

# Vijay Pal Garg & Ors vs Pooja Bahry Liquidator In The Matter Of ... on 4 February, 2020

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) Insolvency No. 949 of 2019  
[Arising out of Order dated 19.07.2019 passed by the Adjudicating Authority  
(National Company Law Tribunal) New Delhi Bench-II in CA-64/C-II/2018 in  
CP(IB)-250/ND/2017)

IN THE MATTER OF:

Vijay Pal Garg & Ors.

.....Appellants

Vs.

Pooja Bahry

(Liquidator in the matter of

Gee Ispat Private Limited

.....Respondent

Present :

For Appellants: Mr. Alok Dhir, Ms. Varsha Banerjee and Mr. Kunal Godhwani,  
Advocates.

For Respondent: Ms. Avni Shrivastav, Advocate

J U D G M E N T

VENUGOPAL M. J.

The Appellants have preferred the instant Company Appeal being aggrieved against the impugned order dated 19.7.2019 in CA-64/C-II/2018 in CP(IB)-250/ND/2017 passed by the Adjudicating Authority ('National Company Law Tribunal'), New Delhi Bench-II.

2. The Adjudicating Authority in the impugned order dated 19.07.2019 at para 8.2, 8.2.2, 8.2.3 and 8.3.2 observed as under:-

Company Appeal (AT) Insolvency No. 949 of 2019 1 "8.2 .....there are serious allegations made by the Resolution Professional in the instant CA and supporting evidence for the same was shown to us during the multiple hearings in the case. In their reply, Respondent 1,2 and 3 have countered these allegations and filed

documents in support of their stand. Respondent 4, being the Operational Creditor on whose application the CIRP was initiated, has also filed reply countering the allegations made by the RP in the instant application. It is also seen that there have been two unsavory incidents at the premises of the CD namely fire at the factory premises on 12.2.2018 and subsequent attack on the security guard at the office of the CD on 15.03.2018."

8.2.2 Voluminous documents and voucher have been filed by the parties in support of their contentions. The proceedings before this Tribunal are summary in nature and it is not possible for us to conduct an in-

depth investigation and examine the veracity of these documents and averments. Without an in-depth investigation, it is not possible to arrive at a correct appraisal of the State of Affairs of the Corporate Debtor and to adjudicate upon the allegations made by the RP. Accordingly, we take recourse to Company Appeal (AT) Insolvency No. 949 of 2019 2 provisions of Section 210 (2) of the Companies Act, 2013 which read as follows:

"Where an order is passed by a court or the Tribunal in any proceedings before it that the affairs of a company ought to be investigated, the Central Government shall order an investigation."

8.2.3. We therefore, order that the affairs of the Corporate Debtor ought to be investigated. Accordingly, the Central Government is directed to order an investigation into the affairs of the Corporate Debtor under Section 210 (2) of the Companies Act, 2013.

8.3.2 Accordingly, the Respondents impleaded in the instant application, namely, the Suspended Directors of the Corporate Debtor and the Operational Creditor on whose necessary, refer their grievances against the Insolvency Professional to IBBI under section 217 of the Code."

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3. The Learned Adjudicating Authority in the impugned order had also proceeded to observe that the suspended Directors of the 'Corporate Debtor' and the 'Operational Creditor' on whose application the 'Corporate Insolvency Resolution Process' was initiated, may, if they consider necessary refer their grievance against the Insolvency professional to IBBI u/s 270 of the Code. Furthermore, it was mentioned by the Adjudicating Authority in the impugned order that the claim of the 4th Respondent would be considered at the time of distribution of liquidation process.

4. Assailing the correctness, validity and legality of the impugned order dated 19.7.2019 passed by the Adjudicating Authority, the Learned Counsel for the Appellants submits that the Adjudicating Authority had incorrectly invoked Section 210(2) of the Companies Act, 2013 while exercising jurisdiction under the provisions of 'I&B' Code.

5. The Learned Counsel for the Appellants contends that for the purpose of exercise of jurisdiction as per Section 210(2) of the Companies Act, 2013, the meaning of term 'Court' or the 'Tribunal' has to be considered in terms of the definition specified under the Companies Act, 2013.

