

Union Of India. Through Serious Fraud ... vs Duane Park Pvt. Ltd. & Anr on 2 December, 2019

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Insolvency) No. 964 of 2019

IN THE MATTER OF:

Union of India,
Through Serious Fraud Investigation
Office (SFI0) ...Appellant

Versus

Maharashtra Tourism Development
Corporation & Anr. ...Respondents

Present:

For Appellant : Mr. Ashim Sood, CGSC with
Ms. Payal Chandna, Advocate

For Respondents : Mr. Sri Harsha Peechara and Mr. Ashish Tiwari,
Advocates
Mr. Anup Kumar, Advocate for 1st Respondent

WITH

Company Appeal (AT) (Insolvency) No. 965 of 2019

IN THE MATTER OF:

Union of India,
Through Serious Fraud Investigation
Office (SFI0) ...Appellant

Versus

Duane Park Pvt. Ltd. & Anr. ...Respondents

Present:

For Appellant : Mr. Ashim Sood, CGSC with
Ms. Payal Chandna, Advocate

For Respondents : Mr. Vivek Sharma, Mr. A.K. D. Sayare and Mr. S. N.
Gautam, Advocates
Mr. Rishabh Jain, Advocate for Liquidator

ORDER

02.12.2019 These appeals have been preferred by 'Union of India' against the orders dated 24th July, 2019 and 26th July, 2019 passed by the Adjudicating Authority, Principal Bench, New Delhi in two different applications filed by the 'Resolution Professional' (now 'Liquidator') in respect of investigation into the affairs of the 'Luxury Train Pvt. Ltd.' and 'Zynke Exports Pvt. Ltd.' (Corporate Debtors and its Directors and officers etc.). The Adjudicating Authority directed 'Serious Fraud Investigation Office' (for short, 'the SFIO'), an investigation agency of the Central Government, for investigation about siphoning of funds in respect of public money which was noticed by the Adjudicating Authority by its earlier orders.

2. The only question arises for consideration in these appeals is whether the Adjudicating Authority has jurisdiction to direct the SFIO to investigate about the fraud or siphoning of funds, if any, committed by the Company (Corporate Debtor).

3. Learned counsel for the 'Union of India' submitted that the Adjudicating Authority has no jurisdiction to direct investigation into the affairs of the company or its Directors or employees as the power is vested with the Central Government under Section 212 of the Companies Act, 2013.

4. Mr. Rishabh Jain, learned counsel appearing on behalf of the 'Liquidator' (who was the Resolution Professional) submitted that after the 'corporate insolvency resolution process' of both the companies including the Directors etc. had not disclosed all the details and had not delivered the assets of the 'Corporate Debtor(s)' and, therefore, they are punishable under Section 70 of the 'I&B Code'.

Company Appeal (AT) (Insolvency) Nos. 964 & 965 of 2019

5. Mr. Anup Kumar, learned counsel appearing on behalf of 'Financial Creditors', is a Pro-forma party, but heard him on the question of law. Section 70 relates to punishment for misconduct in course of the 'corporate insolvency resolution process' and attracts punishment punishable with imprisonment for a term which shall not be less than three years but which may extend to five years, with or without fine which reads as follows:

"70. Punishment for misconduct in course of corporate insolvency resolution process.□(1) On or after the insolvency commencement date, where an officer of the corporate debtor--

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

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

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

(d) fails to inform the resolution professional the information in his knowledge that a debt has Company Appeal (AT) (Insolvency) Nos. 964 & 965 of 2019 been falsely proved by any person during the corporate insolvency resolution process; or

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

(f) accounts for any part of the property of the corporate debtor by fictitious losses or expenses, or if he has so attempted at any meeting of the creditors of the corporate debtor within the twelve months immediately preceding the insolvency commencement date, he shall be punishable with imprisonment for a term which shall not be less than three years, but which may extend to five years, or with fine, which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both:

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

(2) If an insolvency professional deliberately contravenes the provisions of this Part the shall be punishable with imprisonment for a term which 20 Company Appeal (AT) (Insolvency) Nos.

Company Appeal (AT) (Insolvency) Nos. 964 & 965 of 2019 574 & 592 of 2019 may extend to six months, or with fine which shall not be less than one lakh rupees, but may extend to five lakhs rupees, or with both."

