

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 574 of 2019

IN THE MATTER OF:

Mr. Lagadapati Ramesh

...Appellant

Vs.

Mrs. Ramanathan Bhuvaneshwari

...Respondent

Present: For Appellant: - Mr. Arun Kathpalia, Senior Advocate with Mr. Y. Suryanarayan, Advocate.

For Respondent: - Ms. R. Bhuvaneshwari, Resolution Professional.

Ms. Monalisa Kosaria and Mr. D. Abhinav, Advocates for R2.

Company Appeal (AT) (Insolvency) No. 592 of 2019

IN THE MATTER OF:

M/s. Commune Properties India Pvt. Ltd. & Ors.

...Appellants

Vs.

Smt. Ramanathan Bhuvaneshwari & Ors.

...Respondents

Present: For Appellants: - Mr. Rajshekhar Rao, Mr. R.V. Yogesh, Mr. Areeb Amanull and Ms. Anigdha Singh, Advocates.

For Respondents: - Ms. R. Bhuvaneshwari, Resolution Professional.

Mr. Y. Suryanarayan, Advocate for R5.

Mr. Mithun Shashank and Mr. Vikas Mehta, Advocates for R-9.

O R D E R

20.09.2019— In a ‘Corporate Insolvency Resolution Process’ against ‘M/s. Bhuvana Infra Projects Private Limited’ (‘Corporate Debtor’), the ‘Resolution Professional’ filed Interlocutory Application under Section 66 read with Sections 25(2), 69, 70 and other applicable Sections of the Insolvency and Bankruptcy Code, 2016 (“I&B Code” for short), *inter alia* seeking to attach the personal assets of Mr. Pratap Kunda, Mr. Sanjay Raj and Mr. Srinivas, who are responsible for defrauding the creditors, in order to recover the total dues of Rs.461,163,402/-. The ‘Resolution Professional’ brought it to the notice of the Adjudicating Authority (National Company Law Tribunal), Bengaluru Bench, the relevant facts thereof are quoted below:

“1) The Corporate Debtor M/s. Bhuvana Infra Projects is incorporated in the year 2011 and it is the sub – contracting Arm of its Group Companies and undertakes work contracts exclusively for its group Companies. The Group consists of 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 and other Companies.

This is visible from the complete Turnover of the Corporate Debtor with billing breakup of the Group is as below:

Sl. No.	Year	Respondent 7 M/s. Prisha Properties India Pvt. Ltd. (Rs.)	Respondent 6 M/s. Commune Properties (Rs.)	Respondent 8 M/s. Golden Gate Properties (Rs.)	Total as per Audited Financials (Rs.)
1.	2011-12	39,178,307	Nil	Nil	39,178,307
2.	2012-13	177,757,510	Nil	Nil	177,757,510
3.	2013-14	368,183,037	43,211,743	46,021,782	457,416,562
4.	2014-15	500,076,670	155,746,475	344,831,376	1,000,654,522
5.	2015-16	95,241,321	210,422,005	470,192,235	775,855,561
6.	2016-17	23,739,714	29,576,977	347,863,430	414,855,234
7.	2017-18	21,945,758	65,117,153	37,681,398	124,744,309
	Total	1,226,122,317	504,074,353	1,246,590,221	2,990,462,005

2. The ‘Resolution Professional’ further submitted that the ‘Corporate Debtor’ presently does not carry any business activity and hence the company is made a Shell Company with no employees, no business and no assets.

3. It was alleged that the ‘Resolution Professional’ though was entitled to take control and custody of all the assets and records in terms of Section 25(2) of the ‘I&B Code’, the Promoters as named above are not co-operating. As there are no other assets available with the ‘Corporate Debtor, except receivables from the Group Companies, the ‘Resolution Professional’ is entitled to find out the assets diverted by the ‘Corporate Debtor’ to the Group Companies.

