

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL  
AT CHENNAI**

**(APPELLATE JURISDICTION)**

**Company Appeal (AT) (CH) (INS.) No. 95 / 2023**

**(Filed under Section 61 (1) of the Insolvency and Bankruptcy Code, 2016)**

**(Arising out of the 'Order' dated 25.01.2023 in IA(IBC)/204/KOB/2022 in  
CP(IB)/ 25 / KOB / 2021, passed by the 'Adjudicating Authority',  
(National Company Law Tribunal', Kochi Bench, Kochi, under  
Section 66(1) of the I & B Code, 2016)**

**In the matter of:**

**1. Mr. Tenny Jose**

White Mansion, Chirammel House,  
Museum Cross Lane, Chembukkavu,  
Thrissur – 680020

**2. Mrs. Elsa Tenny**

White Mansion, Chirammel House,  
Museum Cross Lane, Chembukkavu,  
Thrissur – 680020

**3. Mr. Arun C. Tenny**

White Mansion, Chirammel House,  
Museum Cross Lane, Chembukkavu,  
Thrissur – 680020

**4. Mr. Kiran C. Tenny**

White Mansion, Chirammel House,  
Museum Cross Lane, Chembukkavu,  
Thrissur – 680020

**..... Appellants / Respondent  
Nos.1 to 3 & 5**

**v.**

**Mr. Prathap Pillai**

**Resolution Professional of**

**M/s. Tenny Jose Limited,**

BLRA 15, Bridge Lane,

Medical College P.O.,

Thiruvananthapuram,

Kerala – 695001

**..... Respondent / Petitioner /  
Resolution Professional**

**Present:**

For Appellants : Mr. Pradeep Joy, Advocate

**J U D G M E N T**  
**(Virtual Mode)**

**Justice M. Venugopal, Member (Judicial):**

**Background:**

**Comp. App (AT) (CH) (INS.) No. 95 of 2023:**

The `Appellants' / `Respondent Nos. 1 to 3 & 5', have preferred the instant Comp. App (AT) (CH) (INS.) No. 95 of 2023, as an `Aggrieved Persons', in respect of the `impugned order', dated 25.01.2023 in IA (IBC) / 204 / KOB / 2022 in CP (IB) / 25 / KOB / 2021 (Filed by the `Respondent / Petitioner'), under Section 66(1) of IBC, 2016), passed by the `Adjudicating Authority' (`National Company Law Tribunal', Kochi Bench, Kochi).

2. While passing the `impugned order', dated 25.01.2023, in IA (IBC) / 204 / KOB / 2022 in CP (IB) / 25 / KOB / 2021 (Filed under Section 66(1) of IBC, 2016), the `Adjudicating Authority' (`National Company Law Tribunal', Kochi Bench, Kochi), at Paragraph Nos. 9 to 16 (For Point No.3), had observed the following:

*``Point No 3: -*

*9. In respect of fraudulent transactions, the applicant stated that the deposits received from the various persons to the tune of Rs.12.64 crores were disguised as loans from the directors or advance from the customers, in violation of section 76 of Companies Act 2013 and the interest paid is shown in different heads as operational expenses. Further it is stated that the respondents drawn excess remuneration of Rs. 3,08,00,000/- in an unusual manner, without any authorization.*

*10. The petitioner alleged that the respondent had indulged in certain fraudulent trade transactions with intents to defraud the creditors of corporate debtor. As per Section 66 of the Insolvency and Bankruptcy Code, 2016 if any persons carried on the business of Corporate Debtor with intent to defraud its creditors, then the said person shall liable to make such contributions to the assets of the Corporate Debtor. One of the allegations made against the respondents is that they have received the loans to the company from the outsiders/public, but disguised those loans as if loan from directors, advances, against sale etc., in this regard in the application it is mentioned that a sum of Rs.99 lakhs has been paid towards interest. In annexure V it is mentioned that loans received from public, were disguised as loan from directors and given certain transactions and observed that this was done to avoid section 76 of the Companies Act 2013. In the annexure V it is stated that deposits from K. Gopal, Rohit enterprises Shanthi Corporation, Sree Seetharama Paper Agency and Mittal Trading company were received but disguised the said deposit as loan received from Tenny Jose, C Tenny Jose and interest paid to the depositors were debited in the different head. Either in the application nor in annexure V no details have been furnished who were benefited by this Act and how the amount Rs.99,00,000/- was arrived. In annexure it is concluded that this practice might have been performed by company to avoid compliances of public deposits as provided under section 76 of Companies Act, 2013 and to mislead other financial creditors, in that event it may come under mismanagement of company affairs in violation of statutory provision but it will not amount to fraud.*

