NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

Company Appeal (AT) (Insolvency) No. 346 of 2024
&
IA No. 6783 of 2024

[Arising out of the Order dated 09.05.2023, passed by the 'Adjudicating Authority' (National Company Law Tribunal, New Delhi Bench, Court-II), in IA. No. 2536/ND/2022 in Company Petition No. (IB)-637(PB)/2020]

IN THE MATTER OF:

1. Mr. Nalinesh Kumar Paurush
   Member of Suspended Board
   of Directors of CD
   H. No. 70B, Street No. 8,
   Balbir Nagar Extension
   Shahdara, Delhi - 110032
   Email id: nalineshpaurush@gmail.com **...Appellant No. 1**
2. Mr. Prince Kumar Mishra
   Member of Suspended Board of Directors of CD Jogdiha, Karail Shukla,
   Uttar Pradesh - 274603
   Email id: princedeorial992@yahoo.com **...Appellant No. 2**
3. Mr. Bhagat Singh
   Member of Suspended Board of Directors of CD House No. 1341, Near Shiv Shakti School,
   Parvati Colony, Sector- 22
   Faridabad, Haryana - 121005
   Email id: bs750650l@gmail.com **...Appellant No. 3**

Versus

1. Mr. Arvind Mittal
   Resolution Professional of Temple Leasing and Finance Limited
   Address at:
   1900, JJ Colony, Phase-3, Madanpur Khadar,
   Sarita Vihar, New Delhi -110076
   Email id:
   templeleasing.rp@gmail.com;
   arvindmittal81@yahoo.in **...Respondent**
2. Shree Vishvamurte Tradinvest Pvt. Ltd. CIN: U65910GJ1983PTC005882
   Address: D-123, Ghantakaran Mahavir Market Sarangpur, Ahmedabad, Gujarat, India, 380001
   Email: vishvatrad@redifimail.com

Mobile:9925023400
(Deleted vide order dated 27.11.2024 **...Respondent**

Present:

For Appellant : Mr. Adit S Pujari, Mr. Avinash Bhati and Mr. Vanya Chhabra, Advocates
For Respondent : Mr. Animesh Pandey, Advocate

J U D G M E N T
(Hybrid Mode)

[Per: Justice Mohd. Faiz Alam Khan, Member (Judicial)]

The instant appeal has been preferred by the members of the Suspended Board of Directors of the CD against the order dated 09.05.2023 passed by the Hon'ble National Company Law Tribunal, Delhi Bench in I.A. No. 2536/2022 in CP No. (IB)-637(PB) 2020, whereby certain transactions done by the appellants have been designated as fraudulent and they were directed to contribute Rs. 28 lakhs to the liquidation estate of the CD.

2. Brief facts necessary for the disposal of the instant appeal as are reflected from the pleadings from the parties are that vide an order dated 25.06.2021 Corporate Insolvency Resolution Process (CIRP) was started against CD, M/s Temple Leasing and Finance Ltd. and Mr. Arvind Mittal was appointed as an Interim Resolution Process (IRP) and vide order dated 21.02.2022, he was also confirmed as Resolution Professional (RP).

3. It is further reflected that after approval of the CoC with 100% voting share Resolution Professional vide I.A. No. 5874/2021 filed an application under section 33(2) of the Code, to liquidate the corporate debtor and he was also proposed to be appointed as liquidator of the CD.

4. During the course of proceedings, a Transactional Auditor was appointed by the liquidator who has submitted a Transaction Audit Report

dated 24.12.2021, after examining the books of accounts of the CD for the period 01.04.2016 to 25.06.2021.

5. It also reflected that the Respondent liquidator filed an application under Section 66 of the Insolvency and Bankruptcy Code 2016, bearing IA No. 2536/ND/2022 alleging two transactions with regard to buying of shares of Uno Industries Limited and Jayant Mercantile Company Limited by the Suspended Board of Directors labelling them as fraudulent. The Ld. Tribunal by passing the impugned order directed the appellants to contribute a sum of Rs. 28,50,000/- to the assets of the CD with regard to these two transactions which in the opinion of Ld. Tribunal were made with the purpose of avoidance of commencement of insolvency resolution process in respect of the CD and due diligence has not been exercised by the Promoters/Directors/Appellants.