4. Referring to different anomalies and other factors, including the Audited Financial Statements and *modus operandi* adopted by the

Promoters with the 'Corporate Debtor', total dues recoverable were brought to the notice of the Adjudicating Authority, as follows:

“9) Total Dues of 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. 33.72 crores and dues towards Assets worth Rs. 1.52 Crores which were distributed to the Group Companies. Details are below:

Group Company Name	Net Receivables Rs.	Assets of CD distributed to the Group Rs.	Total Dues (RS.)
M/s. Commune Properties India Pvt. Ltd. (Respondent 6)	46,322,665	13,375,380	59,698,045
M/s. Golden Gate Properties Ltd. (Respondent 8)	41,804,526	1,801,180	43,605,706
M/s. Prisha Properties India Pvt. Ltd. (Respondent 7)	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	322,064,568		322,064,568
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

5. The application was opposed by Mr. Sanjay Raj, one of the Promoters, on the ground that the application was not maintainable either on law or on facts. It was denied that the company was a Shell Company and asserted that the Applicant is the New Age Properties LLP and is not a Group Company.

6. Mr. Srinivas, another Promoter also opposed the application on the ground that the application filed by the 'Resolution Professional' was hit by the doctrine of *res-judicata* and certain orders were passed by the Adjudicating Authority including one on 24th October, 2019.

7. 'M/s. Commune Properties India Pvt. Ltd.', 'M/s. Prisha Properties India Pvt. Ltd.' and 'M/s. Golden Gate Properties Ltd.' on their behalf also opposed the application and denied the allegation that any asset of the 'Corporate Debtor' was diverted to the Group Companies or there were receivables overdue from the Group Companies.

8. The Adjudicating Authority taking into consideration the submissions made by counsel for the parties, in exercise of powers conferred under Section 213 of the Companies Act, 2013, made following observations and given following directions:

“18. As stated supra, the learned RP has made several allegations of fraudulent transactions basing Forensic Audit report. Similarly, the Respondents also have raised several objections and strongly denied the allegations made by the learned RP. However, in order to adjudicate the issue by this Tribunal, it is necessary to refer to matter to SFIO, to test the veracity of allegations and counter allegations made by the parties. The Central Government established SFIO to investigate frauds relating to Company. As per Section 212, the Central Government is empowered to cause to investigate into the affairs of the Company by SFIO, basing on the receipt of report of Registrar or inspector u/s 208 in public interest or on request from any department of the Central Government or a State Government. Section 213 also empowers the Tribunal to order investigation, if it is of the opinion that the business of the Company is being conducted with intent to

defraud its Creditor, members, or any other person etc. Therefore, we are of the prima facie view that findings given in Forensic Audit Report only prima established the fraudulent transactions in question. Therefore, it is necessary to conduct further investigation by SFIO in the affairs of Company basing on the findings given in Forensic Audit Report, after affording proper opportunity to concern opposite parties to defend them. Hence, we are inclined to refer the matter to SFIO for further investigation by invoking powers conferred U/s 212/213 of the Companies Act, 2013 and thereafter, aggrieved party can take appropriate legal course of action.

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 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 at liberty to take appropriate legal course of action basing on the ultimate findings given by the SFIO in the case.

6) The prayer as sought for in the application stand disposed of in the light of above directions.

7) No order as to costs.”

9. The aforesaid order has been challenged by the Appellant- Mr. Lagadapati Ramesh, one of the Promoters.

10. Learned counsel for the Appellant submitted that the impugned order was passed in exercise of powers conferred under Section 213 of the Companies Act, 2013 without framing any charge against the individual proprietary and without notice and hearing, the Appellants and other Promoters on such charge.

11. According to learned Senior Counsel for the Appellant, Section 212 of the ‘Companies Act, 2013’ can only be invoked by the Central Government not by the Adjudicating Authority/ National Company Law Tribunal.

12. Similar plea has been taken by learned counsel appearing on behalf of the Appellants- ‘M/s. Commune Properties India Pvt. Ltd. & Ors.’ details whereof have been recorded in paragraph 9 of the impugned order dated 16th April, 2019, as quoted above.

13. Learned counsel for the Appellants- ‘M/s. Commune Properties India Pvt. Ltd. & Ors.’ submits that the amount as has been referred to by the ‘Resolution Professional’ is the retention money performed by the

‘Corporate Debtor’ at the instance of three different Appellant’s Companies, which are subject to re-conciliation and final settlement.

14. Mrs. Ramanathan Bhuvaneshwari, the ‘Resolution Professional’ argued, in person, and submitted that no record or assets of the ‘Corporate Debtor’ has been handed over till date though application under Section 7 of the ‘I&B Code’ was admitted on 17th January, 2018.

15. It is further submitted by the ‘Resolution Professional’ that different activities of the promoters, including fraud committed by them by diverting funds to the Group Companies having come to light through other records and accounting system, so prayer was made for investigating and punishment in terms of provisions of Section 66 read with Section 69 of the ‘I&B Code’.

