

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Insolvency) No. 498 of 2019

**[arising out of Order dated 16th April, 2019 by NCLT, Bengaluru Bench,
in I.A. Nos. 446 of 2018 in CP (IB) No. 122/BB/2017]**

IN THE MATTER OF:

Mr. M. Srinivas

No. D26, Golden Corner Apartments
Belangur Gate, Sarjapur Road, Near Belandur Gate
Bangalore – 560 003

...Appellant

Versus

Smt. Ramanathan Bhuvaneshwari

Resolution Professional,
M/s Bhuvana Infra Projects Private Limited
Flat No. 528, K.R. Garden, First Floor,
6th Block, Koramangala,
Bangalore

...Respondent No. 1

Mr. Pratap Kundra

6-3-1096, FNOL 304 V.V. Vintage,
Somajiguda Hyderabad- 500082,
Telangana, India

...Respondent No. 2

Mr. C.D. Sanjay Raj

No.4, Benson Road, Benson Town,
Bangalore- 560046, Karnataka

...Respondent No. 3

Mr. L. Ramesh

#230, 4th Cross, Bellandur,
Bangalore South- 560103,
Karnataka

...Respondent No. 4

Mr. B.R. Rajashekar

No. 20, 12th Cross, RMVInd Stage,
Gedalahalli, Sanjay Nagar,
Bangalore- 560094, Karnataka

...Respondent No. 5

M/s Commune Properties India Pvt. Ltd.

823, 21st Main Road 8th Block,
Koramangala, Bangalore,
Karnataka- 560095

...Respondent No. 6**M/s Prisha Properties India Pvt. Ltd.**

1st Floor, Vikas Tower, Castle Street,
Ashok Nagar, Bangalore,
Karnataka- 560025

...Respondent No. 7**M/s Golden Gate Properties Ltd.**

#820, 80 Feet Road, 20th Main,
8th Block, Koramangala, Bangalore,
Karnataka- 560095

...Respondent No. 8**Mr. Jayatheerthak.B**

NO-337/1A, 18th Cross Upper Place
Orchards, Sadashivanagar,
Bengaluru- 560080

...Respondent No. 9**Present:**

For Appellant : **Mr. Ashish Rana and Mr. Surekh Baxy, Advocates**

J U D G M E N T**SUDHANSU JYOTI MUKHOPADHAYA, J.**

In the ‘Corporate Insolvency Resolution Process’ against M/s. Bhuvana Infra Projects’, the ‘Resolution Professional’ brought to the notice of the Adjudicating Authority (National Company Law Tribunal), Bengaluru Bench that the promoters of the ‘Corporate Debtor’ and its company defrauded a number of creditors of more than crores of rupees. The Adjudicating Authority by impugned judgment dated 16th April, 2019 dispose of

Interlocutory Application in exercising of power conferred u/s 213 of the Companies Act, 2013, with following directions:

“19. *In the result by exercising powers conferred on this Adjudicating Authority, which being NCLT, U/s 213 of Companies Act, 2013, I.A. No. 446/2018 in C.P. (IB) No. 122/BB/2017 is disposed with the following directions :*

- 1) *Learned Resolution Professional is directed to forward all material documents, which is connected to the present case including the Forensic Audit Report dated 14.12.2018, the Central Government, within a period of three weeks from the receipt of the copy of the order.*
- 2) *Learned Resolution Professional is also directed to furnish all the documents forwarded to the Central Government, to all parties/other side duly following principles of natural justice.*
- 3) *The Central Government is directed to refer the matter to the SFIO for further investigation into the Affairs of the Corporate Debtor, Bank of Maharashtra and other related Companies including Director of Companies of Corporate Debtor & related Companies and officials of*

Bank of Maharashtra basing on the Report of Forensic Audit Report, as expeditiously as possible.

