

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI
(APPELLATE JURISDICTION)

COMPANY APPEAL (AT) (CH) (INSOLVENCY) NO. 293 of 2021

&

I.A. No. 625/2021

(Arising out of the Order dated 09th July, 2021 passed by the Learned Adjudicating Authority (National Company Law Tribunal, Kochi Bench, Kerala), in IA No.38/KOB/2021 in IBA/04/KOB/2020)

IN THE MATTER OF:

Mr. Thomas George

Suspended Director of Corporate Debtor

Address:

Neelampilalil House,
Vijaya Road, Ayani Nada, Maradu,
Ernakulam, Kerala State – 682 304.

Email: tg.whispower@gmail.com

...Appellant

Versus

1. K. Easwara Pillai

Resolution Professional

M/s. Mathstraman Manufacturers and Traders
Private Limited.

Address: 6th Floor, Amrita Trade Towers,
S A Road, Pallimukku, Kochi – 16

Email: keaswaran@gmail.com

...Respondent No. 1

2. Mrs. Asha Mary Thomas

Suspended Director of Corporate Debtor

Address:

Neelampilalil House,
Vijaya Road, Ayani Nada, Maradu,
Ernakulam, Kerala State – 682 304.

Email: tg.whispower@gmail.com

...Respondent No. 2

3. M/s. Whispower Sales & Services (P) Ltd.
(Represented by Director Mr. Thomas George)

Address:

Door No.40/6355, Banerji Road,
Near High Court Junction,
Ernakulam – 628031.

Email: tg.whispoer@gmail.com

...Respondent No. 3

4. M/s. Whispower Sales & Services (P) Ltd.
(Represented by Director Mrs. Asha Mary Thomas)

Address: Near High Court Junction
Door No.40/6355, Banerji Road,
Ernakulam – 682031.

Email: tg.whispoer@gmail.com

...Respondent No. 4

5. The Secretary,
Director of Industries & Commerce,
Thiruvananthapuram

Address: Vikas Bhavan, 3rd Floor,
University of Kerala Senate House Campus,
Palayam.

Email: industriesdirector@gmail.com

...Respondent No. 5

6. The Tahasildar
Kanayannur Taluk

Address: Park Ave, Near Subhash Park,
Marine Drive, Ernakulam – 682011.

Email: knrelectio@gmail.com

...Respondent No. 6

7. M/s. Malayalam Industries Ltd.
(Represented by Managing Director Mr. John Mathew)

Address; Mermaid Complex,
Kaniampuzha Road, Vyttila Ernakulam – 682019.

Email: accounts@milmermaid.com

...Respondent No. 7

Present

For Appellant: Mr. Pradeep Joy, Advocate.

For Respondent No. 1: Mr. S. Sethuraman, Advocate for R-1.

For Respondent No. 7: Mr. G.R. Lakshmanan, Advocate for R-7.

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

[Per; Shreesh Merla, Member (T)]

1. Aggrieved by the Impugned Order dated 09.07.2021 passed by the Learned Adjudicating Authority (National Company Law Tribunal, Kochi Bench, Kerala) in IA No.38/KOB/2021 in IBA/04/KOB/2020, the present Appeal has been preferred under Section 61 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'The Code').

2. Facts in brief are that I.A. 38/KOB/2021 was filed by Mr. K. Easwara Pillai/the Resolution Professional ('RP') against the Appellants herein/the suspended Directors of the 'Corporate Debtor' seeking the following reliefs:

“II. To pass an order directing the Respondents to make good the losses caused to the creditors of the Corporate Debtor as concluded in the present Application as envisaged under Section 67(2) of the I&B Code, 2016.

III. To hold the Respondents personally liable for such deliberate and wilful default.

IV. To declare the transaction as concluded in the present Application as Fraudulent Transactions.

V. To direct the Respondents to furnish all such documents as sought by the Applicant for conduct of Resolution Process.

VI. Report the transactions to the Insolvency and Bankruptcy Board of India for making a complaint to the special court under Section 236 of the I&B Code, 2016.”

