

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH

Company Appeal (AT) (Ins.) No. 699 of 2021

[Arising out of Order dated 29.01.2021 passed by the Adjudicating Authority/National Company Law Tribunal, Mumbai Bench in I.A. No. 1125 of 2020 in C.P. No. 2556/MB/2019.]

IN THE MATTER OF:

Shri Baiju Trading and Investment Private Limited

Through its Authorized Representative
Office Address: 204, Link Plaza, CST No. 591,
Veera Desai Road, Link Road, Andheri (West)
Mumbai – 400053.

...Appellant

Versus

**1. Mr. Arihant Nenawati
(Liquidator for Royal Refinery Private Limited) & Ors.**

Office at: Nenawati & Associates B-202
Sherton Classic, Dr. Chand Singh Colony,
Chokala Andheri East,
Mumbai – 400069.
Email: arihant@gmail.com

...Respondent No. 1

2. Mr. Vishal Choudhary

Room No. 501, 5th Floor,
Harlalka heights, 2nd Fanaswadi,
Mumbai – 400002.

...Respondent No. 2

3. Mr. Gaurav D. Panwar

Makan No. 171/172, Anjani Dham, Barbar Road,
Ratlam – 457001 (M.P.)

...Respondent No. 3

Present:

**For Appellant : Mr. Sanchar Anand & Mr. Kshitiz Garg,
Advocates.**

**For Respondents : Mr. Kaustav Som and Mr. Abhijeet Singh,
Advocates for R-1.**

**Ms. Srishti Prabhakar & Mr. Utsav Singhal,
Advocates for R- 2 & 3.**

J U D G M E N T
(29.03.2023)

NARESH SALECHA, MEMBER (TECHNICAL)

The Present Appeal has been filed against the ‘impugned order’ dated 29.01.2021 passed by the ‘Adjudicating Authority’ [National Company Law Tribunal, Mumbai Bench] in I.A. No. 1125 of 2020 in C.P. No. 2556/MB/2019, whereby, the ‘Adjudicating Authority’ allowed the application filed under Section 66 r/w Section 26 of the ‘Insolvency & Bankruptcy Code, 2016’ (in short ‘**I & B Code, 2016**’).

2. Raksha Bullion filed an application under Section 9 of the I & B Code, 2016 in C.P. (I.B.) 2556/MB/2019 in the matter of **Raksha Bullions Vs. Royal Refinery Pvt. Ltd.** (‘Corporate Debtor’) on account of default of Rs. 4,90, 01,183/- . The said application was admitted, the ‘Corporate Insolvency Resolution Process’ (in short ‘**CIRP**’) against the ‘Corporate Debtor’ was initiated on 13.11.2019 and Mr. Nandkishor Vishnupant Deshpande (‘Respondent No. 1’) was appointed as ‘Interim Resolution Professional’ (in short ‘**IRP**’).

3. The ‘Adjudicating Authority’ on 16.04.2021 passed the order of liquidation of the ‘Corporate Debtor’ in I.A. No. 59/2021 filed by Mr. Nandkishor Vishnupant Deshpande, Resolution Professional in C.P. 2556/I&B/MB/2019 titled as ‘Raksha Bullion vs. Royal Refinery Private

Limited', and wherein Mr. Arihant Nenawati was appointed as Liquidator as provided under Section 34(1) of the I & B Code, 2016. In the light of the aforementioned liquidation order dated 16.04.2021 as passed by the 'Adjudicating Authority', the 'Respondent No. 1' in the present Appeal i.e. Mr. Nandkishor Vishnupant Deshpande, Resolution Professional in C.P. 2556/I&B/MB/2019 has become "*Functus officio*" and therefore, Mr. Arihant Nenawati who has been appointed as Liquidator in the above captioned matter requested to be substituted and impleaded in the present Appeal as 'Respondent No. 1'.

During the hearing in the present Appeal on 08.09.2021, this 'Appellate Tribunal', vide its order dated 08.09.2021 directed the 'Applicant' herein to "*substitute the Liquidator as Respondent*".

4. I.A. No. 1125 of 2020 in C.P. No. 2556/MB/2019 was filed before the 'Adjudicating Authority' by Mr. Nandkishor Vishnupant Deshpande (Resolution Professional for Royal Refinery Pvt. Ltd.). In the said application, following prayers were made:-

"1. This is an Application filed by this 'Applicant' seeking for the following reliefs:-

a. Direct the Respondents as detailed in this application to make such contributions to the assets of the Corporate Debtor equivalent to the sums as stated in his application, in respect of benefits wrongfully availed by from the Corporate Debtor.

- b. Pass appropriate directions/ orders in terms of Section 67 of the Code including for recovery/restoration of legitimate amounts due to the 'Corporate Debtor'.*
- c. Intimate IBBI for initiating a complaint to the Special Court in terms of Section 236(2) of the Code, if this Hon'ble Tribunal deems fit.*
- d. Impose such fine under section 70 and 71 of the Code upon the Respondents as this Hon'ble Tribunal may deem fit."*

After hearing Counsel for the Parties and detailed examination, the said I.A. was allowed by the 'Adjudicating Authority' by the 'impugned order' dated 29.01.2021.

