

NATIONAL COMPANY LAW APPELLATE TRIBUNAL**PRINCIPAL BENCH****NEW DELHI****COMPANY APPEAL (AT)(INS) NO. 726 & 728 OF 2021**

(Arising out of judgement and order dated 17.5.2021 and 4.8.2021 passed by National Company Law Tribunal New Delhi in IA No.1248 of 2020 and IA No.3341 of 2021 in CP(IB) No.475/ND/2018)

In the matter of:

1. Ajay Vij
Ex-Director
M/s Solutions Business Centre Pvt Ltd
H-69, UGF
Above HDFC Bank, Outer Circle,
Connaught Place,
New Delhi-110001

2. Parul Khurana,
Ex-Director
M/s Solutions Business Centre Pvt Ltd
H-69, UGF
Above HDFC Bank, Outer Circle,
Connaught Place,
New Delhi-110001

Appellants

Vs

Mr Abhishek Dutta
Official Liquidator
M/s Solutions Business Centre Pvt Ltd
Aureus Law Partners,
D-306,
3rd Floor,
Defence Colony,
New Delhi-110024.

Respondents

For Appellant: Mr Sakal Bhushan, Mr Vasu Bhushan, Mr Ashish Upadhaya,
Mr Nipun Bhushan, Advocates.

For Respondent: Mr Yatin Sharma, Advocate for R-1.

Mr Rohan T., Ms Pooja Dhar, Mr Praful Pratap Pratap Singh, advocates for R2 to R4.

With

COMPANY APPEAL (AT)(INS) NO. 818-819 OF 2021

(Arising out of judgement and order dated 17.5.2021 and 4.8.2021 passed by National Company Law Tribunal New Delhi in IA No.1248 of 2020 and IA No.3341 of 2021 in CP(IB) No.475/ND/2018)

In the matter of:

1. Pankaj Gambhir
Ex-Partner
M/s Solutions Business Centre Pvt Ltd
Flat No.11, Ganga BLK G-2,
Sec-D, Pocket 6, Vasant Kunj
New Delhi-110070
2. Naveen Gambhir
Ex-Partner
M/s Solutions Business Centre Pvt Ltd
Flat No.12, Ganga BLK G-2,
Sec-D, Pocket 6, Vasant Kunj
New Delhi-110070
3. Neeraj Gambhir
Ex-Partner
M/s Solutions Business Centre Pvt Ltd
Flat No.111, Ganga BLK G-1,
Sec-D, Pocket 6, Vasant Kunj
New Delhi-110070
4. Shaloo Gambhir
Ex-Partner
M/s Solutions Business Centre Pvt Ltd
Flat No.12, Ganga BLK G-2,
Sec-D, Pocket 6, Vasant Kunj
New Delhi-110070
5. Lovleen Gambhir
Ex-Partner
M/s Solutions Business Centre Pvt Ltd
L-29/7, DLF Phase II, Sikanderpur,

Ghosi (68), Gurgaon 122002
Haryana.

6. Geeta Gambhir

Ex-Partner

M/s Solutions Business Centre Pvt Ltd

L-29/7, DLF Phase II, Sikanderpur,

Ghosi (68), Gurgaon 122002

Haryana.

Appellants

Vs

Mr Abhishek Dutta

Official Liquidator

M/s Solutions Business Centre Pvt Ltd

Aureus Law Partners,

D-306,

3rd Floor,

Defence Colony,

New Delhi-110024.

Respondents

For Appellant: Mr Sakal Bhushan, Mr Vasu Bhushan, Mr Ashish Upadhaya,
Mr Nipun Bhushan, Advocates.

For Respondent: Mr Yatin Sharma, Advocate for R-1.

Mr Rohan T., Ms Pooja Dhar, Mr Praful Pratap Singh, Advocates for R2 to R4.

JUDGEMENT

JUSTICE YOGESH KHANNA, MEMBER (JUDICIAL)

These appeals are filed against impugned orders dated 17.5.2021 and 4.8.2021 passed by the Ld. Adjudicating Authority, National Company Law Tribunal, New Delhi in IA No.1248/2020 and IA No.3341/2021. The appellant is aggrieved of the fact that *per* impugned order, the appellants have been held guilty of perjury and have been imposed a fine of Rs.2 lakh on each of the appellant. The Ld. NCLT had also directed the RP to initiate proceedings for perjury against Mr Ajay Vij *per* para 10 of the impugned order. The impugned order is as under:-

