

# Tridhaatu Kirti Developers Lp vs Nandkishore Vishnupant Deshpande on 2 January, 2023

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NATIONAL COMPANY LAW APPELLATE TRIBUNAL  
PRINCIPAL BENCH  
NEW DELHI

COMPANY APPEAL (AT)(INSOLVENCY) NO.95/2021

(Arising out of judgement/order dated 21.01.2021 passed by the Adjudicating Authority, National Company Law Tribunal, Mumbai Bench, Mumbai, in IA No.1124/2020 in CP No.2556/2019).

In the matter of:

Tridhaatu Kirti Developers LLP  
5th floor, B-Wing, Shrikant Chambers,  
Near R.K. Studio, Chembur,  
Mumbai

Appellant

Vs

1. Mr. Arihant Nenawati,  
Liquidator of Royal Refinery Pvt Ltd,  
Nenawati & Associates,  
B202, Sheraton Classic,  
Dr. Charat Singh Colony, Chakala,  
Andheri East,  
Mumbai 400 069
2. MR. Vishal Choudhary  
Room No.82, 83 and 84, 4th floor,  
Building 143/D, Khemka Bhavan,  
Fanaswadi, Opp Sitaram Poddar School,  
Chira Bazar,  
Mumbai 400 002
3. Gaurav Panwar  
Makan No.171/172, anjani Dham,  
Barbar road,  
Ratlam 457001

Also At

Makan Number 417, Gali No.4,

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Near Budheshwar Road,  
Tata Nagar,  
Ratlam 457001

4. Manish Panwar,  
401, Lotus Business Park,  
Behind HP Petrol Pump, SV Road,  
Malad West, Mumbai 400064

5. Mukesh Mehta  
320 Hammersmith Ind Premises Coop Soc Ltd,  
Narayan Pathare Marg,  
Off. Sitladevi Temple Road,  
Mahim (West) Mumbai 400 016

Respondents

For Appellant: Mr Vishesh Kalra, Ms Deepti, Advocates.

For Respondent: Mr. Arjun Krishnan, Mr Kaustav Som, Advocates  
for R1.

Ms Srishti Prabhakar, Advocate for R2 and R3.

#### JUDGEMENT

(2ND JANUARY, 2023) This appeal has been filed under Section 61 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred to as 'IBC') against the impugned order dated 21st January, 2021 passed by the Adjudicating Authority, National Company Law Tribunal, Mumbai Bench, Mumbai (hereinafter referred to as 'Adjudicating Authority') in IA No.1124/2020 in CP No.2556/2019.

2. The appellant is aggrieved with the direction of the Adjudicating Authority to direct the appellant to pay an amount of Company Appeal (AT)(Ins) No.95/2021 Rs.8.95 crores outstanding in the ledger of the Corporate Debtor (hereinafter referred to as 'CD') to the CD and he is further aggrieved with the feeling of the Bench for defrauding the Corporate Debtor (CD) for carrying out business with dishonest intents to defraud creditors and, therefore, has to make the contribution to the assets of the CD.

3. To substantiate his claim the appellant has provided list of dates and events to prove that the Resolution Professional in the garb of the said application has attempted to unlawfully recover the money which are not even due and outstanding. The appellant has also taken the stand that mere noting of the transaction in the ledger account cannot be the basis to decide that the said amount was outstanding and liable to be repaid. As also the outstanding amount of the CD was forfeited by the appellant in terms of mutual agreement that took place between the two parties which has never been questioned or challenged. There is absence of any material evidence of fraud against the appellant and the Resolution Professional has failed to substantiate his claim for proving fraud done by the appellant. The appellant has submitted the list of dates and events which are as follows:

Company Appeal (AT)(Ins) No.95/2021 Date Particulars 2010 That Kirti Cooperative Housing Society Ltd (hereinafter referred to as Kirti CHSL) approached the parent company of the Appellant to redevelop the society.

October Accordingly, the parent company of the Appellant 2010 submitted an offer

letter for redevelopment work of Kirti CHSL.

2011 The parent company in order to carry out the proposed redevelopment of Kirti CHSL, constituted a special purpose vehicle namely Tridhaatu Kirti Developers LLP i.e. Appellant.

27.03.2011 Thereafter, Kirti CHSL after considering the proposal and rival offers was pleased to appoint Appellant as the developer for the said redevelopment project.

