

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

**Comp. App. (AT) (Ins) No. 444 of 2022**

**&**

**IA No. 3802 of 2022**

**IN THE MATTER OF:**

**Rakesh Kumar Gupta**

**...Appellant**

**Versus**

**Straight Edge Contracts Pvt. Ltd  
Through its Resolution Professional & Ors.**

**...Respondents**

**Present:**

**For Appellant : Abhishek Anand, Mohak Sharma, Sajal Jain,  
Supriyo banerje, Shikhar Tweari, Adv**

**For Respondents : Gaurav Mitra, Pradeep Kumar Kaushik, Vijeta  
Singh, Shashwati.P Adv for IRP**

**With**

**Comp. App. (AT) (Ins) No. 651 of 2022**

**IN THE MATTER OF:**

**Straight Edge Contracts Pvt. Ltd  
Through its Resolution Professional Ankit Kishore  
Sinha**

**...Appellant**

**Versus**

**Rakesh Kumar Gupta  
RP for Three C Universal Developers Pvt. Ltd & Ors.**

**...Respondents**

**Present:**

**For Appellant : None**

**For Respondents : Abhishek Anand, Mohak Sharma, Sajal Jain,  
Supriyo banerje, Shikhar Tweari, Adv**

**With**

**Comp. App. (AT) (Ins) No. 370 of 2022**

**IN THE MATTER OF:**

**Three C Shelters Pvt. Ltd.  
Through its Resolution Professional  
Mr. Chander Prakash**

**...Appellant**

**Versus**

**Orris Infrastructure Pvt. Ltd.**

**...Respondents**

**Present:**

**For Appellant : Anupam Lal Das, Sr. Adv, Arush Khanna, Rao Kamal, Aseem.A, Vaibhav Mehra, Applicant in IA No. 4233 of 2022**

**For Respondents : None**

**With**

**Comp. App. (AT) (Ins) No. 602 of 2022**

**&**

**IA No. 2900 of 2023**

**IN THE MATTER OF:**

**Greenopolis Welfare Association**

**...Appellant**

**Versus**

**Three C Shelters Pvt. Ltd. & Anr.**

**...Respondents**

**Present:**

**For Appellant : M.L.Lahoty, Anchit Sripat, Pooja Mahajan, S.Mahajan, Shreya Mahalwar, Karan Vir Khosla, Paban K Sharma, Adv**

**For Respondents : None**

**With**

**Comp. App. (AT) (Ins) No. 1379 of 2022**

**&**

**IA No. 4311, 4312, 4733 of 2022**

**IN THE MATTER OF:**

**Girish Chander Joshi**

**...Appellant**

**Versus**

**Orris Infrastructure Pvt. Ltd. & Ors.**

**...Respondents**

**Present:**

**For Appellant : Raj Kamal, Arush Khanna, Aseem, Vaibhav Mehra, Adv**

**For Respondents : Abhishek Anand, Mohak Sharma, Sajal Jain, Supriyo banerje, Shikhar Tweari, Adv**

**ORDER****Per : Justice Rakesh Kumar Jain (Oral)****28.08.2023**      **Company Appeal (AT) (Ins) No.444 of 2022**

1. This appeal is directed against the order dated 29<sup>th</sup> March, 2022 passed by the 'National Company Law Tribunal, Bench-IV, New Delhi (hereinafter referred as to 'the Adjudicating Authority) by which three applications bearing IA No. 2902/ND/2021 and IA No. 2482/ND/2022 filed by the Orris Infrastructure Private Limited (hereinafter referred as to "ORRIS") were partly accepted and IA No. 1663/ND/2021 filed by the Three C Universal Developers Pvt. Ltd. through its Resolution Professional, has been dismissed.

2. In brief, the application bearing IB-2721/ND/2019 has been filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as to 'Code') by M/s. Straight Edge Contract Pvt. Ltd against M/s. Three C Shelters Pvt. Ltd. before the Adjudicating Authority for the resolution of an amount of Rs. 29,95,91,034/- along with 24% interest.

3. This application was initially heard on 20.07.2020 and the following order was passed:

“Heard the submissions made by the Operational Creditor as well as Corporate Debtor. Annexure A-10 which is affidavit of admission shows that on January 27, 2020, the Director of Three C Shelters Private Limited. Mr. Girish Chander Joshi has confirmed that the Corporate Debtor has to pay to the Operational Creditor as per his claim. Therefore, the petition is allowed.”

4. Thereafter, on 14.10.2020, the Adjudicating Authority disposed of the application bearing IA No. 3079 of 2020 filed by the Applicant (M/s. Straight Edge Contract Pvt. Ltd) in which the following order was passed:

“IA No. 3079 of 2020

IA No. 3079 of 2020 is heard and the application is allowed.