16. When the matter was initially taken up, we directed Mr. Lagadapati Ramesh, Promoter to handover all the records and assets of the ‘Corporate Debtor’ to the ‘Resolution Professional’. It was informed by the Appellant- Mr. Lagadapati Ramesh that all the records have been handed over to the ‘Resolution Professional’, but the same has been denied by the ‘Resolution Professional’.

17. We have heard learned counsel for the Appellants and the Respondent as well as perused the record.

18. Section 66 of the ‘I&B Code’ relates to ‘fraudulent trading or wrongful trading’, if found during the ‘Resolution Process’ or ‘Liquidation

Process' in regard to the business of the 'Corporate Debtor', which reads as under:

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

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

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

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

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

19. From bare perusal of Section 66, it is clear that if during the ‘Corporate Insolvency Resolution Process’ or ‘Liquidation Process’, it is found that any business of the ‘Corporate Debtor’ has been carried on with intent to defraud creditors of the ‘Corporate Debtor’ or for any

fraudulent purpose, it is always open to the Adjudicating Authority to pass appropriate orders in terms of the said provisions on the application filed by the 'Resolution Professional'.

20. Part II, Chapter VII deals with "offences and penalties". Section 68 deals with 'punishment for concealment of property' by any officer of the 'Corporate Debtor', including the Promoters within the twelve months immediately preceding the insolvency commencement date, as follows:

"68. Punishment for concealment of property.— *Where any officer of the corporate debtor has,—*

(i) within the twelve months immediately preceding the insolvency commencement date,—

(a) wilfully concealed any property or part of such property of the corporate debtor or concealed any debt due to, or from, the corporate debtor, of the value of ten thousand rupees or more; or

(b) fraudulently removed any part of the property of the corporate debtor of the value of ten thousand rupees or more; or

- (c) wilfully concealed, destroyed, mutilated or falsified any book or paper affecting or relating to the property of the corporate debtor or its affairs, or*
 - (d) wilfully made any false entry in any book or paper affecting or relating to the property of the corporate debtor or its affairs; or*
 - (e) fraudulently parted with, altered or made any omission in any document affecting or relating to the property of the corporate debtor or its affairs; or*
 - (f) wilfully created any security interest over, transferred or disposed of any property of the corporate debtor which has been obtained on credit and has not been paid for unless such creation, transfer or disposal was in the ordinary course of the business of the corporate debtor; or*
 - (g) wilfully concealed the knowledge of the doing by others of any of the acts mentioned in clauses (c), (d) or clause (e); or*
- (ii) at any time after the insolvency commencement date, committed any of the acts*

mentioned in sub-clause (a) to (f) of clause (i) or has the knowledge of the doing by others of any of the things mentioned in sub-clauses (c) to (e) of clause (i); or

(iii) at any time after the insolvency commencement date, taken in pawn or pledge, or otherwise received the property knowing it to be so secured, transferred or disposed, such officer shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to five years, or with fine, which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both:

Provided that nothing in this section shall render a person liable to any punishment under this section if he proves that he had no intent to defraud or to conceal the state of affairs of the corporate debtor.”

21. Section 69 prescribes ‘punishment for transactions defrauding creditors’ by an officer and Promoter(s) of the ‘Corporate Debtor’, which reads as follows:

“69. Punishment for transactions defrauding creditors.— *[If] an officer of the corporate debtor or the corporate debtor—*

(a) has made or caused to be made any gift or transfer of, or charge on, or has caused or connived in the execution of a decree or order against, the property of the corporate debtor;

(b) has concealed or removed any part of the property of the corporate debtor within two months before the date of any unsatisfied judgment, decree or order for payment of money obtained against the corporate debtor,

such officer of the corporate debtor or the corporate debtor, as the case may be, shall be punishable with imprisonment for a term which shall not be less than one year, but which may extend to five years, or with fine, which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both:

Provided that a person shall not be punishable under this section if the acts mentioned in clause (a) were committed more than five years before the insolvency commencement date; or if he proves that, at the time of commission of those acts,

he had no intent to defraud the creditors of the corporate debtor.”