9. After hearing the parties and perusing the documents, the conversion of the corporate debtor from a company to LLP is analyzed via a vis the provisions of the Companies Act and Limited Liability Partnership Act, 2008. We find that company has intentionally taken steps to convert the entity of the corporate debtor from the private limited company to LLP.**to escape the rigors of insolvency code and to shrug off the liabilities of the creditors of the corporate debtor.** As also it is evident that neither at the time of passing of the order nor during CIRP, the LLP partner have come forward for compliance of Section 56 and shown any willingness to accept the liability of the corporate debtor and pay its creditors. Considering that LLP partners were also appearing before the bench and had actively participated while handing over the possession of the units to the lessor which were taken on lease by the corporate debtor The Registrar of Companies in its reply has given the details of the directors of the corporate debtor prior to conversion into LLP as well as the list of designated partners of the LLP. We find Mr. Naveen Gambhir as a common name in both the entities. The chronology of the incidents reveal that the management of the corporate debtor has **played a fraud on this bench and is guilty of perjury.** Mr. Pankaj Gambhir has acted in the entire design as an active participant It is seen from the records that two insolvency applications were filed against the corporate debtor in mid, 2018 and reply in both the application were filed by Mr. Ajay Vij in October 2018, who is reflected as the director of the private limited company. The document submitted for conversion of LLP, as produced before us, shows the date of submission of Form No.18 to Registrar of Companies as 03.11.2019, which was filed by Mr. Ajay Vij. The said Form No. 18 comprising of clause 15 which reads as under:

whether any proceeding by or against the company is pending in any court or any other authority

The answer to this statement was replied in negative by Mr. Ajay Vij on behalf of the corporate debtor. This clearly proves the act of perjury by Mr. Ajay Vij in connivance with all the directors of the corporate debtor. It cannot be believed that other directors which includes Mr. Naveen Gambhir and Mr. Ajay Vij were unaware about the insolvency proceeding against the corporate debtor or

were ignorant about the information filed in Form No 18 specifically in clause 15. Moreover, it is found that in the present application Mr.Pankaj Gambhir filed an affidavit being the designated partner of LLP declaring that the units under the possession of corporate debtor which were lease hold units were handed over to the parties as back as in December 2016 and Mr. Pankaj Gambhir was unaware about the proceedings of insolvency pending against the corporate debtor. Whereas the Id. counsel appearing for the LLP before the bench on 18.09.2019 admitted that the lease hold units will be handed over to the parties. which were till then, in possession of the corporate debtor/ alleged LLP and further undertook to hand over the same as recorded in the said order. The order further records the statement of the corresponding unit holder of handing over of the possession of respective units. Mr.Naveem Gambhir is the common person being the director in the company and designated partner in alleged LLP has not come forwards for the explanation before the bench.

10. The above facts does not leave any doubt in our mind that the management of the corporate debtor in connivance with the alleged LLP partners have acted to defraud the creditors and to make their claims infructuous. We see strong reason to initiate perjury proceedings against the management of the corporate debtor specifically Mr. Ajay Vij. 1 who has submitted incorrect and wrong information while applying for LLP. to RoC. We direct Resolution Professional to immediately initiate appropriate proceedings for perjury against Mr. Ajay Vij. We fail to understand that without any formal agreement/documents/MOU between the corporate debtor and the proposed LLP with respect to the status of creditors, debtors, rights and liabilities, the conversion of accounts and all other formalities with respect to transfer of share capital, how merely on filling Form No. 18 with Registrar of Companies can change/convert the legal status of an entity into entirely different entity especially when both the entities fall under the governance of different statutes The Registrar of Companies is directed to take a cognizance of such kind of conversion on merely filling a single form in the Form No. 18. along with required fees to convert the entity which will have vast and grave repercussions on the public in general, in absence of any detailed document deciding the rights and liabilities of the parties concerned as well as the third parties who will be affected by such simpliciter conversion.

2. Thus the reason for holding the appellant guilty for perjury is two fold **(a)** the appellants have given wrong information to the ROC in Form No.18 required for converting a company into LLP wherein they had stated *no proceedings are pending* against the company but whereas an Insolvency petition under Section 9 IBC was pending against the company; and **(b)** the appellants had filed an affidavit wherein the appellants had deposed the *units were handed over to the parties way back in December, 2016* but whereas their learned counsel stated the *units will be handed over to the parties*.

3. It was submitted by the Ld. Counsel of the Appellants that the Ld. NCLT has no power to convict the appellants under Section 68 of the IBC since such conviction can be done only by Ld. Special Court established under the Companies Act.

