

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI

(APPELLATE JURISDICTION)

Company Appeal (AT) (CH) (Ins) No.377/2023
(IA No.1150/2023)

In the matter of:

1. Anish Lawrence

**35/1761 A, Vengath House, Anish Nivas,
Janatha Road South, Palarivattom P.O,
Palarivattom, Ernakulam 682 025**

2. Shebin Sasthamparambil

**Sasthamparambil House, Chennur, Kothad P.O.,
Ernakulam 682 027**

...Appellants

V

Mr. Renahan Vamakesan,

Liquidator of Axiomata Elevators Pvt. Ltd.

Ponnurunni, Vytilla, P.O., Ernakulam 682 019

...Respondent

Present :

For Appellant : Mr. M. Krishna Dath, Advocate
For Mr. MS. Viswanathan, Advocate

For Respondent : Mr. Chandramouli Prabhakar, Advocate

JUDGMENT
(Hybrid Mode)

[Per: Jatindranath Swain, Member (Technical)]

1. The instant appeal has been preferred by the Appellant, being aggrieved as against the impugned order dated 23.06.2023 as rendered in IA(IBC)/426/KOB/2022, that was filed by the Liquidator of M/s. Axiomata Elevators Pvt. Ltd. (Corporate Debtor), under Section 66(1) and Section 60(5) of the I & B Code, 2016, read with Rule 11 of the NCLT Rules,

2016. By virtue of the impugned order, learned NCLT allowed the aforesaid application and had directed the Respondent to pay a sum of ₹1,20,81,752/-, jointly and severally, within a month of the order, failing which, to pay the same with interest at 12% per annum from the date of the order till the date of its realisation, to the liquidation estate. Aggrieved by the said order, the appellants herein have filed this company appeal.

2. The Corporate Insolvency Resolution Process (CIRP), as against the Corporate Debtor commenced on 26.11.2019 in TIBA/34/KOB/2022, and an Interim Resolution Professional (IRP) was appointed. On 17.06.2022, the learned Tribunal replaced the existing RP and had appointed the respondent herein to function as the RP of the Corporate Debtor. Since no resolution plan could be obtained, within the prescribed period, based on the resolution of the Committee of Creditors (CoC), liquidation was ordered by the learned NCLT on 28.10.2022 in IA(IBC)/189/KOB/2022, and the Respondent herein was appointed to function as Liquidator of the Corporate Debtor.

3. On verification of the records and the report of auditor and after verifying the two bank accounts that were standing in the name of “Axiomata Elevators”, and after collecting information from the customers of the Corporate Debtor stating that they have paid their dues to these accounts, the liquidator identified certain transactions, those were entered

into by the Appellants herein which in his opinion were undertaken to deplete the assets of the Corporate Debtor and it intended to divert its business income, thus he classified those transactions as fraudulent. Based on such inference, the liquidator filed an application IA(IBC)/426/KOB/2022, under section 66(1) and section 60(5) of the I & B Code, 2016, to be read with Rule 11 of NCLT Rules, 2016. The relief as prayed for was to pass an appropriate order, directing the appellants to pay a sum of ₹1,20,81,752/- representing the amount involved in the said fraudulent transactions, to the liquidation estate of the Corporate Debtor as per the details given below: -

- i. Rs.60,08,707.07/- being the sum diverted from the Bank Account of the Corporate Debtor without any explanation or supporting vouchers
- ii. Rs.35,01,200/- being the sum withdrawn by the Appellants in Cash from the Bank Account of the Corporate without any reasoning or justification
- iii. Rs.15,55,360.24/- being the amount collected and withdrawn through Axis Bank Account No. 918020112086622 opened in the name 'Axiomata Elevators' in which Appellants 1 & 2 were 50:50 Partners