5. Aggrieved by the same, the 'Appellant' herein i.e. Shri Baiju Trading and Investment Private Limited has preferred the present appeal filed under Section 61 of the I & B Code, 2016.

6. Heard Counsel for the Parties and perused the records made available, including cited judgments of the Hon'ble Supreme Court of India and this 'Appellate Tribunal'.

7. As per the 'Appellant', they are engaged in the business of Non-Banking Financial Services ('NBFC') and took loan/ financial assistance from the 'Corporate Debtor'.

8. It is the case of 'Appellant', that they came to know that 'Respondent No. 1' has moved an application under Section 66 of the I & B Code, 2016 against the 'Appellant' alleging fraudulent transaction between the 'Appellant' and the 'Corporate Debtor' involving an amount of Rs. 41.03

crores. The 'Adjudicating Authority' issued notice dated 15.09.2020 to the 'Appellant' and they filed their 'Reply/Written Submissions' before the 'Adjudicating Authority'. The 'Appellant' stated that they also pleaded before the 'Adjudicating Authority' that the application was misconstrued and without any substance, however, the 'Adjudicating Authority' admitted the application of the 'Respondent No. 1', which has placed the 'Appellant' in jeopardy.

9. The 'Appellant' submits that the 'Respondent No. 1' has not brought out any supporting documentary evidence to establish that transactions between the 'Appellant' and the 'Corporate Debtor' were fraudulent in nature. The 'Appellant' further submits that they have availed financial assistance to overcome their financial distress and therefore transactions should have been treated as normal commercial transaction. The 'Appellant' also submits that after 16.05.2018, no transaction took place between the 'Appellant' and the 'Corporate Debtor' and the outstanding dues towards the 'Corporate Debtor' was pending for more than one year. As per the 'Appellant', they admit receipt of the money which could not be paid due to their own financial problems which were aggravated by pandemic.

10. As per the 'Appellant', the transactions between the 'Appellant' and the 'Corporate Debtor' cannot and should not be treated as a case of fraud simply because of non-payment of dues. The 'Appellant' further alleges that in addition to failure to establish alleged frauds by suitable

documentary evidence, the 'Respondent No. 1' also did not establish the same by additional evidence/ investigation report like forensic audit etc.

11. It is the case of the 'Appellant' that they are distinct corporate entity different from the 'Corporate Debtor' and were carrying on different business and there was no relationship between them. In fact, only transaction between the 'Appellant' and the 'Corporate Debtor' was duly reflected in the ledger accounts of both the parties as a borrowing transaction which should have been treated as normal commercial transaction without any intention to defraud the 'Creditors' of the 'Corporate Debtor'. The 'Appellant' further alleged that no case of malafide intention or wilful misconduct including collusion with the 'Corporate Debtor' has been established by the 'Respondent No. 1' and therefore, the 'Adjudicating Authority' erred in allowing application against them under Section 66 of the I & B Code, 2016.

12. The 'Appellant' emphasised that the basic parameters as stipulated in Section 66 of the I & B Code, 2016 were not established and therefore it was wrong on the part of the 'Adjudicating Authority' to allow the application under Section 66 against them.

13. The 'Appellant' cited two judgements of the Hon'ble Supreme Court of India in the matter of ***Svenska Handels Banken vs. Indian Charge Chrome and Ors.*** [(1994) 1 SCC 504] and ***Anil Rishi vs. Gurbaksh Singh*** [(2006) SCC 558], according to which the Apex Court held that the allegations of fraud are grave in nature and cannot be *ipsi dixit* of the

person raising such allegations and such allegations of fraud cannot be merely on suspicion but need to be pleaded with strong evidence. The 'Appellant' submits that contrary to these judgments, the 'Adjudicating Authority' accepted the application of 'Respondent No. 1'.

14. The 'Appellant' amplified that there are three milestones in Section 66 which are required to be met before admission of an application under Section 66. First, there should be clear '**opinion**' which should be followed by suitable '**determination**' as second milestone and finally there should be concrete '**finding**' as final milestone. As per the 'Appellant' these milestones were not met herewith. The 'Appellant' further submitted that in addition the Regulation 35A of the IBBI (Insolvency Resolution Process for Corporate Person) Regulations, 2016 has also not been complied with and no ***mens-rea*** was established and therefore the 'impugned order' was illegal.

The 'Appellant' referred to Para 16 of the 'impugned order' dated 29.01.2021 wherein in the findings, the 'Adjudicating Authority' termed the transaction as '**suspicious transaction**'. Similarly, in Para 17 the 'Adjudicating Authority' has noted that the 'Appellant' is a principal beneficiary of '**fraudulent transaction**'. The 'Appellant' submitted that these findings are without application of mind and without examining or establishing transaction to be fraudulent and therefore on this ground alone the 'impugned order' need to be set aside.

15. The 'Appellant' argued that 'Respondent No. 1' purely on assumption basis has classified and treated transaction of Rs. 41.03 crores between the 'Appellant' and the 'Corporate Debtor' of fraudulent in nature, which was also wrongly accepted by the 'Adjudicating Authority' and therefore cannot sustain and need to be set aside.