4. We have gone through the record of the Ld. NCLT and we find the Ld. NCLT had found the appellant guilty of perjury and had rather invalidated the conversion of company into LLP and by subsequent impugned order dated 4.8.2021, the liquidator was permitted to file a complaint and to take further steps as are required under the provisions of Section 340 of Cr PC.

5. Admittedly the impugned order dated 17.05.2021 has held the appellants guilty of act of perjury only on account of a declaration in Form 18 filed before the ROC (see Page 194 of the Appeal Paper Book). In the said declaration, against point No.15 viz ***whether any proceedings by or against the company is pending in any court or tribunal or any authority***, the answer given by one Mr Ajay Vij, i.e. the appellant No.1 was **NO**. It is fairly conceded by the learned counsel for the appellant that declaration/Form 18

dated 03.11.2018 was incorrect since by that time i.e. on 25.04.2018 an application under Section 9 IBC stood filed against Corporate Debtor. Further CIRP commenced later on 14.3.2019.

6. It is the case of the appellants such wrong answer was inadvertently given by Ajay Vij, a Director of the company while filing declaration/Form 18. It is argued even if it is to be considered as has been intentionally done by one of the directors then also offence of perjury could be attracted only when false declaration touches any material fact. Heard.

7. We agree to the submission of the learned counsel for the appellant that Form No.18 was only required to facilitate conversion of the company to LLP, though such declaration filed was not material for such conversion. Further *per law* the conversion of a company into LLP shall have no effect to the pending proceedings *by* and *against* the company since *per* Section 58(4)(b) of LLP Act, 2008; upon conversion of a company into LLP, *all assets, interest, rights, privileges, liabilities, obligation relating to the company and whole of the undertaking of the company stood transferred to the LLP*. Clause **6(b)** of the 3rd Schedule of LLP Act also supports the same. Even *per* Section **58(3)** read with Clause **8** of third schedule of LLP Act, all proceedings *by* and *against* the company pending before any Court, tribunal or other authority can be continued, completed and enforced by or against the LLP.

8. Therefore, it is amply clear on conversion to LLP, the Appellants could not have evaded insolvency proceedings, thus the observation made by the Ld. NCLT *viz the company has intentionally taken steps to convert the entity of the corporate debtor from private limited company to LLP, to escape the rigors*

of insolvency code and to shrug off the liabilities of the creditors of the corporate debtor is based on *misreading*. Thus a wrong declaration in Form 18 *allegedly* made *inadvertently* before the ROC cannot be said to be material in the context of conversion from a Company into LLP so as to fall within the definition of perjury u/s 199 IPC. Thus holding the Appellants guilty of an act of perjury deserves to be set aside on this ground alone; and consequential impugned order dated 04.08.2021 permitting the Liquidator to file complaint u/s 340 Cr.P.C also deserves to be set aside.

9. Admittedly such declaration in Form 18 was never made/filed before the Ld. NCLT but before the ROC; therefore, it was not for the Ld. NCLT/Liquidator to move u/s 195 Cr.P.C for initiating action on such account.

10. Secondly an observation in the impugned order dated 17.05.2021 *viz* there exists a discrepancy in affidavit of Mr. Pankaj Gambhir/Appellant No. 1 in CA(AT)(Ins.) No. 818 & 819/2021) wherein he deposed '*lease hold units were handed over to the parties as back as in December 2016*', and statement of their counsel made before the bench on 18.09.2019 wherein the averment '*lease hold units will be handed over to the parties*', would indicate those are conflicting statements is also factually incorrect on a plain reading of para 5 of the affidavit dated 16.07.2019 where the deponent Mr. Pankaj Gambhir did not use the expression '*handed over*' but all that he had deposed was the Company had '*already vacated*' the said premises in December, 2016. Thus, there was no conflict between these two expressions '*already vacated*' and '*will be handed over*' used respectively by Mr. Pankaj Gambhir (designated

partner of LLP) in his affidavit and the counsel appearing for the LLP before the Ld. NCLT. It is alleged some times a tenant vacates the premises but on actual possession is not taken over by landlord, may be because of pending dispute.. That apart, this statement has no material bearing on the subject of conversion of the Company into LLP because of S. 58(4)(b) of the LLP Act. Thus the impugned orders dated 17.05.2021 and 04.08.2021 deserve to be set aside on this ground too.