6. Ld. Counsel for the appellant while relying on written submissions submitted by him submits that the trial court has committed manifest illegality in passing the impugned order and has completely ignored the fact that due diligence has been exercised by the appellants and they were aware that although the Companies, whose shares were purchased, were not actively trading in their shares but there was probability that they would soon carry out its procedural compliances and will be actively traded on stock exchange and therefore, after carrying out necessary diligence and considering the information received, a decision was taken to invest in these companies anticipating that the share prices of these companies would go up and would reap huge profits and returns for the CD.

7. It is further submitted that the NCLT failed to consider that the commercial decision taken by the appellants with regard to purchase of shares of the aforesaid companies was taken in the ordinary course of business with bonafide for the benefit of the CD and the same could not be doubted, if it has turned out to be non-profitable.

8. It is also submitted that sometimes the decision taken in business also results in loss and these decisions only due to the fact that a loss has been caused may not be termed as fraudulent or not taken with due diligence while in the instant case the decision of purchasing the shares of these two companies was taken by exercising due diligence.

9. It is also submitted that there is no connection of the insolvency of the CD with these investments and the investment remains the sole asset of the CD and has fetched an offer of Rs. 15,00,000/- during liquidation and if the circumstances may be normal these shares might have fetched a higher price and there are many instances the companies which were earlier de-listed from the stock market are relisted again and their shares have fetched higher prices.

10. It is also submitted that there is no evidence which may show that the transaction of purchasing the shares of these two companies was fraudulent or has been carried out with the intent to defraud creditors and the onus to prove the fraudulent intent was on the Respondent, while except the transaction audit report, which could not be relied on, there is no other substantial piece of evidence which may indicate the transactions as fraudulent.

11. It is further submitted that only evidence on which the reliance has been placed by the Ld. Tribunal is transaction audit report which is full of contradictions and could not be relied as such and conclusions arrived at therein are also not conclusive and therefore on the basis of such shaky conclusions the conduct of appellants could not be termed as fraudulent.

12. It is reiterated that to take any action under Section 66 (1) of the Code the proof of dishonest intention is a pre-condition and Ld. Tribunal has not considered this aspect and without, even finding the ingredients of Section 66 (2) of the Code has directed the appellants to deposit Rs. 28,50,000/-.

13. It is further submitted that there is absolutely no link between the transactions in question and the commencement of CIRP against the CD and thus Section 66 of the Code may not be invoked. Reliance in support of his submissions have been placed on by Ld. Counsel for the appellants on ***Inasara Technologies Pvt. Ltd. vs. Yogendra Vasupal & Ors., 2024 SCC Online NCLT 1071. Regen Powertech Pvt. Ltd. vs. Wind Construction Pvt. Ltd., 2022 SCC Online NCLAT 3801.***

14. Respondent – Shree Vishvamurte TradInvest Pvt. Ltd. (SVTIPL) in his reply has denied all the averments made in the memo of appeal and grounds taken therein and has further stated that there is no illegality so far as the impugned order is concerned. It is further stated that in the 4th meeting of the stakeholder's consultation committee (SCC) of the CD convened on 11.12.2023 the SCC with 100% voting power has passed a resolution assigning all the rights, title and interest arisen by virtue of the impugned order dated 09.05.2023 in favour of the answering Respondent Shree Vishvamurte TradInvest Pvt. Ltd.

15. It is further stated that the recovery/proceeds so collected by the answering Respondent would be distributed among the stakeholders in accordance with Section 53 of the Code after deduction of actual cost incurred. It is also stated that the deed of assignment dated 03.09.2024 has also been executed between the CD through its liquidator and SVTIPL. Thus, all the rights in respect of the proceeds of the CD has already been assigned to the answering Respondent.