- iv. Rs.9,72,885/- being the amount collected and withdrawn through People's Urban Co-operative Bank Account No 084101000000169, having an identical name as of the Corporate Debtor, under the same Partnership 'Axiomata Elevators'
- v. Rs.4,36,000/- being the money received from sale of a Car of the Corporate Debtor, which the Appellants did not reflect in the account of the Corporate Debtor and informed the IRP that the said Car was sold as scrap without providing any explanation at all or any documents in support thereof

4. The learned NCLT, after hearing both sides, observed that no explanation has been provided by the Appellants herein for the above identified transactions, and that as no vouchers were produced before it to prove that, they were genuine transactions. It was also observed that the Appellants had opened an unauthorized bank accounts after the commencement of the Corporate Insolvency Resolution Process (CIRP), in the name of "Axiomata Elevators", under a name identical to that of Corporate Debtor, at the branch of Axis Bank (bearing account no. 918020112086622) and also an account at People's Urban Cooperative Bank Limited (bearing account number no. 084101000000169), using the PAN card of the Corporate Debtor, but by giving a false address and collected money from existing customers of the Corporate Debtor and had

thereafter closed those accounts after withdrawing the entire amount thus collected in cash, which was identified only after perusal of 26AS statement of Income Tax. The Appellants did not furnish any evidence to the contrary that these amounts were used for the business of the Corporate Debtor and that it proves that the Appellants indulged in these transactions to defraud the creditors of the Corporate Debtor.

5. The learned NCLT also observed that the dubious manner in which the car was sold and the following acts of the Appellants, where the files were taken away from the auditor, attempt was made to break open the lock of the office of the Corporate Debtor and Bank transactions that were carried on even after commencement of CIRP, it establishes that the Appellants have least regard for law and accordingly held that the Appellants have indulged in fraudulent transactions and are hence liable to pay the amount claimed in the application, jointly, and severally.

6. The Appellants, on the contrary, have contended that as per Section 66 of the I & B Code, 2016, it requires the Liquidator to prove that the directors of the Corporate Debtor had acted with the intent to defraud the creditors or had committed fraudulent transactions. As such as per the Appellant the Liquidator has not produced sufficient evidence to support his allegations of fraud and that as per the order of NCLT Mumbai Bench, in the matter of Jayesh Sanghrajka v. Divine Investments in

MA/1061/201946, a forensic audit was necessary to determine as to whether a transaction qualifies to be as fraudulent transaction under Section 66 and that, in the absence of forensic audit report, the Liquidator cannot declare the transactions identified by him as fraudulent. The appellants have further argued that withdrawals amounting to ₹95,09,907 during the financial year 2019-20 have been in the course of the business of the Corporate Debtor and that it is not correct to hold such transactions as fraudulent, just because of the fact that no payment voucher could be produced. The appellants argued that the Liquidator had failed to verify the recipient accounts concerning these payments and had instead prematurely labelled the transactions as fraudulent. In support of their contention they have submitted the documents such as copy of the Registration Certificate of the vehicle, indicating the endorsement for the termination of hypothecation, the copy of the Extracts from Bank statement, Chola Finance Ledger, Motor vehicle Dosth Ledger, Sale of Motor vehicle Leger, Motor vehicle Group Summary, Extracts of bank statement showing receipt of money on sale of vehicle, Day book entries of corresponding sale transaction, Financial Statement for the FY 2019, and Other Income Group Summary, copy of the PAN, GST certificate and partnership deed of the Partnership firm of the Appellants as evidence.

7. They have further submitted in their defence that neither the Code nor the Regulations prohibits the suspended directors from engaging themselves in other business activities during the CIRP of the Corporate Debtor or from establishing partnership firms in the same line of business of that of the Corporate Debtor.