16. The 'Appellant' stated that he is aggrieved by the impugned order' and reiterated that the 'Appellant' herein was a borrower of the 'Corporate Debtor' which in no way can be construed as a fraudulent transaction. As per the 'Appellant' the borrowing by the 'Appellant' was pertaining to a regular business transaction between the 'Appellant' and the 'Corporate Debtor' which has been treated as a fraudulent transaction by 'Respondent No. 1'.

17. The 'Appellant' stated that merely 'writing off' the debt of Rs. 41.03. crores owed by the 'Appellant' to the 'Corporate Debtor', the 'Corporate Debtor' does not harm himself and the 'Corporate Debtor' has got all the right to recover the money in accordance with the law.

18. As per the 'Respondent Nos. 2 & 3', all the transactions in the books of the 'Corporate Debtor' with the 'Appellant' are official transactions and confirmed by both the parties, hence, the question of such transactions between the 'Corporate Debtor' and the 'Appellant' being fraudulent does not arise. The Application filed by the 'Resolution Professional' was based on assumptions and presumptions and was not supported by any verifiable evidence.

19. As per 'Respondent Nos. 2 & 3', the 'Appellant' informed about its inability that the 'Appellant' was not in a position to refund the balance amount as it was itself under financial stress. Hence, the 'Corporate Debtor' had written off the balance in the books of accounts believing the amount if received in future will be considered as profit of the 'Corporate Debtor' and meanwhile, DRI problem started in May 2019 and the 'CIRP' commenced on 13.11.2019. The amount was balance with the Appellant for more than 1 year prior to the commencement of 'CIRP' and there were no transaction during the 'CIRP'. This clearly establish that there was no fraudulent intent.

20. The Respondent Nos. 2 & 3 also stated that the Financial Reports of the 'Corporate Debtor' were audited by statutory auditor upto Financial Year 2017-18 which establishes bonafide transactions in the Company. All the transactions were genuine and took place in a bonafide manner. Moreover, these transactions are also reflected in Appellant's books of accounts and acknowledged in their Audited Financial Statement's and Income Tax Returns. Hence, the alleged transactions don't fall under the provisions of Section 66 of the I & B Code, 2016. The 'Respondent Nos. 2 & 3' further stated that all the transactions, between the 'Appellant' and the 'Corporate Debtor' were entered into in good faith and during the ordinary course of business.

21. Concluding arguments, the 'Appellant' urged this 'Appellate Tribunal' to allow the appeal and set aside the 'impugned order' dated 29.01.2021.

22. The 'Respondent No. 1' vehemently opposed all the averments made by the 'Appellant' as misleading, mischievous, devoid of any merit and pure abuse of process of law and therefore the 'Appeal' need to be dismissed.

23. Per-contra, the 'Corporate Debtor' was in business of trading in Bullions' i.e. importing and exporting gold and sale/ purchase of gold in local markets. The 'Respondent No. 1' submitted that subsequent to initiation of the 'CIRP', he detected certain bogus and sham transactions. The 'Corporate Debtor' was also raided by 'Department of Revenue Intelligence' ('DRI') and operation of the 'Corporate Debtor' ceased from May 2019.

24. The 'Respondent No. 1' amplified that the 'Corporate Debtor' was in Bullion business and not in business of lending money (short term or long term) and in fact as per general business practice of Bullion market, they do not offer credit facility even to the purchaser of gold item. The 'Respondent No. 1' further submitted that, amount owed by the 'Appellant' to the 'Corporate Debtor' was long over due and admittedly the last transaction between the parties was on 16.05.2018.

25. The 'Respondent No. 1' emphasised that these transactions were completely fraudulent made in connivance between the 'Appellant' and 'Respondent Nos. 2 & 3' who are Suspended Directors of the 'Corporate Debtor' by manipulating ledgers of both the parties i.e. the 'Appellant' and the 'Corporate Debtor'. The 'Respondent No. 1' stated that the entire money owed by the 'Appellant' to the 'Corporate Debtor' was 'written off' by

a simple journal entry 'Sundry Balances W/off'. The 'Respondent No. 1' further stated that just one month prior to the 'Corporate Debtor' was raided by the 'DRI', this huge amount was 'written off' which is clearly a fraudulent transaction to favour the 'Appellant' in connivance to reap the illegal benefits arising of writing off Rs. 41.03 crores and done with intent to defraud the 'Creditors' of the 'Corporate Debtor'. The 'Respondent No. 1' pointed out that this was done with clear knowledge of all concerned and therefore all ingredients of Section 66 of the I & B Code, 2016 were met with and the 'Adjudicating Authority' gave its verdict in favour of 'Respondent No. 1' by a reasoned and speaking 'order'.

26. The 'Respondent No. 1' further submitted that the 'Appellant' has not disputed his liability of Rs. 41.03. crores towards the 'Corporate Debtor' and has termed this transaction as 'Long Term Borrowing (Loan)' and 'not credit from trading activities'. This admission of the 'Appellant' was made before the 'Adjudicating Authority' in Para 6(b) of the 'Reply' filed by the 'Appellant' wherein it has been recorded that 'the Respondent says that the amount disbursed as long term borrowings (loan) by the Corporate Debtor and not credit for trading activities'. The 'Respondent No. 1' assailed the conduct of the 'Appellant' who has now changed his stand in rejoinder before this 'Appellate Tribunal' and stated that money pertains to 'regular business transactions' which is evident from Para 5 of the 'Rejoinder' which reads as *"the borrowing by the Appellant was pertaining to a regular business transaction between the Appellant and the Corporate which had*

been mislabelled as a fraudulent transaction by the Respondent No. 1 in I.A. No. 1125 of 2020 in C.P. No. 2556/I&B/MB/2019.