16. It is further stated that the impugned judgment has been passed keeping in view the transaction auditor report which is a comprehensive document and could not be doubted and confirms the fraudulent transactions committed by the appellants.

17. It is further stated that the findings contained in the transaction audit report are based on the basis of books of accounts of the company for the period commencing from 01.04.2016 to 25.06.2021 and is based on audited financial statement of the CD, bank statements, loan facility agreements, invoices for purchase, sale agreement and income tax returns and other relevant records.

18. It is also stated that the investments were made purposely by purchasing the equity shares of those companies which were not performing well and without opening any demat account without complying with the relevant rules, regulations, guidelines and instructions issued by the RBI and SEBI in the manner and thus due diligence has not been exercised to minimize the potential loss with the creditors of the company.

19. It is also submitted that the impugned transactions were made without any diligence without checking that the equity shares in

purchasing which the funds of the CD are being invested, are not traded for long and were not listed and thus prima facie shows lack of transparency in the transaction ignoring the risks involved in purchasing these non-traded/unlisted shares and thus deliberately a sunk investment was made.

20. Reliance in support of the contention has been placed on ***Amardeep Singh Bhatia vs. Abhishek Nagori liquidator for asian natural resources (India Ltd.), CA (AT) (Ins) No. 671 of 2020, decided on 28.11.2022*** and ***Mr. Thomas George vs. K. Easwara Pillai Resolution Professional M/s. Mathstraman Manufacturers and Traders Private Limited decided on 05.12.2022.***

21. Respondent –Arvind Mittal in his reply has submitted that the appeal, as has been preferred is a gross misuse of the process of law and deserves to be dismissed and there is no infirmity in the impugned order as the findings of the transaction audit, which has been relied on by the Ld. Tribunal, were based on the basis of books of accounts and other relevant material of the CD and as per the transaction audit report the investment made in quoted equity shares were not made with bona fide as these shares were not being traded at that point of time.

22. It is also stated that the equity shares of Uno Industries was last traded on 29.02.2016 at Rs. 0.49/- and for Jayant Merchantile Company Ltd. at Rs. 2.08/- on 03.02.2015. Thus no due diligence has been exercised by the appellants/Suspended Directors of the CD and these transactions has been made in utter disregard to the relevant rules, regulations, guidelines and instructions issued by the RBI and SEBI.

23. It is further stated that the nature of the transactions would itself reveal that these are fraudulent transactions and no reasonable diligence has been exercised by the appellants in entering into these transactions. Knowingly well that it would be difficult to sell such shares and thus a illiquidity has been created and in this way appellants/ Suspended Directors have not exercised due diligence in minimizing the potential loss to the creditors of the CD and thus there is no infirmity in the impugned order whereby the appellants have been directed to contribute to the state of the CD Rs. 28,50,000/- due to wrongful/fraudulent trading.

24. The appellant in his rejoinder has reiterated that every commercial decision made in the business may not be termed as fraudulent as there is always a risk of 'loss' along with 'profit' and it is always not truthful that the companies which are de-listed from the stock market may not be relisted again. It is further stated that there are instances where upon being relisted on the stock market the companies have yielded high value of returns like Champlast Sanmar Ltd. and Max India Ltd.

25. It is further stated that there is no substance in the contention of the Respondent that investments made by the CD has created illiquidity and also that the transaction made by the appellant's have added to the assets of the Corporate Debtor and the investment made by them stands good even post CIRP and an offer of Rs. 15,00,000/- has been received by the Respondent during the liquidation process for the shares which are been termed as purchase fraudulently.

26. It is further stated that the investment in question has attributed value to the corporate debtor's asset and cannot be alleged to be causing

loss. In this regard reliance has been made on the independent auditor's report of the year ending 31.03.2021 evidencing the investment in question as the sole assets of the CD. It is reiterated that the transaction in question may never be termed as fraudulent.

