

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 1606 of 2024
& I.A. No. 5859 of 2024**

[Arising out of Order dated 12.06.2024 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench (Court-II) in IA No.3602 of 2022 in CP (IB) No.50(PB)/2021]

IN THE MATTER OF:

Rakesh Arora & Anr.

...Appellants

Versus

Acute Daily Media Pvt. Ltd. & Ors.

...Respondents

Present:

For Appellants: Mr. Rohit Gandhi, Ms. Akshita Nigam, Advocates.

For Respondents:

**Company Appeal (AT) (Insolvency) No. 1608 of 2024
& I.A. No. 5865 of 2024**

[Arising out of Order dated 12.06.2024 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench (Court-II) in IA No.3602 of 2022 in CP (IB) No.50(PB)/2021]

IN THE MATTER OF:

Rockman Advertising & Marketing (India) Ltd.

...Appellant

Versus

Acute Daily Media Pvt. Ltd. & Ors.

...Respondents

Present:

For Appellant: Mr. Sakal Bhushan, Ms. Vasu Bhushan, Mr. Nipun Bhushan, Advocates.

For Respondents: Ms. Eshna Kumar, Mr. Harpreet Singh Malhotra, Advocates for R-8 to 15.

J U D G M E N T
(07th March, 2025)

Ashok Bhushan, J.

These two Appeals have been filed challenging the same order dated 12.06.2024 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench, Court-II in Company Petition (IB) No.50 (PB) 2021. By the impugned order, the Adjudicating Authority allowed the IA No.3602 of 2022 filed under Section 65 of the IBC and has also recalled the order dated 17.05.2022 admitting Section 7 application filed by the financial creditor. Vide impugned order, Show Cause Notice was issued on the financial creditors- M/s. Acute Daily Media Pvt. Ltd. & Ors. as to why penalty as stipulated under Section 65(1) should not be imposed. Company Appeal (AT) (Ins.) No.1608 of 2024 has been filed by Rockman Advertising and Marketing (India) Ltd., a shareholder of M/s. Sharp Eye Advertising Pvt. Ltd.- the corporate debtor. Company Appeal (AT) (Ins.) No.1606 of 2024 has been filed by two Appellants who had filed the application for intervention in IA No.3602 of 2022. Prayers made in both the appeals are to the limited extent which we shall notice hereinafter. It shall be sufficient to refer the pleadings and facts in Company Appeal (AT) (Insolvency) No.1608 of 2024 for deciding both the appeals.

2. Brief facts of the case giving rise to these appeals are as follows:-

2.1. An application under Section 7 was filed by Respondent Nos.1 to 6 claiming to be financial creditors of corporate debtor- M/s. Sharp Eye Advertising Pvt. Ltd. Section 7 application alleged debt and default on the

corporate debtor. The Adjudicating Authority vide order dated 17.05.2022 admitted Section 7 application and initiated CIRP process against M/s. Sharp Eye Advertising Pvt. Ltd. After Section 7 application was admitted, an IA No.3602 of 2022 was filed by Appellant- Rockman Advertising and Marketing (India) Ltd. claiming to be majority shareholder of the corporate debtor. In the application IA No.3602 of 2022, following prayers were made:-

“a) "Call for record of CP (IB) No. 50(PB)/2021 decided on 17.05.2022 by this Hon'ble Tribunal;

b) Pass an interim Order staying the CIRP proceedings- till the final disposal of this Application disclosing prima facie fraud: played upon the Hon'ble Tribunal, in order to avoid multiplicity of proceedings;

c) Impose a penalty of Rs. One Crore on each of the Respondents in exercise of the powers vested in it under Section 65 IBC for initiating the CIRP of Corporate Debtor fraudulently, with malicious intent and for a purpose other than insolvency resolution of the Corporate Debtor;

d) Recall the Order dated 17.05.2022 (Annexure-1) obtained fraudulently by the Respondents from this Hon'ble Tribunal in CP (IB) No. 50(PB)/2021 as explained above;

e) Award exemplary and compensatory costs in favour of the Applicant whose decade long efforts since 2013 in the oppression and mismanagement petition were sought to be defeated by the Respondents by initiating the CIRP fraudulently;

f) Pass such other/ further orders, as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the instant case."