22. During the ‘Corporate Insolvency Resolution Process’, if the Officer/ Promoter of the ‘Corporate Debtor’ does not disclose to the ‘Resolution Professional’ all the details of property of the ‘Corporate Debtor’ and details of transactions thereof, or any such other information as the ‘Resolution Professional’ may require and does not deliver to the ‘Resolution Professional’ all or part of the property of the ‘Corporate Debtor’ in his control or custody and does not deliver to the ‘Resolution Professional’ all books and papers in his control or custody belonging to the ‘Corporate Debtor’ and fails to inform the resolution professional the information in his knowledge that a debt has been falsely proved by any person during the ‘Corporate Insolvency Resolution Process’ or prevents the production of any book or paper affecting or relating to the property or affairs of the ‘Corporate Debtor’ etc., such person is punishable with imprisonment for a term which shall not be less than three years, but which may extend to five years, or with fine, which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both, which is apparent from Section 70 and reads as follows:

“70. Punishment for misconduct in course of corporate insolvency resolution process.— (1)

*On or after the insolvency commencement date,
where an officer of the corporate debtor—*

(a) does not disclose to the resolution professional all the details of property of the corporate debtor, and details of transactions thereof, or any such other information as the resolution professional may require; or

(b) does not deliver to the resolution professional all or part of the property of the corporate debtor in his control or custody and which he is required to deliver; or

(c) does not deliver to the resolution professional all books and papers in his control or custody belonging to the corporate debtor and which he is required to deliver; or

(d) fails to inform the resolution professional the information in his knowledge that a debt has been falsely proved by any person during the corporate insolvency resolution process; or

(e) prevents the production of any book or paper affecting or relating to the property or affairs of the corporate debtor; or

(f) accounts for any part of the property of the corporate debtor by fictitious losses or expenses, or if he has so attempted at any meeting of the creditors of the corporate debtor within the twelve months immediately preceding the insolvency commencement date,

he shall be punishable with imprisonment for a term which shall not be less than three years, but which may extend to five years, or with fine, which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both:

Provided that nothing in this section shall render a person liable to any punishment under this section if he proves that he had no intent to do so in relation to the state of affairs of the corporate debtor.

(2) If an insolvency professional deliberately contravenes the provisions of this Part the shall be punishable with imprisonment for a term which

may extend to six months, or with fine which shall not be less than one lakh rupees, but may extend to five lakhs rupees, or with both.”

23. Section 71 while relates to ‘punishment for falsification of books of corporate debtor’ whereas Section 72 deals with ‘punishment for wilful and material omissions from statements relating to affairs of corporate debtor’, as quoted below:

“71. Punishment for falsification of books of corporate debtor.— *On and after the insolvency commencement date, where any person destroys, mutilates, alters or falsifies any books, papers or securities, or makes or is in the knowledge of making of any false or fraudulent entry in any register, books of account or document belonging to the corporate debtor with intent to defraud or deceive any person, he shall be punishable with imprisonment for a term which shall not be less than three years, but which may extend to five years, or with fine which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both.”*

“72. Punishment for wilful and material omissions from statements relating to affairs of corporate debtor. — Where an officer of the corporate debtor makes any material and wilful omission in any statement relating to the affairs of the corporate debtor, he shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to five years, or with fine which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both.”

24. On the other hand, Section 73 prescribes for ‘punishment for false representations to creditors’ by any officer of the ‘Corporate Debtor’, including the Promoters on or after the insolvency commencement date, as quoted below:

“73. Punishment for false representation to creditors.— Where any officer of the corporate debtor— (a) on or after the insolvency commencement date, makes a false representation or commits any fraud for the purpose of obtaining the consent of the creditors of the corporate debtor or any of them to an agreement with reference to the

affairs of the corporate debtor, during the corporate insolvency resolution process, or the liquidation process;

(b) prior to the insolvency commencement date, has made any false representation, or committed any fraud, for that purpose, he shall be punishable with imprisonment for a term which shall not be less than three years, but may extend to five years or with fine which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both.”

25. The allegations as levelled by the ‘Resolution Professional’, *prima facie* attracts not only to the provisions of Section 66, but also all the aforesaid provisions such as Section 68 ‘punishment for concealment of property’; Section 69 ‘punishment for transactions defrauding creditors’; Section 70 ‘punishment for misconduct in course of corporate insolvency resolution process’; Section 71 ‘punishment for falsification of books of corporate debtor’; Section 72 ‘punishment for wilful and material omissions from statements relating to affairs of corporate debtor’ and Section 73 ‘punishment for false representations to creditors’, if found prove.