8. They have submitted that, the impugned order passed by the learned NCLT is in violation of the principles of natural justice, as it fails to adequately consider the defence taken by the Appellants, and that the Appellants were not provided an opportunity to produce all relevant evidence before the learned NCLT, as they were unable to retrieve the key documents during the CIRP and that the learned Tribunal failed to grant sufficient time to the Appellants to present a complete defence, thereby resulting in a miscarriage of justice. They have further submitted that, as per the principles of natural justice, no order should be passed without giving both the parties a fair opportunity to present their case, and that the impugned order does not contain detailed reasoning for the findings which were recorded, making it a non-speaking order. Further, that the Hon'ble Apex court in *SN Mukherjee v. Union of India*, (1990) 4 SCC 594, held that a reasoned order is necessarily required to be passed, so as to satisfy the requirements of natural justice and that in the light of the above facts, circumstances, and arguments advanced, it was prayed for that, this

Appellate Tribunal may remit the matter back to the learned NCLT for fresh adjudication and render justice.

9. It is observed that, the Appellants herein (Former Directors of the Corporate Debtor) seeks to challenge the impugned order inter-alia on three primary grounds,

- (i) That the Code or Regulations, does not prevent the suspended directors from pursuing other business during the period of CIRP of the Corporate Debtor and that the Appellants were carrying out the business was the fact they knew and were doing the same, through a partnership firm for their own survival and this can in no manner affect the business of the Corporate Debtor and thus, the opening of the two Bank Accounts in the name of the Partnership and amount earned from the said business are not a fraudulent transactions,
- (ii) That the determination of such transactions as fraudulent transactions by the Respondent is per se wrong and the Respondent had failed to appoint a Forensic Auditor to determine the said aspect,
- (iii) Further, that certain documents, which the Appellants have produced as 'newly retrieved evidences' have only been recently obtained by the Appellants now and therefore it is necessary to

set aside the impugned order and remand the matter before the learned Adjudicating Authority for its fresh adjudication.

10. The Counsel for the Respondent has argued to the contrary that, while the Liquidator had filed an elaborate application before the learned Adjudicating Authority, NCLT Kochi Bench (Page No 96 – 118 of the Appeal) setting out the specific reasons as portrayed as to why the said transactions were to be classified as fraudulent, in his opinion along with supporting documents (Page 121 – 275 of the Appeal), the Appellants had merely opted to file a 5-Page Reply (Pg 278 – 283 of the Appeal) before the learned Adjudicating Authority, without any supporting documents or explanations as to why the same were not fraudulent in nature. Further, prior to forming a determination as to whether the said acts were fraudulent or not under the provisions of the Code, and that before filing an appropriate application before the learned Adjudicating Authority, the Liquidator had duly sent an e-mail dated 27.07.2022 marked to the Appellants requesting for supplying the information and documents required regarding the suspected transactions (Page No 224 of the Appeal), to which the Appellants vide their e-mail dated 28.07.2022 (Pg. 226 of the Appeal) responded by merely stating that all informations had already been provided and contending that the same was harassment and expressed their intention not to attend the said meeting on 29.07.2022. Since the appellants had voluntarily chosen not to provide any explanation to the Liquidator, the

Liquidator, acted based on the material he had, formed the determination that the said transactions were clearly transactions which were carried with an intent to defraud the creditors. He has also argued that the payments made in the absence of any vouchers, ledgers, or any supporting documents, especially after the service of the demand notice by the operational creditor, are to be held to be fraudulent because the appellants had carried out such transactions, knowing fully well that the admission of the Corporate Debtor into CIRP. The mere fact that the transactions have been done through banking channels, that itself will not make such transactions genuine, especially when there is a complete absence of vouchers, bills, and other proof regarding the reasons for such payments. More particularly, when such evidence were also not adduced before the learned NCLT. In the absence of there being any such documents, to substantiate that such payments and the explanations to establish that they are not fraudulent, and particularly in the absence of such pleading being taken before the learned Tribunal, seeking time to produce such evidence by the Appellant, it will have to be accepted that the conclusion of the learned Tribunal is correct.