27. We have heard Ld. Counsel for the parties and have perused the record including the written submissions submitted by the parties.

28. It is evident that during the course of pendency of this appeal an IA No. 6783 of 2024 was filed by the Respondent – Shree Vishwamurte Trad Invest Pvt. Ltd. (SVTIPL) for its impleadment as one of the Respondent and on 27.11.2024 noticing the statement made on behalf of the liquidator that the company has already been sold and liquidator be discharged, Respondent No. 1 liquidator was deleted from the array of the parties and IA No. 6783 of 2024 moved by the Shree Vishvamurte TradInvest Pvt. Ltd. was allowed and Shree Vishvamurte Trad Invest Pvt. Ltd. (herein after called Vishvamurte) was impleaded as Respondent in the appeal. Thus it is in this background Vishvamurte has become a Respondent in this appeal and is also filed its reply.

29. Perusal of the impugned Judgment, would reveal that the adjudicating authority after noticing the nature of the transaction with regard to the purchase of the shares with regard to the companies who were not listed at stock exchange and their shares were not been traded at that point of time, at one place of its judgment has opined that may be one can think of giving the benefit of doubt to Respondents regarding the transactions with a view that there could be a thought regarding appreciation of the value of these shares in future but considering the fact that the shares were not actively

traded on 02.08.2019 and 06.08.2019 and the petition for admitting CD in insolvency was filed on 19.02.2020 the transaction in question is taken as fraudulent and consequently directed the appellants to contribute Rs. 28,50,000/- to the assets of the CD in liquidation.

30. The relevant part of the impugned judgment is being reproduced as under:

> *"6…… May be one can think of giving the benefit of doubt to Respondents regarding the transaction with a view that there could be a thought regarding appreciation of the value of the equity shares in the future. But the fact which may not be ignored is that the funds of the CD were utilized to purchase the equity shares which were not actively traded in the market, on 02.08.2019 and 06.08.2019, while the petition for admitting the CD to insolvency was filed on 19.02.2020. Thus, it would not be gainsaid that the transaction was made by the Respondents when there was no reasonable prospective to escape the admission of CD into CIRP. When it is a known factor that the investment in non-traded shares is not advisable, as it is difficult to sell such shares and illiquidity is created, one may not say that the Respondents were duly diligent in utilizing the funds of CD in purchasing the non-traded shares. The Respondents have tried to confuse the ingredient of fraud under Section 66 of IBC, 2016 with culpable fraud under Section 421 to 424 of IPC. Nevertheless, the requirement of Section 66(2) of IBC is only that the Directors/Partners are found not exercising due diligence only because they could precipitate that there was no reasonable prospect of avoiding the commencement of CIRP in respect of the Corporate Debtor. Thus, the submission put forth on behalf of the Respondents that the act of the Respondents was not covered under Section 447 of the Companies Act is misconceived. As far as the reference to Regulation 35A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016 is concerned, the mandate of the Regulation is that the RP should adhere to the timeline prescribed for completion of the Insolvency Process. The provision is not incorporated to allow the Suspended Directors to get away with preferential, undervalued, extortionate, or fraudulent transactions.*
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> *7. In view of the aforementioned, we are convinced that within 7 months of the purchase of the non-traded equity*

shares out of the funds of the CD, the application for admitting the CD into CIRP was filed, thus, the Respondents were quite aware that the avoidance of commencement of Insolvency Resolution Process in respect of the CD had no reasonable prospect and they did not exercise due diligence while investing the funds of CD in such equity shares, which could not be further sold".

31. The basis of passing the impugned order appears to be the transaction audit report submitted by the transactional auditor relevant except of the said report which has been made available along with the appeal is being reproduced as under:

1.Investment in quoted equity share

As per the review of the Books of Accounts (in Tally Software) of CD, it is observed that investment in following equity share have been made by the suspended directors.

