

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI
(APPELLATE JURISDICTION)
Company Appeal (AT)(CH)(Ins) No.349/2022
(Under Section 61 (1) of the Insolvency and Bankruptcy Code, 2016)
(Arising out of the Impugned Order dated 01.07.2022 in
IA(IBC)/489(CHE)/2021 in IBA/1099/2019
passed by the 'Adjudicating Authority' (National Company Law
Tribunal, Division Bench – II, Chennai)

In the matter of:

Regen Powertech Pvt Ltd ... Appellant
Represented by Erstwhile Resolution Professional
Ebenezar Inbaraj,
at Sivanandam, 1st Floor,
New No.1, Pulla Avenue,
Shenoy Nagar,
Chennai – 600 030.

V

1. M/s. Wind Construction Private Limited,
Naman Midtown, A Wing, 21st Floor, Unit No.101,
Senapati Bapat Marg, Elphinston Road,
Mumbai – 400013.

2. Madhusudhan Khemka,
Suspended Board of Director of
Regen Powertech Private Limited
And
Regen Infrastructure and Services Private Limited,
Y-202, Anna Nagar, Chennai 600 040.

3. Sundaresh Ramanathan,
Suspended Board of Director of
Regen Powertech Private Limited
And
Regen Infrastructure and Services Private Limited,
3, A&B Sarangapani Street,
T. Nagar, Chennai – 600 017.

4. Varahatu Rao Kavala,
Erstwhile Board of Director of
Regen Powertech Private Limited
HIG 233, Phase – 1, Madhava Nagar,
Near BHEL Town Ship,
Ramachandrapuram, Medak District,
Telengana – 502 032.

... Respondents

Present :

For Appellant : Mr. S.R. Raghunathan, Advocate
For Mr. B.Thilak Narayanan, Advocate

JUDGMENT

(Virtual Mode)

Justice M. Venugopal, Member (Judicial)

Background

The ‘Appellant’ / ‘Applicant’ has focussed the present Comp App (AT)(CH)(Ins) No.349/2022 as an ‘Aggrieved Person’, in respect of the ‘impugned order’ dated 01.07.2022 in IA(IBC)/489(CHE)/2021 in IBA/1099/2019, passed by the ‘Adjudicating Authority’ (National Company Law Tribunal, Division Bench – II, Chennai).

2. The ‘Adjudicating Authority’ (National Company Law Tribunal, Division Bench – II, Chennai), while passing the ‘impugned order’ dated 01.07.2022 in IA(IBC)/489(CHE)/2021 in IBA/1099/2019 (Filed by the ‘Appellant’ / ‘Applicant’ / ‘Resolution Professional’ under Section 66 (1) of

the Insolvency & Bankruptcy Code, 2016) at Paragraph Nos.29 to 34 had observed the following:-

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

30. By keeping in mind the scope of sub-section (1) of Section 66 of IBC, 2016, this Tribunal is required to examine as to whether the transactions as alleged by the Applicant in the present Application against the Respondents would fall within the confine of ‘Fraudulent Trading’ that is to say that whether the business of the corporate debtor has been carried on with intent to defraud creditors of the corporate debtor or for any fraudulent purpose. In this context, it is significant to refer to the decision of the Supreme Court, in the matter of **Anuj Jain IRP for Jaypee Inrfatech Limited – Vs – Axis Bank Limited Etc., In Civil Appeal No.8512 – 8527 of 2019;**

29.1. However, we are impelled to make one comment as regards the application made by IRP. It is noticed that in the present case, the IRP moved one composite application purportedly under Sections 43, 45 and 66 of the Code while alleging that the transactions in question were preferential as also undervalued and fraudulent. In our view, in the scheme of the Code, the parameters and the requisite enquiries as also the consequences in relation to these aspects are different and such difference is explicit in the related provisions. As noticed, the question of intent is not involved in Section 43 and by virtue of legal fiction, upon existence of the given ingredients, a transaction is deemed to be of giving preference at a relevant time. However, whether a transaction is undervalued requires a different enquiry as per Sections 45 and 46 of the Code and significantly, such application can also be made by the