*11. The next allegation is the directors were paid excess remuneration of Rs.3,08,00,000/- In annexure V facts are narrated in detail and figures are given in annexure 13, how the excess remuneration was drawn by the respondents 1 to 3 and 5 in violation section 197 & 198 of Companies Act 2013 and without any resolution or authority in this regard. For the financial year 2019-2020 the remuneration payable to the directors has been considered as Nil since the company did not have remarkable profit and the company did not prepare the appropriate notice in compliance of schedule V of the*

*Companies Act 2013. The excess payment for the financial years 2017- 2018 to 2020- 2021 received by the managing director, whole time directors and other directors are given in table.*

*12. The 2<sup>nd</sup> respondent drawn the remuneration from the corporate debtor as a director, but as per annual statements she was non-executive and not in managerial cadre so she is not entitled to draw any remuneration hence remuneration payable to her is considered as Nil., and the entire amount paid towards remuneration of second respondent is liable to be recovered. It is also noticed that 5<sup>th</sup> respondent even though resigned on 19.10.2021 but drawn salary till 31<sup>st</sup> January 2022. The maximum permissible remuneration and actual remuneration paid to the directors for the four financial years 2017-2018 to 2020-2021 are given below: -*

<i>Particulars</i>	<i>2017-18</i>	<i>2018-19</i>	<i>2019-2020</i>	<i>2020-21</i>
<i>Remuneration Paid</i>	<i>1,16,60,000</i>	<i>1,26,60,000</i>	<i>1,26,22,580</i>	<i>76,00,700</i>
<i>Maximum permissible amount</i>	<i>69,84,882</i>	<i>25,23,006</i>	<i>-</i>	<i>42,15,540</i>
<i>Excess remuneration paid</i>	<i>46,75,118</i>	<i>1,01,36,994</i>	<i>1,26,22,580</i>	<i>33,85,160</i>

*13. On the respondents 1 to 3 and 5 side not denies the receipt of the amount mentioned in the supra table, their reply is the pay structure was fixed during the time the company was in flourish and the same was followed for the financial years 2-17-2018 to 2019-2020. When the financial statement of the year 2019-2020 came out then only the respondents restructured the payment schedule by reducing 40% for the following financial year and passed resolution in this regard in July 2020.*

*14. From the contents of the respondents, they have not denied the receipt of excess payment but justified that they have simply followed the pay schedule fixed earlier when the company was in good financial condition, if this contention is accepted it may relieve the respondents from criminal liability but will not exonerate them from the liability to return the amount what according to them received by ignorance or by mistake.*

*15. In the application or in annexure V there is no iota of reference about 4<sup>th</sup> respondent, it is informed that he was appointed as an independent director in non-executive cadre on 18.06.2018 and resigned as such from office on 12.07.2021.*

*16. In the circumstances it is concluded that applicant side in crystal clearly proved that the respondents 1 to 3 and 5 drawn excess remuneration, for which they were not entitled, in consequence they are liable to refund the said excess payments drawn by them individually/personally and severally to the applicant. The prayer V in application is granted against the respondents 1 to 3 and 5. Thus this point is answered.”*

and resultantly, directed the Respondent Nos. 1 to 3 and 5, to pay jointly and severally a sum of Rs.3,08,00,000/- to the Respondent / Petitioner, within a month from today, failing which, the amount of Rs.3,08,00,000/- will carry interest at 12% Simple Interest per annum, from the date of the Order, till the date of realisation of the Amount, thus ordered the ‘Petition’, against the Respondent Nos. 1 to 3 and 5, and in respect of the 4<sup>th</sup> Respondent, ‘dismissed’, the ‘Application’. No cost.

### **Appellants’ Submissions:**

3. According to the Learned Counsel for the Appellants / Respondent Nos. 1 to 3 and 5, the ‘Adjudicating Authority’, had erred in coming to a conclusion that the ‘Respondent / Resolution Professional’, had made a determination, before Filing the ‘Application’.