3. CIRP commenced against the ‘Corporate Debtor’ on 20.11.2020 and Mr. K. Easwara Pillai was appointed as the IRP. During the course of CIRP, while inspecting the factory of the manufacturing unit of the CP the RP found all irregular business activities in the factory and at the Registered Office of the ‘Corporate Debtor’. It was pleaded that as the ‘Corporate Debtor’ was dormant during 2015 – 2016, the RP had prepared the annual Accounts of 2014 – 2015 with limited information. The Books of Accounts, records etc. were either destroyed or mutilated. The Company failed to file the Statutory Accounts before the RoC from 2015 onwards. It is stated that all the movable and current Assets were traded to Respondent 3 and sold to settle the liabilities of the ‘Corporate Debtor’ by cash mode, outside the Books of Accounts of the ‘Corporate Debtor’. It was pleaded that there were no workers and employers working under the pay role of the ‘Corporate Debtor’.

4. Though Notice was served on Respondents 3 to 6, who are the Appellant Nos. 3 to 6 herein, they did not appear before the Adjudicating Authority and hence were set as Ex-Parte. The first Appellant did not file any Reply and the

second Appellant remained absent. M/s. Malayalam Industries Limited who is the 50% Shareholder of the 'Corporate Debtor' filed a Reply and stated that they did not have any dealings in any of the transactions mentioned in the Affidavit filed by the RP.

5. By the Impugned Order, the Adjudicating Authority has allowed the Application filed by the RP under Section 66 of the Code and observed as follows:

“From a reading of the above provision and considering the submission of the learned Resolution Professional, we are of the opinion that the suspended Directors of the Corporate Debtor have carried on the business in the factory and registered office of the Corporate Debtor were illegally continuing with M/s. Whispower Sales & Services (P) Ltd. and the Respondent No. 3 utilised the assets of the Corporate Debtor which is 100% owned by the Directors and Shareholders of the Corporate Debtor. From this it is clear that the suspended Directors were done the above act with an intent to defraud the creditors of the Corporate Debtor for fraudulent purpose. Hence, they are liable to make such contributions to the assets of the Corporate Debtor. It is also clear that suspended directors did not exercise due diligence in minimising the potential loss to the creditors of the Corporate Debtor.

In view of what is stated above, this application is allowed declaring the transactions as fraudulent transactions and directing the Respondents to make good the losses caused to the creditors of the Corporate Debtor holding that Respondents are personally liable for such deliberate and wilful default. The Respondents are directed to furnish all documents requested for by the Resolution Professional for smooth conduct of Corporate Insolvency Resolution Process.”

6. Learned Counsel for the Appellant strenuously contended that the Adjudicating Authority has wrongfully observed in an Ex-Parte Order, without discussing evidence and only based on the assessment of facts pleaded in the Application that the transactions were 'fraudulent' as defined under Section 66 of the Code. The limitation for actions under the Code is three years and therefore Section 66 of the Code is also covered by the provisions of the Limitation Act, 1963 which constricts the period of 'look back' to three years. In this instant case, the third Respondent had taken over all rights for a period of five years and therefore, it is 'barred by Limitation'.

7. It is submitted that the Application filed by the RP does not demonstrate any act or fraud by the Appellants nor does it set out any facts to show any elements of fraud. It is laid down by the Hon'ble Supreme Court in a catena of Judgements that 'fraud' must be established beyond doubt and mere suspicion, however, strange the coincidences, can never be a 'proof of evidence'. It is contended that the Impugned Order passed by the Adjudicating Authority is a non-Speaking Order devoid of any findings to arrive at a conclusion that the Appellant has done any fraudulent act. There was no investigation done nor any report filed to prove that indeed there was any fraud committed by the Appellants. The RP had an apprehension that there was fraudulent transactions done by the ex-Manger of the 'Corporate Debtor', had filed an Application before the Adjudicating Authority, without establishing any basis for the same. Learned

Counsel submitted that the matter be remanded to consider afresh by the Adjudicating Authority as it is an ex-Parte decree.