26. No punishment for imprisonment can be imposed by the Adjudicating Authority (National Company Law Tribunal) except to pass order in terms of Section 66 of the 'I&B Code'.

27. The 'offences and penalties' as prescribed and dealt with in Chapter VII and appropriate order of punishment can be passed only by way of trial of offences by a Special Court in terms of Section 236 of the 'I&B Code'. However, no such Court can take cognizance of any offence punishable under the Act, save on a complaint made by the 'Insolvency and Bankruptcy Board of India' (IBBI) or the Central Government or any person authorised by the Central Government in this behalf. This will be apparent from the relevant provisions of Section 236 as quoted below:

“236. Trial of offences by Special Court.— (1)

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

(2) 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 authorised by the Central Government in this behalf.

(3) The provisions of the Code of Criminal Procedure, 1973 shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session and the person conducting a prosecution before a Special Court shall be deemed to be a Public Prosecutor.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, in case of a complaint under sub-section (2), the presence of the person authorised by the Central Government or the Board before the Court trying the offences shall not be necessary unless the Court requires his personal attendance at the trial.”

28. Normally, the ‘IBBI’ or the ‘Central Government’ are not party to a ‘Corporate Insolvency Resolution Process’. Even if the matter is referred to ‘IBBI’, it cannot file straightaway a compliant before the Special Court without any investigation and only if a *prima facie* case is made out. Therefore, the question arises as to how in such cases the matter can be referred to by the ‘Adjudicating Authority’ to the ‘IBBI’ or the ‘Central Government’ for trial of offences by Special Court under Section 236 of the ‘I&B Code’.

29. In terms of sub-section (1) of Section 60, the 'National Company Law Tribunal' is the 'Adjudicating Authority' for the purpose of 'I&B Code'. It is having concurrent jurisdiction as the 'National Company Law Tribunal' under the Companies Act, as also as the Adjudicating Authority under the 'I&B Code'.

30. Section 212 of the Companies Act, 2013 though relates to 'investigation into the affairs of company by Serious Fraud Investigation Office' and such investigation can be made only if the Central Government is of the opinion that it is necessary to investigate into the affairs of a company by the 'Serious Fraud Investigation Office', as detailed below:

“212. Investigation into affairs of Company by Serious Fraud Investigation Office.— (1) Without prejudice to the provisions of section 210, where the Central Government is of the opinion, that it is necessary to investigate into the affairs of a company by the Serious Fraud Investigation Office—

(a) on receipt of a report of the Registrar or inspector under section 208;

(b) on intimation of a special resolution passed by a company that its affairs are required to be investigated;

(c) in the public interest; or

(d) on request from any Department of the Central Government or a State Government,

the Central Government may, by order, assign the investigation into the affairs of the said company to the Serious Fraud Investigation Office and its Director, may designate such number of inspectors, as he may consider necessary for the purpose of such investigation.

(2) Where any case has been assigned by the Central Government to the Serious Fraud Investigation Office for investigation under this Act, no other investigating agency of Central Government or any State Government shall proceed with investigation in such case in respect of any offence under this Act and in case any such investigation has already been initiated, it shall not be proceeded further with and the concerned agency shall transfer the relevant documents and records in respect of such offences under this Act to Serious Fraud Investigation Office.

(3) Where the investigation into the affairs of a company has been assigned by the Central Government to Serious Fraud Investigation Office, it

shall conduct the investigation in the manner and follow the procedure provided in this Chapter; and submit its report to the Central Government within such period as may be specified in the order.

(4) The Director, Serious Fraud Investigation Office shall cause the affairs of the company to be investigated by an Investigating Officer who shall have the power of the inspector under section 217.

(5) The company and its officers and employees, who are or have been in employment of the company shall be responsible to provide all information, explanation, documents and assistance to the Investigating Officer as he may require for conduct of the investigation.

(6) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), [offence covered under section 447] of this Act shall be cognizable and no person accused of any offence under those sections shall be released on bail or on his own bond unless—

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail:

Provided that a person, who, is under the age of sixteen years or is a woman or is sick or infirm, may be released on bail, if the Special Court so directs:

Provided further that the Special Court shall not take cognizance of any offence referred to this subsection except upon a complaint in writing made by—

(i) the Director, Serious Fraud Investigation Office; or

(ii) any officer of the Central Government authorised, by a general or special order in writing in this behalf by that Government.