Name of Security	***Amount***	***Date***	***Number of share***	***Purchased from***
Unno Industries Ltd.	*15,00,000*	*02.08.2019*	*30,00,000/-*	*Shree Vishvamurte Trade Invest Pvt. Ltd.*
Jayant Mercantile Co. Ltd.	*13,50,000*	*06.08.2019*	*9,00,000/-*	*Shree Vishvamurte Trade Invest Pvt. Ltd.*
Total	***28,50,000***			

As per the review of the Books of Accounts (in Tally Software) of CD, following facts were observed were made:

-The investment were made in quoted equity shares which were not actively traded in the market. The Equity share of Unno Industries was last traded on 29.02.2016 at 0.49/-

and for Jayant Mercantile Co. Ltd. at Rs. 2.08/- on 03.02.2015.

-No Demat account was involved for such transaction.

-These shares directly purchased from Shree Vishvamurte Trade Invest Pvt. Ltd. for which no sale/purchase agreement furnished to us. Further the part consideration amounting to Rs. 15 Lakh was paid inrespect of shares by the corporate debtor.

-These two shares were only the investment in stock in trade held by the company.

-No due diligence or valuation of shares (which were not actively traded) was done before the investment decision was exercised by the suspended management".

32. Section 66 of the Code is also important for our consideration and the same is also reproduced 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".

33. Before moving further let us have a glance with regard to the ingredients of Section 66 of the IBC as is evident that the requirement of Section 66 is that if during the Corporate Insolvency Resolution Process or in liquidation process it is found that any business of the CD has been carried on with the intent to defraud business of the CD or for any fraudulent purpose the adjudicating authority may pass an order that the persons who are carrying on the business would make such contributions to the assets of the CD as it may deem fit. And sub-section 2 of this section also provides that on an application by a resolution professional during the Corporate Insolvency Resolution Process (CIRP) the adjudicating authority may direct the director or partner of the CD shall be liable to make such contribution to the assets of the CD if before the Insolvency Commencement date such director or partner knew or ought to have known that there was no reasonable prospect of avoiding the insolvency process in respect of the CD and such director or partner did not exercise due diligence in minimizing the potential loss to the creditors.

35. Thus the necessary ingredients of invoking this section appears to be that (i) the business of the CD has been carried on with intent to defraud creditors of the CD or for any fraudulent purpose. (ii) 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 CIRP and (iii)or such director or partner did not exercise due diligence in minimizing the potential loss to the creditors.

36. At this juncture, let us also see the manner in which the requirement of Section 66 has been interpreted by this Tribunal.

37. In **Regen Powertech Pvt. Ltd. vs M/s Wind Construction Pvt. Ltd. and Ors., 2022 SCC Online NCLAT 3801,** this tribunal has opined as under:

> *"33. Be it noted, this "Tribunal", significantly, points out that, whenever "fraud" on a "creditor" is perpetrated in the course of "carrying on business", it does not necessarily follow that the "business" is being carried on with an "intent to defraud" the "creditor".*
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> *34.One cannot remain, "oblivious" of the candid fact that, if the "directors" of a "company" had acted on a "bona fide belief" that the "company" would "recover" from its "financial problems"/ "difficulties", then, they will not be held liable for the "act"/ "offence" of "fraudulent trading".*
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> *35.As a matter of fact, the "aspect" of "fraudulent trading" requires a very "high degree of proof", which is attached to the "fraudulent intent". To put it emphatically, a more compelling "material"/ "evidence" is required to satisfy the conscience of this "Tribunal", "on a preponderance of probability". Apart from that, an "isolated"/ "solo fraud" case, against the person, then, action in "tort" can be resorted to, as opined by this "Tribunal". No wonder a "creditor", who was defrauded, will have "recourse" to an "alternative remedy", under "civil law".*

38. This appellate tribunal again in **Renuka Devi Rangaswamy vs. Mr. Madhusudan Khemka and Ors., 2023 SCC Online NCLAT, 1722** while considering the ingredients of Section 66 of the Code has held as under:

> *"33. To be noted that, the expression 'Party to the carrying on business', indicates 'taking positive steps', in carrying*

on 'company's business', in a 'fraudulent manner'. The intent to 'defraud', is to be judged, by its 'effect' on a 'Person', who is the 'object of conduct', in question.