4. The Learned Counsel for the Appellants, submit that the ‘Adjudicating Authority’, had erroneously concluded that merely accepting the conclusions in ‘Forensic Report’, does not amount to delegation of Powers of the ‘Resolution Professional’ and that the ‘Respondent / Resolution Professional’, in the present case, had made a

decision of his own, when the said 'Forensic Report', itself comes with a 'Disclaimer' that 'No person should act on such information without appropriate professional advice based on the circumstances of a particular situation'.

5. The Learned Counsel for the Appellants, takes a stand that a mere submission that a determination is made or an opinion is made does not suffice and that the 'Resolution Professional', has to express and explain 'Application of Mind', based on the 'Books of Accounts', 'Financial Statements', and 'Data' of the Corporate Debtor'.

6. The Learned Counsel for the Appellants, points out that the 'Application / Petition', was made by wholly placing reliance upon the 'Forensic Report', without even cross-checking the Books of Accounts or other relevant documents which were already in possession of the Respondent by virtue of his position, as the Resolution Professional of Corporate Debtor.

7. It is represented on behalf of the Appellants, that the Respondent / Resolution Professional should have relied upon the 'Books of Accounts' and 'Financial Statements' and 'Records' of the 'Company / Corporate Debtor' and not a 'Qualified Opinion' of a 'Forensic Auditor'.

8. It is the version of the Learned Counsel for the Appellants, that the 'Appellants', places reliance upon the decision of the Tribunal in Jitendra

Lohiya v. Nikhil Chowdhury & Ors., reported in (2022) ibclaw.in 337

NCLT, wherein, at Paragraph 16, it is observed as follows:

*16. ``We have carefully seen the averments of the application and corresponding reply of the respondents. We have noticed that the allegations made in application do not constitute anything actionable against the respondents. It was the duty of the RP to come to conclusive determination before filing an application with the Adjudicating Authority. Simply by repeating the extracts or observations made in the forensic auditors report, the RP could not make an independent determination about the nature of transactions as required by Regulation 35A (2) of the CIRP Regulations.``*

9. The Learned Counsel for the Appellants, adverts to the decision in Kshitiz Chhawchharia v. Madhumalati Merchandise Private Limited & Ors., reported in (2022) ibclaw.in 630 NCLT Kolkata, wherein, at Paragraph Nos. 6.7 to 6.9, it is observed as under:

*6.7. ``According to regulation 35A(1) of the CIRP Regulations, the Resolution Professional shall form an opinion whether the corporate debtor has been subjected to any transaction covered under sections 43, 45, 50 or 66 on or before the seventy-fifth day of the insolvency commencement date. According to the regulation 35A(2), on or before the one hundred and fifteenth day of the insolvency commencement date, the Resolution Professional is also required to make a determination to that effect.*

*6.8. Further, Regulation 35A(3) of the CIRP Regulations provides that upon making such determination under regulation 35A(2), the Resolution Professional shall apply to the Adjudicating Authority for the appropriate relief on or before the one hundred and thirty-fifth day of the insolvency commencement date. In this case, the one hundred and thirty fifth day is on 23 May 2018. The instant application being IA. (IBC) 346/KB/2019 has been filed on 20 March 2019, thus making it clear that the Applicant has not complied with the provisions of regulation 35A within the timeline provided therein.*

*6.9. Even if we go by the decision of the Hon'ble NCLAT in Aditya Kumar Tibrewal RP Vs. Om Prakash Pandey, Suspended Director that the timeframe is directory, we do not see any "determination" within the meaning of*

*regulation 35A of the CIRP Regulations. Therefore, we will not act as court of first instance to determine the nature of the transactions mentioned hereinabove.”*

10. The Learned Counsel for the Appellants, advances an argument that an ‘Onus of Proof’, is on a person, who alleges ‘Fraud’ and refers to the decision of the Hon’ble Supreme Court of India, in Union of India v. Chaturbhai M Patel & Co., reported in (1976) 1 SCC at Page 747, wherein, it is observed that “‘Fraud, must be established beyond reasonable doubt and the mere suspicion, however may be the circumstances however strange the coincidences, and however grave the doubt, suspicion alone can never take place of proof.”