11. The Respondent further contended that immediately after the commencement of CIRP, the two new bank accounts standing with Axis Bank Limited and People's Cooperative Bank, were deliberately opened

maliciously intended to divert the receivables of the Corporate Debtor, that the Appellants have failed to demonstrate that the business and the customer base of the Corporate Debtor and that of the partnership were separate. Moreover, the Liquidator had even personally contacted certain customers of the Corporate Debtor who had made payments to these new bank accounts, they divulged to be unaware of the commencement of CIRP proceedings and further that TDS with respect to those payments was deducted into the account of the Corporate Debtor and it shows that the payment into those new accounts was actually intended for the Corporate Debtor.

12. Regarding the sale of the vehicle, he has submitted that the documents that were submitted in support of their claim are being produced for the first time only now before this Appellate Tribunal and that the Appellants should have explained as to why they could not produce it before the learned NCLT, and as to how they got access suddenly to the accounts of the Corporate Debtor. Further, the Appellants have misrepresented before the former RP that the vehicle was scrapped, instead it was actually sold by the Appellants and that their conduct itself points and establishes to their fraudulent intentions. He has further submitted that despite sufficient time being granted to the appellants to file the reply, and to file documents to disprove the determination made by the liquidator,

contrary to their pleadings before this Appellate Tribunal. He has further stated that there is no mandatory requirement under the Code or the Regulations framed thereunder, to appoint a forensic auditor for the purpose of Section 66 of the I & B Code proceedings and that the code and the regulations itself casts the duty on the RP to form his/her opinion on the existence of PUFÉ(Preferential, Undervalued, Fraudulent and Extortionate) transactions and therefore, when the liquidator himself based on the documentary evidence was clearly able to make a determination regarding existence of such PUFÉ transactions, thus there was no requirement for appointment of a Forensic auditor.

13. He has finally submitted that the Appellants have not questioned the findings and the observations made by the learned Adjudicating Authority in Paragraph 14 of the impugned order regarding the conduct of the Appellants in attempting to break open the lock and in removing certain crucial files for which an appropriate police complaint had been lodged, in their pleadings in the instant Company Appeal, and therefore it has to be accepted that the learned Adjudicating Authority had, on the basis of the documentary evidence on record and in the absence of any evidence to the contrary produced by the Appellants, passed a well-reasoned order holding that, the Appellants herein had indulged in established fraudulent transactions and that both the Appellants are liable to pay the amounts as

claimed in the Application jointly and severally, and hence the Appeal deserves to be dismissed.

14. The primary issue for consideration before the learned NCLT was, as to whether the Appellants herein indulged in fraudulent transactions and were liable to pay the amount as claimed in the application. It is seen that the learned NCLT has gone into the details of the application and transactions, and its then only has made a detailed analysis of the facts which were presented before it on each of the items, i.e., sale of the car, withdrawals made from the bank accounts of the Corporate Debtor, without being supportedly corresponding vouchers and opening of new Bank accounts and diverting the receipts of the Corporate Debtor and has rightly come to a reasoned conclusion about each item. The submissions of the Appellants have also been recorded in the impugned order. Nowhere, the Appellants, during the course of proceedings of the learned NCLT, appears to have requested for time to produce documents, which they have produced for first time before this Appellate Tribunal. Further, no explanation whatsoever has been shown to have been offered by the appellants. Nowhere the Appellants have been shown to have prayed before NCLT for to have an access to the documents to prove their innocence. Besides making a lame excuse that they were not given an opportunity to defend themselves by the learned NCLT, they have not been able to point

out a single instance where they were denied a fair chance of representation.

15. Further, there is no explanation forthcoming from the Appellants on the observations of the learned NCLT regarding the acts of removing the files and the attempt to break open the lock of the Corporate Debtor's office.