6. The Learned Counsel for the Appellants by referring to Section 5(1) of 'I&B' Code points out that the Adjudicating Authority as defined thereof clearly does not fall within the purview of the term 'Court' as defined in Section 2(29) of the Companies Act, 2013. In this connection, the Learned Counsel for the Appellants emphatically comes out with the plea that the term 'Tribunal' is Company Appeal (AT) Insolvency No. 949 of 2019 4 defined in Section 2(90) of the Companies Act, 2013 which means the ('National Company Law Tribunal') constituted as per Section 408 of the Companies At, 2013 and further that the jurisdiction exercised by the 'National Company Law Tribunal' in terms of Section 408 of the Companies Act, is distinct from the jurisdiction exercised by the 'National Company Law Tribunal' as the Adjudicating Authority as per Section 5(1) of the 'I&B' Code.

7. The Learned Counsel for the Appellants takes a clear cut stand that the 'National Company Law Tribunal' while acting as the Adjudicating Authority under Part-II of 'I&B' exercises limited jurisdiction and cannot be read as 'Tribunal' entitled to exercise jurisdiction in terms of Section 210(2) of the Companies Act, 2013. In fact, the contention of the Learned Counsel for the Appellants is that the Adjudicating Authority ('National Company Law Tribunal') New Delhi Bench-II had exceeded its jurisdiction by passing an order as per Section 210(2) of the Companies Act, 2013.

8. The Learned Counsel for the Appellants refers to the judgment of this Tribunal in Company Appeal (AT)(Insol.) No. 574 of 2019 in the matte of Mr. Lagadapati Ramesh Vs. Mrs. Ramanathan Bhuvaneshwari, dated 20.09.2019 wherein it is held that the Adjudicating Authority is not competent to straightway direct any investigation to be conducted by the 'Serious Fraud Investigation Office' without giving notice with regard to the same to the Promoters and others and after following the procedure prescribed under the Companies Act and that too after forming a prima facie opinion that the matter Company Appeal (AT) Insolvency No. 949 of 2019 5 requires investigation and contends that in the absence of the same the impugned order is legally untenable.

9. The Learned Counsel for the Appellants submits that the aforesaid judgement in Mr. Lagadapati Ramesh's case is clearly distinguishable on facts of the present case in as much as the said judgment warrants investigation in case of a Company "in presenti" (Company appears to be in Resolution as against Liquidation as in the instant case) wherein the operations of the 'Corporate Debtor' were closed long ago.

10. The Learned Counsel for the Appellants contends that the Adjudicating Authority, exercising limited powers as per 'I&B' Code cannot direct an investigation into the affairs of a Company. Also, it is represented on behalf of the Appellants that the direction issued by the Adjudicating Authority in the impugned order is beyond the ambit of the relevant provisions invoked by the former Resolution Professional against the Appellants.

11. The Learned Counsel for the Appellants comes out with a legal plea that Section 60(5), 66,67,70,71,72,73 and 235A of 'I&B' Code referred to by the former Resolution Professional in the application filed before the Adjudicating Authority do not provide for an issuance of directions u/s 210(2) of the Companies Act and as such the invocation of aforesaid provisions are incorrect. In this regard, the Learned Counsel for the Appellants refers to the decision of the Hon'ble Supreme Court in the matter of Innoventive Industries Limited Vs. ICICI Bank and another (2018) 1 SCC 407 whereby and where under it is held Company Appeal (AT) Insolvency No. 949 of 2019 6 that 'I&B' Code itself provides for the process as well the directions which is required to be passed in case of any relief is sought under any of the applicable provisions of the Code.

12. The Learned Counsel for the Appellants contends that the Adjudicating Authority does not have a 'Residuary Jurisdiction' to delegate the proceedings for investigation by the Central Government. Added further, it is the stand of the Appellants that the impugned order passed by the Adjudicating Authority is not only an unreasoned one but also the same being passed in an arbitrary and whimsical fashion.

13. Lastly, it is the submission of the Learned Counsel for the Appellant that the 'Corporate Debtor' is undergoing 'Liquidation' as on date and thus an investigation as per Section 210 of the Companies Act, 2013 is not feasible as on date and shall result in an unending process. Moreover, the proposed investigation u/s 210 of the Companies Act, 2013 shall be in the nature of a fishing and roving inquiry which has no basis and the same is liable to be struck down by this Tribunal, in the interest of justice.