34.A 'preponderance of probability suffices', but the degree of probability must be such that the 'Tribunal', is satisfied and further that under Section 66 of the I&B Code, 2016, it is not essential to attract that there ought to be a 'Debtor' and a 'Creditor' relationship.

35. It must be borne in mind that for proving a 'Fraudulent Trading' needs meeting the 'High Standard of Proof', which is attached to a 'Fraudulent Intent'. A 'Director', of a 'Company', may be proceeded against for a 'Wrongful Trading', because of the reason of 'Negligent Failure of Management'. Besides this, 'a person', knowingly a 'Party' to a 'Fraudulent Trading', by the 'Company' concerned, may be subject to the proceedings.

36.A 'Single Fraud', against 'a person', may result in Civil Action in the 'Realm of Tort'. It does not lie in the mouth of 'Directors of a Company', being accused of 'Fraudulent Trading', to allege that the 'Company's Claim', for recovery in Civil Action is barred.

37. 'Dishonesty', is an essential ingredient of 'Fraudulent Trading'. The 'Aspect of Dishonesty', is to be established and it cannot be inferred in any manner. Whether a 'Director', had exercised his skill, experience and general knowledge, to be expected of a person, in carrying out the 'duties of his functions', is to be determined for a 'Liability', in the considered opinion of this 'Tribunal'.

38. The Appellant has a 'duty', to establish to the satisfaction of this "Tribunal', that a 'person', is knowingly carrying on the business with the 'Corporate Debtor', with an 'dishonest intention', to 'defraud', the 'Creditors'. For a 'Fraudulent Trading'/'Wrongful Trading', necessary materials are to be pleaded by a 'Litigant'/'Stakeholder', by furnishing 'Requisite Facts', so as to come within the purview of the ingredients of Section 66 of the I & B Code, 2016. Suffice it, for this 'Tribunal', to pertinently point out that the ingredients of Section 66(1) and 66(2) of the I & B Code, 2016, operate in a different arena".

39. In **Shibo Job Cheeran & Ors. vs. Ashok Velamur Seshadari, liquidator of M/s Archana Motors Ltd., 2023 SCC Online, NCLAT 804**.

This appellate tribunal again considered Section 66 of the Code and has opined as under:

> *"42. It is seen from the above that Section 66 of the 1 & B Code, 2016, gives powers to the 'Adjudicating Authority' to pass suitable orders, if it is found that any person has carried on the business of the 'Corporate Debtor' with an intention to defraud its 'Creditors' or other 'stakeholders'. Section 66 also give powers to the 'Adjudicating Authority' to give directions for making contribution to the assets of the 'Corporate Debtor'. This also includes Directors of the 'Corporate Debtor', and their personal liability towards contribution, provided such Directors did not exercise due diligence or failed to take reasonable steps to minimize potential losses to the creditors when there was no possibility of avoiding the commencement of 'Corporate Insolvency Resolution Process'. However, a director can be deemed to have exercised due diligence, if such diligence was exercised as expected reasonably of a director carrying out a business in ordinary course of business.*
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> *43. It is therefore clear that for establishing the fraudulent purpose, it must be shown that the Ex-Directors of the 'Corporate Debtor' knew that the Company was Insolvent but continued to run business with dishonest intentions. On a broader sense, concealment of true financial position of the 'Corporate Debtor' can also be covered under such provisions.*
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> *44. This 'Appellate Tribunal', therefore, observes that the following elements need to be established for success of Section 66 Application, namely,*
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> *(i) Business of the 'Corporate Debtor' has been carried out with an intent to defraud the creditors.*
>
> *(ii) Directors participated in carrying on business of the 'Corporate Debtor' despite knowing likely insolvency of the 'Corporate Debtor'.*

Thus the facts of the instant case are to be appreciated in the background of the abovementioned substantive law and legal precedents.

