appellants while concluding his arguments, requested this Appellate Tribunal to allow present appeal and set aside the "impugned order' dated 22.12.2021.

Respondents Submissions :-

15. Counsel for the Respondent Nos. 1 to 4 stated that the Adjudicating Authority has given 'impugned order' on merits taking into account all facts and provisions of law and give the appeal is without any merit therefore it need to be dismissed.

16. Counsel for Respondent Nos. 1 to 4 emphasised that the present appeal is not maintainable at all as the Appellants were not parties to the original I.A. No. 25/CB/2021. Counsel for the Respondent Nos. 1 to 4 mentioned that as the Resolution Plan has already been approved, the Respondent Nos. 1 to 4 are discharged from the duties by virtue of order dated 01.11.2021 in I.A. No 55/CD/2021.

17. Counsel for Respondent Nos. 1 to 4 further stated that the Appellants have failed to satisfy the basic ingredients of Section 66 i.e *"intent to defraud creditors of the Corporate Debtor or for any fraudulent purpose"* and appeal is without any substance.

18. Counsel for Respondent Nos. 1 to 4 refuted the allegations of the Appellants that they have not submitted documents in time as required by Respondent No. 5. Counsel for the Respondent Nos. 1 to 4 further stated that Respondent No. 5 has taken all the books of account from the earlier IRP and all documents were available in Administrative Office.

19. Counsel for Respondent Nos. 1 to 4 strongly refuted the allegation regarding depletion of stock subsequent to account was classified as NPA without corresponding income and stated that it is an old case and same could have been explained only after discussion with concerned Chartered Accounts (Auditors) and accordingly same was replied vide e-mail dated 08.12.2020 to Respondent No. 5.

Counsel for Respondent Nos. 1 to 4 further stated that stock in the Financial Statement of 2014-15 has been shown at Rs. 4,30,43,884/- and the Auditors have not carried out physical verification during 2015-16 and as such reported the same figure.

Counsel for Respondent Nos. 1 to 4 emphasised that Respondent have taken the possession of unit on 08.07.2015 under Section 13(4) of SARFAESI Act 2002 and on 10.07.2015 Respondent No. 3 has submitted stock statement to Appellant No. 1 to the tune of Rs. 68,67,871/- which was not disputed by the Appellant till initiation of CIRP.

Counsel for Respondent Nos. 1 to 4 clarified that most of the stocks are chemicals which have limited life span and accordingly the value of stock as on 31.03.2017 was shown as nil.

Counsel for Respondent Nos. 1 to 4 stated that the Adjudicating Authority has considered all these facts and came to logical conclusions that Respondent No. 5 could not establish the difference in stock value of Rs. 3,64,00,356/- has been utilised other than for ordinary course of business.

20. Counsel for Respondent Nos. 1 to 4 mentioned that variation in the figure of Financial Audit Report can be attributed at the best as mistake, lack of accounting knowledge, carelessness etc., but cannot be termed as siphoning off money or fraudulent transactions.

21. Counsel for Respondent Nos. 1 to 4 also wondered that when physical record were available to Respondent No. 5, why Respondent No. 5 tried to compare data available in Tally Software with physical data available.

22. Counsel for Respondent Nos. 1 to 4 also denied the charge regarding utilization of short-term funds for long term assets. Counsel for Respondent Nos. 1 to 4 tried to justify the action of utilising such fund for long term assets due to reduction in long term borrowing of the company which was required for the purchase of machinery hence, it cannot be classified as an act of wilful diversion of funds by the Corporate Debtor.

23. Counsel for Respondent Nos. 1 to 4 clarified that after classification of his account as NPA, the Appellants did not allow Respondent No. 1 to operate the accounts even to pay their small Creditors and in order to settle the dues of small creditors, the new bank account was opened with the IDBI. Counsel for the Respondent Nos. 1 to 4 further stated that the cash withdrawal was

made to pay dues of small creditors, who supplied raw material at cheaper rates and did not route their business through banks. Counsel for the Respondent Nos. 1 to 4 emphasised that all this was done in good faith to help small creditors and not with intention to siphoning off money.

24. Concluding his arguments, Counsel for the Respondent Nos. 1 to 4 stated that the appeal should be dismissed for want of maintainability as well as keeping into consideration, that Appellants could not establish applicability of Section 66 in this case as correctly upheld by the Adjudicating Authority in the ‘impugned order’.