By this order the typographical errors of order dated 20.07.2020 are corrected: -

- (i) The word “Section7” is replaced with “Section 9” in the order dated 20.07.2020
- (ii) Annexure A10 which is an affidavit of admission is replaced with the words “Annexure A” to the affidavit of admission
- (iii) The detailed order/final judgment will be uploaded within next three days.”

5. Although, the petition under Section 9 was allowed on 20.07.2020 but the detailed order was not passed immediately thereafter, rather the application IA No. 3079 of 2020 was disposed of on 14.10.2020 and at that time the Adjudicating Authority decided to pass the detailed order within three days and thereafter, the detailed order was passed on 16.10.2020. We do not want to comment on it but we do not appreciate this practice of the Adjudicating Authority for not passing the order immediately thereafter.

6. Be that as it may, during the pendency of the Resolution Process, three applications came to be filed i.e. IA No. 2902/ND/2021 and IA No. 2482/ND/2022 by the Orris Infrastructure Private Limited in which IA No. 2482/ND/2022 was filed for impleadment and IA No. 2902/ND/2021 under Section 60 (5) of the Code whereas IA No. 1663/ND/2021 was filed by the Three C Universal Developers Pvt. Ltd. through its Resolution Professional. All the applications were clubbed together by the Adjudicating Authority and framed 10 questions in which one of the question was “*Whether there was active collusion between M/s.Straight Edge Contracts Pvt. Ltd. & M/s. Three C Shelters Pvt. Ltd. in the initiation of CIRP proceedings and this Tribunal has got jurisdiction u/s 65 of IBC Code to set aside the entire CIR Proceedings?*” There

was another question that *“Whether this Tribunal is having jurisdiction to recall or review its own order after the admission of the Petition under Section 9 on the Ground of allegation of fraudulent & malicious intention of initiation of CIRP proceedings?”*

7. Both the questions have been decided in Para no. 59 & 61 of the impugned order which read as under:

*“59. No doubt there is collusion between the petitioner & respondent qua initiation of the CIR proceedings, but under the garb of section 65 of code the entire proceedings already stand initiated before filing of this application, cannot be set aside. Though, NCLT-in the matter of Middle Zone Solitor Hotel India Pvt. Ltd. Vs. Middle Tone Hotel Pvt. Ltd, held that once there are fraudulent initiation of the proceedings, the said proceedings can be set aside. However, Hon'ble NCLAT, in the matter of Adesh Jain (supra) categorically held that this Tribunal has no power to review its own order. Thus, in the light of the principle laid down in order passed in the matter of Adesh Jain (supra), it is held that this Tribunal is not empowered to review or recall its order, except where there is error apparent on the record, Accordingly, this Tribunal stand barred to recall or review its order dated 20.7.2020 / 16.10.2020.*

*61. Pursuant to specific provision 61 of the Code, it could be said that if Orris was aggrieved of the order dated 20<sup>th</sup> July 2020 or 16<sup>th</sup> October 2020, it has got remedy to approach the Hon'ble NCLAT by way of filing an appeal. As word “Any aggrieved person” includes not only party to the litigation, but it may any third party, who is affected with any such order can file an appeal. Thus, there was an effective remedy with Orris, but it failed to avail. Had, there been any intention on the part of legislature to give the power of review to this tribunal, the said provision would have been specifically incorporated. In the absence of any such specific provision for review, this Tribunal has got no jurisdiction to recall or review its own order, that too, when an efficacious remedy to file an appeal lies with Orris. Hence, it is held that though there was collusion between the petitioner and respondent, but this Tribunal has got no jurisdiction to re-call or review its own order qua initiation of CIR proceedings under the garb of Section 65 of the code. Accordingly, the Point No. II is partly answered in Affirmative, whereas, the Point No. III answered in Negative.”*

8. While decided the issue of conclusion (point No.10) the following conclusion was drawn by the Adjudicating authority which read as under:

“In sequel of the aforesaid detailed discussion, this Tribunal comes to the following conclusion:

a.Orris is necessary party to the lis, being aggrieved party, hence, it is allowed to intervene as there was active collusion between petitioner & Respondent corporate debtor and there was material suppression of the facts on behalf of Ld. RP of the Corporate Debtor from this Tribunal.

b.This Tribunal vests with no power to review or recall its own order 20.07.2020 & 16.10.2020, quo initiation of CIR Proceedings under the garb of Section 65 of the Code.

c. “Moratorium” commenced on passing of order dated 16.10.2020 and not on 20.07.2020, hence, it doesn’t not over-ride the order dated 7.10.2020 passed by Ld. HRERA. Accordingly, both the orders co-exist, being not in conflict with one another.