2.2. The Appellants claimed in the application that Section 7 application was filed fraudulently with malicious intent by financial creditors in collusion with the corporate debtor and its directors. It was pleaded that the corporate debtor and its promoters were previously subject to an oppression and mismanagement petition filed by the shareholders in 2013 where grievance was raised regarding decrease of the shareholding from 62.57% to 17.86%. It was pleaded by the appellants that appellant claim to know about the initiation of the CIRP on 26.05.2022 and thereafter filed the application. We need not notice various other allegations in the application since the issue raised in the appeals are limited as we shall notice hereinafter.

2.3. An intervention petition being IA No.36 of 2022 was filed by Rakesh Arora and Ors. in IA No.3602 of 2022. Adjudicating Authority heard the parties on IA No. 3602 of 2022 as well as intervention petition and by order dated 10.09.2024, allowed the application and recalled the order dated 17.05.2022 held that the CIRP was initiated fraudulently. It is useful to notice paragraphs 16, 17 and 18 of the impugned order:-

"16. To sum up, we are of the considered view that the aforementioned insolvency proceedings in C.P.(IB)-50(PB)/2021 resulting in our order dated 17.05.2022 were initiated fraudulently and with

malicious intent for a purpose other than the resolution of the insolvency of the Corporate Debtor.

17. As a sequel, we recall the order dated 17.05.2022 initiating CIRP of the Corporate Debtor, obtained fraudulently from the Tribunal in C.P.(IB)-50(PB)/2021. The RP is directed to hand over the control and custody of the corporate debtor and its assets to the erstwhile management. The Financial creditors/Applicants in the C.P. (IB)-50(PB)/2021 are directed to pay the CIRP costs incurred so far within 7 days of this order.

18. Regarding action under Section 65(1) of IBC 2016, we deem it appropriate to issue a Show Cause Notice, under Rule 59 of the National Company Law Tribunal Rules, 2016 to the Financial Creditors M/s. Acute Daily Media and Ors. through its Directors as to why penalty as stipulated under Section 65(1) of IBC, 2016 should not be imposed on it. The notice is made returnable on 09.09.2024. Learned Registrar NCLT would serve Show Cause Notice under Section 65(1) of IBC, 2016 read with Rule 59 of the National Company Law Tribunal Rules, 2016 upon M/s Acute Daily Media and other financial creditors calling upon them to explain and submit in writing as to why the penalty as stipulated under Section 65(1) of IBC, 2016 should not be imposed on them.”

2.4. Company Appeal (AT) (Insolvency) No.1608 of 2024 has been filed on 12.08.2024 praying for following reliefs:-

“i. Modify the impugned order dated 12.06.2024 to the extent that it does not impose any penalty under S. 65, IBC on the R. Nos. 1-6 (alleged FCs) and R. Nos. 8-15 (promoters of CD) despite agreeing to and accepting all the allegations levelled by the Appellant and reaching the conclusion that "insolvency proceedings in C.P.(IB)-50(PB)/2021 resulting in our order dated 17.05.2022 were initiated fraudulently and with malicious intent for a purpose other than the resolution of the insolvency of the Corporate Debtor":

ii. Impose a penalty of Rs. One Crore on each of the R. Nos. 1-6 (alleged FCs) and R. Nos. 8-15 (promoters of CD) under S. 65, IBC since it already stands that the Respondents initiated CIRP of the CD fraudulently, with malicious intent and for a purpose other than resolution of insolvency of the CD;

iii. Award exemplary and compensatory costs in favour of the Appellant whose decade long efforts since 2013 in its oppression and mismanagement petition were sought to be defeated by the Respondents by initiating the CIRP fraudulently; and/or

iv. Pass any such other or further orders as this Hon'ble Appellate Tribunal may deem fit and proper in the facts and circumstances of the instant case.”