11. The Learned Counsel for the Appellants, points out that the ‘Adjudicating Authority’, had erroneously held that the Respondent / Resolution Professional, had proved that the ‘Appellants’, had drawn an ‘Excess Remuneration’, from the ‘Corporate Debtor’, which amounted to a ‘Fraudulent Transaction’, within the meaning of Section 66 of the I & B Code, 2016.

12. The Learned Counsel for the Appellants, brings it to the notice of this ‘Tribunal’, that the Respondent / Resolution Professional should have placed on record (before the ‘Adjudicating Authority’), the ‘Books of



Accounts', 'Financial Statements', 'Records of the Corporate Debtor', to prove the 'Fraudulent Trading', as alleged.

13. It is projected on the side of the Appellants, that the Respondent / Petitioner, had mainly relied on the 'Forensic Audit Report', which does not hold 'any value', to enable a decision in respect of an allegation, made in the 'Petition'.

14. Also that, there was no contention in regard to the 'Intention to Defraud', 'Dis-honest Intention', in the pleading, nor there were facts relevant to the 'Corporate Debtor'.

15. The Learned Counsel for the Appellants, submits that the 'Adjudicating Authority', should have considered that the 'Corporate Debtor', was a 'Family Run Enterprise', who had conducted the 'Business', in a 'Bona fide Manner', and that there was 'no intent', whatsoever, to 'Defraud' the 'Creditors', or any 'Stakeholder' of the 'Corporate Debtor'.

16. According to the Appellants, the 'Petition', was filed by the Respondent / Petitioner, in a delayed manner, suffering from laches, and the same was filed beyond time. Besides this, the 'Adjudicating Authority', had failed to consider that the 4<sup>th</sup> CoC Meeting, took place on 02.04.2022, in which, the Respondent / Petitioner received an 'Authorisation', to appoint the 'Forensic Auditors'. Indeed, the 'Final

Audit Report', was submitted by the 'Auditor', only on 04.06.2022, and that the 'Petition', was filed on 15.07.2022, i.e., after 206 days of the Commencement of 'Corporate Insolvency Resolution Process' proceedings.

17. On behalf of the Appellants, a plea is taken before this 'Tribunal' that the 'Information Memorandum', issued by the 'Respondent / Petitioner', does not mention in any manner that the downfall of the Corporate Debtor was because of the 'Fraudulent Transaction' or 'Mismanagement' of the 'Former Management'.

18. The Appellants, come out with a plea that the 'Remuneration', paid to the Directors / Appellants, were duly 'disclosed', and there was no 'Element of Fraud', by the 'Appellant', with an 'Intent', to 'Defraud the Creditors' of the Corporate Debtor.

19. The Learned Counsel for the Appellants, cites the decision in Venkatesan Sankaranarayanan, the Resolution Professional for RTIL Limited v. Nitin Shambhukumar Kasliwal & Ors. (vide CP No. 382 / I & B / MB/2018), NCLT, Mumbai, wherein, at Paragraph 6, it is observed as under:

*6. "The Bench observes that it is a fact that management of company have taken certain decision which has not worked out as intended by the management and eventually loss occurred. However, such bad commercial business decision cannot be considered to be fraudulent or wrongful trading under provisions of Section 66 of the IBC."*

20. The Learned Counsel for the Appellants, contends that IA (IBC) / 204 / KOB / 2022 in CP (IB) / 25 / KOB / 2021 (Filed by the Respondent / Petitioner), before the 'Adjudicating Authority' / 'Tribunal', is a 'misconceived' one, the same is liable to be 'dismissed', by this 'Tribunal', by 'allowing', the instant 'Appeal', preferred by the 'Appellants'.

**Fraudulent Trading:**

21. The 'Offence of Fraudulent Trading', unlike 'Fraudulent Preference', involves an 'element of blame'. When whole 'business' of a 'Company', is being carried on, with an 'intend to Defraud', then, Section 66 of the I & B Code, 2016, is breached, as opined by this 'Tribunal'.

22. A pre-ponderance of probability, will suffice, in respect of an 'Offence of Fraudulent Trading', under Section 66 of the 'Code', is sufficient, but, the 'probability, must be such that, it must 'satisfy', the 'subjective conscience of the 'Adjudicating Authority' / 'Tribunal'.