27. The 'Respondent No. 1' elaborated that alleged loan of Rs. 41.03 crores was given by the 'Corporate Debtor' to the 'Appellant' whereas the 'Corporate Debtor' was functioning as a Gold Bullion Trader and not in business of lending money. The 'Respondent No. 1' further alleged that by no stretch of imagination such huge amount can be written off without any reasons and therefore cannot be treated anything other than the fraudulent and sham transaction.

28. The 'Respondent No. 1' also referred to the 'impugned order' dated 29.01.2021 which mentioned that the I & B Code, 2016 does not require pre-existence of ***mens-rea*** as wrongly pleaded by the 'Appellant'. The 'Respondent No. 1' further denied the allegation that Regulation 35A of the IBBI (Insolvency Resolution Process for Corporate Person) Regulations, 2016 was not complied with. The 'Respondent No. 1' submitted that it only requires the 'Resolution Professional' to file such an application once the 'Resolution Professional' forms an '**opinion**' regarding the existence of such prohibited transactions and does not require the determination of any ***mens rea*** on the part of the parties.

29. The 'Respondent No. 1' submitted that the 'Appellant' admittedly owed sum of Rs. 41.03 crores to the 'Corporate Debtor' and this entire admitted dues owed by the 'Appellant' to the 'Corporate Debtor' was fraudulently written off by the erstwhile directors (i.e. Respondent Nos. 2 &

3) of the 'Corporate Debtor'. The 'Respondent No. 1' further submitted that as the admitted dues have been retained by the 'Appellant', it is clear that the 'Appellant' is the principal beneficiary of the fraudulent write off of the admitted dues owed to the 'Corporate Debtor' by the 'Appellant', therefore, the 'Adjudicating Authority' has correctly classified these transaction as fraudulent transaction under Section 66.

30. The 'Respondent No. 1' cited judgement of the Hon'ble Supreme Court of India on the issue of fraud in the matter of **Ram Preeti Yadav vs. U.P. Board of High School and Intermediate Education**, [(2003) 8 SCC 311], wherein it has been held that as sole beneficiary of the fraud must be presumed that he was party thereto.

31. The 'Respondent No. 1' stated that it is an admitted position that the Appellant owes Rs. 41.03 crore to the 'Corporate Debtor', which has remained unpaid till date. The Appellant has admitted in the appeal that the last transaction made between the Appellant and the 'Corporate Debtor' was dated 16.05.2018, and that the amount of Rs. 41.03 crore has remained unpaid since that date till the date of commencement of 'CIRP', i.e., 13.11.2019. Hence, the 'Appellant' cannot at all be aggrieved by the order of the 'Adjudicating Authority' which effectively directs contribution towards dues that are admittedly owed by it to the 'Corporate Debtor'. This would also assist in the process of liquidation since it would increase the pool of assets available for liquidation, which would benefit all stakeholders.

32. The ‘Respondent No. 1’ concluded his pleadings with request to dismiss the present appeal in view that consent transactions have been clearly entered into clandestinely with an intent to defraud the creditors knowing well the nature of transaction and therefore meeting all the ingredients of Section 66 of the I & B Code, 2016.

33. In order to examine issues raised in the ‘appeal’, it will be desirable to look into the provisions of Section 66 r/w Section 26 of the I & B Code, 2016 and Regulation 35A of the IBBI (Insolvency Resolution Process for Corporate Person) Regulations, 2016. These are as under:-

“26. Application for avoidance of transactions not to affect proceedings. –

The filing of an avoidance application under clause (j) of sub-section (2) of section 25 by the resolution professional shall not affect the proceedings of the corporate insolvency resolution process.”

“66. Fraudulent trading or wrongful trading. –

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

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

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

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

[(3) Notwithstanding anything contained in this section, no application shall be filed by a resolution professional under sub-section (2), in respect of such default against which initiation of corporate insolvency resolution process is suspended as per section 10A.]

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

Regulation 35A of the IBBI (Insolvency Resolution Process for Corporate Person) Regulations, 2016:-

“[35A. Preferential and other transactions.

(1) On or before the seventy-fifth day of the insolvency commencement date, the resolution professional shall form an opinion whether the corporate debtor has been subjected to any transaction covered under sections 43, 45, 50 or 66.

*(2) Where the resolution professional is of the opinion that the corporate debtor has been subjected to any transactions covered under sections 43, 45, 50 or 66, he shall make a determination on or before the one hundred and fifteenth day of the insolvency commencement date [***].*

(3) Where the resolution professional makes a determination under sub-regulation (2), he shall apply to the Adjudicating Authority for appropriate relief on or before the one hundred and thirty-fifth day of the insolvency commencement date.]”