14. Repelling the contention of the Appellants, the Learned Counsel for the Respondent submits that it is not correct on the part of Appellants to contend that the Appellate Authority has no jurisdiction in directing the Central Government to conduct an investigation into the affairs of the 'Corporate Debtor' as per Section 210(2) of the Companies Act, 2013 and this plea is not tenable one because of the reason that Section 210(2) of the Companies Act, 2013 clearly Company Appeal (AT) Insolvency No. 949 of 2019 7 mandates the Central Government to order an investigation into the affairs of the Company, when an order is passed by the Court or the Tribunal in any proceedings before it that the affairs of the Company ought to be investigated. Furthermore, the Learned Adjudicating Authority had suo moto came to the conclusion that the affairs of the 'Corporate Debtor' ought to be investigated and, therefore, a direction was rightly issued in this regard.

15. It is the stand of the Respondent that Section 210(2) of the Companies Act, 2013 does not refer to formation of any opinion of the Central Government and in fact, it imposes a mandatory obligation on the part of Central Government to conduct an investigation into the affairs of any Company, if an order of this effect is passed by a Court or Tribunal in any proceedings before it.

16. The Learned Counsel for the Respondent points out the word 'opinion' of the Central Government is employed and is relevant only for passing an order u/s 210(1) of the Companies Act. Percontra, the word 'opinion' is conspicuously absent in Section 210(2) of the Companies Act, 2013 which is in mandatory terms. Therefore, it is the stand of the Respondent that in the ingredients of Section 210(2) of the Companies Act, 2013 the order of a Court or Tribunal as regards the

investigation into the Company's Affairs is relevant and not the opinion of the Central Government.

17. The Learned Counsel for the Respondent points out that the Adjudicating Authority for the purpose of part-I of 'I&B' (which contains provisions regarding Insolvency Resolution and Liquidation for Corporate Persons) is the Tribunal i.e. Company Appeal (AT) Insolvency No. 949 of 2019 8 NCLT constituted u/s 408 of the Companies Act, 2013. Moreover, as per Section 5(1) of 'I&B' Code, 'Adjudicating Authority' for the purpose of part-II thereof means the NCLT constituted under Section 408 of the Companies Act. Besides this, as per Section 2(90) of the Companies Act, 2013 "Tribunal" means the National Company Law Tribunal constituted under Section 408. Thus, the Adjudicating Authority for the purposes of part II of the IBC (i.e. for Insolvency Resolution and Liquidation for Corporate Persons) is the Tribunal constituted under Section 408 of the 2013 Act would be covered u/s 210(2) of the Act, the Adjudicating Authority for the purpose of part III of IBC i.e. dealing with insolvency/bankruptcy of individuals and partnerships being the 'Debt Recovery Tribunal' would not have the jurisdiction to pass order under Section 210(2) of the Companies Act.

18. The Learned Counsel for the Respondent submits that just because the additional power of Adjudicating Authority has been vested, the powers of the NCLT under the Companies Act, 2013 do not stand extinguished. Also that in the present case, the Adjudicating Authority had invoked the power u/s 210(2) of the Companies Act which is much wider in scope and does not entail the following specific conditions specified u/s 2013 of the Act.

19. It is represented on the side of the Appellant that a company in liquidation continues to retain its corporate existence and as such it can among other things, sue and be sued in its name, till it is dissolved in accordance with law.

20. At this juncture, the Learned Counsel for Respondent brings to the notice Company Appeal (AT) Insolvency No. 949 of 2019 9 of this Tribunal that in the instant case, no order of dissolution has been passed in respect of the 'Corporate Debtor' so far and further that, the numerous fraudulent/wrongful action and mentioned in the 'Application' filed by the Respondent related to the period prior to the 'Corporate Insolvency Resolution Process' of the 'Corporate Debtor'.

21. The Learned Counsel for Respondent projects an argument that the Adjudicating Authority has inherent powers under Rule 11 of 'NCLT' Rules, 2016 to make such orders as may be necessary for meeting the ends of justice or to prevent an abuse of the process of the Tribunal and in public interest, it is open to the Adjudicating Authority after giving the parties a reasonable opportunity of being heard, to refer the matter to Central Government for investigation, if this is of a prima facie opinion that acts of fraud have been committed by the 'Corporate Debtor' or its Directors. In pith and substance, the submission of Learned Counsel for the Respondent is that the impugned order of the Adjudicating Authority is maintainable even under Rule 11 of the 'NCLT' Rules, as per judgement of this Tribunal in Company Appeal (AT)(Ins.) No. 498/2019 dated 24.07.2019 Mr. M. Srinivas V Smt. Ramanathan Bhuvaneshwari and Ors.