**Third Person's Liability:**

23. In 'Law', a 'Company' or 'other Entity', which is involved in or assist and benefits from the 'offending business' or 'benefits', from 'Business', in an 'offending manner, does so knowingly and 'dishonestly', can be held 'liable' for a 'Fraudulent Trading'.

### **Discussions:**

24. Before the 'Adjudicating Authority' / 'Tribunal', the Respondent / Petitioner / Resolution Professional, had filed IA (IBC) / 204 / KOB / 2022 in CP (IB) / 25 / KOB / 2021 (under Section 66(1) of the I & B Code, 2016), among other things, averring that, he was informed that the South Indian Bank, after 'Classifying the Account of the Corporate Debtor', as 'Non Performing Asset', on 23.02.2021, and later as 'Red Flag Account', on 01.03.2021, engaged M/s. T.G. Sukumaran Company, to conduct a 'Forensic Audit' of the 'Corporate Debtor', and that the said 'Report', was finalised on 16.08.2021.

25. According to the Respondent / Resolution Professional (Before the 'Adjudicating Authority'), the 'South Indian Bank', had reported the 'Findings', in the 'Report' to the 'Director', 'Serious Fraud Investigation Office' ('SFIO'), 'Ministry of Corporate Affairs', New Delhi, and the 'Bank', had mentioned that they had deducted a 'Fraud', at 'Thrissur Branch', in the 'Account' of the 'Corporate Debtor'.

26. It is brought to the fore, that the 'Gist of the Allegations', communicated to the 'Serious Fraud Investigation Office', were (i) The 'Corporate Debtor', had diverted 'Funds to the Accounts of its 'Directors', for starting Subsidiaries in India and Abroad (ii) The 'Corporate Debtor', had deployed borrowed Funds for creating Assets

other than for those activities for which the loan was sanctioned (iii) The 'Corporate Debtor' removed and disposed hypothecated stocks without the knowledge of 'Bank'.

27. By way of 'Reply', dated 15.12.2021, the 'Corporate Debtor', furnished the detailed 'Reply' (for the Clarification, sought for by the Registrar of Companies, Kochi, in his Letter dated 30.11.2021), denying all such 'allegations', of 'Fraud', but mentioned that all the 'Transactions', were carried with the knowledge of the 'Banks'. Further, according to the 'Corporate Debtor', the 'Findings' of the 'Audit Report', are one sided and they were not heard by the 'Auditor' and no 'explanation', was sought for, from them, by the 'Auditors'.

28. It transpires that when the 'State of Affairs' of the 'Corporate Debtor', was pointed out by the 'Respondent / Petitioner', to the 'Committee of Creditors', of the 'Corporate Debtor', it was decided that a 'Forensic Audit' of the 'Corporate Debtor', was necessary and in the '4<sup>th</sup> CoC Meeting', that took place on 02.04.2022, the Respondent / Petitioner / Resolution Professional, was authorised to appoint CA Jackson Abraham Thekkekara, as 'Forensic Auditor', to conduct the 'Forensic Audit' of the 'Corporate Debtor', and an 'opportunity of fair Hearing', was to be provided to the 'Suspended Directors', to explain their case.

29. In the instant case on hand, it is evident that the Respondent / Resolution Professional, had filed IA (IBC) / 204 / KOB / 2022 in CP (IB) / 25 / KOB / 2021, under Section 66(1) of the Code (Based on the 'Forensic Auditor's Final Report', dated 04.06.2022), in the teeth of numerous 'Fraudulent Transactions', carried out by the 'Directors' of the 'Corporate Debtor', along with other 'Sister Concerns' of the Corporate Debtor. In fact, the Respondent / Resolution Professional analysed the 'Corporate Debtor's State of Affairs', and his conclusions, were in tune with the 'Findings' of the 'Forensic Audit', carried out by the 'Forensic Auditor'.

30. According to the Respondent / Resolution Professional, the 'acceptance of Public Deposits', to the tune of Rs.12.64 Crores from numerous 'Parties', were disguised as 'Loan', from 'Directors' or 'Advances' from the 'Customer', in negation to 'Section 76 of the Companies Act, 2013', and interest on the same, amounting to Rs.99 Lakhs, was paid, which was disguised as 'Operational Expense' – 'Overdue Charges'.