27.04.2011 The appointment of the Appellant was ratified by the Assistant Registrar of Cooperative Societies.

2012-2016 Accordingly, the appellant took steps towards redevelopment of Kirti CHSL and ensured that requisite plans are sanctioned so that Company Appeal (AT)(Ins) No.95/2021 redevelopment can be effectively carried out. Subsequently, the appellant circulated the Draft Development Agreement but the same could not be executed for no fault on part of the Appellant. 2017 The Corporate Debtor extended a loan facility to the Appellant for its business activities and specifically for the purposes of redevelopment project of Kirti CHSL.

19.07.2018 The Appellant repaid a part of loan amount aggregating to Rs.50,00,000/- to the Corporate Debtor. It is pertinent to note that the said repayment is reflected in the Ledger Account of both the parties.

24.09.2018 Further, the Appellant made part payment of Rs.55,00,000/- to the Corporate Debtor and the same is reflected in the accounts of both the parties. This indeed proves the bona fide nature of the said transaction as repayment was done in ordinary course of business.

Company Appeal (AT)(Ins) No.95/2021 2018 Appellant after analysing the progress of redevelopment work concluded that the loans availed cannot be repaid in entirety.

Thereafter, the Corporate Debtor and the Appellant after due deliberation reached on a mutual agreement. As per the said understanding the Appellant was required to make a repayment of Rs.45,00,000/- towards the loan and the balance amount would be converted as Corporate Debtor's investment towards the redevelopment project. Further the Corporate Debtor agreed to make a total investment of Rs.20 crores for the said project. That an event of default would authorise the Appellant to forfeit the amount already invested by Corporate Debtor i.e. outstanding loan amount.

07.06.2019 The Appellant in terms of the agreement repaid a sum of Rs.45,00,000/- to the Corporate Debtor. Accordingly, the balance loan amount was adjusted as investment towards the said redevelopment project. Thereafter, the Corporate Debtor failed to fulfil his obligations under the agreement thereby Company Appeal (AT)(Ins) No.95/2021 constraining the Appellant to call upon the Corporate Debtor to make the requisite investment. Further, despite the repeated reminder the Corporate Debtor failed to make the promised investment and Appellant after due intimation forfeited the balance amount.

13.11.2019 The Corporate Insolvency Process was initiated for the Corporate Debtor by the Ld. Adjudicating Authority.

21.11.2019 A public announcement was made in Form A in pursuance to Regulation 6 of the CIRP Regulations, 2016.

13.02.2020 An intimation was filed before the Ld. Adjudicating Authority confirming the appointment of Interim Resolution Professional as the Resolution Professional.

20.07.2020 That the Resolution Professional filed an Application under Section 66 read with 26 of the Code numbered as IA No.1124 of 2020 against the Appellant and other respondents alleging fraudulent trading.

Company Appeal (AT)(Ins) No.95/2021 24.11.2020 The Appellant filed its reply by way of affidavit against the said application.

21.01.2021 Accordingly, the Ld. Adjudicating Authority passed the Impugned order in IA 1124/2020 in CP No.2556/MB/2019 and onerously directed the Appellant to make the payment within a period of two days of pronouncement of the said order. 01.02.2021 Hence, the present Appeal.

4. The Learned counsel for the appellant took us to the provisions of Section 66 of the Code and made an emphatic attempt to prove that the Resolution Professional has failed to establish any fraudulent or wrongful transaction. It was submitted by learned Counsel that the provisions of Section 66 (1) and 66(2) are against the director and partners of the CD and not against the third party. Section 66 of the Code is not a recovery provision to seek repayment of loan and has cited a few judgements as numerated hereunder to substantiate his claim that fraud must be not only pleaded but also be pleaded alongwith necessary evidence:-

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1. Sevenska Handels Bunken Vs Indian Charge Chrome and Ors (Reported in (1944) 1 SCC (504) (paras 41 and 42) "41. Again it appears that the High Court found a strong prima facie case against defendant 4 merely on reading the plaint.

Pleadings make only allegations or averments of facts. Mere pleadings do not make a strong case of prima facie fraud. The material and evidence has to show it. No material whatsoever is referred to by the High Court.

42. In A.L.N. Narayanan Chettyar V. Official Assignee, High Court Rangoon the Privy Council held that:

"Fraud like any other charge of a criminal offence whether made in civil or criminal proceedings, must be established beyond reasonable doubt. A finding as to fraud cannot be based on suspicion and conjecture."

2. Ratan Singh and Ors Vs Nirmal Gill and Ors. Civil Application No.3681 of 2020 (Civil Appeal No.3681 of 2020- Judgement dated 16th November, 2020 (para 41).