22. The Learned Counsel for the Respondent proceeds to point out that the Adjudicating Authority had taken note of "two unsavoury incidents" at the premises of the 'Corporate Debtor' were

fixed/records of the Company were kept (i.e. fire incident burning the records and attack on security guard guarding the premises) and as per I&B Code and CIRP Regulations it is the duty of the Company Appeal (AT) Insolvency No. 949 of 2019 10 'Resolution Professional' to bring to the attention of the Adjudicating Authority about the fraudulent/wrongful trading transactions.

23. The Learned Counsel for the Respondent contends that the Appellants deliberately refrained from disclosing and further withheld the information from the Respondent in falsification and destruction of the records of the 'Corporate Debtor' and made wilful and material omissions from settlements and also defrauded the creditors of the 'Corporate Debtor'. As such, it is projected on the side of the Respondent that no fault can be found with the conduct of the Resolution Professional who has done everything within her power to uphold the objections of 'I&B' Code and diligently discharged her duties.

24. In the instant case, it comes to be known that the Applicant/Resolution Professional came across various instances and materials to exhibit that the business of Corporate Debtor was carried on with in intent to defraud its creditors and for fraudulent purposes by the erstwhile management of the 'Corporate Debtor'. Apart from that, the Applicant/Respondent had grounds to believe that CIRP of the 'Corporate Debtor' was initiated fraudulently and/or with malicious intent for a purpose other than for 'Resolution of Insolvency' or Liquidation of Corporate Debtor. Before the Adjudicating Authority the Applicant/Resolution Professional in the application had averred that directions (in suspension) of the Corporate Debtor had not deliberately disclosed the affairs of the 'Corporate Debtor' from time to time to the Applicant / Resolution Professional and indulged in falsification and determination of Books and Company Appeal (AT) Insolvency No. 949 of 2019 11 Records of the 'Corporate Debtor' and made wilful and material omissions relating to its affairs and further defrauded its creditors. In reality, the Applicant/Resolution Professional filed the application before the Adjudicating Authority in terms of Sections 60(5), 66, 67, 70, 71, 72, 73 and 235A of the I&B Code and sought the undermentioned reliefs which run as under:-

"a. allow the present application under Sections 60(5), 65, 66 and 67 of the Insolvency and Bankruptcy Code, 2016;

b. grant leave to the Applicant/RP to approach the Insolvency and Bankruptcy Board of India for taking appropriate action under Sections 70,71,72,73 and Section 235A of the Insolvency and Bankruptcy Code, 2016;

c. direct the Suspended Directors of the Corporate Debtor, jointly and / or severally, to pay the entire debt amounting to approx. Rs. 512 Crores owed to the financial creditors of the Corporate Debtor;

d. direct the Suspended Directors of the Corporate Debtor, jointly and/or severally, to contribute Rs. 191 Crores to the assets of the Corporate Debtor so that the creditors of the Corporate Debtor can be paid their dues;

Company Appeal (AT) Insolvency No. 949 of 2019 12 e. Direct the Suspended Directors and the Operational Creditor, jointly and/or severally, to pay the costs of CIRP of the Corporate Debtor;

f. Grant police protection to the Applicant/RP."

25. The Resolution Professional/Applicant found discrepancies in the Accounts of Corporate Debtor i.e. (i) non-existence of Debtors and that the recent Balance sheet of the Corporate Debtor reflected Debtors of Rs. 191 crores (Approx.) as trade receivables etc. In fact the Resolution Professional/Applicant after taking charge, grew suspicious of the genuineness / veracity of dates and receivables pursuant to the non-delivery of letters to the debtors. The Resolution Professional / Applicant later came to know that most of the addresses of the 'Debtors' as shown in the Tally either had not existed or even if they had existed, there was no such Companies/Firms found in the 'Addresses' described.

26. Moreover, inspite of sending representatives to numerous debtors, 90% of the addressees had not existed or the firms were not in existence at the given addresses, in the tally. Based on the Financial Audited Balance sheet of the year 2012-2-13, the discrepancies were pointed out and it was evident that there was falsification of the Accounts of the Corporate Debtor. Besides this, although the outstanding debts in the Books was Rs. 200 crores and that the Corporate Debtor being in trouble with a Debt of Rs. 500 crores, to pay the same to the 'Financial Creditors'. There was no record to show that the steps taken by the Directors relating to the recovery of the outstanding sum, payable to it.

