

Aditya Kumar Tibrewal vs Om Prakash Pandey & Ors on 6 April, 2022

Author: Ashok Bhushan

Bench: Ashok Bhushan

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
Company Appeal (AT) Insolvency No. 583 of 2021

(Arising out of Order dated 26.02.2021 passed by National Company Law Tribunal, Kolkata Bench, Kolkata in I.A. No. 742/KB/2020 in CP (IB) No. 518/KB/2018.)

IN THE MATTER OF:

Aditya Kumar Tibrewal,
Having registration No.

IBBI/IPA-002/IP-P00743/2017-2018/11249

Having office at 7C, Kiran Shnkar Roy Road,
Hastings Chambers, Basement, Kolkata West Bengal -
700001, acting as Resolution Professional in
Respect of the Corporate Debtor

...Appellant

Versus

1. Om Prakash Pandey,
Suspended Director of the Company
Residing at 67/21, Strand Road, Kolkata
700006 West Bengal

...Respondent 1

2. Dhiraj Pandey,
Suspended Director of the Company
Residing at 67/21, Strand Road, Jorabagan Kolkata
700006 West Bengal

...Respondent 2

3. Imax Infrastructure Private Limited,
Having its registered office at 41,
B.B. Ganguly Street 04th Street Floor
Kolkata 700012

...Respondent 3

4. Mr. Vikash Murarka,
Director of Imax Infrastructure Private Limited,
Having its registered office at 41, B.B.
Ganguly Street 4th Floor Kolkata 700012

...Respondent 4

5. Mr. Digvijay Pandey,
Director of Imax Infrastructure Private Limited,
Having its registered office at 41, B.B.

2

Ganguly Street 4th Floor Kolkata 700012

...Respondent 5

6. M/s. Shree Ram Saw Mill Private Limited,
Having its registered office at
67/10, Strand Road Kolkata - 700006

...Respondent 6

7. M/s. Shova Properties Private Limited,
Having its registered office at P-214 Lake Town,
Block -A, Kolkata - 700089

...Respondent 7

For Appellant: Mr. Abhijeet Sinha, Mr. Sidhartha Sharma, Mr. Arjun
Asthana, Advocates.
For Respondent: Mr. Subhasish Bhowmick, Advocate for R1.
Ms. Debaleena Ganguly, Advocate for R2.
Mr. Jishnu Saha, Senior Advocate with Mr. J. Patnaik,
Advocate for Intervenor
Ms. Manisha Pandey, Advocate for R3 & 4.
Ms. Mousumi Dey, Advocate for R6.

JUDGEMENT

Ashok Bhushan, J:

1. This Appeal has been filed by the Resolution Professional challenging the Order dated 26.02.2021 passed by the Adjudicating Authority (National Company Law Tribunal, Kolkata Bench, Kolkata) in I.A. No. 742/KB/2020 in CP (IB) No. 518/KB/2018 by which Order, I.A. No. 742/2020 filed by the Resolution Professional has been rejected.

2. Brief facts of the case and sequence of the events necessary to be noted for deciding this Appeal are:

- An Application being CP(IB) No. 518/KB/2018 filed by the Bank of India under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'Code') was admitted and 'Corporate Insolvency Resolution Process' (hereinafter referred to as 'CIRP') was initiated vide Order dated 18.10.2019 of the Adjudicating Authority Company Appeal (AT) Ins. No. 583 of 2021 against the Corporate Debtor M/s. Sri Balaji Forest Products Private Limited.

- Resolution Professional published the Form-A and constituted the 'Committee of Creditors' (Hereinafter referred to as 'CoC'). On numerous requests and reminders issued by the Appellant, Ex-

Director of the Corporate Debtor did not extend any cooperation nor provided the relevant documents pertaining to the Corporate Debtor.

An application under Section 19(2) of the Code was filed in which by Order dated 09.12.2019, the Adjudicating Authority directed suspended directors of the Corporate Debtor to extend cooperation in the CIRP. Due to numerous hindrances in conducting the CIRP caused by the suspended directors, the Resolution Professional initiated 'Contempt Proceedings' against the suspended directors on which the

Adjudicating Authority issued a Notice on 04.02.2020. On 15.01.2020 the suspended directors shared the Lease Deed dated 30th November, 2016 executed by the Corporate Debtor in favour of Respondent No. 3 by which all land, plot and machinery have been leased by the Corporate Debtor to Respondent No. 3 for a period of 29 years.

- On the Audited Balance Sheet of the Corporate Debtor, transaction audit report was finalised. The Resolution Professional after the transaction audit report filed an I.A. No. 742/2020 under Section 43 and 45 read with Section 49 and Section 66 and 60(5) of the Code seeking various reliefs under Section 49 and Section 66 of the Code.
- In the Application I.A. 742/2020, Adjudicating Authority issued notice to the suspended directors and other Respondents who were impleaded in the said Application however none of the Respondents Company Appeal (AT) Ins. No. 583 of 2021 including suspended directors chose to file any Reply to the Application.
- The Adjudicating Authority vide Order dated 26.02.2021 rejected the Application I.A. 742/2020 of the Resolution Professional holding that the Application is hit by Regulation 35A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons), Regulations, 2016 (Hereinafter referred to as 'CIRP Regulations, 2016') and by Section 46 of the Code.
- Aggrieved by the Order rejecting the I.A. 742/2020, this Appeal came to be filed by the Resolution Professional.

3. We have heard Mr. Abhijeet Sinha, Advocate for the Resolution Professional-Appellant, Mr. Shubhasish Bhowmick, Advocate for Respondent No. 1, Ms. Debaleena Ganguly, Advocate for Respondent No. 2, Ms. Manisha Pandey for Respondent No. 3 & 4 and Mr. Jishnu Saha, Sr. Advocate for Intervenor.