- 4) Bank of Maharashtra is also directed to extend full assistance to the SFIO to complete the investigation as expeditiously as possible.*
- 5) The parties are liberty to take appropriate legal course of action basing on the ultimate findings given by the SFIO in this case.*
- 6) The prayer as sought for the application stand disposed of in the light of above directions.*
- 7) No order as to costs.”*

2. The Appellant – ‘M. Srinivas’, majority shareholder of the ‘Corporate Debtor’ (3rd Respondent before the Adjudicating Authority) has challenged the order dated 16th April, 2019 on the ground that the Adjudicating Authority has no jurisdiction to pass order u/s 213 of the Companies Act, 2013

3. The question arises for consideration in this appeal is whether the ‘Adjudicating Authority’ which is ‘National Company Law Tribunal’ having dual jurisdiction under the ‘Companies Act, 2013’ and the ‘Insolvency and Bankruptcy Code, 2016’ can direct the Central Government to refer the matter to the ‘Serious Fraud Investigation Office’ (**SFIO**) for further investigation into the affairs of the ‘Corporate Debtor’, Bank of Maharashtra and other group of companies including the Directors of the companies of Corporate Debtor and group companies and officials of Bank of Maharashtra basing it on the ‘Forensic Audit Report’.

4. During the ‘Corporate Insolvency Resolution Process’, the ‘Resolution Professional’ of M/s. Bhuvana Infra Projects Pvt. Ltd. earlier filed an application (I.A. No. 269/2018) u/s 66 of the ‘Insolvency & Bankruptcy Code, 2016 (for short, ‘the **I&B Code**’) for recovery of Rs. 46 Crores from the ‘Groups of Companies’ and the Directors of the ‘Corporate Debtor’, the Adjudicating Authority by order dated 24th October, 2018 observed that the ‘Resolution Professional’ has not made out any *prima facie* case for alleged discrepancies under Section 66 of the I&B Code and there cannot be a parallel proceedings before the Tribunal and the Court.

5. Subsequently, the ‘Committee of Creditors’ appointed ‘Forensic Auditor’ to conduct a Forensic Audit Report and on receipt of the report, ‘Resolution Professional’ filed another I.A. No. 446 of 2018 under Section 66 read with Section 25(2), 69, 70 and other applicable sections of the ‘I&B Code’ *inter alia*’ seeking to attach the personal assets of one Mr. Pratap Kunda (who was the 1st Respondent) and Mr. Sanjay Raj (who was the 2nd Respondent) and Mr. M. Srinivas (who was the 3rd Respondent and Appellant herein) alleging that they are responsible for defrauding the creditors and in order to recover the total dues of Rs. 461,163,402/- by exercising power conferred on the ‘Adjudicating Authority’ / ‘National Company Law Tribunal’ and on the said application, the order has been passed referring the matter to the Central Government for investigation through SFIO. The appellant – ‘Mr. M. Srinivas has challenge the aforesaid order.

6. Learned counsel appearing on behalf of the Appellant submitted that the Adjudicating Authority has not been conferred with power u/s Section 213 of the Companies Act, 2013 in absence of any amendment made in

Schedule XI of the I&B Code. It was also submitted that the Adjudicating Authority has powers under Section 49, - “Transactions defrauding creditors” – which relates to undervalued transaction; Section 65, which provides action against any person who has done certain things fraudulently or with malicious intent during the ‘Insolvency Resolution Process’ or ‘Liquidation’; Section 66 in case during the ‘Corporate Insolvency Resolution Process’ or in ‘liquidation process’, it is found that any business of the ‘Corporate Debtor’ has carried out with the intent to defraud creditors and under Section 35 for the ‘Liquidator’ to investigate the affairs of the ‘Corporate Debtor’. This apart, action can be taken and punishment can be imposed by Special Court only under Section 68(b) of the I&B Code, Section 69, Section 71 and Section 74 of the ‘I&B Code’. According to the Appellant all the allegations are baseless and not based on record.

7. From the record, we find that the Adjudicating Authority having gone through the ‘Forensic Audit Report’ and observed:

“7. Following are the irregularities pointed out in the Forensic Audit Report:

a. Related Parties’ and individuals behind these Companies:

i. Corporate Debtor M/s. Bhuvana Infra Projects (BIPPL) M/s. Golden Gate Properties Ltd. (GGPL), M/s. Prisha Properties India Pvt. Ltd. (PPIL) and M/s. Commune Properties Pvt. Ltd.