6. Similar issue fell for consideration before this Appellate Tribunal in 'Company Appeal (AT) (Insolvency) No. 574/2019 - "Mr. Lagadapati Ramesh Vs. Mrs. Ramanathan Bhuvaneshwari' wherein this Appellate Tribunal by its judgment dated 20th September, 2019 observed and held as follows:

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

"236. Trial of offences by Special Court.□(1) Notwithstanding anything in the Code of Criminal Procedure, 1973, offences under this Code shall be tried by the Special Court established under Company Appeal (AT) (Insolvency) Nos. 964 & 965 of 2019 Chapter XXVIII of the Companies Act, 2013.

(2) No Court shall take cognizance of any offence punishable under this Act, save on a complaint made by the Board or the Central Government or any person authorised by the Central Government in this behalf.

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

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

Company Appeal (AT) (Insolvency) Nos. 964 & 965 of 2019

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

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

30. Section 212 of the Companies Act, 2013 though relates to 'investigation into the affairs of company by Serious Fraud Investigation Office' and such investigation can be made only if the Central Government is of the opinion that it is necessary to investigate into the affairs of a Company Appeal (AT) (Insolvency) Nos. 964 & 965 of 2019 company by the 'Serious Fraud Investigation Office', as detailed below:

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

- (a) on receipt of a report of the Registrar or inspector under section 208;
- (b) on intimation of a special resolution passed by a company that its affairs are required to be investigated;
- (c) in the public interest; or
- (d) on request from any Department of the Central Government or a State Government, the Central Government may, by order, assign the investigation into the affairs of the said company to the Serious Fraud Investigation Office and its Director, may designate such number of inspectors, as he may consider necessary for the purpose of such investigation. (2) Where any case has been assigned by the Central Government to the Serious Fraud Company Appeal (AT) (Insolvency) Nos. 964 & 965 of 2019 Investigation Office for investigation under this Act, no other investigating agency of Central Government or any State Government shall proceed with investigation in such case in respect of any offence under this Act and in case any such investigation has already been initiated, it shall not be proceeded further with and the concerned agency shall transfer the relevant documents and records in respect of such offences under this Act to Serious Fraud Investigation Office.
- (3) Where the investigation into the affairs of a company has been assigned by the Central Government to Serious Fraud Investigation Office, it shall conduct the investigation in the manner and follow the procedure provided in this Chapter; and submit its report to the Central Government within such period as may be specified in the order.
- (4) The Director, Serious Fraud Investigation Office shall cause the affairs of the company to be investigated by an Investigating Officer who shall have the power of the inspector under section 217.

Company Appeal (AT) (Insolvency) Nos. 964 & 965 of 2019 (5) The company and its officers and employees, who are or have been in employment of the company shall be responsible to provide all information, explanation, documents and assistance to the Investigating Officer as he may require for conduct of the investigation. (6) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), [offence covered under section 447] of this Act shall be cognizable and no person accused of any offence under those sections shall be released on bail or on his own bond unless--

- (i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and
- (ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail:

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

Company Appeal (AT) (Insolvency) Nos. 964 & 965 of 2019 Provided further that the Special Court shall not take cognizance of any offence referred to this subsection except upon a complaint in writing made by--

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

(ii) (ii) any officer of the Central Government authorised, by a general or special order in writing in this behalf by that Government. (7) The limitation on granting of bail specified in subsection (6) is in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.

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

Company Appeal (AT) (Insolvency) Nos. 964 & 965 of 2019 (9) The Director, Additional Director or Assistant Director of Serious Fraud Investigation Office shall, immediately after arrest of such person under subsection (8), forward a copy of the order, along with the material in his possession, referred to in that sub-section, to the Serious Fraud Investigation Office in a sealed envelope, in such manner as may be prescribed and the Serious Fraud Investigation Office shall keep such order and material for such period as may be prescribed.

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

(11) The Central Government if so directs, the Serious Fraud Investigation Office shall submit an interim report to the Central Government. (12) On completion of the investigation, the Serious Fraud Investigation Office shall submit the investigation report to the Central Government.

Company Appeal (AT) (Insolvency) Nos. 964 & 965 of 2019 (13) Notwithstanding anything contained in this Act or in any other law for the time being in force, a copy of the investigation report may be obtained by any person concerned by making an application in this regard to the court. (14) On receipt of the investigation report, the Central Government may, after examination of the report (and after taking such legal advice, as it may think fit), direct the Serious Fraud Investigation Office to initiate prosecution against the company and its officers or employees, who

are or have been in employment of the company or any other person directly or indirectly connected with the affairs of the company.