(emphasis supplied)

34. This ‘Appellate Tribunal’ notes from the findings in the ‘impugned order’ in this regard which are reproduced below for the sake of Convenience :

21. *Therefore, the Bench is beset that 4 sets of Ledger account as appearing in the books of accounts of i) Corporate Debtor collected from the DRI in May, 2019 where it shows as Rs. 41.24 crores, ii) ledger account produced by R1 where it shows the same amount as*

unpaid and ii) ledger account produced by R2 and R3 where the due amount is about Rs 41.03 crore but the same has been written off by making a write off entry and iv) balance sheet as submitted by the R2 and R3 (the suspended directors) as part of their reply in a separate I.A. No. 1212 of 2020 where R2 and R3 have disclosed that there is an outstanding balance from of R1 of Rs. 41.24 crore as receivable by the Corporate Debtor from.”

"24. The Bench is aware that section 66 (1) of IBC imposes a liability on any person who knowingly becomes party in carrying out the business with a dishonest intent to defraud the creditors have to make a contribution to the assets of the Company. Therefore, the Bench is of the considered view that the R1 i.e. Baiju Trading investment Private Limited who is the principal beneficiary of this fraudulent transaction has to return at least Rs. 41.03 crores into the account of Corporate Debtor Company. The Bench is also of the view that R2 and R3 are the Suspended directors of the Corporate Debtor company and are covered under section 66 (2) of the IBC with respect to their misconduct which makes them liable to make such contribution to the assets of the Corporate Debtor company. ...

..25. The Bench concludes that it is clear from the above that R1 is fairly covered under provisions of section 66 (1) and R2 and R3 are covered under section 66(2)(a) and 66(2)(b) of the Code. Since, the R1 is the principal beneficiary of this transaction and has clearly admitted to the dues owned to the Corporate Debtor, the Bench directs that an amount of Rs. 41.03 crore be remitted back by R1

into the bank account of the Corporate Debtor company within 7 days from the pronouncement of this order."

(emphasis supplied)

35. This 'Appellate Tribunal' notes that as per Section 66, the 'Adjudicating Authority' can pass suitable orders, if it is found that any person has carried on the business of the 'Corporate Debtor' with intent to defraud its creditors and such persons can be directed to make contributions to the assets of the 'Corporate Debtor'. It can also be inferred that the 'fraud' can, interalia, consist of such debts which debtor has no intention of paying or does not expect to be able to pay or such fraud may also happen by way of false representation and without intention to pay back. The expression any person includes a knowing party to the carrying out fraudulent transactions.

36. Section 66 of the I & B Code, 2016, therefore, clearly provides that if it is found that any business of the 'Corporate Debtor' has been carried on with an intent to defraud the creditors of the 'Corporate Debtor' or for any fraudulent purpose, the 'Adjudicating Authority' may on the application of the Resolution Professional pass an order to make liable to such contribution to the assets of the 'Corporate Debtor' as may deemed fit.

37. We also note that, similarly, as per Regulation 35A of the IBBI (Insolvency Resolution Process for Corporate Person) Regulations, 2016, the Resolution Professional is required to form an '**opinion**' whether the 'Corporate Debtor' has been subjected to any transaction covered under

Sections 43, 45, 50 & 66 of the I & B Code, 2016 and where such opinion has been formed the 'Resolution Applicant' shall make a '**determination**' and subsequently is required to '**apply**' to the 'Adjudicating Authority' for appropriate relief.

38. This 'Appellate Tribunal' notes that the business of the 'Corporate Debtor' was related to trading in Bullion i.e. import/ export/ dealing in local markets by way of sale/purchase of gold and the 'Corporate Debtor' was not at all connected with business of financial services or lending money. It has also been brought to our notice that as per normal business practice in gold business, the transaction and dealing occur on spot payment basis and in such business there is hardly any scope for lending money. It also transpires that the bullion/ gold business is conducted on 'thin margins' and cash flow of the such business is required to be regulated/ maintained strictly in order to sustain and for growth of the business by way of purchase of gold on continuous basis. In this background, this 'Appellate Tribunal' finds it quite unusual on the part of the 'Corporate Debtor' to lend such huge amount of Rs. 41.03 crores and similarly unusual on point of the 'Appellant' to have benefitted of this largesse without any explainable rhyme or reason.

39. We also observe that the money was admittedly long overdue and as per the 'Appellant' it was overdue for more than one year. From the averments made during the hearing as well as records available, it transpires that the 'Appellant' made two different and contradictory

submissions regarding nature of its relationship with the 'Corporate Debtor' and nature of the transaction based on which the 'Appellant' received such huge amount of Rs. 41.03. crores from the 'Corporate Debtor'. It is noted that initially the 'Appellant' explained this transaction as 'Long Term Borrowing (Loan)' and 'not credit from trading activities' before the 'Adjudicating Authority' in Para 6(b) of the 'Reply' filed by the 'Appellant'. The 'Appellant' has now taken the stand in rejoinder before this 'Appellate Tribunal' that money pertains to 'regular business transactions' which is evident from Para 5 of the 'Rejoinder'.

Such contradictory statements also do not auger well and raises doubts in the mind of the 'Appellate Tribunal' regarding the real nature of the transaction along with true relationship between the 'Appellant' and the 'Corporate Debtor'.