creditor under Section 47 of the Code. The consequences of under valuation are contained in Sections 48 and 49. Per Section 49, if the undervalued transaction is referable to sub-section (2) of Section 45, the Adjudicating Authority may look at the intent to examine if such undervaluation was to defraud the creditors. On the other hand, the provisions of Section 66 related to fraudulent trading and wrongful trading entail the liabilities on the persons responsible therefor. We are not elaborating on all these aspects for being not necessary as the transactions in question are already held preferential and hence, the order for their avoidance is required to be approved; but it appears expedient to observe that the arena and scope of the requisite enquiries, to find if the transaction is undervalued or is intended to defraud the creditors or had been of wrongful/fraudulent trading are entirely different. Specific material facts are required to be pleaded if a transaction is sought to be brought under the mischief sought to be remedied by Sections 45/46/47 or Section 66 of the Code. As noticed, the scope of enquiry in relation to the questions as to whether a transaction is of giving preference at a relevant time, is entirely different. Hence, it would be expected of any resolution professional to keep such requirements in view while making a motion to the Adjudicating Authority.

31. From the above judgement of the Hon'ble Apex Court, it is to be noted that specific material fact in relation to the transaction which is sought to be challenged by the Resolution Professional is required to be pleaded in the Application. As to the present case, the Applicant sought to reverse the transactions purported to be done by the Respondents under Section 66 (1) of IBC, 2016.

32. From the averments and from the ingredients extracted supra, it is seen that the Applicant is required to prove the following;

- a. The person should knowingly carry on the business with the Corporate Debtor;

b. The said person should have a dishonest intention to defraud the creditors;

33. The Applicant in the present case has miserably failed to prove the dishonest intention of the Respondents to defraud the creditors. Only allegations has been made by the Applicants in respect of the amount which is due and payable by the Respondents and no documentary proof has been filed in support of the same, to show that the business of the Corporate Debtor was carried out by the Respondents with an dishonest intention and to defraud the creditors. Under the said circumstances, the reason given by the respondent appears to be plausible and cannot be brought under Section 66 (1) of IBC, 2016.

34. Hence for the aforestated reasons, we find no merits in the present Application.”

and finally, dismissed the ‘Application’, without Costs.

Appellant’s submission

3. Questioning the order of dismissal of IA(IBC)/489(CHE)/2021 in IBA/1099/2019, passed by the ‘Adjudicating Authority’ (National Company Law Tribunal, Division Bench – II, Chennai) an ‘Appeal’ before this ‘Tribunal’ filed under Section 66 (1) of the Insolvency & Bankruptcy Code, 2016, the Learned Counsel for the Appellant / Applicant submits that the ‘Adjudicating Authority’ (National Company Law Tribunal, Division Bench – II, Chennai) had committed an error in not appreciating the ‘Conduct’ of the ‘Respondents’, in diverting the ‘Receivables’ of the ‘Corporate Debtor’, which were specifically charged to the ‘Creditors’ of the ‘Corporate Debtor’

to 'Third Parties', by itself 'constitute' 'carrying on Business', with a view to defraud the 'Creditors' of the 'Corporate Debtor'.

4. According to the Learned Counsel for the 'Appellant', the finding of the 'Adjudicating Authority' (National Company Law Tribunal, Division Bench – II, Chennai), that only allegations were made by the 'Applicant' in respect of the amount, which was due and payable by the 'Respondents', and no 'Documentary Proof' was filed in respect of the same, to exhibit that the 'Business' of the 'Corporate Debtor' were carried out by the Respondents, with a dishonest intention and to 'defraud' the 'Creditors' was an 'incorrect' and 'erroneous' one.

5. The 'Prime Plea' of the Appellant / Applicant is that the 'Adjudicating Authority' (National Company Law Tribunal, Division Bench – II, Chennai) had failed to appreciate that the 'Appellant' / 'Applicant' had categorically pleaded that the 'Respondents' had routed a sum of Rs.70,82,13,056/- from the 'Bank Account' of the 'Corporate Debtor' to the 'Bank Account' of the 1st Respondent, without any reason.