16. Regarding the allegation of the Appellants that the learned Tribunal has erred in deciding that the transactions of the Appellant is fraudulent without proper evidences, it is to be noted that the Appellants have attempted to introduce new evidence at this stage, to be appreciated and considered by this Appellate Tribunal. It is a settled principle under Order XLI Rule 27 of CPC, that production of additional evidence, whether oral or documentary, is permitted before the Appellate Court only under three circumstances which are: -

- (I) Where the trial Court had refused to admit the evidence though it ought to have been admitted;
- (II) the evidence was not available to the party despite exercise of due diligence; and
- (III) the appellate Court required the additional evidences so as to enable it to pronounce judgment or for any other substantial cause of like nature. Appreciation of additional evidence cannot be

allowed if the appellant has not been diligent in producing the relevant documents before the lower court, subject to exceptions as laid down in CPC.

17. In the matter of Union of India v. Ibrahim Uddin & Another, as reported in (2012) 8 SCC 148, the Hon'ble Apex Court has held as under: -

“36. The general principle is that the appellate court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order 41 Rule 27 CPC enables the appellate court to take additional evidence in exceptional circumstances. The appellate court may permit additional evidence only and only if the conditions laid down in this Rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, the provision does not apply, when on the basis of the evidence on record, the appellate court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the Rule itself. (Vide K. Venkataramiah v. A. Seetharama Reddy AIR 1963 SC 1526, Municipal Corpn. of Greater Bombay v. Lala Pancham AIR 1965 SC 1008, Soonda Ram v. Rameshwarlal (1975) 3 SCC 698 and Syed Abdul Khader v. Rami Reddy (1979) 2 SCC 601.)

37. The appellate court should not ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the court can, in

such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. (Vide Haji Mohammed Ishaq v. Mohd. Iqbal and Mohd. Ali and Co. (1978) 2 SCC 493)

38. Under Order 41 Rule 27 CPC, the appellate court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate court is empowered to admit additional evidence. (Vide Lala Pancham [AIR 1965 SC 1008] .)

39. It is not the business of the appellate court to supplement the evidence adduced by one party or the other in the lower court. Hence, in the absence of satisfactory reasons for the non-production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this Rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. (Vide State of U.P. v. Manbodhan Lal Srivastava [AIR 1957 SC 912] and S. Rajagopal v. C.M. Armugam [AIR 1969 SC 101] .)

40. The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or

that the party did not realise the importance of a document does not constitute a “substantial cause” within the meaning of this Rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.”

18. In the instant company appeal, the new documents that were sought to be produced for the first time for appreciation were the documents which were available during the proceedings before the learned NCLT, and yet they were not filed by the Appellants. When these documents were not filed before the learned Adjudicating Authority, in that eventuality, this Appellate Tribunal cannot entertain the same documents filed as evidence for deciding the Company Appeal as they don't fall under any of the exceptions culled out under Order 41 Rule 27 of CPC, the principles of which would appreciate as per sub section 2 of Section 424 of the Companies Act, 2013.

19. In the matter of Jayesh Sanghrajka v. Divine Investments, relied by the appellants, the ratio of the same can't be applied to this case as under **Section 66 of the IBC**, the onus is on the applicant to establish that the business of the Corporate Debtor was not conducted with an intent to defraud creditors or for fraudulent purposes. In the instant case, the Liquidator has found certain established fraudulent transactions and the fraudulent intent of the Appellants were proved behind these transactions.

The Appellants did not avail of the opportunity given by the Liquidator to produce the evidence in his support, which they now seek to produce. They also, for the reasons best known to themselves, did not produce such evidence before the learned NCLT. Thus, it has to be held that the learned NCLT has rightly allowed the application, holding that the evidence presented did substantiated the determination of fraudulent transaction as envisaged under Section 66 of the IBC.

Owing to the above, the impugned order passed by the learned NCLT does not call for any interference by this Appellate Tribunal. The Appeal lacks merits and the same is accordingly dismissed. All the pending Interlocutory Applications would stand closed.

[Justice Sharad Kumar Sharma]
Member (Judicial)

[Jatindranath Swain]
Member (Technical)

23.09.2025
AR/MS/AK