2.5. In Company Appeal (AT) (Insolvency) No.1606 of 2024, similar prayers have been made to the following effect:-

“(i) Modify the impugned order dated 12.06.2024 to the extent that it does not impose any penalty under S. 65, IBC on the Respondent Nos. 1 to 6 (alleged Financial Creditors) and Respondent Nos.8 to 15 (promoters of Corporate Debtor)

(ii) Impose a penalty of Rs. One Crore on each of the Respondent Nos. 1 to 6 (alleged Financial Creditors) and Respondent Nos. 8 to 15 (promoters of Corporate Debtor) under Section 65, IBC;

(iii) Award exemplary and compensatory costs in favour of the Appellant; and/or

(iv) Pass any such other/ further orders, as this Hon'ble Appellate Tribunal may deem fit and proper in the facts and circumstances of the instant case.”

2.6. Notices were issued in these appeals and both the parties were heard.

2.7. It is relevant to notice that against order dated 12.06.2024 passed by the Adjudicating Authority in IA No.3602 of 2022, Company Appeal (AT) (Insolvency) No. 1480 of 2024 has been filed by financial creditors Respondent Nos.1 to 6 to this appeal which appeal was heard and dismissed by judgment and order of this Tribunal on 16.01.2025.

3. Counsel for the Appellants challenging the impugned order has contended that the Adjudicating Authority after having found that Section 7 application was initiated fraudulently, Adjudicating Authority ought to have imposed the penalty on the financial creditors as well as on the promoters of the corporate debtor to the extent of Rs.1 Crore each and the Adjudicating

Authority instead of imposing penalty has directed for issuance of notice to the financial creditors only. It is contented that the financial creditor having initiated the proceedings in collusion with the promoters of the corporate debtor, penalty was liable to be imposed both on financial creditors as well as promoters of the corporate debtor. It is further contended that Rule 59 of the NCLT Rules, 2016 which is relied for issuance of notice is not applicable. It is further submitted that the findings of the Adjudicating Authority that the CIRP has been initiated by the financial creditor fraudulently having been affirmed by this Tribunal vide its judgment dated 16.01.2025, both financial creditors and the promoters are liable to be penalised. The expression “initiates” employed in Section 65 of the IBC is not confined only to the alleged creditors who file an application under Section 7 or 9 but the same is broad enough to include within its sweep all other persons like promoters etc. who collude/conspire with the alleged creditors in formally filling the application. There is no legislative intent in Section 65 to issue any further notice to a wrongdoer after finding him guilty have been arrived at in Section 65. Counsel submits that in the facts of the present case, this Tribunal may allow the appeal and impose the penalty on the financial creditors Respondent Nos.1 to 6 as well as Respondent Nos. 7 to 15 promoters of the corporate debtor which may serve as a deterrent to others as well and preserve the sanctity of the machinery established under the IBC.

4. Counsel for the promoters has opposed the above submissions and submits that penalty under Section 65 can be imposed only on financial

creditors who has initiated the proceedings. Section 65 does not indicate that on the promoters' penalty can also be imposed. It is further submitted that the Adjudicating Authority in the impugned order dated 12.06.2024 has not returned any finding regarding collusion of the promoters. Allegations made against the promoters are denied. Adjudicating Authority itself having not found sufficient material to issue notice against the promoters, Appellants' contention that promoters be also penalised is without any basis. Scope of Section 65 does not include collusion. There is no direct evidence to establish that answering respondent conspired and colluded with Respondent Nos.1 to 6 in initiation of the CIRP.

5. We have considered the submissions of the counsel for the parties and perused the record.

6. The submission which has been advanced by the counsel for the parties is with regard to interpretation of Section 65 of the IBC. Section 65 of the IBC provides as follows:-

“65. Fraudulent or malicious initiation of proceedings. - (1) *If, any person initiates the insolvency resolution process or liquidation proceedings fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, as the case may be, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.*

(2) *If, any person initiates voluntary liquidation proceedings with the intent to defraud any person,*

the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees but may extend to one crore rupees.