(CPIL), New Age Properties LLP are part of the 56 Group Companies, which are Related Parties.

- ii. Mr. Prattap Kunda and Mr. Sanjay Raj are the individuals related to all the above Group/ Related Entities.*
- iii. Loan from HDB Financial Services being serviced by GGPL and PPIPL, also showing Group Company relationship between the entities and Corporate Debtor.*
- iv. Mr. Sanjay Raj is the 'Benami' Individual in whose name the properties are being purchased by the Group Companies.*

b. Loans availed from the Bank of Maharashtra (BOM) in a fraudulent manner and mis-utilisation of Cc facility:

- i. Few months Directorship to impress the Bank with Credentials of Group Entities: Mr. Sanjay Raj, the Director cum KMP of the Group became director of Corporate Debtor (BIPPL) for a period of five months only during which period the first tranche of CC limit of INR 500 Lakhs was*

availed from BoM by also providing personal guarantee and had hypothecated land in his name as collateral security.

- ii. *Mis-use of CC facility from BoM against the terms of sanction: The Cash Credit facility, meant for working capital, was mis-utilized by transfer to other bank accounts of BIPPL and in turn used for purchase of fixed assets for INR 79.50 Lakhs in contravention to the conditions of CC limit sanction. As per the loan sanction, the facility can be called back if there is violation in the utilization of funds.*
- iii. *Enhancing bank CC facility from Rs. 5 crores to Rs. 10 Crores to accommodate Fixed assets purchase in violation of Loan sanction Terms: BIPPL had applied for a term loan of INR 450 Lakhs with BoM in relation to setting up of a per-cast plant for the Commune 1 project under CPIPL in FY 2015-16. However, the term loan was rejected due to issues with the property pledged as collateral and the bank requesting additional security which BIPPL was not willing to give.*

Thus, it appears that during FY 2014-15 the CC facility from BoM was enhanced from INR 500 Lakhs to INR 1,000 Lakhs in order to potentially accommodate the setting up of Precast Plant which is in violation of the restrictive covenant of the loan.

- iv Further issue of shares from ICD from the group: During FY 2015-16, the Inter Corporate Deposit ("ICD") from PPIPL was used to allot an additional 37,00,000 shares to M. Srinivas taking the subscribed share capital to 50,00,000 shares.*

Therefore, RP is of the view that this done primarily to meet the capital adequacy ratio and the requirement of promoters' contribution for the enhanced CC facility.

- v. Inflating Revenue to avail CC limit enhancement:*

Revenue for FY 2014-15 inflated by INR 2,300.49 Lakhs through year-end adjustment entry. It may be noted that CC limit enhanced by BoM from 500

Lakhs to 1,000 Lakhs in FY 2015-16, apparently based on the financial for 2014-15.

- vi Surge in Financials in 2014-15 to facilitate enhancement: The auditors observed in FY 2014-15, when then enhancement of the CC facility from INR 500 Lakhs to INR 1,000 Lakhs, a surge in revenue, profit, and inventory and a reduction in debtors.*

c. Financial Irregularities in the conduct of business of CD:

- i. Identified cash deposits of INR 171.95 Lakhs into and cash withdrawals of INR 165.81 Lakhs from the bank accounts of BIPPL. The transactions pattern indicates that these could potentially be diversion of funds for generation of unaccounted cash.*
- ii. Identified purchases of INR 1,881.55 Lakhs from non-OEM, small time vendors and traders, which appears to be suspicious.*
- iii. Parking of funds of INR 346.66 Lakhs with contactors through potentially*

fictitious suspense account in FY 2013-14 and subsequently written-off the books of accounts of BIPPL in FY 2016-17.

d. Round Tripping Transaction:

- i. Identified round tripping transactions form the bank accounts of BIPPL for INR 779.00 Lakhs which could potentially be accommodation entries.*

e. Asset Stripping:

- i. Inventory worth INR 941.23 Lakhs written-off during FY 2017-18 without any documentation and/or revenue being recognized.*
- ii Fixed assets sold to scrap dealers, resulting in INR 579.00 Lakhs of fixed assets being written-off in the books of BIPPL during FY 2016-17.*

f. Anomalies in Accounting and Audited Financial Statements:

- i. Revenue for FY 2014-15 inflated by INR 2,300.49 lakhs through year-end adjustment entry. It may be noted that CC limit enhanced by BoM from 500*

Lakhs to 1,000 Lakhs in FY 2015-16, apparently passed on the financial for 2014-15.