4. Mr. Abhijeet Sinha, Learned Counsel for the Appellant submitted that the Adjudicating Authority committed error in rejecting the Application I.A. 742/2020 of the Appellant. He submits that Regulation 35 A of CIRP Regulations, 2016 is only a directory regulation and the Application filed by the Appellant beyond the period prescribed under Regulation 35A was not liable to be rejected on the ground that it has not been filed within the timeline prescribed under Regulation 35A. Mr. Sinha submits that the Adjudicating Authority again committed error in relying on Section 46 for rejecting the Application holding that Lease Deed which was claimed by Appellant to be fraudulent transaction was executed 2 years earlier from the CIRP commencement date. It is further submitted that the time period Company Appeal (AT) Ins. No. 583 of 2021 prescribed under Section 46 is only for avoiding an undervalued transaction which provision does not cover a fraudulent transaction as referred to in Section 66 of the Code. Transaction of Lease by which all assets, plant

and machinery have been given to related party of the Corporate Debtor on meagre amount was fraudulent transaction undertaken with intent to defraud the creditors and the Adjudicating Authority erred in law in refusing to consider the Application on the ground that such transaction was beyond two years period. It is submitted that there were clear allegations of other transactions entered with related parties within the period of two years which was also not considered on merits on the ground that specific date has not been given by the Appellant. Mr. Sinha submits that there was substantial pleadings of fraud in the I.A. 742/2020 filed by the Appellant and observations of the Adjudicating Authority that fraud has not been committed is incorrect. It is further submitted that none of the Respondents including the suspended directors chose to file any Reply-Affidavits to the Application filed by the Resolution Professional since they have no defence to Application, Adjudicating Authority ought to have drawn adverse inference against the Respondents which was not done. It is further submitted that even in this Appeal, this Appellate Tribunal has issued notice and granted time for filing Reply-Affidavits but no Reply-Affidavit has been filed by any of the Respondents in this Appeal which clearly indicates that the Respondents have no defence to the pleas raised by the Appellant and they have only tried to avoid determination of the issues on the merits. It is submitted that the document dated 30th November, 2016 i.e. Lease Document was document not supported by credible payment, the Financial Creditor has already issued notice under Section 13 (2) of the SARFAESI Act, 2002 against the Company Appeal (AT) Ins. No. 583 of 2021 Corporate Debtor and has taken symbolic possession on 09.08.2016 and the alleged lease dated 30th November, 2016 executed thereafter was ex facie illegal and in contravention of the provisions of Section 13 of the SARFAESI Act, 2002 and further entire assets of the Corporate Debtor which were dealt in the lease deed were allegedly mortgaged with the Financial Creditor to secure the loan taken in the year 2013 and no lease could have been executed without the consent of the Financial Creditor and further no lease could have been executed for the period of 29 years.

5. Mr. Subhasish Bhowmick, Advocate for Respondent No. 1 refuting the submissions of Learned Counsel for the Appellant contends that the Appellant could not be allowed to question the Lease Deed which was executed on 30th November, 2016 by the Corporate Debtor beyond the lookout period of two years as prescribed under Section 46 of the Code. It is further submitted that the dispute is pending regarding the Lease Deed in the Civil Court where there is also an Interim Injunction in favour of the Respondent No. 3 and the Appellant has concealed all details with regard to the Civil Proceedings in this Appeal. Learned Counsel for Respondent No. 1 has made several requests for restructuring of their Account which was not accepted and Bank has classified the dues of the Company as 'NPA'.

Respondent No. 1 has also filed an Appeal vide diary No. 16919/2019 challenging the Order dated 18.10.2019 which Appeal is still pending. It is further submitted that Resolution Professional has failed to comply the requirement of Regulation 35A of the CIRP Regulations, 2016 and Section 46 of

the Code hence the Application was rightly rejected by the Adjudicating Authority. Specific Pleading of fraud is necessary which is wanting in the Company Appeal (AT) Ins. No. 583 of 2021 Application filed by the Appellant, there being no specific pleading of fraud Adjudicating Authority has rightly rejected the Application of the Appellant.

6. Learned Counsel appearing for the Respondent No. 2 submits that Respondent No. 2 does not belong to family of Respondent No. 1 and there are no allegations against the Respondent No. 2 in the Application filed by the Resolution Professional. There is no specific pleading of any fraud in the I.A. filed by the RP.

7. Learned Counsel appearing for Respondent Nos. 3, 4 and 5 submits that the Respondent No. 3 to whom the land, machinery tools and furniture have been leased out is not related party to the Corporate Debtor. Respondent No. 3 is completely separate entity from the promoters of the Corporate Debtor and their family members had no control over Respondent No. 3. The Lease Deed was executed on 30th November, 2016 between Shri Murlidhar Pandey, Shree Satya Prakash Pandey and Balaji Forest Products Pvt. Ltd. and Imax Infrastructure Pvt. Ltd. -Respondent No. 3. I.A. No. 742/2020 filed for cancellation of the said lease deed could not have been granted by the Adjudicating Authority since the Appellant had failed to comply the requirement of Regulation 35A of the CIRP Regulations, 2016 and Section 46 of the Code hence the Application was rightly rejected. There is an Interim Injunction granted by the Civil Court dated 12th July, 2019 in favour of Respondent No. 3.

8. Learned Counsel for the Intervenor submits that Intervenor is Successful Resolution Applicant whose Resolution Plan has already been approved by the Committee of Creditors. It is submitted that Notice Under Section 13(2) of the SARFAESI Act, 2002 was served on the mortgagers including the Corporate Debtor by the Bank of India on 11th February, 2015 Company Appeal (AT) Ins. No. 583 of 2021 in pursuance of which Indian Bank took symbolic possession of the Bank on 09th August, 2016. The Lease deed dated 30th November, 2016 executed thereafter for bypassing the statutory provisions and defraud the creditors. It is submitted that as per Section 65(a), 62(e) of Transfer of Property Act, 1882 the Lease could not have been granted for more than a period of three years wherein the present case lease claims to be having granted for 29 years. Lease hold rights granted after the property has been mortgaged without the consent of the Creditor is illegal. The creation of lease of entire factory along with the land of the Corporate Debtor was a fraudulent exercise. The Corporate Debtor not only handed over the land and other assets of the Corporate Debtor but also business to Respondent No. 3 which is presently carrying on business using the trademark of the Corporate Debtor. It is submitted that Application filed by the Resolution Professional under Section 43 and 45 read with Section 49 and Section 66 and 60(5) has wrongly been rejected by the Adjudicating Authority. The Plan submitted by Intervenor proceeds on the premise that entire land on which the factory of Corporate Debtor is established would be transferred to the Intervenor to enable him to continue to run the factory of the Corporate Debtor. The lease transaction is required to be declared as fraudulent and cancelled and the land and factory of the Corporate Debtor be permitted to hand over to the Resolution Professional.

9. We have considered the submissions of Learned Counsel for the parties and perused the record.

10. From the submissions of Learned Counsel for the parties, following are the questions which are arising for consideration in this Appeal:

Company Appeal (AT) Ins. No. 583 of 2021 i. Whether an Application by the Resolution Professional relating to a Transaction covered under Section 43, 45, 49 and 66 is mandatory to be filed within the period of 135th Day of the Insolvency Commencement Date and in event the Application is filed beyond such period, the same is liable to be rejected due to non-compliance of Regulation 35A of CIRP Regulations, 2016?

ii. Whether time period prescribed under Regulation 35A of the CIRP Regulations, 2016 is mandatory or directory? iii. Whether Transaction claimed to be defrauding the Creditor under section 49 and fraudulent trading or wrongful trading within meaning of Section 66 can be questioned only within time period as prescribed under Section 46 i.e. one year or 2 years respectively and Application alleging defrauding the Creditors and transaction to be fraudulent trading or wrongful trading is liable to be rejected if it is filed beyond the period prescribed under Section 46 of the Code?

iv. Whether in the Application filed by the Appellant being I.A. No. 742 of 2020 there were any pleadings of fraud as contemplated by Section 49 and 66 of the Code?

v. Whether the Adjudicating Authority committed error in rejecting the Application being I.A. No. 742 of 2020?