Findings:-

25. Heard Learned Counsel for the ‘Appellants’ and the ‘Respondents’ and also perused record made available to us. The Appellant has raised several issues. We will examine them in following discussions:-

26. At the outset, it is imperative for this Appellate Tribunal to examine the issue regarding maintainability of the appeal. It is the case of the Respondent Nos. 1 to 4 that since Appellants were not the contesting party or even impleader in I.A. No. 25/CB/2021, they are not entitled to prefer the present appeal. Per-contra, it has been brought out that Financial Creditor are having the 100% shareholding of the CoC and their huge public money is at stake hence they are directly aggrieved by the ‘impugned order’.

It is noted that Respondent No. 5 had filed I.A. No. 25/CB/2021 with a prayer to declare some transactions as fraudulent under Section 66 as well as directions to the Respondent Nos. 1 to 4 herein to reimburse money and

prayer was made to attach bank accounts of Respondent Nos. 1 to 4. Since, this was done which was directly beneficial to the Appellants the (Financial Creditors) there was no need of the Appellants (Financial Creditors) to be party in the said I.A. No. 25/CB/2021. Since, the ‘impugned order’ has dismissed I.A. No. 25/CB/2021 and the same is squarely and directly hitting financial interest of the Appellant who have land Rs. 28.868 crores (approx.) therefore they are aggrieved persons.

This Appellate Tribunal takes into account provisions of Section 61(1) of the I & B Code, 2016 which reads as under :

“61. Appeals and Appellate Authority

(1) Notwithstanding anything to the contrary contained under the Companies Act 2013 (18 of 2013), any person aggrieved by the order of the Adjudicating Authority under this part may prefer an appeal to the National Company Law Appellate Tribunal”.

(Emphasis Supplied)

This Appellate Tribunal find merit in the contention of the Financial Creditor i.e. Appellant herein are indeed aggrieved by the ‘impugned order’ of the Adjudicating Authority as such they are entitled to prefer the present appeal before this Appellate Tribunal and in view of this, we hold that the present appeal is maintainable.

27. Having established issue regarding maintainability, it is necessary to discuss the other points brought out in this appeal and for which averments have been made by both the Appellants and the Respondents. These can broadly be classified as under:-

A. Depletion of Stock without any justification

B-1. Diversion of funds in form of utilisation of short-term working capital fund for long-term purpose in violation of the terms of sanction of credit facilities.

And

B-2. Opening of new bank account in IDBI after the account of the Corporate Debtor was declared as NPA.

28. (A) Depletion of Stock without any justification:

- It has been seen from the record made available and averments that in the Financial Statement for the period ending 31.03.2015 as well as 31.03.2016, the value of inventory was shown as Rs. 4,30,43,884/- however, in the Financial Statement for the period ending 31.03.2017, all of a sudden inventory was shown as 'NIL'. This implies that inventory should have been either used for production purpose or should have been disposed off including sale or remained unexplained.
- Appellants have brought out that this amount was written off by Respondent Nos. 1 to 4 fraudulently which tantamount to diversion of funds in violation of terms of sanction and RBI guidelines.
- It is a case of Respondent that after physical possession has been taken by the Appellants, the stock was not physically verified and the inventory which mainly consisted of chemicals, cartoons, polythene, etc., had limited life span and destroyed over a period of time. They also pointed out that the Respondent No. 3 submitted the stock

statement with Appellant No. 1 of Rs. 68,67,871/- as stock statement dated 10.07.2015.

- This Appellate Tribunal has also gone through the 'Transaction Audit Report' conducted by the Independent Chartered Accountants as well as '*explanation on depletion of stock subsequent to account becoming NPA without corresponding income thereto*' given by Respondent No. 3 to the Respondent No.5 during the CIRP proceedings.
- From the stock statement which the Corporate Debtor is stated to be have furnished to Appellant No. 1, it is noted that the same has been received by the Appellant No. 1 with note 'Receipt Without Prejudice'. This signifies that the alleged statement has not been examined or accepted by Appellant No. 1 and as such the contention of the Respondent Nos. 1 to 4 on explanation that inventory was only Rs. 68,67,871/- and not Rs. 4,30,43,884 as per Financial Statement cannot be accepted on the face of it.
- The 'Transaction Audit Report' furnished by the Chartered Accountants has done detailed analysis of the pattern/movement of the closing stock right from Financial Year 2011-12 to 2016-17 along with analysis of net profit which is reproduced herein below :-

Analysis of Closing Stock as per Accounting Software and Financial Statements

Year	As per Books of Accounts	As per Financial Statements	Difference
2011 - 12	1,77,68,870	66,32,649	1,11,36,221
2012 - 13	3,29,36,692	7,08,84,081	(3,79,47,389)
2013 - 14	85,22,438	11,23,49,997	(10,38,27,559)
2014 - 15	67,96,002	4,30,43,884***	(3,62,47,882)
2015 - 16	66,43,528*	4,30,43,884	(3,64,00,356)
2016-17	Note*	NIL**	

* No entries were recorded in the accounting software post 18th July, 2015.