31. It is the version of the Respondent / Resolution Professional, that an 'Excess Remuneration', was paid to the 'Directors', amounting to Rs.46,75,188/- in the Financial Year 2017-18, Rs.1,01,36,994/- in the Financial Year 2018-19, Rs.1,26,22,580/- in the Financial Year 2019-20,

Rs.33,85,160/- in the Financial Year 2020-21, and that an `excess total Remuneration of Rs.308.2 Lakhs`, was paid to the `Directors`, with an `intent`, to `Defraud` its `Creditors` (discovered through `Forensic Report`), in `breach of Section 197 and 198 of the Companies Act, 2013`.

32. In so far as the 2<sup>nd</sup> Appellant / 2<sup>nd</sup> Respondent, is concerned, she drew the Remuneration from the `Corporate Debtor`, as `Director`, but, she was not in a `Managerial Position`, as she was non-executive and therefore, she is not entitled to get any `Remuneration`, but the amount so paid to her, is to be `recovered`.

33. A perusal of the `impugned order`, dated 25.01.2023, in IA (IBC) / 204 / KOB / 2022 in CP (IB) / 25 / KOB / 2021, indicates that the `maximum allowable Remuneration` and `real Remuneration`, paid to the Directors, for the Financial Years 2017-18 to 2020-21, proceeds as under:

<i>Particulars</i>	<i>2017-18</i>	<i>2018-19</i>	<i>2019-2020</i>	<i>2020-21</i>
<i>Remuneration Paid</i>	<i>1,16,60,000</i>	<i>1,26,60,000</i>	<i>1,26,22,580</i>	<i>76,00,700</i>
<i>Maximum permissible amount</i>	<i>69,84,882</i>	<i>25,23,006</i>	<i>-</i>	<i>42,15,540</i>
<i>Excess remuneration paid</i>	<i>46,75,118</i>	<i>1,01,36,994</i>	<i>1,26,22,580</i>	<i>33,85,160</i>

34. It comes to be known that the 4<sup>th</sup> Appellant / 5<sup>th</sup> Respondent, had drawn Salary, till 31.01.2022, despite the fact that he had resigned on 19.10.2021. As regards the `Appellant Nos. 1 to 3 / Respondent Nos. 1 to 3 and 4<sup>th</sup> Appellant / 5<sup>th</sup> Respondent`, they took a stand, before the `Adjudicating Authority`, in `Reply`, that the `Pay Structure`, was determined, when the `Company`, was in a Flourishing Position and the same was followed in respect of the Financial Years 2017-18 to 2019-20. However, the Financial Statement for the Year 2019-2020, showed that the `Payment Schedule`, was `Restructured`, by the `Appellants / Respondents`, by minimising 40% for the Following Financial Year and passed a Resolution in July 2020, on this aspect.

35. As regards, 4<sup>th</sup> Respondent in IA (IBC) / 204 / KOB / 2022 in CP (IB) / 25 / KOB / 2021, he was appointed as an `Independent Director`, in the `Cadre of Non-Executive`, on 18.06.2018, and he had resigned from his position on 12.07.2021 and that the `Adjudicating Authority`, had `dismissed` the IA (IBC) / 204 / KOB / 2022 in CP (IB) / 25 / KOB / 2021, as far he is concerned, based on the fact that there is no semblance of reference, about him in the `Petition` or in `Annexure V`, filed before the `Adjudicating Authority`, by the `Respondent / Resolution Professional`.



36. It cannot be forgotten in the instant case, the 'Corporate Debtor' / 'M/s. Tenny Jose Limited', was 'admitted', to 'Corporate Insolvency Resolution Process', on 21.12.2021. The Respondent / Resolution Professional, had filed IA (IBC) / 204 / KOB / 2022 in CP (IB) / 25 / KOB / 2021 on 15.07.2022.