8. A perusal of the Application I.A. 38/KOB/2021 preferred by the RP before the Adjudicating Authority along with the filed Annexures, shows that the erstwhile Management of the 'Corporate Debtor' had transferred the ownership of land mortgage to the 'Financial Creditor' in favour of M/s. Whispower Sales & Services Pvt. Ltd./the third Respondent on 31.07.2018. The said land was originally issued on 04.10.2001 in favour of M/s. Malayalam Industries Limited which is the 50% Shareholder of the 'Corporate Debtor'. The RP has also filed the Land Pattas issued by the Tehsildar before the Adjudicating Authority. The said land was hypothecated on 18.09.2019 as equitable mortgage for the loan availed by the 'Corporate Debtor' from Union Bank of India. It is the case of the RP that the said facts came to his notice on verification of the Claim filed by Union Bank of India by way of 'Form-C' dated 07.12.2020. The land on which the manufacturing unit of the 'Corporate Debtor' is located, has been handed over along with its Plant and Machinery to the third Respondent. It is the case of the RP that all the current Assets such as stock, raw materials, finished goods, trade debtors, Motorcars, Trade Advance were wilfully treated to m/s. Whispower Sales & Services Limited.

9. It is not in dispute that the Audited Annual Accounts with RoC was in default from 2015 – 2016 onwards. The RP, based on the statements of the

suspended Directors as well as on the site inspection and the documents had formed an opinion that the suspended Directors had fraudulently transferred the land alongwith the machinery, plant and other Movable Assets in favour of M/s. Whispower Sales & Services Pvt. Ltd.

10. On a perusal of the grounds of Appeal, it is observed that there is absolutely no ground made out for not having filed their Reply despite service of Notice on the Appellant herein. Therefore, in the absence of any reasons given by the Appellant herein, this Tribunal does not find any sufficient cause for setting aside the Ex-Parte Order or giving another opportunity for the Appellant herein to present their case. The Advocate for the Appellant was very much present but did not choose to contest the matter. Having not contested their case before the Adjudicating Authority, despite service of Notice they cannot now wriggle out of the observations made by the Adjudicating Authority. The RP deposed in the Counter Affidavit that he has observed several irregularities and found that all the activities in the factory and at the Registered Office were continuing with all Assets of the 'Corporate Debtor' by Respondent No. 3 i.e., M/s. Whispower Sales & Services Pvt. Limited. It is stated that the Appellant herein and his wife Mrs. Asha Marry Thomas are the Directors and the Shareholders of the third Respondent Company. It is not disputed that the activities of the Corporate Debtor was abruptly stopped during 2013 – 14.

11. We observe from the Impugned Order that the Adjudicating Authority has passed an Order on merits and also having heard the first and the seventh Respondent. It is the matter of record that though the first Respondent was represented by an Advocate they did not choose to file a Reply. We also observe from the grounds of Appeal that M/s. Whispower Sales & Services Pvt. Limited is 100% owned by the Directors and Shareholders of the 'Corporate Debtor'. There is not a single whisper of denial regarding the statement by the RP.

12. As regarding the contention of the Learned Counsel for the Appellant that the look back period for Section 66 is to be construed as three years as the law of Limitation under the Code is three years from the date of default. This Tribunal is of the considered view that Section 66 of the Code does not provide for any 'look back period' as far as fraudulent transactions are concerned. Further, this Tribunal is also conscious of the fact that the Appellant has not denied even in this Appeal about taking over the factory, plant and machinery of the 'Corporate Debtor Company'. Therefore, we see no grounds in giving any additional opportunity to the Appellant as this Tribunal is of the earnest view that the RP has produced sufficient material to evidence that the Appellants have committed the fraudulent act knowingly and in a dishonest manner to hoodwink the Creditors.

13. Unlike other types of transactions provided under the Code, there is no specified look back period for fraudulent trading under Section 66. Hence, the

Resolution Professional is allowed to retrieve/repossess without any limitation of time and correct all the wrong doings for any relevant point of time. Section 66 of the Code envisages that the losses caused to the Creditors are recovered in the event of the Liquidation and that the Directors who caused such losses are made liable to make good such losses.

14. For all the foregoing reasons, we see no substantial grounds in allowing this Appeal, therefore this Appeal is dismissed accordingly. No order as to costs.

15. The connected pending Interlocutory Applications, if any, are closed.

[Justice M. Venugopal]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

Chennai Bench,
05th December, 2022

himanshu