"41. The High Court, however, went on to observe that defendants had abused their position of active confidence, in the following words:

".....

The entire exercise indeed smacks of connivance, misrepresentation and fraud. This Court would be failing in its duty, if the necessary inference is not drawn from the evidence on record. Present is a clear cut case of an unsuspecting sister Company Appeal (AT)(Ins) No.95/2021 being defrauded by her own step brothers/bhabi in whom she had reposed implicit trust. It is a clear case of misuse and abuse of the position of confidence held by the step brothers of the plaintiff. ..." The requirement regarding shifting of burden onto the defendants had been succinctly discussed in Anil Rishi v. Gurbaksh Singh<sup>10</sup>, wherein this Court had held that for shifting the burden of proof, it would require more than merely pleading that the relationship is a fiduciary one and it must be proved by producing tangible evidence. The relevant extract of the said decision is reproduced as thus:

"8. The initial burden of proof would be on the plaintiff in view of Section 101 of the Evidence Act, which reads as under:

"101. Burden of proof.--Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

9. In terms of the said provision, the burden of proving the fact rests on the party who substantially asserts the affirmative issues and not the party who denies it. The said rule may not be universal in its application and there may be an exception thereto. The learned trial court and the High Court proceeded on the basis that the defendant was in a dominating position (2006) 5 SCC 558 and there had been a fiduciary relationship between the parties. The appellant in his written statement denied and disputed the said averments made in the plaint.

10. Pleading is not evidence, far less proof. Issues are raised on the basis of the pleadings. The defendant appellant having not admitted or acknowledged the fiduciary relationship between the parties, indisputably, the relationship between the parties itself would be an issue. The suit will fail if both the parties do not adduce any evidence, in view of Section 102 of the Evidence Act. Thus, ordinarily, the burden of proof would be on the party who asserts the affirmative of the issue and it rests, after evidence is gone into, upon the party against whom, at the time the question arises, judgment would be given, if no further evidence were to be adduced by either side.

11. The fact that the defendant was in a dominant position must, thus, be proved by the plaintiff at the first instance. Company Appeal (AT)(Ins) No.95/2021 xxx xxx xxx

14. But before such a finding is arrived at, the averments as regards alleged fiduciary relationship must be established before a presumption of undue influence against a person in position of active confidence is drawn. The factum of active confidence should also be established.

15. Section 111 of the Evidence Act will apply when the bona fides of a transaction is in question but not when the real nature thereof is in question. The words "active confidence" indicate that the relationship between the parties must be such that one is bound to protect the interests of the other.

16. Thus, point for determination of binding interests or which are the cases which come within the rule of active confidence would vary from case to case. If the plaintiff fails to prove the existence of the fiduciary relationship or the position of active confidence held by the defendantappellant, the burden would lie on him as he had alleged fraud. The trial court and the High Court, therefore, in our opinion, cannot be said to be correct in holding that without anything further, the burden of proof would be on the defendants.

(emphasis supplied)"

3.Anil Rishi Vs Gurbaksh Singh (reported in (2006) SCC

558) (para 8 to 16) @ page 153-240 of Appeal Memo.

"8. The initial burden of proof would be on the plaintiff in view of Section 101 of the Evidence Act, which reads as under:

"101. Burden of proof.--Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

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(emphasis supplied)"

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5. It was also attempted to be explained by the learned counsel of the appellant that there is no case against the appellant on fact. Learned counsel for the appellant submitted that the material facts pertaining to the dispute are briefly summarized as under:

a) On 13.11.2019, CIRP was initiated against one Royal Refinery Pvt Ltd, where Mr. Nandkishore V Despande was appointed as the Resolution Professional. The CD is now under liquidation, which order was passed during the pendency of this Appeal.

b) The Appellant is a real estate developer who intended to develop a society by the name of Kirti CHSL, in Santacruz Mumbai. The Appellant was given loans by the CD in the year 2017 much prior to any CIRP being initiated. It is pertinent to highlight that the loans were received by way of bank transfers which are reflected in the ledger accounts maintained by both the CD and the Appellant. Part of these loans were repaid from time to time.

c) The Appellant has no relation with the CD or its business.

At no point in time has any allegation been made to that effect Company Appeal (AT)(Ins) No.95/2021 that the Appellant has colluded with the CD either by RP or by any investigating agency.

d) In the year 2018, the Appellant was not being in a position to repay the loan, requested the CD to convert into the loan into an investment into the project, which was agreed by the CD. The CD agreed to invest a sum of Rs.20 crores with an understanding that the amount shall stand forfeited on failure of investment. Accordingly, on failure the amount stood forfeited.