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27. The case of the Applicant/Resolution Professional before the Adjudicating Authority was that during the Financial year 2012-2013 no comments were made in the Auditor's report. But in the financial year 2013-2014 several qualifications were made in respect of receivables mentioning that there were no supporting documents for the same and in fact more than Rs. 187 crores was shown as Receivable outstanding for more than six months. Also that, the Resolution Professional/Applicant suspected that the records pertaining to fake Debtors were fabricated by the suspended Directors after the Applicant commenced for investigation in respect of the same.

28. According to the Resolution Professional/Applicant the fire incident on the ground floor of the office of the Corporate Debtor at Rohini on 12.2.18 was the handy work of the suspended Directors with a view to evade investigation and prosecution in respect of their actions. In regard to the Fire incident a complaint was lodged in FIR No. 0138/2018, registered by the police authorities u/s 435 and 452 of Indian

Penal Code and according to the First Information Report the window of the Office was unbroken by removing the 'Grill'.

29. The Resolution Professional/Applicant recovered from the Corporate Office of the Corporate Debtor a 'show cause notice' of the Office of the Commissioner Central Excise Rohtak, in regard to the availing of Cenvat credit by the Corporate Debtor resting upon on fake invoices given by the respective dealers. Apart from this, as against the Corporate Debtor the Income Tax Department passed an order on 29.12.2011 as per Section 143(3) of the Income Tax Act, 1961 Company Appeal (AT) Insolvency No. 949 of 2019 14 relating to the Accounting year 2010-2011 and also that the Commissioner of Income Tax (Appeals) passed an order on 31.8.2012, in respect to an Appeal preferred by the Corporate Debtor.

30. The Resolution Professional/Applicant before the Adjudicating Authority had also in the application had mentioned about the fabrication of the Books of the Accounts relating to fake supplies, fraudulent operational creditors and also an operational creditor who commenced the CIRP of the 'Corporate Debtor' etc. Continuing further to avail credit from Banks, exaggerated stock statements were dishonestly shown about the operations of the 'Corporate Debtor' in an unrealistic manner with a view to obtain credit facilities from the Banks. The other grievance of the Applicant/Resolution Professional is that if only the proper Books of accounts were maintained, as per law then, the real state of affairs about the financial status of the Corporate Debtor would come to light.

31. In this connection, it not out of place for this court to make significant mention that this Tribunal in the Judgement in Company Appeal (AT) (Insolvency) No. 574 of 2019 in the matter of Mr. Lagadapati Ramesh Vs. Mrs. Ramanathan Bhuvaneshwari at para 34 to 44 observed as under:-

"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 Appeal (AT) Insolvency No. 949 of 2019 15 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, 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 Company Appeal (AT) Insolvency No. 949 of 2019 16 thereupon to it in such manner as the Central Government may direct.

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.

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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:

"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 Company Appeal (AT) Insolvency No. 949 of 2019 18 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 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 Company Appeal (AT) Insolvency No. 949 of 2019 19 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 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.

44. As we have heard learned counsel for the parties and prima facie we are of the view that the matter requires investigation to find out whether one or other promoter or the company as referred to in paragraph 9 and quoted above to find if they have violated any of the provisions of Sections 68, 69, 70, 71, 72 & 73 of the 'I&B Code', we modify the impugned order dated 16th April, 2019 and refer the matter to the Secretary, Ministry of Corporate Affairs, Government of India, to get the matter investigated by Inspector or Inspectors and following the procedure in terms of Section 213 of the Companies Act, 2013 and/ or Company Appeal (AT) Insolvency No. 949 of 2019 20 on such report after investigation by the Inspector, the Central Government feels that the matter is further required to be investigated by the 'Serious Fraud Investigation Office' it may do so and thereafter, if actionable material making out case of fraud is made out after such investigation by the 'Serious

Fraud Investigation Office', it may act in terms of sub-section (2) of Section 236 of the 'I&B Code' for referring the matter to the Special Court."

32. In the present case it is to be pointed out that the term Adjudicating Authority, as defined in Section 5(1) of IBC cannot come within the ambit of court as defined in Section 2(29) of the Companies Act, 2013. In fact, Section 2(29)(i) of the Companies Act defines 'Court' the High Court having jurisdiction in relation to the place at which the registered office of the Company concerned is situated etc. Section 2(29)(ii) of the Act speaks of 'District Court' and Section 29(iii) deals with the Court of Session, Section 29(iv) pertains to the Special Court constituted u/s 435 and Section 29(5) is concerned with any Metropolitan Magistrate or Judicial Magistrate of the 1st Class.