11. Thus we are of the considered view no act of perjury has been committed by the Appellants. But even if it is presumed just for the arguments' sake that an offence of perjury stands committed, then also the impugned order dated 04.08.2021 r/w impugned order dated 17.05.2021 permitting the Liquidator to file complaint u/s 340 Cr.P.C is not sustainable there being admittedly no finding recoded to the effect *“that it is expedient in the interest of justice* a complaint should be filed. In the absence of a finding to the above effect which is a *sine qua non* under S. 340(1)(a) Cr.P.C, the impugned order dated 04.08.2021 is not sustainable in law.

12. The Hon'ble Supreme Court in Chajoo Ram v. Radhey Shyam (1971) 1 SCC 774 has held:

*“7. Prosecution should be ordered when it is **considered expedient in the interests of justice** to punish the delinquent and **not merely because there is some inaccuracy in the statement which may be innocent or immaterial.** There must be prima facie case of deliberate falsehood on a matter of substance and the court should be satisfied that there is reasonable foundation for the charge.”*

13. Further the Hon'ble Supreme Court in Santokh Singh v. Izhar Hussain (1973) 2 SCC 406 held:

*"11. Every **incorrect or false statement does not make it incumbent on the court to order prosecution.** The court has to exercise judicial discretion in the light of all the relevant circumstances when it determines the question of expediency. The court orders prosecution in the larger interest of the administration of justice and not to gratify feelings of personal revenge or vindictiveness or to serve the ends of a private party. Too frequent prosecutions for such offences tend to defeat its very object. It is only in glaring cases of deliberate falsehood where conviction is highly likely, that the court should direct prosecution."*

14. The above propositions of law were also reiterated by the Hon'ble Supreme Court in Narendra Kumar Srivastava v. State of Bihar (2019) 3 SCC 318. Further these judgements have also been relied upon by this Appellate Tribunal in its judgment dated 18.12.2020 titled M/s KVR Industries Pvt. Ltd. v. M/s PP Bafna Ventures Pvt. Ltd.

15. Further we are also of the view Ld. NCLT has no jurisdiction to convict a person for an offence under Section 68 under Chapter VII of Part II IBC in view of the express provision contained in S. 236(1) IBC to the following effect:

"Notwithstanding anything in the Code of Criminal Procedure, 1973 (2 of 1974), offences under this Code shall be tried by the Special Court established under Chapter XXVIII of the Companies Act, 2013 (18 of 2013)."

Further S. 236(2) read:

"No Court shall take cognizance of any offence punishable under this Act, save on a complaint made by the Board or the Central Government or any person authorized by the Central Government in this behalf."

16. The Principal Bench of this Tribunal in its judgment dated 04.02.2022 titled as Writers Business Services Pvt. Ltd. & Ors. v. Ashutosh Agrawala, RP

for Cox & Kings Ltd. has categorically held an act which is termed as offence within specific provisions of Chapter VII of Part II IBC could not be dealt with even indirectly by the Adjudicating Authority by imposing a fine. Thus the impugned order dated 17.05.2021 convicting the Appellants u/s 68(i)(a) IBC and imposing a fine of Rs. 2 lac on each Appellant deserves to be set aside on this ground itself.

Even otherwise, there are no averments *qua* commission of an offence u/s 68(i)(a) IBC in IA No. 1248/ND/2020 filed by the RP as a matter of record. Moreso, there is no finding in the impugned order dated 17.05.2021 as to how the said offence is attracted in the present case.

17. We have also examined the notification dated 27.7.2016 as under:-

S.O. 2554(E).-In exercise of the powers conferred by sub-section (1) of section 435 of the Companies Act, 2013 (18 of 2013), the Central Government hereby, with the concurrence of the Chief Justice of the High Court of Delhi, designates the following Court as Special Court for the purposes of providing speedy trial of offences punishable under the Companies Act, 2013 with imprisonment of two years or more under the Companies Act, 2013, namely:-

TABLE

Sl. No. (1)	Existing Court (2)	Jurisdiction as Special Court (3)
1	Court of Additional Sessions Judge-03, South-West District, Dwarka	National Capital Territory of Delhi

2.The aforesaid Court mentioned in column number (2) shall exercise the jurisdiction as Special Court in respect of jurisdiction mentioned in column number (3).

18. Thus there exists a Special Court *per* Section 236 of the Companies Act, 2013, hence the Ld. NCLT has no power to convict the appellants and impose a fine and as such the conviction and the fine imposed by Ld. Adjudicating Authority is hereby set aside.

19. The appeals are thus allowed. Pending applications are also disposed of.

(Justice Yogesh Khanna)
Member (Judicial)

(Mr Ajai Das Mehrotra)
Member (Technical)

Dated:28-02-2025
bm