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

(16) Notwithstanding anything contained in this Act, any investigation or other action taken or initiated by Serious Fraud Investigation Office Company Appeal (AT) (Insolvency) Nos. 964 & 965 of 2019 under the provisions of the Companies Act, 1956 (1 of 1956) shall continue to be proceeded with under that Act as if this Act had not been passed.

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

(b) The Serious Fraud Investigation Office shall share any information or documents available with it, with any investigating agency, State Government, police authority or income-tax authorities, which may be relevant or useful for such investigating agency, State Government, police authority or income-tax authorities in respect of any offence or matter being Company Appeal (AT) (Insolvency) Nos. 964 & 965 of 2019 investigated or examined by it under any other law."

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

32. Section 212 does not empower the National Company Law Tribunal or the Adjudicating Authority to refer the matter to the Central Government for investigation by the 'Serious Fraud Investigation Office' even if it notices the affairs of the Company of defrauding the creditors and others.

33. However, investigation into affairs of company at the instance of the Tribunal has been prescribed under Section 213 and reads as follows:

"213. Investigation into company's affairs in other cases.-- The Tribunal may,--

Company Appeal (AT) (Insolvency) Nos. 964 & 965 of 2019

(a) on an application made by--

(i) not less than one hundred members or members holding not less than one-tenth of the total voting power, in the case of a company having a share capital; or

(ii) not less than one-fifth of the persons on the company's register of members, in the case of a company having no share capital, and supported by such evidence as may be necessary for the purpose of showing that the applicants have good reasons for seeking an order for conducting an investigation into the affairs of the company; or

(b) on an application made to it by any other person or otherwise, if it is satisfied that there are circumstances suggesting that--

(i) the business of the company is being conducted with intent to defraud its creditors, members or any other person or otherwise for a fraudulent or unlawful purpose, or in a manner oppressive to any of its members or that the company was Company Appeal (AT) (Insolvency) Nos. 964 & 965 of 2019 formed for any fraudulent or unlawful purpose;

(ii) persons concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards the company or towards any of its members; or

(iii) the members of the company have not been given all the information with respect to its affairs which they might reasonably expect, including information relating to the calculation of the commission payable to a managing or other director, or the manager, of the company, order, after giving a reasonable opportunity of being heard to the parties concerned, that the affairs of the company ought to be investigated by an inspector or inspectors appointed by the Central Government and where such an order is passed, the Central Government shall appoint one or more competent persons as inspectors to investigate into the affairs of the company in respect of such matters and to report Company Appeal (AT) (Insolvency) Nos. 964 & 965 of 2019 thereupon to it in such manner as the Central Government may direct: Provided that if after investigation it is proved that--

(i) the business of the company is being conducted with intent to defraud its creditors, members or any other persons or otherwise for a fraudulent or unlawful purpose, or that the company was formed for any fraudulent or unlawful purpose; or

(ii) any person concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud, then, every officer of the company who is in default and the person or persons concerned in the formation of the company or the management of its affairs shall be punishable for fraud in the manner as provided in section 447."

34. In terms of clause (b) of Section 213, on an application made to it by any other person ('Resolution Professional') or otherwise (suo motu), if the National Company Law Tribunal is satisfied that there are circumstances suggesting that (i) the business of the company is being conducted with intent to defraud its creditors, Company Appeal (AT) (Insolvency) Nos. 964 & 965 of 2019 members or any other person or otherwise for a fraudulent or unlawful purpose, or in a manner oppressive to any of its members or that the company was formed for any fraudulent or unlawful purpose as alleged by the 'Resolution Professional' in the present case and or by; (ii) persons concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards the company or towards any of its members etc., (which is also the allegation made by the 'Resolution Professional'), in such case, the Tribunal after giving a "reasonable opportunity"

of being heard to the parties concerned, that the affairs of the company ought to be investigated by an 'Inspector' or 'Inspectors' appointed by the Central Government and where such an order is passed, in such case, the Central Government is bound to appoint one or more competent persons as Inspectors to investigate into the affairs of the company in respect of such matters and to report thereupon to it in such manner as the Central Government may direct.