6. It is represented on behalf of the 'Appellant' / 'Applicant' that when the 'Appellant' / 'Applicant' took charge of the affairs of the 'Corporate Debtor', the 'Appellant' / 'Applicant', much inquired with the 1st Respondent

relating to the said 'payments'. However, the 1st Respondent, who was silent initially, subsequently, furnished 'evasive replies' and, thereafter, gave the 'misleading' and 'untenable' information.

7. The categorical stand of the 'Appellant' / 'Applicant' is that the 'conduct' of the then existing 'Directors' of the 'Corporate Debtor' on remitting a sum of Rs.70,82,13,056/- into the 'Bank Account' of the 1st Respondent, in connivance with it, is a 'Fraudulent Transaction', carried out to divert the 'Creditors' of the 'Corporate Debtor'.

8. The Learned Counsel for the 'Appellant' brings it to the 'Notice' of this 'Tribunal' that as per the 'Books' of the 'Corporate Debtor', the 1st Respondent had remitted a sum of Rs.206,90,45,531.50 paise into the 'Bank Accounts' of the 'Corporate Debtor', viz., 'Karur Vysya Bank' and 'HDFC Bank'. Besides this, a sum of Rs.70,82,13,056/- was remitted back from the 'Karur Vysya Bank' account of the 'Corporate Debtor' to the 'Current Account' of the 1st Respondent with YES Bank Ltd., bearing No.041985700000247 on various dates from April 2018 to June 2018. The Learned Counsel for the Appellant points out that the 'impugned order' is an erroneous and unacceptable one, in 'Law'.

9. The Learned Counsel for the ‘Appellant’ takes a stand that the Respondents are liable to contribute a sum of Rs.75.63 Crore together with 18% interest to the ‘Assets’ of the ‘Corporate Debtor’ and the said amount are ‘Receivables’, exclusively charged to the ‘Financial Creditors’ of the ‘Corporate Debtor’ and, therefore, the ‘Appellant’ / ‘Applicant’ is duty bound to prefer this ‘Application’, with a view to recover the said amount and to safeguard the interests of all the ‘Creditors’ of the ‘Corporate Debtor’.

10. The ‘clear cut’ stand of the ‘Appellant’ / ‘Applicant’, is that the Respondents had ‘colluded fraudulently’ and ‘knocked off’ the ‘Receivables’, charged to the ‘Financial Creditors’ of the ‘Corporate Debtor’, by paying the amounts to the unsecured ‘Operational Creditors’ and ‘Third Parties’, squarely fall under the purview of the ‘Preferential Transactions’, carried on with a ‘fraudulent motive’, ‘causing loss’ to the ‘Creditors’.

Assessment

11. At this juncture, this ‘Tribunal’ refers to IA(IBC)/489(CHE)/2021 in IBA/1099/2019, filed by the ‘Appellant’ / ‘Applicant’ before the ‘Adjudicating Authority’ (National Company Law Tribunal, Division Bench – II, Chennai) under Section 66 (1) and Section 65 of the Insolvency & Bankruptcy Code, 2016, wherein M/s. Regen Powertech Pvt. Ltd. (Corporate

Debtor) was described as an 'Equipment Manufacturer' of 'Wind Turbines and Components', after obtaining exclusive license to manufacture from Germany based Company 'Vensys', being the 'Original Intellectual Property Rights Holder' for the said 'Designs'.

12. In reality, it was averred in IA(IBC)/489(CHE)/2021 in IBA/1099/2019 before the 'Adjudicating Authority' (National Company Law Tribunal, Division Bench – II, Chennai) had entered into an agreement with the 1st Respondent, for supply of 49.5 MW comprising 33 Windmills on 24.01.2018 and the mentioned agreement was a 'Turn Key Agreement' for supply, erection and commissioning of 49.5 MW with a capacity of 1.5 MW at Onamakulam, Tirunelveli, by virtue of the 'Payment Terms', mentioned in the agreement, if there was a delay in payment by the 1st Respondent, the 'Corporate Debtor' is entitled to levy 18% interest per annum, on the sum payable.