33. Likewise, the term Tribunal is defined u/s 2(90) of the Companies Act which means the NCLT constituted under Section 408 of the Companies Act, 2013.

34. It is significant to point out that a court of Law exercises judicial power in discharging judicial function and finally arrive at a conclusion. A 'Tribunal' is similar to a 'Court' but it is not a 'Court'. In short, the 'Court' means a 'Court' Company Appeal (AT) Insolvency No. 949 of 2019 21 of civil judicature and the and the 'Tribunal' means body of men appointed to decided the disputes /controversies (of course judicial power of the state being conferred in it. The procedure of a 'Court of Law' and 'Tribunal' will differ but they function in their own field. However, a 'court of Law' and the 'Tribunal' act judicially in both senses. To put it lucidly, a Tribunal does not have the trappings of a 'court'.

35. An Administrator is to exercise a prudent skill and care in dealing with property affairs, duly entrusted to him. Further, the Adjudicating Authority is to subjectively satisfy itself that a complete and comprehensive probe into the affairs of company is very much required, in the interest of Company because of maladministration and poor governance.

36. A 'Resolution Professional' is a creation of 'I&B' Code is quite competent to prefer an application before an 'Adjudicating Authority' by pointing out the Hardships/obstacles which he came across/comes across during the Resolution process.

37. Be it noted, in the case on hand, an order of dissolution was not passed in regard to the 'Corporate Debtor' so far. To put it precisely, the fraudulent/wrongful actions mentioned in the application projected by the 'Resolution Professional' before the Adjudicating Authority related to the period before 'Corporate Insolvency Resolution Process'.

38. It cannot be lost sight of that a Company in liquidation retains its existence and it is entitled to 'sue' and be 'sued' in its name, till it is dissolved in Company Appeal (AT) Insolvency No. 949 of 2019 22 the manner know to law. Under Section 430 of the Companies Act, 2013 'National Company Law Tribunal' will have jurisdiction to deal with the disputes arising out of the Companies Act, 2013.

39. No wonder, an investigation is not to be ordered on mere suspicion, assumptions, presumptions, conjectures or surmises. The aim of investigation is to unearth the hidden materials / and to bring it to the fore which are not to be seen through bare eyes. Before the Tribunal ordering an investigation must issue a notice to the concerned authorities requiring them to state as to why the affairs of a Company ought not be investigated and an opportunity of hearing is to be given to it. Every individual whose civil right is affected / likely to be affected has to be given a reasonable notice of the matter to repudiate the adverse materials / allegations levelled against him/it. In fact, the Rules of Natural Justice are not edicts of a statute and they are not a rigid one. Section 424 of the Companies Act, 2013 enjoins the 'National Company Law Tribunal' to follow the principles of 'Natural Justice' and that the Tribunal is to pass an order after providing a reasonable opportunity of being heard.

40. Section 43 of the IBC deals with the 'avoidance of preferences' given by the 'Corporate Debtor'. It is to be remembered that the intention of Debtor is a prime factor. Section 44 of the Code mentions the order that may be passed by Adjudicating Authority ('National Company Law Tribunal') on an application filed by the 'Resolution Professional' or Liquidator in a Section 43 proceedings. Section 46 relates to the relevant period for avoidable transactions. As per Company Appeal (AT) Insolvency No. 949 of 2019 23 Section 66 of the I&B Code the 'Resolution Professional' is empowered to institute proceedings in 'fraudulent/wrongful trading' before the 'Adjudicating Authority' and the said authority is to pass necessary orders. As an Adjudicating Authority ('National Company Law Tribunal') a punishment of imprisonment cannot be imposed by it, except to pass orders u/s 66 of the 'I&B' Code. Section 71 of the Code deals with punishment for falsification of books of 'Corporate Debtor' and Section 72 of the Code speaks of punishment for wilful and material omission committed by the Officer of the 'Corporate Debtor' in statements relating to its affairs. Section 73 is concerned with the punishment of fraud and false representations to the Creditors subject to the proof of the same.