The very fact that the 'Appellant' was 'NBFC' and the 'Corporate Debtor' was in the business of bullion/ gold, therefore, there cannot be such transactions in the normal course of business. Similarly, there is no reason for 'Corporate Debtor' to give such loan without any basis, reason and substance and that too, apparently as brought out, without suitable incentives or returns for time value of money.

40. Pointed queries were put up to the 'Appellant' by this 'Appellate Tribunal' regarding the circumstances under which the 'Appellant' took this loan or financial assistance in any form including so-called "regular business transaction", underlying agreement for the same, detailed terms

and conditions of such understanding/ loan, time value of the money in terms of interest payable/ incentives to the 'Corporate Debtor', whether such loan/ financial assistance was backed by suitable resolutions by both parties 'Appellant' and 'Corporate Debtor' being separate corporate entities, whether such agreement was registered. This 'Appellate Tribunal' observed that there were no answers from the 'Appellant' on such specific queries. The 'Appellant's' only defence to these queries was that these were normal commercial transaction done through proper banking channels and payments were made/received through RTGS. It is further the case of the 'Appellant' that these were recorded in the ledger accounts and therefore cannot be treated as fraudulent transaction. On the face of it, the non-discloser and evasive replies on the part of the 'Appellant' on pointed queries raises adequate suspicion and genuine doubts about the transaction and prima facie cannot find fault in the 'impugned order' on this account.

41. On a serious note, this 'Appellate Tribunal' observes that in 2019 such huge loan was all of a sudden written off by the 'Respondent Nos. 2 & 3' from the books of the 'Corporate Debtor' and evidently the 'Appellant' is the principal/sole beneficiary. The plea of the 'Appellant' made before us that it is a 'Corporate Debtor' who has written off and not by the 'Appellant' and therefore the 'Appellant' should not be held liable for fraudulent transactions under Section 66 is not convincing at all. It is a matter of common prudence that if the money is written off from the books of the

‘Corporate Debtor’, there is hardly any chance for the management/successor/ Resolution Professional to recover the same from the ‘Appellant’. There is no explanation which we can take into account either from the submissions of the ‘Appellant’ or Respondent Nos. 2 & 3 as to why such write off was necessary and circumstances which led to this write off. Such transactions of giving huge amount to unconnected/unrelated parties and apparently without any security interest or bank guarantee as collateral security in favour of the ‘Corporate Debtor’ and subsequently ‘writing off’ the same from the book can only be termed nothing else but as fraudulent transactions done with the intent to defraud the creditors of the ‘Corporate Debtor’. From the averments as well from the records made available, this ‘Appellate Tribunal’ tend to agree with the ‘Adjudicating Authority’ that the nature of the transactions are covered squarely under Section 66 of the I & B Code, 2016.

42. This ‘Appellate Tribunal’ also takes into account that the ‘Respondent No. 1’ made serious attempts in soliciting the information from the Appellant as well as from the Respondent Nos. 2 & 3 by sending repeated emails by asking for ledger accounts. As per ‘Respondent No. 1’, the e-mail to the ‘Appellant’ were sent on 12.12.2019, 14.12.2019, 19.12.2019, 31.12.2019 & 07.01.2020, however, the ‘Respondent No. 1’ did not receive any response. Subsequently, the Respondent No. 1 also addressed a letter dated 27.02.2020 to the ‘Appellant’ to submit copies of ledger accounts and also confirm to the balances upto insolvency commencement date, which

was also not replied by the 'Appellant'. All these also establishes the overall eco system of non-cooperation by the 'Appellant' to the 'Respondent No. 1' and makes the credentials of the 'Appellant' doubtful and the transactions as fraudulent.

43. It is noted that the requirements of Section 66(1) of the I & B Code, 2016 is also satisfied as it is a settled principle of law that the beneficiaries of fraud is presumed to be a party to the fraud, as laid down by the Hon'ble Supreme Court in the case of **Ram Preeti Yadav vs. U.P. Board of High School and Intermediate Education**, [(2003) 8 SCC 311] as follows:-

"10. It is also a matter of great suspicion as to how another marksheet was issued in his favour on 1-9-1986 with the words "WB" particularly when the Principal of the College admittedly was made known about the order dated 1-9-1985 passed by the first respondent cancelling the examination of Respondent No. 3. Thus, it is evident that a fraud was committed. Respondent No. 3 is the sole beneficiary of the said fraud and it, as much, must be presumed that he was a party thereto."

(emphasis supplied)

44. It cannot be the case of the Appellant's that the 'Appellant' is not a party to the subject fraudulent and wrongful trading, despite being the sole beneficiary of the same and beyond any acceptable logical conclusion.