** As per Note 8 of the financial statements for the year ended 31st March 2017, the stocks were unsaleable, obsolete, and not fit for sale even if at scrap value and hence raw material, stores and spares, loose tools, etc worth Rs. 4,30,43,884 was written off from the books of accounts.

*** As per Note 8 of the financial statements for the year ended 31st March 2015, huge stocks of raw materials and semi-finished products were found shortage with reference to the book stock. Some stocks were stolen and due to reconversion of inferior quality goods huge burning loss was sustained

We also analysed Net Profit as per books of accounts and financial statements, the following difference was observed:

Analysis of Net Profit as per Accounting Software and Financial Statements

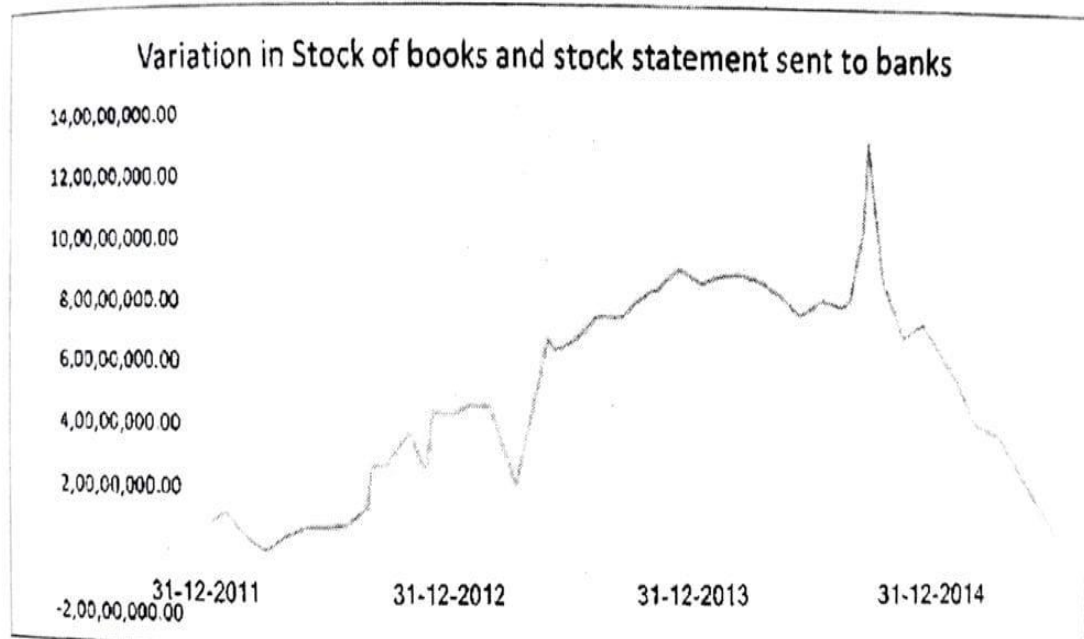
Particulars	As per Accounting software	As per Financial Statements	Difference
2010 - 11	(24,47,822.33)	(24,47,822.13)	NIL
2011 - 12	12,43,036.66	(1,66,48,103.12)	1,78,91,139.78
2012 - 13	(2,29,75,600.70)	10,49,942.79	(2,40,25,543.49)
2013 - 14	(8,76,08,129.78)	11,22,396.16	(8,87,30,525.94)
2014 - 15	(3,33,72,115.74)	(11,63,07,764.94)	8,29,35,649.20
2015 - 16	(21,10,939.40) *	(2,72,70,217.11)	2,51,59,277.71

* No entries were recorded in the accounting software post 18th July, 2015

Due to the nature as well as materiality of variance observed, the reliance on the books of accounts is limited. The Corporate Debtor has reported shortage during physical verification mostly due to defalcation. The erstwhile directors responded that since there were frequent petty thefts neither any FIR nor any insurance claim was filed. It seems that closing stock figures were inflated to meet banking requirements.

We also analysed the quarterly stock statement sent to the Banks. On Analysis of the same, it can be observed that the stock statement provided to the Banks

showed higher inventory than those as per the books of accounts.