41. As per Section 210(c) of the Companies Act, 2013, the Central Government without resorting to an 'investigation' can order for an appropriate action being taken, based on its discretion. Further, as per Section 210(1)(b) of the Act, the Central Government can direct an investigation on its own accord. If need be, or on a special resolution passed by the shareholders of the Company. As per Section 210(3) of the Companies Act the Central Government has no option but to direct an investigation and appoint an inspector and to obtain his Report. The inspectors are empowered to scrutinise the materials gathered from a company and prepare the report. Section 212 of the Act, 2013 specifies a procedure for an investigation by SFIO taken up in the teeth of Section 212(1) of the Act.

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42. As per Section 60(1) of 'I&B' Code the 'National Company Law Tribunal' is an Adjudicating Authority, possessing concurrent jurisdiction under the Companies Act and also under the I&B Code, 2016.

43. The affairs of Company will include within its fold any violation of law (including fraud and wrongful acts) in the conduct of company affairs. Section 210(2) of the Companies Act gives power to the Central Government and the said power is a mandatory one. As per Section 210(3) of the Companies Act, the Central Government has no option but to order an investigation and appoint an inspector(s) and to obtain his report. The inspector(s) are empowered to scrutinise the materials gathered from a particular company and prepare his final report. The SFIO report as per Section 212 of the Companies Act is like that of a report filed by a Police Officer as per Section 173 CRPC before the concerned special court for framing necessary charges.

44. Be that as it may, this Tribunal on a careful consideration of respective contentions and also keeping in mind a prime fact that the Tribunal/Adjudicating Authority is guided by the Principles of Natural justice and is to follow the procedure prescribed u/s 213(b) of the Companies Act comes to an 'irresistible' and inescapable conclusion that the Adjudicating Authority (Tribunal) in Law is not empowered to order an investigation directly, to be carried out by the Central Government. An Adjudicating Authority (Tribunal) as a competent / Appropriate authority in terms of Section 213 of the Companies Act has an option to issue notice in regard to the charges/allegations Company Appeal (AT) Insolvency No. 949 of 2019 25 levelled against the promoters and others (including the Appellants) of course after following the due procedure enshrined u/s 213 of the Companies Act, 2013. In case an exfacie/prima facie case is made out, then, the Tribunal is empowered to refer the matter to the Central Government for an investigation by the Inspectors and upon such investigation, if any action is required to be taken and if the Central Government subjectively opines that the subject matter in issue needs an investigation, through the Serious Fraud Investigation Office, it may proceed in accordance with Law. Suffice it for this court to make a relevant mention that the Tribunal/Adjudicating Authority on receipt of an application/complaint of breach of the relevant provisions of the IBC, 2016 and the Companies Act and after satisfying itself that there are attendant circumstances pointing out fraudulent/wrongful trading etc. was / which has been committed then, it is well within jurisdiction to refer the matter to Central Government for an investigation by Inspector(s) to be appointed by the Central Government. If an investigating authority after completion of investigation comes to a conclusion that any offence punishable in terms of Section 213 read with 447 of Companies Act or under Section 68,69,70,71,72,73 of the IBC Code is/are made out then, the Central Government, may refer the matter to the 'Special Court' itself or may even require the 'Insolvency and Bankruptcy Board of India' or to authorise any person as per Section 236(2) of the I&B Code to file a complaint. Viewed in that perspective this Tribunal varies the impugned order dated 19.07.2019 passed by the Adjudicating Authority and refer the matter to the Central Government for investigation through any inspector. Accordingly, Company Appeal (AT) Insolvency No. 949 of 2019 26 this Tribunal refers the matter to the Secretary, Ministry of Corporate Affairs, Government of India in carrying out an investigation by the Inspector or Inspectors by following the due procedure as per Section 213 of the Companies Act, 2013 etc. If the matter needs to be examined by 'Serious Fraud Investigation Office', the Central Government may do so, if the case of fraud is made out and proceed further in accordance with law.

45. Resultantly, with the aforesaid observations and directions, the instant Appeal stands disposed of. No Costs. IA 2843 and 2844/19 are closed.

46. The Office of Registry is directed to communicate a copy of this order to the Secretary and Joint Secretary, Ministry of Corporate Affairs, 5th Floor, 'A' Wing, Shastri Bhawan, Dr. R.P. Road, New Delhi-110001 for information and necessary follow up action.

[Justice Venugopal M.] Member (Judicial) [Kanthi Narahari] Member (Technical) [V.P. Singh] Member (Technical) New Delhi 4th February, 2020 ss Company Appeal (AT) Insolvency No. 949 of 2019 27