11. Questions I & II i. We now recapitulate the facts of the case. The CIRP was initiated by the Order dated 18.10.2019. The suspended directors did not cooperate with the Resolution Professional nor provided the relevant documents, books of accounts etc. and Application i.e. C.A. (IB) No. 1679/KB/2019 Company Appeal (AT) Ins. No. 583 of 2021 was filed by the Resolution Professional before the Adjudicating Authority under Section 19(2) of the Code on which the Order was passed by the Adjudicating Authority on 09.12.2019 directing the suspended board of directors to hand over custody of all assets, liabilities and books of accounts to the Resolution Professional. On 15th January, 2020, the Respondent No. 1 shared the Lease Deed dated 30th November, 2016 executed by the Corporate Debtor in favour of the Respondent No. 3, with the Resolution Professional. The Adjudicating Authority also issued a Notice for contempt against the suspended directors on 04.02.2020 due to non-compliance of Order directing the suspended director to extend cooperation with the Resolution Professional. After receipt of the transaction audit Report under the Code which was finalised on 14th August, 2020. I.A. No. 742/2020 has been filed by the Resolution Professional-Appellant. In the I.A., following reliefs have been prayed for by the Resolution Professional:

"a. Declare that the execution of the lease deed is in the nature of transaction as described in section 45 of the Code, 2016 and reverse the transaction in accordance with section 49 of the Act or such other relevant provision; b. Declaration that the lease deed executed on 30th November, 2016, and registered on 15th December, 2016

with Imax Infrastructure Pvt. Ltd. be declared as cancelled, null and void in terms of section 49 of the prior to the transfer of the said land through the illegal lease transaction;

c. Appointment of an independent expert to assess evidence relating to the value of the property under Section 46(2) of the I&B Code;

Company Appeal (AT) Ins. No. 583 of 2021 d. Direct Imax Infrastructure Pvt. Ltd. to forthwith make the differential lease consideration payment after determination of market value of annual lease consideration of the premises in accordance with prayer (c) hereinabove along with interest;

e. Pass appropriate orders in terms of Section 66 of the Code, 2016;

f. Direct M/s. Shree Ram Saw Mill Pvt. Ltd. to forthwith make the payment amounting to Rs. 11,10,009/- (Rupees Eleven Lakh and Ten Thousand only) along with interest to the corporate debtor with respect to the preferential related party payments;

g. Direct M/s. Shova Properties Pvt. Ltd. to forthwith make the payment amounting to Rs. 5,50,000/- (Rupees Five Lakh and Fifty Thousand only) along with interest to the corporate debtor with respect to the preferential related party payments;

h. Restrain Respondent Nos. 3 to 5 from using the Brand Name "AEON" of the corporate debtor for sale of the goods;

i. Direct seizure of the infringing goods of Respondent No. 3;

j. Direct the Respondent Nos. 3 to 5 to furnish a list of inventories of the infringing goods and the sale register of the infringing goods sold by Respondent Nos. 3 to 5; k. Direct the Respondent Nos. 3 to 5 to pay damages and compensation to the Corporate Debtor for infringement of the copyright;

l. Ad-interim orders in terms of prayer above; m. Such further order or orders as to which this Hon'ble Tribunal may deem fit and proper."

Company Appeal (AT) Ins. No. 583 of 2021 ii. Regulation 35A provides preferential and other transaction which was substituted by notification dated 3rd July, 2018. Regulation 35A is as follows:

"35A. Preferential and other transactions. - (1) On or before the seventy fifth day of the insolvency commencement date, 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.

(2) Where the resolution professional is of the opinion that the corporate debtor has been subjected to any transactions covered under sections 43, 45, 50 or 66, he shall make a determination on or before the one hundred and fifteenth day of the insolvency commencement date, (3) Where the resolution professional makes a determination under sub-regulation 2, he shall apply to the Adjudicating Authority for appropriate relief on or before the one hundred and thirty-fifth day of the insolvency commencement date."

iii. Regulation 35A prescribed a period during which Resolution Professional has to form an opinion whether corporate debtor has been subjected to any transaction covered under Section 43, 45, 50 or 66 and the period during which he shall make a determination and a period of one hundred thirty-fifth day of insolvency commencement date during which he shall apply to the Adjudicating Authority. The expression used in Regulation 35A "shall form an opinion" "shall make a determination"

and he "shall apply to the Adjudicating Authority". The question which has come up for consideration before us is as to whether the time period Company Appeal (AT) Ins. No. 583 of 2021 prescribed for taking different measures under Regulation 35A are mandatory and Resolution Professional is not competent to take any action beyond the timeline prescribed and due to non-compliance of timeline prescribed in Regulation 35A, the Application deserves to be dismissed?

iv. In the present case, the Adjudicating Authority has taken a view that Appellant Resolution Professional has not complied Regulation 35A in filing the I.A. No. 742 of 2020. In paragraph 30 of the Impugned Order, following has been observed by the Adjudicating Authority:

"30. The facts and circumstances of the present application do not inspire our confidence that it is maintainable ex facie. The application is first hit by regulation 35A of the CIRP Regulations and then by Section 46 of the Code. We are also not satisfied that the lease deed was entered into to defraud the creditors of the Corporate Debtor."

v. What is intend and purpose of using the expression "shall" in Regulation 35A of the CIRP Regulations has to be looked into for coming to a conclusion as to whether non-compliance of time period prescribed in Regulation 35A of the CIRP Regulations vitiates all actions taken by Resolution Professional. In the present case, the case of the Appellant is that he came to know about the fraudulent transaction i.e. lease deed dated 30th November, 2016 only on 15th January, 2020 when Respondent No. 1 shared lease deed with the Resolution Professional and thereafter the Application I.A. 742/2020 was filed. The Application filed being I.A. No. 742/2020 was obviously filed beyond the period of 135th Day of Insolvency Commencement Date. The rules of statutory Company Appeal (AT) Ins. No. 583 of 2021 interpretation for finding out true nature of statutory provision, whether the mandatory or directory, are well settled. Hon'ble Supreme Court in 'State of Uttar Pradesh Vs. Manbodhan Lal Shrivastava' AIR1957 SC 912 at page 917 made following observations:

"..Hence, the use of the word "shall" in a statute, though generally taken in a mandatory sense, does not necessarily mean that in every case it shall have that effect, that is to say, that unless the words of the statute are punctiliously followed, the proceeding, or the outcome of the proceeding, would be invalid. On the other hand, it is not always correct to say that where the word "may" has been used, the statute is only permissive or directory in the sense that non-compliance with those provision will not render the proceeding invalid. In that connection, the following quotation from Crawford on 'Statutory Construction'- art. 261 at p. 516, is pertinent:

"The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provisions but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other...."

vi. The I&B Code, 2016 contains timeline for different actions the time period prescribed under Regulation 35A of the CIRP Regulations is time period which casts a duty on the Resolution Professional to take Company Appeal (AT) Ins. No. 583 of 2021 measures as prescribed in Regulation 35A of the CIRP Regulations. The Privy Council in 'Montreal Street Railway Vs. Normandin' AIR 1917 PC 142 had laid down following principles of statutory interpretation:

"When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those who are entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only."

vii. The above proposition of the Privy Council was quoted with approval by Hon'ble Supreme Court. The same proposition was reiterated by Hon'ble Apex Court in (2016) 11 SCC 31 in 'Lalaram Vs. Jaipur Development Authority' wherein paragraph 106 following has been held:

"106. As noticed hereinabove, it is affirmatively acknowledged as well that where provisions of a statute relate to the performance of a public duty and where the invalidation of acts done in neglect of these have the potential of resulting in serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and at the same time would not promote the main object of the legislature, such prescriptions are generally understood as mere instructions of the guidance of those on which the duty is imposed and are regarded as directory. It has been the practice to hold such provisions to be directory only, neglect of those, though punishable, would not, however, affect the Company Appeal (AT) Ins. No. 583 of 2021 validity of the acts done. At the same time where however, a power or authority is conferred with a direction that certain regulation or formality shall be

complied with, it would neither be unjust nor incorrect to exact a rigorous observance of it as essential to the acquisition of the right of authority."

viii. Regulation 35A of the CIRP Regulations imposes a duty on the Resolution Professional to take measure within the timeline as prescribed. In performance of such duty the public in general has no control including the Corporate Debtor. In event it is held that any action taken by Resolution Professional beyond the time prescribed in Regulation 35A of the CIRP Regulations is prohibited, it shall cause serious general inconvenience or injustice to the Corporate Debtor. One of the objective of the Code is to maximise the assets of the Corporate Debtor. In event the actions taken by the Resolution Professional after the timeline prescribed in Regulation 35A of the CIRP Regulations are to be annulled, the undervalued and fraudulent transactions will go out of the reach of Resolution Process, reach of the Court and shall cause great inconvenience and injustice to Corporate Debtor. Hence, we are of the view that timeline prescribed in Regulation 35A of the CIRP Regulations is only directory and any action taken by the Resolution Professional beyond the time prescribed under Regulation 35A of the CIRP Regulations cannot be held to be non-est or void only on the ground that it is beyond the period prescribed under Regulation 35A of the CIRP Regulations. There may be genuine and valid reasons for Resolution Professional not to file application for avoiding the transactions within time prescribed which are question relating to each case and has to be Company Appeal (AT) Ins. No. 583 of 2021 examined on case-to-case basis and if there are reasons due to which Resolution Professional could not file the Application within time the same has to be examined on merit.

ix. Coming to the facts of the present case, it is clear that there was no cooperation by the Suspended Directors, documents and assets were not handed over to the RP, RP had to move an Application under Section 19(2) of the Code. The Order was passed on 09th December, 2019 by the Adjudicating Authority directing the suspended Directors to extend cooperation and it was only thereafter on 15th February, 2020 the lease deed was shared by Respondent No. 1 with the Corporate Debtor. The Transaction Audit Report was finalised on 14th August, 2020 and thereafter the Application was filed.

x. The view which we are taking with regard to the interpretation of Regulation 35A of the CIRP Regulations fully finds support from the Judgment of the Hon'ble Supreme Court in (2017) 16 SCC 143 in 'Surendra Trading Company Vs. Juggilal Kamlapat Jute Mills Company Limited and Ors.'. The Hon'ble Apex Court in the above case had occasion to consider the provisions of Section 7 of the Code, Section 9(5) proviso and Section 7(5) proviso and Section 10(4) proviso. Under Section 9 (5) a period of 14 days have been given by the statute to the Adjudicating Authority to take a decision to admit or reject the Application which was held to be directory and the decision taken by the NCLT holding the provision directory was approved by the Hon'ble Supreme Court. Similarly other provisions which came for consideration Proviso Section 7(5) and Proviso Section 9(5) and Proviso Section 10(4) to remove the defects within seven days was held to be mandatory by this Company Appeal (AT) Ins. No. 583 of 2021 Appellate Tribunal against which the Appeal was allowed by the Hon'ble Supreme Court and Judgment of this Tribunal was reversed holding the period of 7 days to remove the defects is directory. The Hon'ble Supreme Court has quoted with approval the reasons given by the Appellate Tribunal for holding the provisions of Section 9(5) directory, Section 9(5)

provides:

"Section 9(5) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub- section (2), by an order-

(i). admit the application and communicate such decision to the operational creditor and corporate debtor if,-

(a) the application made under sub-section (2) is complete;

(b) there is no payment of the unpaid operational debt;

(c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and

(e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-

section (4), if any.

ii. reject the application and communicate such decision to the operational creditor and the corporate debtor, if-

(a) the application made under sub-section (2) is incomplete;

(b) there has been payment of the unpaid operational debt;

Company Appeal (AT) Ins. No. 583 of 2021

(c) the creditor has not delivered the invoice or notice for payment to the corporate debtor:

(d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or

(e) any disciplinary proceeding is pending against any proposed resolution professional;

Provided that Adjudicating Authority, shall before rejecting an application under sub-clause (a) of clause

(ii) give a notice to the applicant to rectify the defect in his application within seven days of the date of receipt of such notice from the adjudicating Authority." xi. In paragraph 18 of the Judgment of Hon'ble Supreme Court in 'Surendra Trading Company Vs. Juggilal Kamlapat Jute Mills Company Limited and Ors.' the Apex Court noticed and approved the view of the Appellate Tribunal that period of 14 days is not mandatory. It is useful to extract paragraph 18 of the Judgment which is to the following effect:

"18. The aforesaid statutory scheme laying down time limits sends a clear message, as rightly held by the NCLAT also, that time is the essence of the Code. Notwithstanding this salutary theme and spirit behind the Code, the NCLAT has concluded that as far as fourteen days time provided to the adjudicating authority for admitting or rejecting the application for initiation of insolvency resolution process is concerned, this period is not mandatory. For arriving at such a conclusion, the NCLAT has discussed the law laid down by this Court in some judgments. Therefore, we deem it proper to reproduce the discussion of the NCLAT itself in this behalf:

Company Appeal (AT) Ins. No. 583 of 2021 "32. In P.T. Rajan Vs. T.P.M. Sahir and Ors. (2003) 8 SCC 498, the Hon'ble Supreme Court observed that where Adjudicating Authority has to perform a statutory function like admitting or rejecting an application within a time period prescribed, the time period would have to be held to be directory and not mandatory. In the said case, Hon'ble Apex Court observed:

"48. It is well-settled principle of law that where a statutory functionary is asked to perform a statutory duty within the time prescribed therefor, the same would be directory and not mandatory. (See Shiveshwar Prasad Sinha v. The District Magistrate of Monghur & Anr. AIR (1966) Patna 144, Nomita Chowdhury v. The State of West Bengal & Ors. (1999) CLJ 21 and Garbari Union Co-operative Agricultural Credit Society Limited & Anr. V. Swapan Kumar Jana & Ors. (1997) 1 CHN 189).

49. Furthermore, a provision in a statute which is procedural in nature although employs the word "shall" may not be held to be mandatory if thereby no prejudice is caused."

33. That the Hon'ble Apex Court has on numerous occasions interpreted the word 'shall' to mean 'may'. An analogous position can be found in the context of the time prescribed for filing Written Statements by Defendants to a suit, wherein the Hon'ble Apex Court was faced with the question of a Court's power to take on record Written Statements that were filed beyond the period of 90 days, as prescribed under Order VIII Rule 1 of the Code of Civil Procedure, 1908. In this regard, the Hon'ble Supreme Court in Kailash Versus Nanhku and Ors (2005) 4 SCC 480 held as under:

Company Appeal (AT) Ins. No. 583 of 2021 "27. Three things are clear. Firstly, a careful reading of the language in which Order 8 Rule 1 has been drafted, shows that it casts an obligation on the defendant to file the written statement within 30 days from the date of service of summons on him and within the extended time falling

within 90 days. The provision does not deal with the power of the court and also does not specifically take away the power of the court to take the written statement on record though filed beyond the time as provided for.

Secondly, the nature of the provision contained in Order 8 Rule 1 is procedural. It is not a part of the substantive law. Thirdly, the object behind substituting Order 8 Rule 1 in the present shape is to curb the mischief of unscrupulous defendants adopting dilatory tactics, delaying the disposal of cases much to the chagrin of the plaintiffs and petitioners approaching the court for quick relief and also to the serious inconvenience of the court faced with frequent prayers for adjournments. The object is to expedite the hearing and not to scuttle the same. The process of justice may be speeded up and hurried but the fairness which is a basic element of justice cannot be permitted to be buried."

34. Further, Hon'ble Supreme Court in the matter of Smt. Rani Kusum vs Smt. Kanchan Devi (2005) 6 SCC 705, concurring with the ratio laid down in *Kailash Versus Nanhku* (supra) held that:

"10. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial Company Appeal (AT) Ins. No. 583 of 2021 system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice.

11. The mortality of justice at the hands of law troubles a judge's conscience and points an angry interrogation at the law reformer.

12. The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in the judges to act *ex debito justitiae* where the tragic sequel otherwise would be wholly inequitable. Justice is the goal of jurisprudence, processual, as much as substantive. (See *Sushil Kumar Sen v. State of Bihar* [(1975) 1 SCC 774] .)

13. No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner for the time being by or for the court in which the case is pending, and if, by an Act of Parliament the mode of procedure is altered, he has no other right than to proceed according to the altered mode. (See *Blyth v. Blyth* [(1966) 1 All ER 524 : 966 AC 643 : (1966) 2 WLR 634 (HL)] .) A procedural law should not ordinarily be construed as mandatory; the procedural law is always subservient to and is in aid to justice. Any interpretation which eludes or frustrates the recipient of justice is not to be followed.

Company Appeal (AT) Ins. No. 583 of 2021 (See Shreenath v. Rajesh [(1998) 4 SCC 543 : AIR 1998 SC 1827] .)

14. Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice."

Xx xx xx

41. Further, nature of the provisions contained in sub- section (5) of section 7 or sub-section (5) of section 9 and sub-section (4) of section 10 of the 'Code' like Order VIII Rule 1 being procedural in nature cannot be treated to be a mandate of law.

42. The object behind the time period prescribed under sub-section (5) of section 7, sub-section (5) of section 9 and sub-section (4) of section 10, like Order VIII, Rule 1 of CPC is to prevent the delay in hearing the disposal of the cases. The Adjudicating Authority cannot ignore the provisions. But in appropriate cases, for the reasons to be recorded in writing, it can admit or reject the petition after the period prescribed under section 7 or section 9 or section 10.

43. Thus, in view of the aforementioned unambiguous position of law laid down by the Hon'ble Apex Court and discussion as made above, we hold that the mandate of sub-section (5) of section 7 or sub-section (5) of section 9 or sub-section (4) of section 10 is procedural in nature, a tool of aid in expeditious dispensation of justice and is directory."

xii. The Hon'ble Supreme Court further noticed the view of this Tribunal that period of 7 days for rectification of defects as contained in Proviso Company Appeal (AT) Ins. No. 583 of 2021 Section 7(5) and Proviso Section 9(5) and Proviso Section 10(4) are mandatory. Following was noted in Paragraph 20 of the judgment. The view of the Tribunal holding 7 days period as mandatory was reversed by the Hon'ble Supreme Court and following was laid down in Paragraph 24:

"Further, we are of the view that the judgments cited by NCLAT and the principle contained therein applied while deciding that period of fourteen days within which the adjudicating authority has to pass the order is not mandatory but directory in nature would equally apply while interpreting the proviso to sub-section 5 of Section 7, Section 9 of sub-Section 4 of Section 10 as well. After all, the applicant does not gain anything by not removing the objections inasmuch as till the objections are removed, such an application would not be entertained. Therefore, it is in the interest of the applicant to remove the defects as early as possible."

xiii. The Law laid down by the Hon'ble Supreme Court in the above judgment which deals with the interpretation of provisions of the Code itself are applicable to interpretation of Regulation 35A of CIRP Regulations and following the above judgment we hold that timeline prescribed in Regulation

35A of CIRP Regulations is directory and not mandatory.