13. The Appellant / Applicant in IA(IBC)/489(CHE)/2021 in IBA/1099/2019 at Paragraph No.4 had averred that the Corporate Debtor had raised invoices to the 1st Respondent to an extent of Rs.286,19,78,856/- inclusive of GST. Indeed, the 1st Respondent had paid the following amounts, which run as under: -

<i>IN HDFC BANK ACCOUNT OF RPPL</i>		<i>IN KVB BANK ACCOUNT OF RPPL</i>			
<i>Date</i>	<i>Amount in Rs.</i>	<i>Date</i>	<i>Credit Amount in Rs.</i>	<i>Cheque No.</i>	<i>RTGS to Wind Construction</i>
25/01/2018	170000000.00	27/04/2018	79953693.50		
08/02/2018	40000000.00	27/04/2018	99809688.50		
16/02/2018	195897938.50	30/04/2018		173	99866632
26/02/2018	339717712.50	05/04/2018	106643558.50		
09/03/2018	181062820.50	05/05/2018		201	106526632
16/03/2018	283604898.50	19/05/2018	51768072.50		
		23/05/2018		306	99439896
		23/05/2018		245	51750000
		05/06/2018		352	350629896
	1210283370.00		858762161.50		708213056

14. According to the ‘Appellant’ / ‘Applicant’ a total sum of Rs.206,90,45,531.50 Paise was brought into ‘Bank Accounts’ of the ‘Corporate Debtor’ i.e., 1) Karur Vysya Bank and 2) HDFC Bank, but a sum of Rs.70,82,13,056/- was remitted back from the Karur Vysya Bank account of the ‘Corporate Debtor’ to the ‘Current Account’ of the 1st Respondent with YES Bank Ltd. bearing No.041985700000247.

15. The Learned Counsel for the ‘Appellant’ / ‘Applicant’, before this ‘Tribunal’, comes out with the ‘Plea’ that the ‘Corporate Debtor’ had only

received a sum of Rs.136,08,32,475.50 Paise, as against the 'Total Invoices' for a sum of Rs.286,19,78,856.

16. The Learned Counsel for the Appellant points out that the 1st Respondent had not paid a sum of Rs.4.81 Crore to the Corporate Debtor and hence, one WEC was not handed over to the 1st Respondent, out of 33 machines and that a sum of Rs.75.63 Crore is due and payable from the 1st Respondent. Therefore, it is the contention of the 'Appellant' / 'Applicant' that the conduct of Respondent Nos.2 and 3 paid a sum of Rs.70,82,13,056 into the 'Bank Account' of the 1st Respondent, is a 'Fraudulent Transaction' and carried out between the 'Respondents' to 'defraud' the 'Creditors' of the 'Corporate Debtor'.

17. It is the version of the 'Appellant' / 'Applicant' that the 1st Respondent / M/s. Wind Construction Private Limited, Mumbai had made a claim with the 'Appellant' / 'Applicant' and the 'Appellant' / 'Applicant' through 'E-mails' had requested the 1st Respondent to furnish its 'ledger accounts', in response to the said claim filed by the 1st Respondent, and that the 1st Respondent had not responded to the such requests and, ultimately the said claim was rejected. Subsequently, the Appellant / Applicant, after approval from the 'Committee of Creditors' had appointed M/s. Khicha and

Prabhu Kesavan to perform 'Transaction Audit' in accordance with the Insolvency & Bankruptcy Code, 2016, etc.

18. The contention of the 'Appellant' / 'Applicant' is that the 1st Respondent had paid a sum of Rs.16 Crore to the 'vendors', directly (vendors of the 'Corporate Debtor'), and the same was an 'incorrect one', because of the fact, that the said 'vendors' are not the 'vendors' of the 'Corporate Debtor' and only 'vendors' of 'Regen Infrastructure and Services Private Limited, a 'Sister Concern' of the 'Corporate Debtor'.