40. It appears to be an admitted situation that the appellants who are suspended director of the CD were involved in the business of financial intermediation and it was their core business and the sole defence of the

appellants is that the decision to purchase the shares of these two companies which were admittedly not being traded at that point of time was a commercial decision, taken for the reason that it was expected that in future the shares of these companies may be listed and may be transacted at the stock exchange and thereafter a high value may be fetched by selling them.

41. As noticed earlier, one of the main ingredient of Section 66 of the Code is that a transaction may only be termed as a fraudulent transaction if it has been carried on with a intention to defraud creditors and before the insolvency commencement date the directors knew that there was no reasonable prospect of avoiding the CIRP process along with the fact that the due diligence has not been exercised by directors for minimizing the losses to the creditors.

42. At this juncture, the financial position of the CD at the relevant point of time is also required to be seen, when these shares were purchased and a glimpse of the same may be assessed from the reply filed by the Respondent- Shree Vishvamurte whereby the minutes of stakeholder's consultation committee has been placed on record. The minutes of the meeting allegedly held on 11.12.2023 through video conferencing has been placed as Annexure R-2 to this reply wherein the position of the claims owed to unsecured financial creditors have been shown as under:

Financial Debt Owed to Unsecured Financial Creditors							
Sr. No.	**Name of the Financial Creditor**	**Type of Facilities i.e. Term Loan or Cash Credit or Bank Guarantee or Letter of Credit, Bill Discounting**	**Secured or Unsecured**	**Total amount admitted (in Rs.)**	**Voting Share (in %)**	**Distribution of proceed (in Rs.)**	**Recovery (in %)**
1	Novelty Buildwell Pvt. Ltd.	Short-term inter Corporate Deposit	Unsecured	4,00,000	10%	86,061	22%
2	Prominent Hospitals Pvt. Ltd.	Short-term inter Corporate Deposit	Unsecured	7,00,000	17%	150,606	22%
3	Shree Vishvamurte Tradinvest Pvt. Ltd.	Unsecured loan	Unsecured	1,527,161	37%	328,572	22%
4	Orchid Recruiter Pvt. Ltd.	Unsecured loan	Unsecured	2,90,000	7%	62,394	22%
5	BNS Tour & Travel Pvt. Ltd.	Unsecured loan	Unsecured	7,00,000	17%	150,606	22%
6	Navjyoti Farming Pvt. Ltd.	Unsecured loan	Unsecured	5,50,000	13%	118,334	22%
				4,167,161	**100%**	**896,573**	**22%**

43. From the table above the admitted claims of the six unsecured financial creditors have been shown and the total value of these admitted claims appears to be Rs. 4,167,161/- in this amount Rs. 15,27,161/- is the admitted claim of the Respondent- Shree Vishvamurte Trad Invest Pvt. Ltd. It is the same entity from which the appellants appear to have purchased the shares and though it is not crystal clear from the record as to whether the claim of Rs. 15,27,161/- of Vishvamurte is pertaining to the remaining amount left to be paid with regard to the purchase of the impugned shares, as only Rs. 15,00,000/- were paid at the time of purchase of these shares or the same was with regard to any other debt, but one thing is clear that both impugned transactions were made by the appellants with one of the creditor, that too by paying only Rs.15 lakhs, out of Rs. 28 lakhs. Therefore, doing transaction with one of the creditors exclude the possibility of doing transaction to the detriment of the interest of creditors.