6. Learned Counsel for the Respondent has submitted that the CD was trading in Gold i.e importing raw gold, conduct manufacturing, selling/exporting finished products of gold. It was submitted by the learned counsel for the Respondent No.1 that the CD advanced a loan in the year 2017 to the appellant, the builder/developers, for redevelopment of residential apartment known as Kirti CSH. For this purpose the CD advanced a loan in the year 2017 to the Appellant. Some payments were made by the Appellant from time to time towards loan repayment.

7. As per audited financial Statement an amount of Rs.8.95 crore was admittedly due to be paid by the Appellant to the CD on 31.03.2019. It was also stated by the Learned counsel for the Company Appeal (AT)(Ins) No.95/2021 Respondent No.1 that the Appellant has done fraudulent transaction by setting up a fraudulent and sham transaction to evade its dues under the loan advanced by the CD. The Learned Counsel for the Respondent No.1 also submitted followings and alleged that these stands of Appellant is prima facie illogical and fraudulent.

a) The Appellant claimed that in 2018, an 'understanding' was arrived at between the parties that it would repay Rs.45 lakhs and the rest of the dues would remain in the project and the CD would invest further in the project;

b) The Appellant alleged that the CD would invest a further Rs.20 crores, and in the event such investment was not made, the Appellant would have the option of forfeiting the 'investment' amount i.e. outstanding loan.

c) The appellant alleged that since the CD did not make the further investment, the amount of the loan stood forfeited, and it has no dues towards the CD.

8. It was also stated by the learned counsel for the Respondent No.1 that no document has been executed between the CD and the Appellant in relation to the transfer of the said funds, especially Company Appeal (AT)(Ins) No.95/2021 any document/agreement which would allow the appellant to forfeit the entire outstanding amount.

9. It was also stated by the learned counsel for the Respondent No.1 that no development agreement has been annexed by the Appellant in relation to its purported housing project (which purportedly commenced in 2011) even in 2017 or 2019, when the CD had transferred the said funds to the Appellant, purportedly as an 'investment' for development of the project.



10. It was also stated by the learned Counsel for the Respondent No.1 that the impugned order has duly reached the correct conclusion after considering all available material and the directions issued on the Appellant are justified in view of Section 66 of the IBC

11. We have gone through the pleading of the parties, submissions made by the learned counsel of Respondent and appellant and are having following observations:

i) It is not in dispute that the appellant and the respondent company are not a related party.

ii) It is also not in dispute that an amount of Rs.8.95 crores is due and outstanding for recovery from the Appellant to the Company Appeal (AT)(Ins) No.95/2021 CD as both the parties agreeing that this is existing in their Balance Sheet as per accounting norms.

iii) It is the law laid down that fraud unravels of acts. In some way it is a deception to gain by another loss.

iv) It is also well settled law that the establishment of fraudulent conduct does not require the same standard of proof as in criminal trial. It is not necessary that each instance of fund being siphoned needs to be established from inception to the end and even one conduct of director of CD can depict an act of fraud.

12. Even the law laid down in UK Insolvency Act as held in Hon'ble England and Wales Court of Appeal in JSC BTA Bank V Mukhtar Ablyazov, (2018) ewca Civ 1176 Para 14, For attracting liability under Section 423 of the UK IA it is sufficient to show that the transaction was entered into for a prohibited purpose (i.e. to defraud creditors of the corporate debtor, or for any fraudulent purpose, as per Section 66 of the IBC) and the fact that the transaction was also for some other purpose is of no relevance. 13 In this case reference can also be made the following judgements:

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i) S.P. Chengalvaraya Naidu Vs Jagannath (1994) 1 SCC 1, para 5 and 6 "5. The High Court, in our view, fell into patent error. The short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the court. The High Court, however, went haywire and made observations which are wholly perverse. We do not agree with the High Court that "there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-

grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court- process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation.

6. The facts of the present case leave no manner of doubt that Jagannath obtained the preliminary decree by playing fraud on the court. A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. Jagannath was working as a clerk with Chunilal Sowcar. He purchased the property in the court auction on behalf of Chunilal Sowcar. He had, on his own volition, executed the registered release deed (Ex. B-15) in favour of Chunilal Sowcar regarding the property in dispute. He knew that the appellants had paid the total decretal amount to his master Chunilal Sowcar. Without disclosing all these facts, he filed the suit for the partition of the property on the ground that he had purchased the property on his own behalf and not on behalf of Chunilal Sowcar. Non- production and even non-mentioning of the release deed at the trial is tantamount to playing fraud on the court. We do not agree with the observations of the High Court that the appellants- defendants could have easily produced the certified registered copy of Ex. B-15 and non-suited the plaintiff. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. Company Appeal (AT)(Ins) No.95/2021 If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party."

ii) Col. M.R. Bhakshi Vs Fintra Systems Ltd, 2008 (106) DRJ 166, Para 10 and 11.