12. Question III i. Now we come to question whether the time period prescribed under Section 46 for avoiding undervalued transactions are also to be applied for judging of fraudulent transaction. We need to first notice Section 45 and 46 which is to the following effect:

Company Appeal (AT) Ins. No. 583 of 2021 "45. Avoidance of undervalued transaction.- (1) If the liquidator or the resolution professional, as the case may be, on an examination of the transactions of the corporate debtor referred to in sub-section (2) of section 43 determines that certain transactions were made during the relevant period under section 46, which were undervalued, he shall make an application to the Adjudicating Authority to declare such transactions as void and reverse the effect of such transaction in accordance with this Chapter.

(2) A transaction shall be considered undervalued where the corporate debtor--

(a) makes a gift to a person; or

(b) enters into a transaction with a person which involves the transfer of one or more assets by the corporate debtor for a consideration the value of which is significantly less than the value of the consideration provided by the corporate debtor, and such transaction has not taken place in the ordinary course of business of the corporate debtor.

46. Relevant period for avoidable transactions. -(1) In an application for avoiding a transaction at undervalue, the liquidator or the resolution professional, as the case may be, shall demonstrate that--

(i) such transaction was made with any person within the period of one year preceding the insolvency commencement date; or

(ii) such transaction was made with a related party within the period of two years preceding the insolvency commencement date.

(2) The Adjudicating Authority may require an independent expert to assess evidence relating to the value of the transactions mentioned in this section."

ii. Now we come to Section 66 which deals with fraudulent trading and wrongful trading. Section 66 is as follows:

Company Appeal (AT) Ins. No. 583 of 2021 "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.

(3) Notwithstanding anything contained in this section, no application shall be filed by a resolution professional under sub-section (2), in respect of such default against which initiation of corporate insolvency resolution process is suspended as per section 10A.

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 Company Appeal (AT) Ins. No. 583 of 2021 out the same functions as are carried out by such director or partner, as the case may be, in relation to the corporate debtor."

iii. Section 66 contemplates that 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, the Adjudicating Authority may on the application of the resolution professional pass an order. In the present case the Adjudicating Authority has held that Application under Section 66 also ought to be filed within period as prescribed under Section 46 of the Code. We have noticed that in Paragraph 30 of the Judgment Adjudicating Authority held that Application filed by the RP is hit by Section 46 and to the same effect observations are made in paragraph 26 of the Impugned Order, which are as follows:

"26. Although we are not very satisfied with the reasons for not complying with the timeline as envisaged under regulation 35A of the CIRP Regulations by the RP, even if we are to accept these reasons, section 46 of the Code binds our hands from proceeding further inasmuch as we cannot look into transactions that were entered into during the period of two years preceding the date of commencement of CIRP. It is the RP's own case that the lease deed was entered into between the Corporate Debtor and Respondent No. 6 and 7 on 30.11.2016 whereas the CIRP envisaged under section 46 of the Code. The RP is not expected to undertake any roving inquiry beyond the timeframe stipulated in the Code and the regulations."

iv. The Code contains a scheme which provides for avoidance of undervalued transaction under the period prescribed under Section Company Appeal (AT) Ins. No. 583 of 2021

46. We may look into other provisions of the Code dealing with other kind of transactions. The time period as prescribed under Section 46 is not applied with regard to other nature of transactions for example we take Section 49 which contains heading "transaction defrauding creditors". Section 49 is as follows:

"49. Transactions defrauding creditors.- Where the corporate debtor has entered into an undervalued transaction as referred to in sub-section (2) of section 45 and the Adjudicating Authority is satisfied that such transaction was deliberately entered into by such corporate debtor--

(a) for keeping assets of the corporate debtor beyond the reach of any person who is entitled to make a claim against the corporate debtor; or

(b) in order to adversely affect the interests of such a person in relation to the claim, the Adjudicating Authority shall make an order--

(i) restoring the position as it existed before such transaction as if the transaction had not been entered into; and

(ii) protecting the interests of persons who are victims of such transactions:

Provided that an order under this section--

(a) shall not affect any interest in property which was acquired from a person other than the corporate debtor and was acquired in good faith, for value and without notice of the relevant circumstances, or affect any interest deriving from such an interest, and

(b) shall not require a person who received a benefit from the transaction in good faith, for value and without notice of the relevant circumstances to pay any sum unless he was a party to the transaction."

Company Appeal (AT) Ins. No. 583 of 2021 v. Section 49 does not contain a time period during which the Application has to be filed. Hence Section 46 is not to be applied to the transactions which have been made to defraud the creditors. We may notice one more provisions of the Code i.e. Section 69 which deals with punishment for transactions defrauding creditors. Section 69 is to the following effect:

"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."

Company Appeal (AT) Ins. No. 583 of 2021 vi. The Proviso to Section 69 indicates 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. The person can save himself from prosecution if act had been done more than 5 years before the Insolvency Commencement date.

Converse is that any acts mentioned under Clause (a) of Section 69 if done within 5 years the doer can be punished. The scheme of Section 69 thus clearly indicates that under Section 49, which deals with transactions defrauding creditors the time period prescribed under Section 46(2) is not attracted. We thus conclude that for transactions defrauding creditors and fraudulent trading or wrongful trading as under Section 66 the timeline prescribed under Section 46 is not applicable and the Adjudicating Authority erred in holding the Application No. 742/2020 not maintainable as hit by Section 46(2) which opinion of the Adjudicating Authority is not in accordance with the statutory scheme of the Code. Now we need to notice other transaction which were alleged to be questioned in I.A. No. 742/2020.

The Application which is filed by the RP contained following heading at page 119 of the Appeal Paper Book:

"Application under Section 43, Section 45 read with Section 49, Section 66 and Section 60(5) of the Insolvency and Bankruptcy Code, 2016 along with other relevant provisions"

vii. Thus Application filed by the RP was not only under Section 43, 45 but also Section 49 and 66 which were specifically mentioned. There were pleadings also in the Application that transaction made by the Company Appeal (AT) Ins. No. 583 of 2021 Corporate Debtor was with intent to

defraud the creditors and fraudulent transactions. Paragraphs xv and xvi at Page 145 and 146 is relevant to be noticed in this context:

"xv. Based on the aforesaid fact and documents made available to the Resolution Professional, the Resolution Professional has formed the following opinion:

1. The Lease agreement and its transaction clearly tantamount to be preferential transaction and undervalued transactions u/s 43,45 and also to be carried out to defraud the creditors under section 49 and section 66 of the Code, 2016.