d.On the strength of collaboration agreement dated 02.11.2011, the status of the corporate debtor is mere of ‘contractor’ and not statutory license holder, of project greenopolis, accordingly, it does not vest with any right, title and interest in that project.

e.Project “Greenopolis” belongs Orris being owner of land as well as statutory license holder from Director town & Country planning, Harayan, according, Ld. RP of corporate Debtor is not entitled to take its control and custody.

f. Rs. 53 Crores lying in the Escrow account pertains to project Greenopolis and has to be utilized for its construction only, accordingly, Ld. RP of Corporate Debtor doesn’t have any right & interest in the same also accordingly, it could not be controlled by him”

9. Aggrieved against the impugned order, two appeals bearing Company Appeal (AT) (Ins) No. 444 of 2022 (present appeal) and 651 of 2022 have been filed. Company Appeal (AT) (Ins) No. 444 of 2022 has been filed by the RP of Three C Universal Developers Pvt. Ltd. who has challenged the finding

recorded in para 59 and 61 of the impugned order whereas the other appeal i.e. Company Appeal (AT) (Ins) No. 651 of 2022 has been filed by Straight Edge Contracts Pvt. Ltd through its Resolution Professional challenging the finding recorded in para 59 and 61 of the impugned order that there is a collusion between the parties.

10. No one has put in appearance on behalf of Respondent No.1 in Company Appeal (AT) (Ins) No. 444 of 2022 and Appellant in Company Appeal (AT) (Ins) No. 651 of 2022. Therefore, we have heard ex parte arguments of the Appellant in Company Appeal (AT) (Ins) No. 444 of 2022 and Company Appeal (AT) (Ins) No. 651 of 2022 is dismissed for non-prosecution.

11. Counsel for the Appellant has referred to an order of Hon'ble Supreme Court rendered in Civil Appeal No(s) 7641/2019 Beacon Trusteeship Limited Vs. Earthcon Infracon Pvt. Ltd & Anr. decided on 18.02.2020 to contend that as per this order the issue of collusion can neither be raised for the first time before this Tribunal or even in appeal before the Hon'ble Supreme Court. It is submitted that it means that the issue of collusion has to be raised before the Adjudicating Authority who has to look into it and take a decision.

12. It is further submitted that the Adjudicating Authority has committed a patent error in dismissing the application of the Appellant only on the ground that it does not have the jurisdiction to review or recall its order dated 20.07.2020 by which Section 9 of the Code was admitted and the order dated 16.10.2020 by which a detailed order was passed of admitting the application filed under Section 9 of the Code.

13. Counsel for the Appellant has submitted that in case of a fraud the whole proceedings stand vitiated and in this regard relied upon a decision of the Hon'ble Supreme Court in the case of S.P Chengal Varaya Naidu (Dead) by LRS V. Jagannath (Dead) by LRS and Ors. (1994) 1 SCC 1.

14. In relation to appeals namely CA(AT)(Ins)651/2022 and CA(AT)(Ins) 370/2022 and CA(AT)(Ins)602/2022, no respondent or their learned counsel came forward to submit oral arguments.

15. Insofar as appeal CA(AT)(Ins)1379/2022, in which Mr. Girish Chander Joshi, an ex-director of the corporate debtor is the appellant, is concerned we offered to hear oral arguments of the appellant, but no one came forward to present any oral arguments. We, therefore, decided to peruse and rely on the record while deciding this appeal.

16. We have heard Counsel for the Appellant and perused the recorded with his able assistance.

17. The issue involved in this case travels in a narrow compass as it is to be decided as to whether the Adjudicating Authority has committed a patent error in not recalling the order of admission dated 20.07.2020 & 16.10.2020 despite recording a finding that there has been an active collusion between both the parties in admission of the application filed under Section 9.

18. Section 65 of the Code is reproduced as under:

“65(1) If, any person initiates the Insolvency Resolution Process or Liquidation proceedings fraudulently or with malicious intent for any purpose other than for the resolution of insolvency, or liquidation, as the case may be, the Adjudicating Authority may



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

(2) If, any person initiates voluntary liquidation proceedings with the intent to defraud any person, the Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees but may extend to one crore rupees”.

(3) fi any person initiates the pre-packaged insolvency resolution process:-

(a) Fraudulently or with malicious intent for any purpose other than for the resolution of insolvency; or

(b) with the intent to defraud any person,

The Adjudicating Authority may impose upon such person a penalty which shall not be less than one lakh rupees, but may extent to one crore rupees.”