*** **

- From above mentioned 'Transaction Audit Report' it is therefore clear that Rs. 4,30,43,884/- was written off from stock being unsalable, obsolete and not for sale even at scrap value during Financial Year 2016-17. Since, the Corporate Debtor was in business of production of aluminium items and products like alloys, ingots, billets etc., it is surprising to note that the entire inventory/ stock was written off during financial year of 2016-17 without suitable notes to the Accounts. In the 'impugned order' it has been recorded 'in absence of physical verification of the stock the e-auction as has been made as on 31.03.2015 has been shown as unchanged as on 31.03.2016" and shown as NIL as of 31.03.2017 as most of the stock has crossed their expiry date'.

- On the pointed query by this Appellate Tribunal to Respondent Nos. 1 to 4 on above discrepancy, no convincing and direct answer could be furnished regarding details of item written of, proof of the procurement or utilisation during production process or details of writing of such inventories. In Written Submissions by the Respondent Nos. 1 to 4 as well as averments made, the Respondents relied upon the facts that the Appellants could not establish the fact that difference in stock has been sold or disposed or otherwise utilised other than ordinary course of business. Incidentally, this Appellate Tribunal has also noted from 'Written Note of Argument by Respondent' before the Adjudicating Authority dated 21.09.2021 where it has been mentioned that 'The variation in the figures in Financial Audit Report can be categorized as mistake, lack of accounting knowledge, carelessness etc. but shall not be evidenced the stock has been disposed of'.

The contention of the Respondents cannot be accepted in view of detailed explanation in the 'Transaction Audit Report'.

- This Appellate Tribunal has also seen Auditor's Report conducted by RDA & Associates for the Financial Year ending 31.03.2015 and the relevant portion regarding inventory is reproduce as under

2. (a) The physical verification of inventory has been conducted at reasonable intervals by the management.

(b) The procedures of physical verification of inventory followed by the management are reasonable and adequate in relation to the size of the company and the nature of its business.

(c) The Company is maintaining proper records of inventory. The physical verification of Stock of Raw materials, stores & spares, loose tools and semi finished / finished goods of aluminium has been conducted by the authorized representatives of the company at the year end and the verifying officers have suggested rates for valuation of the stock basing upon the quality and condition of the said stock. As reported by the management of the company, the obsolete stock has been excluded for the purpose of valuation and considering the condition of the stock, the net realizable value has been adopted for the purpose.

As reported by the company's management and as has been disclosed vide item no-8 of the Notes to Financial Statements, huge stock were found as shortages during the course of physical verification. Further, as per the information and explanations given to us, certain stocks were stolen during the financial year 2014-15 against which no FIR was lodged by the company at the nearest police station.

○ The Auditor's Report while mentioning the fact that management has been doing physical verification of inventory from time to time and has also recorded that the huge stock were found as shortage during physical verification and as per information and explanation given by the Management to the Auditors certain stock was stolen against which no FIR was logged.

○ On a pointed query by this Appellate Tribunal to the Respondent No.1 to 4 as to what items were stolen, value thereof, reason for theft, reason for non-filing FIR etc., the Respondents could not give any explanation. It is strange that the stock is stolen from the premises which is pointed out in Auditor's Report and

management has chosen not to file even FIR and is clueless about its details. Prima-facie such stand of the management i.e. Respondent No.1 to 4 herein is beyond reasonable comprehension and has to be factored into accordingly.

- From the Balance Sheet as on 31.03.2017 it is noted that inventory was shown as Rs. 4,30,43,884/- as on 31.03.2016 whereas the value for the same as on 31.03.2017 has been shown as 'NIL'. Surprisingly, no '**NOTES**' were furnished against this item of 'Inventory' especially writing off of Rs. 4.30 crores (approx..) as against the Balance Sheet as on 31.03.2015 where a suitable note No. 10 was given against the same item of inventory. Such financial reporting without any explanation is beyond logical justification on the part of Respondents No.1 to 4.
- Based on above qualitative and quantitative detailed analysis this Appellate Tribunal is of the view that the Adjudicating Authority erred on this point in the 'impugned order'.

29. B-1. Diversion of funds in form of utilisation of short-term working capital fund for long-term purpose in violation of the terms of sanction of credit facilities.

And

B-2. Opening of new bank account in IDBI after the account of the Corporate Debtor was declared as NPA.