- ii. Revenue for FY 2015-16 written-off to the extent of INR 2,437.24 Lakhs through year-end adjustment entry. However, BOM enhanced CC limit from 1,000 Lakhs to 1,250 Lakhs in FY 2016-17.*
- iii. Revenue for FY 2016-17 written-off to the extent of INR 2,706.26 Lakhs through year end adjustment entry.*
- iv. Undue Benefit to the Statutory Auditor: Outstanding balance of INR 8.82 Lakhs of statutory auditor settled through transfer of plots worth Rs. 26 Lakhs to Miracle Pools Private Limited, an entity registered by the Auditor.*
- v. Variance in accounts receivable between financial statements of BIPPL and payables in the financial statements of customers of BIPPL.*

- vi *Revenue, cost and advances recognized for Golden Serenity project with no work order.*
- vii. *Cost recognized and advances given in relation to Golden County project with no work order with no revenue recognized.*
- viii. *Cash and other receipts of INR 44.91 Lakhs associated with ledger “GMD – Golden Days” in relation to work execution, with no work order and no revenue recognized; and*
- ix. *Arm’s length pricing not assessed while estimating costs and revenue for projects.*
- x. *Inflated value of work orders issued to BIPPL by customers of BIPPL in relation to projects Commune and Orchids.*

8 **Modus Operandi Adopted:** From the above observations of the Forensic audit Report, RP submits the following fraudulent intentions and actions:

- a. *The Corporate Debtor was set-up for fraudulent Purpose and to defraud the creditors: This Golden Gate Group of*

Companies with a fraudulent intention set up the CD for various fraudulent transactions, namely, to somehow avail bank loans, to generate unaccounted cash, to manage round tripping of funds with respect to group Companies businesses, for diversion of funds amounting to fraud, etc.

- b. *Wrong-Purpose shown to ensure loan sanction: The CD and its Directors applied for enhancement of CC facility for working capital with a fraudulent intention to use the same for purchase of Fixed Assets as the Term loan applied for Capex was rejected by Bank.*
- c. *Manipulated Financials to ensure loan sanction.*
- d. *Increased the losses in 2016-17 through fictitious transactions to reduce the statutory liability and also to justify default to banks.*

- e. *Liquidated Assets/Inventory in a planned manner in 2016-17 to make the Company a Shell.*
- f. *Facilitated to file u/s 7 of the Code with the sole aim to liquidate the CD: Mr. Sanjay Raj, one of the Common Directors in all the Group Companies resigned from directorship of all the customers of BIPPL i.e. GGPL, PPIPL, CPIPL and from New Age Properties LLP in 2017, the year when New Age Properties LLP filed an application on BIPPL under Section 7 of the IBC.*

Planned Resignation of original Shareholder cum Directors: To avoid responsibility on loans becoming NPA all Directors of CD resign around the same time in Feb/March 2017 and Dummy Directors were brought in to meet MCA requirement.

- g. Statutory Auditors of the Group-Companies used for the entire Modus Operandi: The Director cum Statutory Auditor of the Group Companies Mr.

Rajashekar and Mr. Jayatheertha, the Statutory Auditor have been used for their expertise to facilitate the entire modus operandi.