19. In the case of Beacon Trusteeship Limited (Supra), the Hon’ble Supreme Court has categorically held that:

“7.Considering the provision of Section 65 of the IBC, it is necessary for the Adjudicating Authority in case such an allegation is raised to go into the same. In case, such an objection is raised or application is filed before the Adjudicating Authority, obviously, it has to be dealt with in accordance with law. The plea of collusion could not have been raised for the first time in the appeal before the NCLAT or before this court in this appeal. Thus, we relegate the appellant to the remedy before the Adjudicating Authority.

8. In case a proper application is filed, aspect whether the proceedings have been initiated in collusive manner will be looked into, in accordance with law and the appropriate orders have to be passed, considering the facts and circumstances of the case. We have been made it clear that we have not commented on the merit of the case. We set aside the impugned order passed by the NCLAT and dispose of the appeal in accordance with the aforesaid directions”.

20. Similarly, in the case of S.P Chengal Varaya Naidu (Supra), the Hon’ble Supreme Court has held that:

“1. Fraud avoids all judicial acts, ecclesiastical or temporal observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eyes of law. Such a judgment/ decree – by the first court or by the highest court- has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings.”

21. Furthermore in the matter of A V Pappayya Sastry Vs. State of Andhra Pradesh (2007) 4 SCC 211, Hon’ble Supreme Court has similarly held as follows, in the matter of fraud :

*“21. Now, it is well settled principle of law that if any judgment or order is obtained by fraud, it cannot be said to be a judgment or order in law. Before three centuries, Chief Justice Edward Coke proclaimed: “Fraud avoids all judicial acts, ecclesiastical or temporal.”*

*22. It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the court, tribunal or authority is a nullity and non est in the eye of the law. Such a judgment, decree or order—by the first court or by the final court—has to be treated as nullity by every court, superior or inferior. It can be challenged in any court, at any time, in appeal, revision, writ or even in collateral proceedings.*

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*25. It has been said: fraud and justice never dwell together (fraus et jus nunquam cohabitant); or fraud and deceit ought to benefit none (fraus et dolus nemini patrocinari debent).*

*26. Fraud may be defined as an act of deliberate deception with the design of securing some unfair or undeserved benefit by taking undue advantage of another. In fraud one gains at the loss of another. Even most solemn proceedings stand vitiated if they are actuated by fraud. Fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam. The principle of “finality of litigation” cannot be stretched to the extent of an absurdity that it can be utilised as an engine of oppression by dishonest and fraudulent litigants.”*

22. In view of the aforesaid facts and circumstances of the case, we are totally satisfied that there is complete misappreciation of law on the part of

the Adjudicating Authority in rejecting the application filed both by the present Appellant as well as M/s. Oriss Infrastructure Pvt Ltd. wherein they have also submitted that the Adjudicating Authority has the jurisdiction to recall its own order if it is obtained by playing fraud upon it.

23. In view of the aforesaid discussions, the present appeal has the merit, therefore, the same is allowed and the impugned order is set aside.

24. Since, we have allowed the present appeal on the issue that the Adjudicating Authority had the jurisdiction to recall its own order which has been obtained by playing fraud upon it, the order passed by the Tribunal on 20.07.2020 & 16.10.2020 are hereby recalled.

25. Since, we have allowed Company Appeal (AT) (Ins) No. 444 of 2022 by which of admission of the application under Section 9 has been recalled, therefore, the other appeals namely CA(AT)(Ins) 651/2022, CA(AT)(Ins) 370/2022, and CA(AT)(Ins) 602/2022, wherein the impugned order dated 29.3.2022 are the subject matter of challenge have become infructuous and one also disposed of accordingly.

26. Insofar as appeal CA(AT)(Ins) 1379/2022 is concerned, we note from record that the appellant has challenged the order dated 9.9.2022 in IA No. 4302 is concerned, we note from record that the appellant has challenged the order dated 9.9.2022 in IA No. 4302 (ND)/2022 in IB-2721(ND)/2019 whereby the application for recalling and setting aside ex-parte order dated 29.3.2022 passed in CP IB/2721/ND/2019 has been dismissed. Upon a perusal of the impugned order dated 9.9.2022 in this case and the related record, we find that by challenging this impugned order, the Appellant Girish Chander Joshi

has sought 'recall' of order dated 29.3.2022. Since, in the other appeals we set aside the order dated 29.3.2022, therefore, we are of the view that this appeal CA(AT)(Ins) 1379/2022 has also become infructuous. It is disposed of accordingly.

27. All the pending interlocutory applications in all the appeals being disposed of by this common order are also closed herewith.

**[Justice Rakesh Kumar Jain]**  
**Member (Judicial)**

**[Dr. Alok Srivastava]**  
**Member (Technical)**

*Raushan/Ravi*