37. As a matter of fact, the 'Forensic Auditor', was appointed on 02.04.2022 and a 'Report', was submitted. Although, as per Regulation 35A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the Resolution Professional, is to form an opinion, within 75 days of the 'Corporate Insolvency Resolution Process, and made determination within 115 days and is to file an 'Application', within 135 days, from the 'Date of Commencement of Corporate Insolvency Resolution Process', the said 'time period', is not a 'Mandatory' one, but, only 'Directory in Character'. As such, the 'contra plea', taken on behalf of the Appellants, in IA (IBC) / 204 / KOB / 2022 in CP (IB) / 25 / KOB / 2021, was not filed within the prescribed time, as per 'Regulation 35A of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations', 2016, is 'not acceded to', by this 'Tribunal'.

38. To be noted, that the Respondent / Petitioner / Resolution Professional, came to know of the 'Fraudulent Trading' of the 'Appellants / Respondents', on 4<sup>th</sup> June 2022, when the 'Audit Report', was given to him, and from that date, the IA (IBC) / 204 / KOB / 2022 in CP (IB) / 25 / KOB / 2021, was filed on 15.07.2022 (Before the 'Adjudicating Authority'), which was within 45 days. Hence, it is concluded by this 'Tribunal', that there is 'no delay'. Even, if there is any 'delay' beyond 135 days prescribed under Regulation 35A, considering the fact that the said Regulation is 'Directory in Character', the same is not 'Fatal', as opined by this 'Tribunal'.

39. In the present case, the Respondent / Resolution Professional, filed the IA (IBC) / 204 / KOB / 2022 in CP (IB) / 25 / KOB / 2021, before the 'Adjudicating Authority', on 15.07.2022, after coming to know of the 'Fraudulent Trading' of the 'Appellants / Respondents', on 04.06.2022, and therefore, the plea of 'Fraud', has no 'Limitation', whatsoever, in the considered opinion of this 'Tribunal'.

40. In 'Law', a 'Fraudulent Intent', is to be 'proved', after a careful examination of all materials / evidence, as the case may be. If a 'Fraudulent Intent' or 'Fraudulent Purpose', is made out, the 'Liability', must follow. An action can also lie, when there is a 'Fraudulent Purpose', upon the 'Customers' of the 'Company'. The 'Burden of Proof', is the

same as in a 'Civil' case, where 'Serious Allegations of Misconduct', such as, 'Fraud' are in 'issue'. In an 'isolated fraud' case, an 'Individual Tort Action' ('Civil Wrong'), will lie.

41. The expression 'Party to the carrying on Business', indicates, taking positive steps, in carrying of the Company's Business, in a fraudulent manner, undoubtedly, the victim of 'Fraud', must be a 'Creditor'.

42. As far as the present case is concerned, the 'Appellants / Respondents', had not 'controverted' or 'denied', the excess payment, but, came out with a version, that they had followed the 'Payment Schedule', earlier determined, when the 'Company', was in a good 'Financial Position'.

43. The very fact that the Appellants / Respondents, had drawn an 'excess Remuneration', to which, they are not legally entitled to, as a 'logical corollary', they are bound in 'Law', to 'refund', the 'excess amounts drawn by them', 'individually' and 'jointly', to the 'Respondent / Resolution Professional / Petitioner'. Viewed in that perspective, the 'impugned order', dated 25.01.2023, in IA (IBC) / 204 / KOB / 2022 in CP (IB) / 25 / KOB / 2021, passed by the 'Adjudicating Authority' ('National Company Law Tribunal', Kochi Bench, Kochi), in directing the 'Appellant Nos. 1 to 3 / Respondent Nos. 1 to 3 and the 4<sup>th</sup> Appellant /

5<sup>th</sup> Respondent', to 'Refund' / 'Pay', 'Jointly' and 'Severally', an amount of 'Rs.3,08,00,000/-, to the 'Respondent / Resolution Professional', within a month from today, failing which, for the said amount, an Interest of 12% per annum, is to be paid from the 'Date of the Order', till the 'Date of Realisation of the Sum', is free from any 'Legal Flaws'. Consequently, the 'Appeal' fails.

**Result:**

In fine, the instant Comp. App (AT) (CH) (INS) No 95 of 2023 is 'Dismissed'. No costs. The connected pending IA No. 332 of 2023 ('For Stay') is 'Closed'.

**[Justice M. Venugopal]  
Member (Judicial)**

**[Shreesha Merla]  
Member (Technical)**

04 / 08 / 2023

SR / TM