19. The Learned Counsel for the 'Appellant' / 'Applicant' advances a 'Plea' that the 'Respondents' cannot be permitted to get away, with the aspect of 'Fraud' and 'Cheat' the 'Financial Creditor'. Therefore, the 'Appellant' / 'Applicant' had filed IA(IBC)/489(CHE)/2021 in IBA/1099/2019 before the 'Adjudicating Authority' (National Company Law Tribunal, Division Bench – II, Chennai) praying for passing an order

“(1) in directing the Respondents jointly and severally to contribute to the 'Assets' of the 'Corporate Debtor' by paying a sum of Rs.75.63 Lakh along with 18% interest from 05.06.2018 till the date of 'Realisation' in 'Full'.

(2) to 'Declare' that the 'Applicant' has got an 'unpaid vendor's lien over the 'Assets' of the 1st Respondent supplied by the 'Corporate Debtor' for a sum of Rs.75.63 Crore along with 18% interest from 05.06.2018 till the date of 'Realisation' in 'Full'."

20. Before the 'Adjudicating Authority' (National Company Law Tribunal, Division Bench – II, Chennai), the 1st Respondent / M/s. Wind Construction Private Limited had filed a 'Reply' to IA(IBC)/489(CHE)/2021 in IBA/1099/2019, wherein at Paragraph '(iv)', it is mentioned as under:-

"The Balance payment of the Project cost was to be paid after commissioning of all 33 Machines on permanent connectivity basis against submission of commissioning certificate and against submission of all applicable NOCs to be obtained from authorities for commissioning and operation of the same."

21. Added further, the 1st Respondent / Wind Construction Private Limited, in its 'Reply' had proceeded to mention that as per Clause 5 of the 'Contract', the 1st Respondent was entitled to claim 'liquidated damages', from the 'Corporate Debtor' upon 'occurrence of events', more particularly, specified in the 'Contract', etc.

22. According to the 1st Respondent before the ‘Adjudicating Authority’ (National Company Law Tribunal, Division Bench – II, Chennai) that the 1st Respondent had paid a sum of Rs.3,11,08,97,735/- in respect of the ‘Sale Consideration’ of 33 Wind Mills. However, as per Clause 5 of the Contract, the 1st Respondent had made a claim of Rs.43,33,35,810/- towards liquidated damages.

23. The 1st Respondent in its ‘Reply’ to IA(IBC)/489(CHE)/2021 in IBA/1099/2019 before the ‘Adjudicating Authority’ (National Company Law Tribunal, Division Bench – II, Chennai) had averred that it had filed its claim before the ‘Appellant’ / ‘Applicant’ and the same is pending before the ‘Appellant’ / ‘Applicant’ and, therefore, the allegation that the 1st Respondent / Wind Construction Private Limited is liable to pay a sum of Rs.75.63 Crore to the ‘Corporate Debtor’ is a ‘baseless’ and ‘untenable’ one. Moreover, the 1st Respondent had explained to the ‘Appellant’ / ‘Applicant’ that a sum of Rs.70,82,13,056, which was returned by the ‘Corporate Debtor’, was accounted for, while deriving the ‘Sale Consideration’, paid.

24. On ‘cursory perusal’ of the ‘Reply’ of the 1st Respondent to IA(IBC)/489(CHE)/2021 in IBA/1099/2019, clearly indicates that the ‘claim’ of the ‘Appellant’ / ‘Applicant’ that the 1st Respondent is liable to contribute a sum of Rs.75.63 Crore along with an interest @ 18% to the

‘Assets’ of the ‘Corporate Debtor’ is a ‘False One’ and further that IA(IBC)/489(CHE)/2021 in IBA/1099/2019 is not maintainable.

25. A glance of the ‘Reply’ of the Respondent Nos.2 and 3 before the ‘Adjudicating Authority’ (National Company Law Tribunal, Division Bench – II, Chennai) shows that they were not necessary parties to the Application, because of the fact that the 1st Respondent is the ‘Right’ and ‘Party’, liable to provide for any explanation relating to the instant ‘Application’.