[(3) If any person initiates the pre-packaged insolvency resolution process—

(a) fraudulently or with malicious intent for any purpose other than for the resolution of insolvency; or (b) with the intent to defraud any person, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees, but may extend to one crore rupees.]”

7. The expression “initiation date” has been defined in Section 5(11) which is to the following effect:-

“5. Definitions. – (11) “initiation date” means *the date on which a financial creditor, corporate applicant or operational creditor, as the case may be, makes an application to the Adjudicating Authority for initiating corporate insolvency resolution process [or pre-packaged insolvency resolution process, as the case may be]”*

8. “Initiation date” has been defined in Section 5(11). From the definition of “initiation date”, it is clear that initiation is by a financial creditor, corporate applicant or operational creditor only. In Section 65 of the IBC when we examine the expression *“if any person initiates the insolvency resolution process fraudulently or with malicious intent for any purpose other than for resolution of insolvency”*, the focus is on the person who initiates the

insolvency resolution process. We, in the present case, are concerned with initiation of insolvency resolution process under Section 7. Insolvency resolution process can be initiated under Section 7, 9 and 10 which is also clear from definition of “initiation date” under Section 5(11) and the scheme of the IBC as captured by Sections 7, 9 and 10. No other person is entitled to initiate insolvency resolution process except financial creditor, operational creditor or corporate applicant. The heading of Section 65 also provides “*fraudulent or malicious initiation of proceedings*”. The use of expression “impose upon such person a penalty” in sub-section (1) of Section 65 obviously relates to the person who has initiated the insolvency resolution process. The submission of the appellant is that the promoter should also be treated in whose collusion the proceedings initiated by financial creditors needs consideration. Counsel appearing for the promoters has refuted the contention that any collusion was found with the promoters. It is not necessary for us to enter into issue as to whether there is any finding of collusion in the order of the Tribunal or this Tribunal dismissing the appeals. We need to examine the statutory scheme under Section 65, unless the promoters can also be covered under the statutory scheme, the prayer of the appellants to impose penalty on the promoters cannot be accepted. Section 65 is a penal provision. Hon’ble Supreme Court in AIR 1954 SC 496-
“Tolaram Relumal and Anr. vs. State of Bombay” laid down:-

“.....if two possible and reasonable constructions can be put upon a penal provision, the Court must lean towards that construction which exempts the subject

from penalty rather than the one which imposes penalty.”

9. It is not competent to the court to stretch the meaning of expression used by the legislature in order to carry out the intention of legislature. Even the literal construction of Section 65 does not contemplates that penalty can be imposed on any person other than one who has fraudulently or maliciously initiated the proceedings. It is well settled that penal statute are to be strictly construed. We may refer to the judgment of the Hon’ble Supreme Court in **“(2013) 8 SCC 71- Aparna A. Shah vs. Sheth Developers Pvt. Ltd. & Anr.”** where in reference to Section 138 of the NIA Act, the Hon’ble Supreme Court has occasion to consider the construction of penal provision. In paragraphs 15 & 16, following was laid down:-

“15. In S.K. Alagh v. State of U.P. [(2008) 5 SCC 662 : (2008) 2 SCC (Cri) 686] this Court held: (SCC p. 667, para 19)

“19. ... If and when a statute contemplates creation of such a legal fiction, it provides specifically therefor. In absence of any provision laid down under the statute, a Director of a company or an employee cannot be held to be vicariously liable for any offence committed by the company itself. (See Sabitha Ramamurthy v. R.B.S. Channabasavaradhya [(2006) 10 SCC 581 : (2007) 1 SCC (Cri) 621] .)”

16. In Sham Sunder v. State of Haryana [(1989) 4 SCC 630 : 1989 SCC (Cri) 783] , this Court held as under: (SCC p. 632, para 9)

“9. ... The penal provision must be strictly construed in the first place. Secondly, there is no vicarious liability in criminal law unless the statute takes that also within its fold. Section 10 does not provide for such liability. It does not make all the partners liable for the offence whether they do business or not.”