(7) The limitation on granting of bail specified in subsection (6) is in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any

other law for the time being in force on granting of bail.

(8) If the Director, Additional Director or Assistant Director of Serious Fraud Investigation Office authorised in this behalf by the Central Government by general or special order, has on the basis of material in his possession reason to believe (the reason for such belief to be recorded in writing) that any person has been guilty of any offence punishable under sections referred to in sub-section (6), he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest.

(9) The Director, Additional Director or Assistant Director of Serious Fraud Investigation Office shall, immediately after arrest of such person under sub-section (8), forward a copy of the order, along with the material in his possession, referred to in that sub-section, to the Serious Fraud Investigation Office in a sealed envelope, in such manner as may be prescribed and the Serious Fraud Investigation Office shall keep such order and material for such period as may be prescribed.

(10) Every person arrested under sub-section (8) shall within twenty-four hours, be taken to a Judicial Magistrate or a Metropolitan Magistrate, as the case may be, having jurisdiction: Provided that the period of twenty-four hours shall exclude the time necessary for the journey from the place of arrest to the Magistrate's court.

(11) The Central Government if so directs, the Serious Fraud Investigation Office shall submit an interim report to the Central Government.

(12) On completion of the investigation, the Serious Fraud Investigation Office shall submit the investigation report to the Central Government.

(13) Notwithstanding anything contained in this Act or in any other law for the time being in force, a copy of the investigation report may be obtained by any person concerned by making an application in this regard to the court.

(14) On receipt of the investigation report, the Central Government may, after examination of the report (and after taking such legal advice, as it may think fit), direct the Serious Fraud Investigation Office to initiate prosecution against the company

and its officers or employees, who are or have been in employment of the company or any other person directly or indirectly connected with the affairs of the company.

(15) Notwithstanding anything contained in this Act or in any other law for the time being in force, the investigation report filed with the Special Court for framing of charges shall be deemed to be a report filed by a police officer under section 173 of the Code of Criminal Procedure, 1973 (2 of 1974).

(16) Notwithstanding anything contained in this Act, any investigation or other action taken or initiated by Serious Fraud Investigation Office under the provisions of the Companies Act, 1956 (1 of 1956) shall continue to be proceeded with under that Act as if this Act had not been passed.

(17) (a) In case Serious Fraud Investigation Office has been investigating any offence under this Act, any other investigating agency, State Government, police authority, income-tax authorities having any information or documents in respect of such offence shall provide all such information or documents

available with it to the Serious Fraud Investigation Office;

(b) The Serious Fraud Investigation Office shall share any information or documents available with it, with any investigating agency, State Government, police authority or income-tax authorities, which may be relevant or useful for such investigating agency, State Government, police authority or income-tax authorities in respect of any offence or matter being investigated or examined by it under any other law.”

31. From bare perusal of Section 212 of the Companies Act, 2013, it will be evident that such investigation into affairs of company can be made only on receipt of a report of the Registrar or Inspector under Section 208 of the Companies Act, 2013 or on intimation of a special resolution passed by a company that its affairs are required to be investigated; or in the public interest; or on request from any Department of the Central Government or a State Government.

32. Section 212 does not empower the National Company Law Tribunal or the Adjudicating Authority to refer the matter to the Central Government for investigation by the ‘Serious Fraud Investigation Office’

even if it notices the affairs of the Company of defrauding the creditors and others.

33. However, investigation into affairs of company at the instance of the Tribunal has been prescribed under Section 213 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.”

34. In terms of clause (b) of Section 213, on an application made to it by any other person ('Resolution Professional') or otherwise (*suo motu*), if the National Company Law Tribunal 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 as alleged by the 'Resolution Professional' in the present case and or by; (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 etc., (which is also the allegation made by the 'Resolution Professional'), in such case, the Tribunal 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, in such case, the Central Government is bound to 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.

35. 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.

36. For punishment of fraud in a manner as prescribed in Section 447 of the Companies Act, 2013, the matter is required to be tried by a Special Court as established under Section 435 which requires speedy trial for offences under the Companies Act, 2013. The same Court i.e. Special Court established under Section 435 is the Court empowered under Section 236 of the 'I&B Code' for trial of such offence under the 'I&B Code' also.