26. Continuing further, it is the stand of the Respondent Nos.2 and 3 before the ‘Adjudicating Authority’ (National Company Law Tribunal, Division Bench – II, Chennai) in IA(IBC)/489(CHE)/2021 in IBA/1099/2019, that out of the consideration for the ‘Wind Turbines’ purchased by the 1st Respondent, the 1st Respondent had paid a sum of Rupees about INR 121 Crores to the HDFC Bank Account of the ‘Appellant’ / ‘Applicant’ and a sum of Rupees about INR 86 Crore was paid to the Karur Vysya Bank Account of the ‘Appellant’ / ‘Applicant’, aggregating to a sum of Rs.207 Crore was paid to the ‘Appellant’ / ‘Applicant’. Moreover, the 1st Respondent has claimed the ‘Liquidated Damage’ from the ‘Appellant’ / ‘Applicant’, amounting to about INR 23 Crore, which was adjusted in the ‘Receivables’ of the ‘Appellant’ / ‘Applicant’. Also, that a sum of INR 130 Crore was paid directly to the ‘Vendors’ of the ‘Appellant’ / ‘Applicant’ subsidiary RISPL,

in relation to 33 'Wind Turbines' purchased by the 1st Respondent. In addition, a sum of INR11 lakh was paid by the 1st Respondent, on behalf of the 'Appellant' / 'Applicant,' for the 'right of way', directly to the respective 'land owners' and a sum of INR 130 Crore was paid directly by the 1st Respondent to the TDS 'Receivables' by the 'Appellant' / 'Applicant' etc. After adjusting the aforesaid sums, according to the Respondent Nos.2 and 3, the 1st Respondent is still liable to pay a sum of Rs.4.81 Crore, for which, the balance one 'Wind Turbine', is yet to be handed over to the 1st Respondent.

27. The 4th Respondent in its 'Reply' before the 'Adjudicating Authority' (National Company Law Tribunal, Division Bench – II, Chennai) in IA(IBC)/489(CHE)/2021 in IBA/1099/2019 had taken its stand that he was nowhere related in the 'decision making process' and, in fact, IA(IBC)/489(CHE)/2021 in IBA/1099/2019 filed by the 'Appellant' / 'Applicant' does not satisfy the requirement to invoke Section 66 (1) of the Insolvency and Bankruptcy Code, 2016. According to the 4th Respondent, he was 'never in-charge of' or 'vaguely connected' to any of the 'Financial / Transaction' actions of the 'Corporate Debtor' and that IA(IBC)/489(CHE)/2021 in IBA/1099/2019, filed by the 'Appellant' / 'Applicant' is to be dismissed in 'Law'.

28. To be noted, that in the instant Case, the ‘Resolution Plan’ was approved on 01.02.2022. At this stage, this ‘Tribunal’ refers to Clause 2.4 of the Chapter III of the ‘Insolvency Law Committee’ Report, dated 20.02.2020 whereby and whereunder Clause 2.4 proceeds to the following effect: -

“2.4. The Committee also considered if the successful resolution applicant should be permitted to file such applications. However, it was agreed that this would possibly result in the resolution applicant being entitled to a return that was not factored in at the time of submitting their bid. Therefore, the Committee decided that the resolution applicant should not be permitted to file applications against improper trading or applications to avoid transactions”.

29. From the above, this ‘Tribunal’ aptly points out Regulation 38 of the ‘Mandatory contents of the resolution plan’ of the ‘Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016’ which are as to the under mentioned effect: -

(2) A resolution plan shall provide: -

(a) the term of the plan and its implementation schedule:

(b) the management and control of the business of the corporate debtor during its term; and

(c) adequate means for supervising its implementation.

[(d) provides for the manner in which proceedings in respect of avoidance transactions, if any, under Chapter III or fraudulent or wrongful trading under Chapter VI of Part II of the Code, will be pursued after the approval of the resolution plan and the manner in which the proceeds, if any, from such proceedings shall be distributed.