45. This 'Appellate Tribunal' also examined the issue raised by the 'Appellant' regarding outside investigation/ forensic audit not done by the 'Respondent No. 1' and therefore as per the 'Appellant', their transaction

cannot be clarified as fraudulent transaction. This 'Appellate Tribunal' notes that this aspect was suitably decided by this 'Appellate Tribunal' earlier in case of **Nitin Bharal, Ex-Director & Ors. vs. Stockflow Express Private Limited** [2022 SCC OnLine NCLAT 179]. The relevant paras read as under:-

“21. Now we address ourselves to the contention of the Appellant Counsel that the amounts were written off as bad debts only because they could not be recovered. The Adjudicating Authority after discussing in detail the Bank Account Statements (for the sake of brevity, the same is not being reproduced here) of Yes Bank, ICICI Bank and Axis Bank has observed as follows:

“27. Now coming to the third point, the cash transactions receiving cash from debtors admittedly Vyke Logistics and Vyke International, the respondent No. 9 owes the debts and they have debtors of the Corporate Debtor, as per the books of Corporate Debtor, total amount is of Rs. 20,12,383/- and Rs. 22,20,651/- and the claim of these respondents are they have settled the amount on full and final payment after making payment of Rs. 3 lakhs as cash. A total debt of Rs. 42,33,034/- was settled only after making payment of Rs. 3 lakhs that has not been disclosed either by the respondent Nos. 1 to 4 and respondent No. 9. We further notice that there is another Creditor as per the averments made in the Application that is respondent no. 10 RJ Logistics Services LLP with Mr. Rohit Jasoria as the designated partner and RJ brother with Mr. Rohit

Jasoria owes the debt of Rs. 10,71,250/- and Rs. 13,06,702/- respectively and their debts are also written off. The respondent No. 9 and 10 by filing their reply claimed that they never owe any debt and they are not the debtor of the Corporate Debtor. The respondent No. 9 further claimed that the amount had already been settled after making the payment of Rs. 3 lakhs. We failed to understand how the Rs. 42,33,304/- will be settled only on the payment of Rs. 3 lakhs. Therefore, we are of the considered view these transactions also comes under the category of the fraudulent transactions.

22. *A perusal of the scanned copy of the Bank Statement evidences that the Adjudicating Authority has rightly concluded that there are no reasons given for how an amount of Rs. 42,33,304/- has been settled for a mere payment of Rs. 3 Lakhs/-. This fraudulent transaction took place during the time the Appellants were Directors of the 'Corporate Debtor' and squarely falls within the ambit of Section 66 of the Code.*

23. *Keeping in view, the copy of the Bank Statements, amounts written off as bad debts during the Financial Year when the Appellant/Promoters were the Directors, the circuitous sale of shares, this Tribunal is of the earnest view that the contention of the Learned Counsel for the Appellant that there was no Transaction Audit and hence the Adjudicating Authority ought not to have given a finding of fraudulent transaction under Section 66 of the Code is unsustainable. If the IRP/RP has prima facie suspicion of any fraudulent transactions, as defined under*

the Code, have a recourse to approach the Adjudicating Authority for necessary action. At the cost of repetition, it is specifically averred by the IRP that there was no cooperation from the Appellant/Promoters and hence an Affidavit was filed by him with a detailed analysis. We find merit in the submission that not having cooperated in giving information to the IRP, the contention of the Appellants that the Adjudicating Authority has in the absence of any Audit Report, has given these findings, which cannot be relied upon, has no legs to stand. To reiterate, the debts written off to defraud the Creditors, the cash transaction post their resignation evidencing their financial control in the affairs of the 'Corporate Debtor', clearly establish that they are 'fraudulent transactions' done with a wilful intention of financial gain at the cost of negatively effecting the Creditors.

(emphasis supplied)

46. This 'Appellate Tribunal' is aware that above judgment has been challenged in the Hon'ble Supreme Court of India in Civil Appeal No. 4496/2022 and notice was issued but no stay was granted. This read as under:-

"Issue notice on the civil appeal as well as on the application for stay returnable in one week.

Dasti service in addition to ordinary process is permitted."

We tend to agree with above that Forensic Audit is not mandatory in such cases and therefore do not accept pleadings of the 'Appellant' on this aspect.

47. This 'Appellate Tribunal' notes from submissions/ pleadings of the 'Respondent No. 1' that a similar appeal was dismissed by this 'Appellate Tribunal' in CA (AT) (Ins.) No. 95 of 2021 whereas same set of 'Respondents' were made parties as in present appeal by one another the 'Appellant' therein - 'Tridhaatu Kirti Developers LLP' who was held responsible under Section 66 of the I & B Code, 2016. The relevant paras read as under:-

***“2.** The appellant is aggrieved with the direction of the Adjudicating Authority to direct the appellant to pay an amount of Rs.8.95 crores outstanding in the ledger of the Corporate Debtor (hereinafter referred to as 'CD') to the CD and he is further aggrieved with the feeling of the Bench for defrauding the Corporate Debtor (CD) for carrying out business with dishonest intents to defraud creditors and, therefore, has to make the contribution to the assets of the CD.*

***3.** To substantiate his claim the appellant has provided list of dates and events to prove that the Resolution Professional in the garb of the said application has attempted to unlawfully recover the money which are not even due and outstanding. The appellant has also taken the stand that mere noting of the transaction in the ledger account cannot be the basis to decide that the said amount was outstanding and liable to be repaid. As also the outstanding amount of the CD was forfeited by the appellant in terms of mutual agreement that took place between the two parties which has never been questioned or challenged. There is absence of any material evidence of*

fraud against the appellant and the Resolution Professional has failed to substantiate his claim for proving fraud done by the appellant.

