

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH, COURT II**

I.A.NO.206/MB/C-II/2019

In

C.P (IB) No. 1790/MB/C-II/2017

**Under section 25(2)(i) r/w section 43-48 and 66 of
the Insolvency and Bankruptcy Code, 2016.**

Filed by

Subodh Kumar Agarwal,

Resolution Professional of,

Ushdev International Limited

...Applicant

In the matter of

State Bank of India

...Petitioner/Financial Creditor

Versus

Ushdev International Limited

... Respondent/Corporate Debtor

Order Delivered on :- 02.12.2022

Coram:

Member (Judicial) : Justice P.N. Deshmukh
Member (Technical) : Mr. Shyam Babu Gautam

Appearances:

For the Applicant : Mr. Subodh Kumar Agrawal (Erstwhile RP)
For the Financial Creditor : Mr. Nausher Kohli a/w Mr. Akhil Nene
For the Corporate Debtor : Mr. Aditya Pimple

ORDER

Per: CORAM

1. The court is convened via video conference today.
2. The present application is filed by **Mr. Subodh Kumar Agarwal, (erstwhile Resolution Professional)** (hereinafter called as “the Applicant”) seeking the avoidance of preferential and undervalued transactions entered into by the Corporate Debtor with the Respondents 1-4 under Sections 25(2) (i) read with Sections 43-48 and 66 of the Insolvency and Bankruptcy Code, 2016 (the Code) during the relevant period, being the period from April 1, 2013 to May 13, 2018 seeking contributions amounting to Rs. 332.12 Lakhs from Respondent Nos. 5-8 to the assets of the Corporate Debtor under Section 66 of the Code. The prayers of the said Application are as follows :-
 - a. That the Hon’ble NCLT be pleased to pass an order directing the Respondent Nos. 1-4 to, jointly and severally pay the Applicant Rs. 1,175.14 lakhs being the benefits received by them from the Corporate Debtor in terms of Section 44(d) of the Code;
 - b. That the Hon’ble NCLT be pleased to pass an order directing the Respondent Nos. 1-4 to vest in the Corporate Debtor, any property transferred in connection with the giving of the preference under Section 44(a) of the Code;
 - c. That the Hon’ble NCLT be pleased to pass an order directing

the Respondent Nos.1-4 to provide security or charge on any property for the discharge of any financial or operational debt under the order and such security or charge to have the same priority as security or charge released or discharged wholly or in part by the giving of preference in terms of Section 44(f) of the Code;

- d. That the Hon'ble NCLT be pleased to pass an order directing the Respondent Nos.1-4 to, jointly and severally, pay the Applicant Rs. 99.74 lakhs being the benefits received by them from the Corporate Debtor in terms of 48(c) of the Code;
- e. That the Hon'ble NCLT be pleased to pass an order directing the Respondent Nos.1-4 to vest in the Corporate Debtor, any property transferred in connection with the giving of the preference under Section 48(a) of the Code;
- f. That the Hon'ble NCLT be pleased to pass an order directing the Respondent Nos.1-4 to pay such consideration for the undervalued transaction as may be determined by an independent expert in terms of Section 48(d) of the Code.
- g. That the Hon'ble NCLT be pleased to pass an order directing the Respondent Nos.5 – 8 to be jointly and severally liable to contribute an amount of Rs. 332.12 lakhs to the assets of the Corporate Debtor under Section 66 of the Code.

Submissions made by the Applicant.

3. The Applicant states that the Insolvency proceedings against the Corporate Debtor was commenced on 14.05.2018. The Applicant

herein was appointed as the Interim Resolution Professional and later was confirmed as Resolution Professional.

4. In the 2nd Committee of Creditors (CoC) meeting held on 06.07.2018, the Applicant informed the CoC that appointment of a forensic auditor is necessary so as to ascertain whether the Corporate Debtor has entered into any transaction under section 43-51 and section 66 of the Code. In the 3rd CoC meeting held on 20.07.2018 appointment of M/s Kirtane & Pandit LLP as special auditor to conduct special audit of the Corporate Debtor was approved.
5. The RP received the report from the forensic auditor on 15.10.2018 and placed it before the CoC for discussion. Further, the Forensic auditor submitted its audit report wherein the following transactions were identified as preferential, undervalued and fraudulent :

Sr. No.	Transaction Particulars & Report Reference	Amount (in Rs.)
1.	Corporate Debtor entered in to transactions with 4 related parties i.e. Respondent Nos. 1-4 – <i>Preferential Transanction</i>	1,775.14 Lakhs
2.	Sale of certain vehicles to M/s Montex Trading Private Limited -	99.74 Lakhs

	<i>Undervalued Transaction</i>	
3.	Sale Purchase Transaction with M/s Executive Trading Company Private Limited, M/s Blue Seas Commodities Private Limited and M/s JM Ferro Alloys Private Limited.	Cash Loss
4.	CSR expenses being reversed.	8.52 Lakhs
5.	Advancement of Loan to M/s P.G. Mercantile Private Limited - <i>Fraudulent Trading</i>	332.12 Lakhs