9) **Total Dues to the CD:**

As per the Audited Results as on 31st March 2018, The Corporate Debtor has overdues from its Group Companies, in the form of Receivable of Rs. 33.70 crores and dues towards Assets worth Rs. 1.52 Crores which were distributed to the Group Companies. Details are below:

<i>Group Company Name</i>	<i>Net Receivables (Rs.)</i>	<i>Assets of CD distributed to the Group Rs.</i>	<i>Total Dues (Rs.)</i>
<i>M/s. Commune Properties India Pvt. Ltd. (Respondent 6)</i>	46,322,665	13,375,380	59,698,045
<i>M/s. golden Gate Properties Ltd. (Respondent 8)</i>	41,804,526	1,801,180	43,605,706
<i>M/s. Prisha Properties India Pvt. Ltd. (Respondent 7)</i>	233,937,377		233,937,377
Total	322,064,568	15,176,560	337,241,128

10. Also as per Audited results for 2017-18, the rest of the assets shown in the books have been distributed to the Group Companies to the extent of Rs. 1,51,76,560/-(Rs. 1.52 Crores), Duly confirmed by the Director of the Company and the rest of the assets worth Rs. 7,441,849 is not found physically. Also, as pointed out in the audit report 2017/18 and also confirmed in the forensic audit report, the inventory of amount Rs. 941,23,192/- have been written off without any revenue recognized/no invoice raised.

Hence, the minimum amount due from the Group to the Corporate Debtor amounts to:

Sl. No.	Details	Amount overdue from Group (Rs.)	To be recovered from the Directors of CD (Rs.)	Total amount due (Rs.)
1.	Receivables overdue	322,064,5681		322,064,5681
2.	Assets with Group	15,176,560		15,176,560
3.	Assets not found		7,441,849	7,441,849
4.	WDV of Assets sold to scrap dealers and money siphoned off		22,357,233	22,357,233
5.	Inventory consumed, not invoiced		94,123,192	94,123,192
	Total dues from Group	337,241,128	123,922,274	461,163,403

9. The Appellant, who is the 3rd Respondent, was heard by the Adjudicating Authority, which has been recorded by the Adjudicating Authority as follows :

“3. *The application is opposed by the Respondent No. 3 by filing separate reply dated 20.03.2019 by inter alia contending as follows:*

- 1) *The instant application is not maintainable either in law or on facts, and thus it is liable to be dismissed in limine on this ground alone.*
2. *It is true that the Company M/s. Bhuvana Infra Projects was incorporated in the year 2011. However, it is not correct to state that it is a sub-contracting arm of its group Companies. The Companies has its own objects and functions within the ambit of objects as stated in the Memorandum & Article of Association. Hence, it is denied that the Company M/s. Bhuvana Infra Projects (herein after referred to as Company for brevity) exclusive for the group Companies obviously RP has not looked into the records and has made bald and frivolous allegations. It is asserted that the Application is the New Age Properties LLP itself is not a Group Company*

belied this claim. However, the RP is put to strict proof of the allegations made in this paragraph.

- 3) *It is admitted that the RP has to take control of all the assets of the Corporate Debtor but it is false to state that there are receivables overdue from the Group Companies. It is pointed out that the Tribunal rejected earlier I.A. NO. 269/2018 with an observation that the appropriate forum for initiating fraudulent actions is Criminal Court and also granted liberty to RP to initiate Criminal Proceedings in accordance with law.”*

10. We have heard the learned counsel for the parties and perused the record. As per Section 60(1) of the I&B Code the National Company Law Tribunal having territorial jurisdiction over the place where the registered office is located will be the Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors, as quoted below:

“60. (1) The adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal having territorial jurisdiction over the place where the

registered office of the corporate person is located.”

11. The provision aforesaid makes it clear that the National Company Law Tribunal is empowered to deal with insolvency resolution and liquidation for corporate persons including corporate debtor and others. Merely because additional power of Adjudicating Authority has been vested, the power of the National Company Law Tribunal under the Companies Act, 2013 does not stand extinguished.

12. In the case of “**Y. Shivram Prasad Vs. S. Dhanapal & Ors.**” - **Company Appeal (AT) (Insolvency) No. 224 of 2018 etc.**” disposed of on 27th February, 2019 the Appellate Tribunal held that the Adjudicating Authority has dual role of ‘Adjudicating Authority’ and ‘National Company Law Tribunal’ for the purpose of ‘I&B Code’.

13. Hon’ble Supreme Court in ‘**Swiss Ribbons Pvt. Ltd. & Anr.**’, - ‘2019 SCC Online SC73’ while dealing with the matter of settlement between the parties also observed that the ‘National Company Law Tribunal’ has inherent power under Rule 11 of the National Company Law Tribunal Rules, 2016.