37. In view of the aforesaid position of law, we hold that the Tribunal/ Adjudicating Authority, on receipt of application/complaint of alleged violation of the aforesaid provisions and on such consideration and being

satisfied that there are circumstances suggesting that defraud etc. has been committed, may refer the matter to the Central Government for investigation by an Inspector or Inspectors as may be appointed by the Central Government. On such investigation, if the investigating authority reports that a person has committed any offence punishable under Section 213 read with Section 447 of the Companies Act, 2013 or Sections 68, 69, 70, 71, 72 and 73 of the 'I&B Code', in such case, the Central Government is competent to refer the matter to the Special Court itself or may ask the Insolvency and Bankruptcy Board of India or may authorise any person in terms of sub-section (2) of Section 236 of the 'I&B Code' to file complaint.

38. The National Company Law Tribunal is the Adjudicating Authority under Part-II of the 'I&B Code' in terms of sub-section (1) of Section 60, which reads as follows:

“60. Adjudicating Authority for corporate persons.— (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.....”

39. The Civil Procedure Code is not applicable for any proceeding before the Tribunal and in terms of Section 424, the Tribunal is guided by principle of natural justice and subject to other provisions under the Companies Act, 2013 or the 'I&B Code' or any Rule made thereunder. The Tribunal and the Adjudicating Authority have also been empowered to regulate their own procedure.

40. In view of the aforesaid position of law also, the procedure laid down under Section 213 of the Companies Act, 2013 can be exercised by the Tribunal/ Adjudicating Authority, as held above.

41. Further, after the investigation by the Inspector, if case is made out and the Central Government feels that the matter also requires investigation by the 'Serious Fraud Investigation Office' under Section 212 of the Companies Act, 2013, it is open to the Central Government to decide whether in such case the matter may be referred to the 'Serious Fraud Investigation Office' or not. This will depend on the gravity of charges as may be found during the investigation by the Inspector.

42. In view of the aforesaid position of law, we are of the view that the Adjudicating Authority was not competent to straight away direct any investigation to be conducted by the 'Serious Fraud Investigation Office'. However, the Adjudicating Authority (Tribunal) being competent to pass order under Section 213 of the Companies Act, 2013, it was always open to the Adjudicating Authority/Tribunal to give a notice with regard to the

aforesaid charges to the Promoters and others, including the Appellants herein and after following the procedure as laid down in Section 213, if *prima facie* case was made out, it could refer the matter to the Central Government for investigation by the Inspector or Inspectors and on such investigation, if any, actionable material is made out and if the Central Government feels that the matter requires investigation through the 'Serious Fraud Investigation', it can proceed in accordance with the provisions as discussed above. Impugned order shows parties have been heard on the charges claimed by the 'Resolution Professional'.

43. We, accordingly, modify the impugned order dated 16th April, 2019 and refer the matter to the Central Government for investigation through any Inspector or Inspectors.

44. As we have heard learned counsel for the parties and *prima facie* we are of the view that the matter requires investigation to find out whether one or other promoter or the company as referred to in paragraph 9 and quoted above to find if they have violated any of the provisions of Sections 68, 69, 70, 71, 72 & 73 of the 'I&B Code', we modify the impugned order dated 16th April, 2019 and refer the matter to the Secretary, Ministry of Corporate Affairs, Government of India, to get the matter investigated by Inspector or Inspectors and following the procedure in terms of Section 213 of the Companies Act, 2013 and/ or on such report after investigation by the Inspector, the Central Government feels that the matter is further required to be investigated by

the 'Serious Fraud Investigation Office' it may do so and thereafter, if actionable material making out case of fraud is made out after such investigation by the 'Serious Fraud Investigation Office', it may act in terms of sub-section (2) of Section 236 of the 'I&B Code' for referring the matter to the Special Court.

Both the appeals stand disposed of with aforesaid observations and directions. No costs.

Let a copy of this order be communicated to the Secretary, Ministry of Corporate Affairs, Government of India, "A" Wing Shastri Bhawan Garage, No.14, Dr Rajendra Prasad Road, New Delhi, Delhi 11000 and Joint Secretary, Ministry of Corporate Affairs, Government of India, for appropriate investigation, as ordered above.

(Justice S.J. Mukhopadhaya)
Chairperson

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

(Kanthi Narahari)
Member(Technical)

Ar/sk