44. Thus, when the total debt owed to unsecured financial creditors was to the tune of Rs. 41,00,000/- (approximately) it may not be presumed that in order to deceive the creditors of this small amount the impugned transactions might have been undertaken. It is also evident that the appellants have categorically stated that the shares purchased by them were fetching a value of Rs. 15,00,000/- during CIRP, even when the CD was in CIRP and this fact has not been denied by the Respondent. To attract Section 66 though the standard of proof would be of preponderance of probability but the same is subjected to the heavy proof to the applicant, as each and every commercial transaction which has resulted in 'loss' may not be labelled as fraudulent. That is why under Section 66 (2) it is provided

that the directors of the CD or partner must know or ought to have known that there is no reasonable prospect of avoiding the commencement of corporate insolvency resolution process and simultaneously another condition is added by putting the word "and" that such director or partner did not exercise due diligence in minimizing the potential loss to the creditors. Thus the clause "a" and "b" of Sub-Section 2 of Section 66 are required to be read together and if a comprehensive reading of these provisions is done it would emerge that the director or partner of the CD at the time of making the impugned transactions must know that there is no reasonable prospect of avoiding the CIRP process and they did not exercise due diligence in minimizing the potential loss to the creditors of the CD. Thus non-exercise of due diligence alone may perhaps be not sufficient to label a transaction as fraudulent in order to attract sub-section 2 of section 66 of the Code.

45. The Ld. Tribunal has given much emphasis on the fact that the CIRP process application has been moved within 7 months of purchase of these equity shares. As we have already stated that having regard to the trade wherein the CD was involved and keeping in view the amount of debt owed by the CD it may be not presumed, in absence of any direct evidence that these transactions of purchasing shares of unlisted companies were made for the purpose of avoiding the CIRP or that these transactions have been done as the appellants knew that there is no reasonable prospect of avoiding the CIRP.

46. It is also reflected that only Rs. 15,00,000/- has been paid by the directors/appellants in making the impugned transaction and thus the

whole amount of shares value has also not been paid. It may be taken that if the intention of the directors was to defraud the creditors they have shown payment of the whole amount of the shares i.e. Rs. 28,50,000/- and making part payment itself shows that they have exercise due diligence and unrebutted fact stated by the appellant is that these shares were fetching Rs.15 lakhs, during CIRP. It is also evident that only Rs. 15 lakhs, out of purchase value of Rs. 28 lakhs, were paid by the appellant to Vishvamurte (Respondent) for purchase of these shares and thus Rs. 13 lakhs were further required to be paid to Vishvamurte (newly arrayed Respondent). Thus, when only Rs. 15 lakhs were paid to the Respondent by appellants for purchase of the impugned shares and this amount may be recovered by selling them, in fact no loss could be said to have been caused to the CD, as these shares are still in the possession of the CD and Keeping in view the fact that Respondent is seller of these shares, he could not be the beneficiary of its own wrongful act. Therefore, the main ingredients of Section 66 (2) of IBC, i.e. (i)director of the CD knew or ought to have known that there is no reasonable prospect of avoiding insolvency proceedings and (ii) that they did not take due diligence to minimize the potential loss to the creditors is conspicuously lacking in this case. Thus no case is emerging under Section 66 (2) of the Code against appellants. It is reiterated that every decision mode in business of taking risk, in order to earn more profit cannot be labelled as fraudulent or to have been done to deceive creditors.

47. Keeping in view all the facts and circumstances, together and the law described herein before we are of the view that the Tribunal has not correctly appreciated the facts of the instant case and only on the basis of

the transactional audit report which may not be termed as a conclusive piece of evidence, has arrived at an erroneous conclusion that impugned transactions made by the appellant at the relevant point of time were fraudulent without adverting to see the impugned transactions in the broad spectrum of commercial wisdom.

48. Thus, we find merit in the appeal. Resultantly, the appeal is allowed and the impugned order passed by the tribunal is hereby set aside. There is no order as to costs. Pending IA's if any are also closed.

[Justice Mohd. Faiz Alam Khan]
Member (Judicial)

[Arun Baroka]
Member (Technical)

New Delhi.
25.09.2025.

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