4. The Learned counsel for the appellant took us to the provisions of Section 66 of the Code and made an emphatic attempt to prove that the Resolution Professional has failed to establish any fraudulent or wrongful transaction. It was submitted by learned Counsel that the provisions of Section 66 (1) and 66(2) are against the director and partners of the CD and not against the third party. Section 66 of the Code is not a recovery provision to seek repayment of loan and has cited a few judgements as numerated hereunder to substantiate his claim that fraud must be not only pleaded but also be pleaded alongwith necessary evidence.

5. It was also attempted to be explained by the learned counsel of the appellant that there is no case against the appellant on fact. Learned counsel for the appellant submitted that the material facts pertaining to the dispute are briefly summarized as under:

a) On 13.11.2019, CIRP was initiated against one Royal Refinery Pvt Ltd, where Mr. Nandkishore V Despande was appointed as the Resolution Professional. The CD is now under liquidation, which order was passed during the pendency of this Appeal.

b) The Appellant is a real estate developer who intended to develop a society by the name of Kirti CHSL, in Santacruz Mumbai. The Appellant was given loans by the CD in the year 2017 much prior to any CIRP being initiated. It is pertinent to highlight that the loans were received by way

of bank transfers which are reflected in the ledger accounts maintained by both the CD and the Appellant.
Part of these loans were repaid from time to time.

c) The Appellant has no relation with the CD or its business. At no point in time has any allegation been made to that effect that the Appellant has colluded with the CD either by RP or by any investigating agency.

d) In the year 2018, the Appellant was not being in a position to repay the loan, requested the CD to convert into the loan into an investment into the project, which was agreed by the CD. The CD agreed to invest a sum of Rs.20 crores with an understanding that the amount shall stand forfeited on failure of investment. Accordingly, on failure the amount stood forfeited.

11. We have gone through the pleading of the parties, submissions made by the learned counsel of Respondent and appellant and are having following observations:

i) It is not in dispute that the appellant and the respondent company are not a related party.

ii) It is also not in dispute that an amount of Rs.8.95 crores is due and outstanding for recovery from the Appellant to the CD as both the parties agreeing that this is existing in their Balance Sheet as per accounting norms.

iii) It is the law laid down that fraud unravels of acts. In some way it is a deception to gain by another loss.

iv) It is also well settled law that the establishment of fraudulent conduct does not require the same standard of proof as in criminal trial. It is not necessary that each instance of fund being siphoned needs to be established

from inception to the end and even one conduct of director of CD can depict an act of fraud.

15. It is very much clear from the above that it is the intention to defraud creditors at that stage Section 66 is applicable. This section empowers the Adjudicating Authority to pass an order for recovery from such fraudulent parties as contribution to the assets of the CD. The Hon'ble Apex Court in the case of Phoenix A.R.C. Vs. Spade Financial Services (2021) 3 SCC 475 vide para 51 as tabulated below has identified the applicability of this provision

“51. The IBC has made provisions for identifying, annulling or disregarding “avoidable transactions” which distressed companies may have undertaken to hamper recovery of creditors in the event of the initiation of CIRP. Such avoid able transactions include:

- i) Preferential transactions under Section 43 IBC;
 - ii) Undervalued transactions under Section 45(2) IBC;
 - iii) Transactions defrauding creditors under Section 49 IBC; and
 - iv) Extortionate transactions under Section 50 IBC
- The IBC recognises that for the success of an insolvency regime, the real nature of the transactions has to be unearthed in order to prevent any person from taking undue benefit of its provisions to the detriment of the rights of legitimate creditors.”

16. In view of the above stated fact and circumstances we are constrained to uphold the hand of

the Adjudicating Authority and is not able to agree with the Appellant.”

(emphasis supplied)

48. We find above finding of this ‘Appellate Tribunal’ as seen above as directly connected and relevant and therefore need to be taken into account. Incidentally, this has attained finality as it was challenged in the Hon’ble Supreme Court of India vide Civil Appeal No. 914 of 2023 and dismissed.

“Heard learned counsel for the appellant.

We find no merit in this appeal. Admission is refused and the civil appeal is, accordingly, dismissed.”

49. It is seen that the intent to defraud the creditors”, under Section 66(1) of the I & B Code, 2016 is further established by the fact that the ‘Respondent Nos. 2 & 3’ had provided different books of accounts in different proceedings before the ‘Adjudicating Authority’ with a clear intent to fraudulently deprive the creditors of the ‘Corporate Debtor’ from the admitted amounts.

50. This ‘Appellate Tribunal’ observed that the ‘Appellant’ is a principal beneficiary of fraudulent and wrongful trading and therefore the ‘Adjudicating Authority’ has rightly held this transaction as fraudulent under Section 66 of the I & B Code, 2016.

51. In view of above, detailed qualitative and quantitative examination along with cited judgments of the Hon’ble Supreme Court of India and this

‘Appellate Tribunal’ own earlier judgments and legal provisions of the I & B Code, 2016, this ‘Appellate Tribunal’ comes to definitive conclusion that there is no error in the ‘impugned order’ dated 29.01.2021. The ‘Appeal’, devoid of any merit is dismissed. No cost. The ‘Interlocutory Application(s)’, if any, are closed.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Naresh Salecha]
Member (Technical)

Simran