Company Appeal (AT) (Insolvency) Nos. 964 & 965 of 2019

35. If after investigation it is proved that (i) the business of the company is being conducted with intent to defraud its creditors, members or any other persons or otherwise for a fraudulent or unlawful purpose, or that the company was formed for any fraudulent or unlawful purpose; or (ii) any person concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud, then, every officer of the company who is in default and the person or persons concerned in the formation of the company or the management of its affairs shall be punishable for fraud in the manner as provided in section 447.

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

Company Appeal (AT) (Insolvency) Nos. 964 & 965 of 2019

37. In view of the aforesaid position of law, we hold that the Tribunal/ Adjudicating Authority, on receipt of application/complaint of alleged violation of the aforesaid provisions and on such consideration and being satisfied that there are circumstances suggesting that defraud etc. has been committed, may refer the matter to the Central Government for investigation by an Inspector or Inspectors as may be appointed by the Central Government. On such investigation, if the investigating authority reports that a person has committed any offence punishable under Section 213 read with Section 447 of the Companies Act, 2013 or Sections 68, 69, 70, 71, 72 and 73 of the

'I&B Code', in such case, the Central Government is competent to refer the matter to the Special Court itself or may ask the Insolvency and Bankruptcy Board of India or may authorise any person in terms of sub-section (2) of Section 236 of the 'I&B Code' to file complaint.

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

Company Appeal (AT) (Insolvency) Nos. 964 & 965 of 2019 "60. Adjudicating Authority for corporate persons.□(1) The Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of the corporate person is located....."

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

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

41. Further, after the investigation by the Inspector, if case is made out and the Central Government feels that the matter also requires investigation by the 'Serious Fraud Investigation Office' under Company Appeal (AT) (Insolvency) Nos. 964 & 965 of 2019 Section 212 of the Companies Act, 2013, it is open to the Central Government to decide whether in such case the matter may be referred to the 'Serious Fraud Investigation Office' or not. This will depend on the gravity of charges as may be found during the investigation by the Inspector.

42. In view of the aforesaid position of law, we are of the view that the Adjudicating Authority was not competent to straight away direct any investigation to be conducted by the 'Serious Fraud Investigation Office'. However, the Adjudicating Authority (Tribunal) being competent to pass order under Section 213 of the Companies Act, 2013, it was always open to the Adjudicating Authority/Tribunal to give a notice with regard to the aforesaid charges to the Promoters and others, including the Appellants herein and after following the procedure as laid down in Section 213, if prima facie case was made out, it could refer the matter to the Central Government for investigation by the Inspector or Inspectors and on such investigation, if any, actionable material is made out and if the Central Government feels that the matter requires Company Appeal (AT) (Insolvency) Nos. 964 & 965 of 2019 investigation through the 'Serious Fraud Investigation', it can proceed in accordance with the provisions as discussed above. Impugned order shows parties have been heard on the charges claimed by the 'Resolution Professional'.

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

7. As both the matters are covered by this Appellate Tribunal's decision in 'Mr. Lagadapati Ramesh' (Supra), we modify the impugned orders dated 24th July, 2019 and 26th July, 2019 passed in relation to the 'Luxury Train Pvt. Ltd.' and 'Zynke Exports Pvt. Ltd.' (Corporate Debtors) and refer the matter to the Central Government for investigation through 'Inspector' or 'Inspectors' to find out whether one or other promoter or officer or employee or any other person related to the company or companies in question have violated the provisions of Section 70 of the 'I&B Code'. The matter is referred to the Secretary, Ministry of Corporate Affairs to get the matter investigated by 'Inspector' or 'Inspectors' following the procedure in terms of Section 213 of the Companies Act, 2013 read with Section 70 of the 'I&B Code' and Section 447 of the Companies Act, 2013 or any other offence punishable under Chapter VII of the 'I&B Code'. The Appellant being the 'Union of India' represented by the Ministry of Corporate Affairs will inform the Secretary of the Ministry of Corporate Affairs. Company Appeal (AT) (Insolvency) Nos. 964 & 965 of 2019 Both the appeal(s) stand disposed of with aforesaid observations and directions. No costs.

[Justice S.J. Mukhopadhaya] Chairperson [Justice Bansi Lal Bhat] Member (Judicial) [Justice Venugopal M.] Member (Judicial) /ns/gc Company Appeal (AT) (Insolvency) Nos. 964 & 965 of 2019