- Both above are interconnected matters and are being dealt accordingly in combined manner..
- It is a case of Appellants that during “Financial Year 2013-14, there was an increase in long-term sources which had come to a deposit amount of INR 25,91,913/- whereas long-term funds amounting to INR 5,16,30,824/- were also transferred in short-term funds of INR 10,18,97,202/- whereas the short-term use was for Rs. 76,74,465/-. The increase in short-term fund resulted mainly because of the fact that the short-term funds in the form of working capital taken as loan from the banks over part of the CoC was utilised for long-term purpose which included investment in form of plant and machinery. This utilisation of short-term working capital fund for long-term purpose was not in conformity with the terms of the sanction and was diversion of funds as per Clause 2.2.1 of the Master Circular dated 01.07.2015”.
- As regards, opening of new bank account after declaration of account of Corporate Debtor as NPA, it is seen that Respondent Nos. 1 to 4 have opened bank account in IDBI on 29.01.2015 and fund amounting to Rs.72.81 lakhs (approx..) were transferred to the new bank account without consent of the Appellants. We have also perused RBI Master Circular on ‘wilful defaulter’ dated 01.07.2015 which is applicable in this case as lender being banker (Appellant herein) and unit (Respondent Nos. 1 to 4) includes individual, juristic person whether incorporated or not. Similarly, the definition of ‘wilful default’ includes units which has defaulted in meeting payments/ obligations to the lenders even when it has got capacity to honour to settle said

obligation. Similarly, Clause 2.2 of the RBI Circular defines Diversion of Funds and siphoning off money reads as under:-

“2.2 Diversion and Siphoning of funds:-

2.2.1 Diversion of Funds: The terms ‘diversion of funds’ referred to at paragraph 2.1.3(b) above, should be construed to include any one of the undernoted occurrences:

- a.) Utilisation of short-term working capital funds for long-term purposes not in conformity with the terms of sanction;*
- b.) Deploying borrowed funds for purposes/ activities or creation of assets other than those for which the loan was sanctioned;*

Clause 2.2.2 Siphoning of Funds:- The term ‘siphoning of funds’, referred to at paragraph 2.1.3(c) above, should be construed to occur if any funds borrowed from banks/ FIs are utilised for purposes unrelated to the operations of the borrower, to the detriment of the financial health of the entity or of the lender. The decision as to whether a particular instance amounts to siphoning of funds would have to be a judgment of the lenders based on objectives facts and circumstances of the case.”

- The Appellant has also brought out that no documentary evidence that money has been used from newly opening of bank account in favour of persons who were genuine creditors, could be furnished by the Respondent Nos. 1 to 4.
- The Respondent Nos. 1 to 4 justified their actions of opening new account alleging that the Appellants did not give any cooperation to

operate account as a result of which they could not pay to small creditors and hence they were forced to open new account.

- It is the case of Respondent Nos. 1 to 4 that this is a standard business practice that small creditor do not operate through bank account and deal in cash for ease of business and therefore Respondent Nos. 1 to 4 made all the payment in cash to small creditors with good intention and not to defraud the Appellants.
- This Appellate Tribunal has again gone through the 'Transaction Audit Report' to examine this aspect which mention following in report:

“Indian Overseas Bank classified the Account as Non-Performing Asset as on 31s December 2014. Post the NPA declaration, the corporate debtor opened a current account with IDBI Bank LTD {A/c ID as 1659102000000408) on 29-01-2015 without consent of the financial creditors. The total deposit in the said account post the NPA date was Rs 72.81 lakhs which included cash deposits and collection from debtors. The said account was also used to withdraw cash for payment to the Corporate Debtor's creditors.”

- Admittedly, after declaration of account of Corporate Debtor as NPA, the Corporate Debtor is not entitled to open new bank account without consent of the Financial Creditor i.e the Appellants herein. In the present case, no such consent was obtained and therefore the action of opening new account is in violation of Clause 2.2 of RBI Master Circular dated 01.07.2015 on wilful defaulter.

- This Appellate Tribunal is also not inclined to accept the logic of the Respondent No.1 to 4 that small creditors are not in habit of doing transaction through bank and therefore the Corporate Debtor used to withdraw the cash to make the payment to small creditors.

From the nature of the business as well as the suppliers which includes items like chemicals, this looks quite improbable and therefore arguments of the Respondent Nos. 1 to 4 are not convincing.

- Similarly, use of short-term funds for creation of long-term assets is also not in accordance with RBI Master Circular dated 01.07.2015 the same has also been adversely commented by the Independent Chartered Accountant in their 'Transaction Audit Report'.

30. Based on above analysis, this Appellate Tribunal find that the Adjudicating Authority erred in 'impugned order' dated 22.12.2021 and this Appellate Tribunal tends to agree with submissions made by the Appellants in the Appeal. The Appellants herein have made prayer to set aside the 'impugned order' dated 22.12.2021.

31. Hence, the Appeal succeeds and is allowed and the 'impugned order' dated 22.12.2021 is set aside. No costs. Interlocutory Applications, if any, are Closed.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Naresh Salecha]
Member (Technical)

Simran