10. Section 65 of the IBC being a penal statute, it is required to be strictly construed and as observed above even a literal reading of Section 65 which is a golden rule of construction of statutory statute, no interpretation can be put on the provisions of Section 65 that penalty can be imposed on any other person except those who have initiated insolvency resolution process fraudulently or maliciously. We, thus, do not accept the submission of the appellant that in exercise of jurisdiction under Section 65, promoters are also need to be penalised.

11. The next submission which has been pressed by the Appellant is that the Adjudicating Authority by the impugned order has issued notice to the financial creditors which is clear from direction under paragraph 18 as extracted above. It is submitted that the Adjudicating Authority has referred to Rule 59 of the NCLT Rules, 2016 for issuance of notice which Rule is not applicable. Rule 59 of the NCLT Rules deals with procedure for imposition of penalty under the Act. Rule 59 is as follows:-

“59. Procedure for imposition of penalty under the Act.- (1) Notwithstanding anything to the contrary contained in any rules or regulations

framed under the Act, no order or direction imposing a penalty under the Act shall be made unless the person or the company or a party to the proceeding, during proceedings of the Bench, has been given a show cause notice and reasonable opportunity to represent his or her or its case before the Bench or any officer authorised in this behalf.

(2) In case the Bench decides to issue show cause notice to any person or company or a party to the proceedings, as the case may be, under sub-rule (1), the Registrar shall issue a show cause notice giving not less than fifteen days asking for submission of the explanation in writing within the period stipulated in the notice.

(3) The Bench shall, on receipt of the explanation, and after oral hearing if granted, proceed to decide the matter of imposition of penalty on the facts and circumstances of the case.”

12. Counsel for the Appellant is right in his submission that the expression “Act” used in Rule 59 has to take colour from the definition as given in Rule 2. Rule 2(1) defines the “Act” in following manner:-

“2. Definitions.- (1) “Act” means the Companies Act, 2013 (18 of 2013);

13. When we read Rule 59 read with definition under Rule 2(1) of the NCLT Rules, 2016, it is clear that Rule 59 is procedure for imposition of penalty under the Companies Act, 2013. Under the Companies Act 2013, there are various provisions like Sections 229, 237, 446B and 455A under

which penalty can be imposed. Rule 59, thus, strictly is to confine only with procedure while imposing penalty under the Companies Act, 2013.

14. Admittedly, show cause notice was issued to the financial creditors in pursuance to the order dated 12.06.2024. The financial creditors to whom the notice has been issued are not aggrieved by the issuance of notice and it is the appellant who has challenged the issuance of notice by the Adjudicating Authority in paragraph 18 of the order.

15. As observed above, although Rule 59 is not applicable while issuing notice of penalty under Section 59 and it was open for the Adjudicating Authority to impose penalty under Section 65 without issuing any notice to the financial creditors on the basis of materials on record. However, fact remains that by the impugned order penalty was not imposed. Adjudicating Authority having returned finding that the CIRP was initiated fraudulently, it is for the Adjudicating Authority to impose penalty under Section 65. We are not persuaded to accept the submission of the Appellant that this Tribunal in exercise of jurisdiction in this appeal may impose the penalty on the financial creditors. Issuance of notice being not precluded by any statutory provisions, in event the Adjudicating Authority has called the financial creditors to show cause, no exception can be taken to the said procedure adopted by the Adjudicating Authority. We, however, are of the view that it is the Adjudicating Authority who has to take a decision on the penalty in reference to the order dated 12.06.2024 passed by the Adjudicating Authority. We, thus, are of the view that the prayers of the appellant that this Tribunal may in this appeal modify the order dated

12.06.2024 and impose the penalty cannot be accepted. We, however, observe that the Adjudicating Authority may proceed to pass an appropriate order with regard to penalty on the financial creditors in continuation of the order dated 12.06.2024 and in accordance with law.

16. With these observations and directions, we dispose off both the appeals.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

New Delhi
Anjali