Provided that this clause shall not apply to any resolution plan that has been submitted to the Adjudicating Authority under sub-section (6) of section 30 on or before the date of commencement of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2022.] (Inserted by Notification No.IBBI/2022-23/GN/REG084, dated 14th June, 2022 (w.e.f. 14-06-2022).

30. It is not in dispute that the ‘Corporate Debtor Insolvency Resolution Process (‘CIRP’) had attained finality and that the ‘Resolution Plan’ became ‘Functus Officio’ and he cannot file / pursue any ‘Petition’ / ‘Application’ on behalf of the ‘Company’.

31. The ingredients of Section 23 of the Insolvency & Bankruptcy Code, 2016 pertains to the 'Role' of the 'Resolution Professional' to conduct 'Corporate Insolvency Resolution Process' (CIRP) in managing the 'affairs of the Corporate Debtor' during the 'Resolution Process Period' and not at a later 'point of time'.

32. Indeed, the 'Resolution Plan' approved by the 'Adjudicating Authority' (National Company Law Tribunal, Division Bench – II, Chennai) under the 'Head' 5.2.10 litigations, enquiries, investigations, etc. proceeds to the following effect: -

*“For avoidance of doubt, it is clarified that, during the CIRP Period, the Resolution Professional will be entitled to file or initiate applications or transactions, extortionate credit transactions and transactions involving fraudulent trading or wrongful trading under Section 43 to 51 and Section 66 of the IBC (“RP Applications”). Post the Approval Date, any cost or expenses incurred in continuing the RP Applications (including in connection with any appeal or recovery thereof) shall be borne by the CoC / Secured Financial Creditors and the **CoC / Financial Creditors shall endeavour to take the said applications to their logical end in their name**”.*

33. Be it noted, this ‘Tribunal’, significantly, points out that, whenever ‘Fraud’ on a ‘Creditor’ is perpetrated in the course of ‘carrying on Business’, it does not necessarily follow that the ‘Business’ is being carried on with an ‘Intent to Defraud’ the ‘Creditor’.

34. One cannot remain ‘oblivious’ of the candid fact that, if the ‘Directors’ of a ‘Company’ had acted on a ‘bonafide belief’ that the ‘Company’ would ‘recover’ from its ‘Financial Problems’ / ‘Difficulties’, then, they will not be held liable for the ‘act’ / ‘offence’ of ‘Fraudulent Trading’.

35. As a matter of fact, the ‘aspect’ of ‘Fraudulent Trading’ requires a very ‘High Degree of proof’, which is attached to the ‘Fraudulent Intent’. To put it emphatically, a more compelling ‘Material’ / ‘Evidence’ is required to satisfy the conscience of this ‘Tribunal’, ‘on a preponderance of probability’. Apart from that, an ‘isolated’ / ‘solo fraud’ case, against the person, then, action in ‘tort’ can be resorted to, as opined by this ‘Tribunal’. No wonder, a ‘Creditor’, who was defrauded, will have ‘recourse’ to an ‘alternative remedy’, under ‘Civil Law’.

36. In the instant Case ‘on hand’, the ‘Appellant’ / ‘Applicant’ before the ‘Adjudicating Authority’ (National Company Law Tribunal, Division Bench – II, Chennai) had filed IA(IBC)/489(CHE)/2021 in IBA/1099/2019 under Section 66 (1) of the Insolvency and Bankruptcy Code, 2016. In this

connection, this 'Tribunal' significantly points out that in respect of an 'Application' (Filed under Section 66 of the Insolvency and Bankruptcy Code, 2016) 'Fraudulent Trading' / 'Wrongful Trading', by the 'Applicant' / 'Resolution Professional' is concerned, 'Tangible Materials' / 'Relevant Facts' are to be pleaded in an 'Unambiguous and Unequivocal Terms', by supplying the necessary details / facts as the case may be.

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

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

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

In fine, the instant Comp App (AT) (CH) (Ins) No.349/2022 is ‘dismissed’, for the reasons assigned by this ‘Tribunal’, in this ‘Appeal’. No Costs.

[Justice M. Venugopal]
Member (Judicial)

[Naresh Salecha]
Member (Technical)

23/09/2022

ghk/tm