2. The payments made to the following two related parties, when the Corporate Debtor did not had any business transactions since last few years, and when huge sums are payable to financial creditors and operational creditors are completely preferential transactions u/s 43 of the I & B Code. The brief details of the related party payments are explained hereunder in the following table:

Payments made to related party for the period 01.04.2017 to 18.10.2019

Name of Related Party	Amount (in INR)
Shree RamSaw Mill Pvt Ltd	11,10,000.00
Shova Properties Pvt Ltd	5,50,000.00
Total	16,60,000.00

xvi. It is most humbly submitted that on a bare perusal of the lease deed dated 30th November, 2016 it becomes apparent that the corporate debtor entered into a transaction with respondent No. 3 with respect to the transfer of leasehold rights over the assets owned by the corporate debtor for a consideration, the value of which is significantly less than the market value consideration of the premises and Company Appeal (AT) Ins. No. 583 of 2021 it is most humbly submitted that there is a continuous cause of action for execution of such undervalued transaction. It is further submitted that the said lease deed was mischievously executed for a period of 29 years for keeping assets of the corporate debtor beyond the reach of the financial creditor and further to adversely affect the interests of all the creditors of the corporate debtor, as stipulated under Section 49 of the I & B Code."

viii. The above paragraph 'xv' indicates that in so far as the Lease Agreement was concerned that was sought to be questioned under Section 49 and 66 of the Code and whereas the preferential transactions were attacked were under Section 43 of the Code. Thus the Application contained the allegations which were falling both under Section 43, 45 and Section 49, 66 and in so far as the allegations referable to Section 49, 66 the timeline prescribed under Section 46 is not attracted.

13. We thus answer Question Nos. I, II & III in following words:

Answer I The Application filed by the Resolution Professional relating to Sections 43 and 45 read with Sections 66 and 60(5) of the Code is not to be rejected filed beyond the period of 135th Day of Insolvency Commencement Date only on the ground of non-compliance of Regulation 35 A of the CIRP Regulations, 2016. It shall depend on the facts of each case as to whether there are genuine reasons to consider the

Application on merits even filed beyond 135th day.

Answer II The expression "shall" in regulation 35A (1), 35A(2) and 35A(3) is not mandatory and requirement of "forming an opinion" under Section 35A(1) "make a determination" under Section 35A(2) and "shall apply to the Company Appeal (AT) Ins. No. 583 of 2021 Adjudicating Authority for appropriate relief on or before 135th day of the Insolvency Commencement Date" are only directory.

Answer III Application questioning the transactions covered by Section 49 and 66 of the Code are not to be rejected on the ground that Application has been filed beyond the period prescribed under Section 46 of the Code. The timeline prescribed for transactions under Section 46 does not cover the transactions covered by Section 49 and 66 of the Code.

Answer IV & V Learned Counsel for the Respondent No. 1 emphatically submitted that there were no pleading in the Application filed by the RP of fraud or any fraudulent transaction. Learned Adjudicating Authority also in paragraph 30 of the Impugned Order as noted above, has observed that RP has not substantiated his allegation that execution of Lease deed amount to fraudulent transaction. Whether in the Application filed by the RP, there were sufficient pleadings to the effect that the transaction under Section 49 and 66 are to be found out from the pleadings in the Application. The Application filed by the RP I.A. No. 742/2020 is on the record of the Appeal.

We have also extracted Paragraph xv of the Application where there was specific pleading that the lease transaction was carried out to defraud the creditors under Section 49 and 66 of the Code. The Application filed by the RP also pleaded that schedule of lease property has been hypothecated to the Bank obtaining credit facility in the year 2013. Paragraph xiii(c) and xiii(h) are to the following effect:

"xiii(c). It has also come light that such property was hypothecated, having been given as a security interest to the bank in 2013, and that the leasing out of the same property to respondent no. 3 has been executed Company Appeal (AT) Ins. No. 583 of 2021 without any prior notice and consent being obtained from the bank.

....

Xiii(h). Such transaction having been carried out with a realted party has been entered into without the knowledge and consent of the creditor bank and in violation of the terms and conditions of the letter of hypothecation dated 30th March, 2013. Moreover, the act of entering into such grossly undervalued transaction and registering the said lease deed for a period of 29 years was aimed at keeping the only valuable asset of the corporate debtor out of the reach of the creditor bank, thereby making it difficult for them to liquidate it in the event of liquidation and make its

claims as against such asset."

The pleadings in paragraph xv and xvi have already been extracted as noted above and further in Paragraph xiv and xvi again following has been pleaded:

"xiv. It is further imperative to mention here that the Corporate Debtor has also entered into numerous related party transactions with M/s. Shree Ram Saw Mill Private Limited, M/s. Shova Properties Pvt. Ltd., cumulating to a sum of Rs. 16,60,000/- (Rupees Sixteen Lakh and Sixty Thousand Only). The details of related party transactions are elucidated in a chart as under:

Name of the Related party	Relation	Transaction from 01.04.2017 to 31.12.2019
Shree Ram Saw Mill Pvt Ltd	Om Prakash Pandey is the common Director	Opening - Rs. 6,69,481.00 Receipt - Rs. 3,02,944.00 Payments - Rs. 11,10,000.00 Closing- Rs. 14,76,537.00
Shova Properties Pvt Ltd	Om Prakash Pandey is the common Director	Opening - Rs. 85,985.21 Payments - Rs. 5,50,00 Closing- Rs. 6,35,985.21 Dr. Bal.
Total of Related Party Transactions		Payments Total - Rs. 16,60,000/-
xvi.	It is most humbly submitted that on a bare perusal	

of the lease deed dated 30th November, 2016 it becomes apparent that the corporate debtor entered into a transaction with respondent No. 3 with respect to the transfer of leasehold rights over the assets owned by the corporate debtor for a consideration, the value of which is significantly less than the market value consideration of the premises and it is most humbly submitted that there is a continuous cause of action for execution of such undervalued transaction. It is further submitted that the said lease deed was mischievously executed for a period of 29 years for keeping assets of the corporate debtor beyond the reach of the financial creditor and further to adversely affect the interests of all the creditors of the corporate debtor, as stipulated under Section 49 of the I & B Code."

The averments made in Paragraphs as extracted above clearly indicate that Application contains substantial pleadings within the meaning of Section 49 and 66 regarding the lease transaction. The Lease Deed and all other relevant materials were part of the Application.

There is one more very important aspect of the matter which although has been noticed by the Adjudicating Authority but has not been given due consideration. In the Application filed by the RP being I.A. No. 742 of 2020, Company Appeal (AT) Ins. No. 583 of 2021 the notices were issued by the Adjudicating Authority to the Respondent Nos. 1 to 7 but none of the Respondent have chosen to either appear or file their any say in the matter which fact has been clearly stated by the Adjudicating Authority in Paragraph 18 of the Impugned Order to the following effect:

"18. It appears from the record that despite notice of the present Application having been served on Respondent No. 1 to 7, none of the Respondents have chosen to either appear or file any say in the matter."