"10. Having considered the respective submissions I am, as at present advised, inclined to agree with the submissions of Mr. Rajiv Shakhder, Sr. Advocate the learned Amicus Curiae. Keeping in view the purpose for which Section 542 has been enacted, and the fact that timely action is of the essence, not only to prevent the presentation of a fiat accompli by the fraudulent Directors of the company, but also to provide relief to the victims of the fraud, it seems that the establishment of the fraudulent conduct for attracting the provision of Section 542 of the Companies Act does not require the same standard of proof as in a criminal trial and the rigours of the law of evidence as apply to a criminal trial would not apply to establish the commission of fraudulent acts and omissions by the Directors and managers of a company. It has also to be kept in mind that by its very nature, fraud is not easy to establish. This is even more so, when the fraudulent conduct is undertaken by the Directors of a company, sitting in their own office, with a view to defraud the creditors/investors who, though the victim of the fraud, are not involved in the transactions which constitute such conduct, and may have no personal knowledge of the same. In K.T. Dharanendrah v. R.T. Authority the Supreme Court, while dealing with a case under the Customs Act, 1962 observed that "An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the Community. A disregard for the interest of the Community can be manifested only at the cost of forfeiting the trust and faith of the

Community in the system to administer justice in an even handed manner without fear of criticism from the quarters which view white collar crimes with a permissive eye unmindful of the damage done to the National Economy and National Interest."

11. I also find merit in the submission of Mr. Shakdher that it is not necessary that each transaction/instance of funds being siphoned or fraudulent conduct needs to be established from the beginning to the end to invoke Section 542 of the Act. That is because it would be reasonable to assume, that directors/managers who are shown to have indulged in even a Company Appeal (AT)(Ins) No.95/2021 single act of fraud in the discharge of their duties towards the company, its shareholders and creditors, would have generally resorted to such conduct. Traits of greed and dishonesty amongst men are known to manifest whenever the opportunity presents itself. This is even more true, when such conduct is displayed by the relatively affluent members of society, as their conduct is not driven by their need or undertaken in desperation. The pattern that emerges from the conduct of Mr. & Mrs. Shakt shows that their actions were focused on collecting funds in the company from the public by promising huge returns, and then siphoning them out in one way or another. That seems to have been the true "business activity" of the promoter Directors and managers of the company. No other business appears to have been conducted by the company with a view to earn profits for the company, its shareholders and creditors. In the aforesaid process, the entity of the company has been misused and exploited."

14. Section 66 of the IBC Cod reads as follows:

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.

Company Appeal (AT)(Ins) No.95/2021 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 out the same functions as are carried out by such director or partner, as the case may be, in relation to 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 10-A.

15. It is very much clear from the above that it is the intention to defraud creditors at that stage Section 66 is applicable. This section empowers the Adjudicating Authority to pass an order for recovery from such fraudulent parties as contribution to the assets of the CD. The Hon'ble Apex Court in the case of Phoenix A.R.C. Vs. Spade Financial Services (2021) 3 SCC 475 vide para 51 as tabulated below has identified the applicability of this provision "51. The IBC has made provisions for identifying, annulling or disregarding "avoidable transactions" which distressed companies may have undertaken to hamper recovery of creditors in the event of the initiation of CIRP. Such avoidable transactions include:

- i) Preferential transactions under Section 43 IBC;
- ii) Undervalued transactions under Section 45(2) IBC;

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- iii) Transactions defrauding creditors under Section 49 IBC;

and

iv) Extortionate transactions under Section 50 IBC The IBC recognises that for the success of an insolvency regime, the real nature of the transactions has to be unearthed in order to prevent any person from taking undue benefit of its provisions to the detriment of the rights of legitimate creditors." 16 In view of the above stated fact and circumstances we are constrained to uphold the hand of the Adjudicating Authority and is not able to agree with the Appellant.

The Appeal is accordingly dismissed.

(Dr.Ashok Kumar Mishra)  
Member (Technical)

(Justice Rakesh Kumar)  
Member (Judicial)

bm

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