6. In the 10th CoC meeting held on 02.11.2018, the members of the CoC sought to revise the scope of the Forensic Auditor and in view of the this a Supplementary report dated 04.12.2018 was submitted by the Forensic Auditor. Further another revised Supplementary Audit report dated 03.01.2019 was submitted.
7. The Applicant submits that the payments were made to the suppliers, related parties owing to which the receivables are stuck which led to liquidity crunch and hence the Corporate Debtor was unable to discharge its obligations.
8. The Applicant has alleged that the Corporate Debtor have failed to adopt standard procedure and above transactions are not conducted in usual course of business.

Submissions made by the Respondent

9. The Respondent have denied the false allegations made by the Applicant. The Respondent states that the Applicant has relied upon the Forensic Audit report dated 13.10.2018 and has failed to take into account final findings of the Supplementary Forensic Report dated 03.01.2019.
10. The final findings as set out in the Supplementary Audit report clearly indicated that there are no instances of frauds or siphoning of the funds or transactions from the Corporate Debtor or its promoters or its directors. The report in fact states that the nature of the transaction entered are in normal course of the business. It is clear from the report that there has been no fraudulent, undervalued or preferential transaction in the business of the Corporate Debtor.
11. The allegation as raised regarding the preferential transaction made to the related parties is false and the Applicant has completely ignored the relevant information and documents before him. The dealings done were in ordinary course of business. The transactions as stated out were only to assist its sister concern companies.
12. The Applicants have not placed any material or any evidence to show any intention of the Corporate Debtor of having made any preferential undervalued transaction.

13. The Respondent Nos. 1,2,3,4,5,6,7 have adopted the submissions of the Respondent No. 8.

FINDINGS

14. Having considered, the submission of the Counsel appearing for the Applicant and Counsel appearing for the Respondent.
15. Before entering into the merits of the case, it is important to examine whether the RP has adhered to the timeframe in bringing the present Application for avoidance of preferential transactions under Section 44 of the Code. It is seen that the Applicant has filed the present Application for avoidance on 16.01.2019 i.e. after 246 days of the insolvency commencement date. Hence the most vital essence of regulation 35A(3) is missing in the present case. Further, the avoidance Application filed also does not disclose any formation of opinion or any determination as mandated by the said regulation. Hence there is non-compliance of the timelines as set out and mandated under the regulation.
16. Also, the Resolution Plan of the Corporate Debtor has been approved by this Bench on 03.02.2022 and hence once the Resolution Plan is approved, the Corporate Debtor is managed by a new management and the RP becomes *functus officio*. An Application for avoidance of preferential transaction cannot be carried on by the Resolution Professional on behalf of the Corporate Debtor in light of the Judgement passed by the Hon'ble Delhi High Court in *Venus Recruiters Private Limited vs. Union of India* wherein it is crystal clear that the law does not contemplate an RP for prosecuting the avoidance applications nor the

Adjudicating Authority to have any jurisdiction to adjudicate upon the said Avoidance Applications after the approval of the Resolution Plan. The Resolution Professional cannot carry the hat of the “Former Resolution Professional” and pursue an avoidance Application in respect of preferential transaction after the change of hands in the management of the Corporate Debtor.

17. The avoidance Applications filed by the Applicant on 16.01.2019 were pending for long time and no sufficient steps were taken by the Applicant nor the Applicant at the time of approving the Plan by the Adjudicating Authority take any objection for the Plan being approved.
18. Further the findings of the Supplementary Forensic Report cannot be ignored as the report gives a complete clean chit with respect to the transactions entered into by the Corporate Debtor are prima facie in normal business operations. The transactions under section 43 in form of loans and also the repayment thereof are part of ordinary course of business. The Respondent has satisfactorily proved the treatment/nature of the alleged fraudulent/preferential transactions which do not fall within the stipulated exceptions under section 43, 45, 66 of the Code.
19. Further as seen from the Supplementary report of the Forensic Auditor, it is evident that the payments as made by the Corporate Debtor during the period from April, 2013 to May 2018, had been made to suppliers, related parties for repayment of advances and finance costs. The report also reveals that the transactions entered had been in normal course of business. The transactions as observed from the Bank Statements,

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receipts and payments depict that the same were prima facie not detrimental to the interest of the Corporate Debtor.

20. Keeping in view the foregoing and all relevant facts pleadings in the present Application, the MA is dismissed
21. With the aforesaid observation the present **M.A No. 206 of 2019 In C.P (IB) No. 1790/MB/C-II/2017 is rejected and stands disposed of.**

Sd/-

**SHYAM BABU GAUTAM
MEMBER (TECHNICAL)**

Sd/-

**JUSTICE P.N. DESHMUKH
MEMBER (JUDICIAL)**