Serious allegations of fraudulent transactions were made against the Respondent Nos. 1 to 7 and despite issue of notice by the Adjudicating Authority none have chosen to file any reply which clearly indicates that they were not keen to bring facts before the Adjudicating Authority. Non-Filing of the Reply in the application was substantial ground for raising adverse inference against the Respondents against whom serious allegations were made by the RP in the Application. Further the factum of non-cooperation by the suspended directors and therefore issue of order under Section 19(2) by the Adjudicating Authority itself as well as contempt notice issued by the Adjudicating Authority on 04.02.2020 clearly speaks the conduct of the Respondent Nos. 1 to 7 and observations of the Adjudicating Authority that Resolution Professional failed to substantiate the allegations is unsustainable. We thus are of the view that there were substantial pleadings in the Application within the meaning of Section 49 and 66 of the Code and Adjudicating Authority committed error in rejecting the Application.

14. Learned Counsel for the Respondent Nos. 1 to 3 has laid much emphasis on the submission that the Appellant has concealed the Civil Company Appeal (AT) Ins. No. 583 of 2021 Court Proceedings which are pending with regard to the Lease in question. It is relevant to note that no efforts were made on behalf of Respondents who were party to the Civil Proceedings to bring the Orders on record either before the Adjudicating Authority or before this Court.

15. Learned Counsel for Respondent No. 3 has referred to the Injunction Order dated 12th July, 2019 of the Civil Court. We had directed the Learned Counsel for the Respondent No. 3 to place the Order on record. Learned Counsel for the Respondent Nos. 3, 4 and 5 has placed on record the Copy of the Interim Injunction dated 12th July, 2019 passed in T.S. No. 97/2017 along with the written submissions. The suit TS No. 97/2017 was filed by the Respondent No. 3 against Om Prakash Pandey and others. The Plaintiff filed the suit on the basis of Lease Deed dated 30th November, 2016 and claimed that Plaintiff acquired the right and interest over the property and is entitled to get profit of its lawful rights. Defendant Nos. 1, 2 and 3 of the suit had admitted and pleaded that they have never raised any objection in peaceful running of the business of the Plaintiff. The Interim Injunction passed is as follows:

".....

After having heard and perusal of the materials available on record it appears to me at this stage the order of ad interim injunction needs to be allowed till the disposal of the instant suit. More so, the defendants have also stated that they have never raised any objection in peaceful running of the business of the plaintiff and/or the peaceful possession of the plaintiff. Accordingly, if, at this stage, the order of ad interim injunction is allowed till the disposal of the instant suit then nobody will be prejudiced in any manner whatsoever, rather it will facilitate the proper adjudication of the instant suit at hand.

Company Appeal (AT) Ins. No. 583 of 2021 Hence, it is ORDERED, That the defendants are hereby restrained from making any obstruction, hindrances and/or any kind of objection of any manner in respect of the lawful and smooth running of the business of the plaintiff from the factory lying and situated at the schedule mentioned in the plaint till the disposal of the instant suit.

Fix 28.08.2019 for framing of issues."

16. T.S. No. 97/2017 was thus inter se between the lessor and lessee and the defendants in the suit did not object to the right, claim and the contention of the plaintiff, noticing the aforesaid, Interim Injunction Order was issued. In the T.S. No. 97/2017 the Lease Deed dated 30th November, 2016 was not in question nor was under challenge. Thus, the pendency of the suit No. 97/2017 shall have no bearing on the Application which has been filed by the RP under Section 49 and 66 of the Code before the Adjudicating Authority.

17. Learned Counsel for the Respondent No. 1 as well as Respondent Nos. 3,4 and 5 had made submissions that RP who is Appellant before us has concealed the proceeding of T.S. No. 97/2017. The suit i.e. TS 97/2017 was filed much before the initiation of CIRP against the Corporate Debtor, the CIRP was initiated on 18.10.2019 at the time when injunction order was already passed by the Trial Court. There is no substance in the argument of Learned Counsel for the Respondent No. 1, 3, 4 and 5 that RP has concealed the Order dated 12th July, 2019 before the Adjudicating Authority. RP was not a party to the Civil Proceeding i.e. Case No. 97/2017 hence there is no occasion for RP to conceal the said proceeding. A party can be guilty of Company Appeal (AT) Ins. No. 583 of 2021 concealment of fact and concealment of proceeding when he is party to the said proceeding and does not disclose it. The Respondent Nos. 1,3,4 and 5 were parties to the proceeding and if they wanted to rely on any Order passed in the Civil Proceeding it was incumbent on them to bring on record. The Respondent Nos. 1, 3, 4 and 5 chose not to file any Reply either before the Adjudicating Authority or before this Appellate Tribunal and on other hand they are making reckless allegations against the RP that RP had concealed the Civil Proceeding. We are of the considered opinion that the Proceeding in Civil Suit i.e. T.S. No. 97/2017 has no bearing on the application filed by the RP under Section 49 and 66 of the Code.

18. We are further of the view that with regard to the proceedings under Sections 49 and 66, the Civil Proceeding in question can not create any prohibition from consideration of the issues by the Adjudicating Authority which is competent under the Code to take decision on such transaction. The I & B Code, 2016 specifically empowers the Adjudicating Authority to take decision regarding transaction to maximise the assets of the Corporate Debtor and those assets which are subject to undervalued transactions or fraudulent transactions or transaction to defraud the creditors be unearthed and appropriate measures and directions to benefit the Corporate Debtor need to be taken.

19. We thus are of the view that the Civil Proceedings as referred by Respondent Nos. 1 and 3 does not in any manner cause any impediment in proceeding to decide the Application on merits by the Adjudicating Authority. It is further relevant to notice that even in Appeal before us Respondents who were issued notice and given time to file Reply have chosen not to file any Reply. In the Insolvency Resolution Process, Adjudicating Authority has Company Appeal (AT) Ins. No. 583 of 2021 been empowered to pass appropriate order in the Application which are brought before it as per provisions in the Code, when the RP brought into the notice of the Adjudicating Authority by filing the Application I.A. No. 742 of 2020 it was incumbent on the Adjudicating Authority to consider the Application on merits and take appropriate decision to benefit the Corporate Debtor. Rejection of the Application on the ground as noted above by the Adjudicating Authority is unsustainable. We are of the view that Adjudicating Authority committed error in rejecting the Application i.e. I.A. 742/KB/2020. In result, we allow this Appeal, set aside the Impugned Order dated 26.02.2021 and the Application is revived before the Adjudicating Authority and the Adjudicating Authority may proceed to pass orders on the said Application in accordance with law. Parties shall bear their own costs.

[Justice Ashok Bhushan] Chairperson [Dr. Alok Srivastava] Member (Technical) [Ms. Shreesha Merla] Member (Technical) New Delhi 06th April, 2022 Basant/nn Company Appeal (AT) Ins. No. 583 of 2021