14. Therefore, we hold that the ‘Adjudicating Authority’ which is the ‘National Company Law Tribunal’ has dual and interwoven role and power to pass order under Section 213 of the Companies Act, 2013 read with Rule 11 of the National Company Law Tribunal Rules, 2016.

15. Section 213 of the Companies Act, 2013 relates to ‘investigation into company’s affairs in other cases’ and reads as follows:

“213. Investigation into company’s affairs in other cases

The Tribunal may,—

- (a) on an application made by—*
 - (i) not less than one hundred members or members holding not less than one-tenth of the total voting power, in the case of a company having a share capital; or*
 - (ii) not less than one-fifth of the persons on the company's register of members, in the case of a company having no share capital, and supported by such evidence as may be necessary for the purpose of showing that the applicants have good reasons for seeking an order for conducting an investigation into the affairs of the company; or*
- (b) on an application made to it by any other person or otherwise, if it is satisfied that there are circumstances suggesting that—*
 - (i) the business of the company is being conducted with intent to defraud its creditors, members or any other person or otherwise for a fraudulent or unlawful purpose, or in a manner oppressive to any of its members or that the company was formed for any fraudulent or unlawful purpose;*

- (ii) *persons concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards the company or towards any of its members; or*
- (iii) *the members of the company have not been given all the information with respect to its affairs which they might reasonably expect, including information relating to the calculation of the commission payable to a managing or other director, or the manager, of the company, order, after giving a reasonable opportunity of being heard to the parties concerned, that the affairs of the company ought to be investigated by an inspector or inspectors appointed by the Central Government and where such an order is passed, the Central Government shall appoint one or more competent persons as inspectors to investigate into the affairs of the company in respect of such matters and to report thereupon to it in such*

manner as the Central Government may direct:

Provided that if after investigation it is proved that—

- (i) the business of the company is being conducted with intent to defraud its creditors, members or any other persons or otherwise for a fraudulent or unlawful purpose, or that the company was formed for any fraudulent or unlawful purpose; or*
- (ii) any person concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud,*

then, every officer of the company who is in default and the person or persons concerned in the formation of the company or the management of its affairs shall be punishable for fraud in the manner as provided in section 447.”

16. From Clause (b) of Section 213 of the Companies Act, 2013, it is clear that on an application made to it ‘by any other person’ or ‘otherwise’, if Tribunal/Adjudicating Authority is satisfied that there are circumstances suggesting that the business of the company is being conducted with intent to

defraud its creditors, members or any other person or otherwise for a fraudulent or unlawful purpose or in a manner oppressive to any of its members, or that the company was formed for any fraudulent or unlawful purpose and that the person concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards the company or towards any of its members or the members of the company have not given all the information with respect to its affairs which they might reasonably expect, and that the affairs of the company ought to be investigated, after giving a reasonable opportunity of being heard to the parties concerned, the Tribunal/Adjudicating Authority has power to refer the matter to the Central government for investigation into the affairs of the company.

17. Apart from the power conferred by Section 213 of the Companies Act, 2013, the 'National Company Law Tribunal' has inherent powers under Rule 11 of National Company Law Tribunal Rules, 2016. Therefore, in public interest, it is always open to the 'National Company Law Tribunal' after giving a reasonable opportunity of being heard to the parties concerned refer the matter to the Central Government for investigation, if the Tribunal/Adjudicating Authority forms a *prima facie* opinion that acts of fraud have been committed by company or group of companies or its Director(s) or officers. In the present case 'Forensic Audit Report' alleged that the members of the 'Corporate Debtor' and its 'Group Companies' along with officers of the 'Bank of Maharashtra' have committed certain fraud, which, *inter alia*, suggest that a sum of Rs. 3,172.25 Lakhs are receivable by the 'Corporate Debtor'. The Appellant and others were given reasonable opportunity of hearing by Adjudicating Authority. As such no

interference is called for against the impugned order. In absence of any merit, the appeal is dismissed. No cost.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice A.I.S. Cheema]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

New Delhi

24th July, 2019

/ns/