

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA**

I.A. (IB) No. 841/KB/2020
And
I.A. (IB) No. 1288/KB/2020
In
C.P. (IB) No. 1510/KB/2018

In the Matter of:

An Application Under section 60(5) and section 25(2) (j) of the Insolvency and Bankruptcy Code, 2016, reads with Rule 11 of the National Company Law Tribunal Rule, 2016.

And

In the Matter of:

Star India Private Limited

....Operational Creditors

Versus

Advance Multisystem Broadband Communications Limited

.... Corporate Debtor

And

In the Matter of:

Shri Kuldeep Verma, Resolution Professional of Advance Multisystem Broadband Communications Limited

... Applicant

-Versus-

IndusInd Media and Communications Limited (IMCL) & Ors.

....Respondents

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Date of Hearing : 23/05/2022

Date of pronouncing the order:30/05/2022

Coram:

Mr. Rohit Kapoor, Member (Judicial)

Mr. Harish Chander Suri, Member (Technical)

Appearances (via Video Conferencing):

For Resolution Professional : Mr. Jatinder Singh Dhatt, Adv.

For R1,R2,R3& R6 in IA/841/2020 : Mr. Kuldip Mallik, Adv.
& for R1,R2,R3,R6 to R11 in : Ms.Labanyasree Sinha, Adv.
IA/1288/2020

For R4 & R5 IA/841/2020 : Mr. Jitendra Patnaik, Adv.

ORDER

Per: Harish Chander Suri, Member (Technical):

1. This Court convened through video conferencing.
2. This Order will dispose of I.A (IB) No. 841/KB/2020 in C.P. (IB) No.1510/KB/2018.
3. The Interlocutory Application No. 841 of 2020 has been filed by the Applicant Shri Kuldeep Verma (Resolution Professional) under section 60(5) and section 25(2)(j) of the Insolvency and Bankruptcy Code, 2016, read with Rule 11 of the National

Company Law Tribunal Rule, 2016, seeking the following reliefs from this Adjudicating Authority:

- a. *“For the combined and cumulative effect of all aforesaid and to protect the assets of the Corporate Debtor from being parted with by the holding company, this Adjudicating Authority may graciously be pleased to impose the vicarious liability of respondents and to pierce the corporate veil by disregarding the false description of corporate debtor created by the holding company. Respondents be held liable to discharge liabilities of the subsidiary/corporate debtor along with assets of all be held as merged or consolidated or intricately intertwined.*
- b. *pleased to declare all the aforesaid vulnerable transactions including illegal inter-se sale of shares of the corporate debtor among respondents by the holding company as preferential, undervalued, fraudulent, non-est and void and ab intio.*
- c. *Directions be passed for forensic audit of the holding and subsidiary company so that the notion of reciprocity between benefit and burden can be proved by inspecting transactions and their veracity.*
- d. *Order of investigation inter alia for money laundering and the trial of offences committed under Companies Act by the Court of appropriate jurisdiction.*
- e. *To pass such other orders and further orders to which your Lordships may deem fit on the facts or/and in the interest of justice.*

3A. Vide order dated 30.09.2019, the applicant was appointed as IRP and later on vide order dated 13/01/2020, confirmed as RP for conducting CIRP of the Corporate Debtor

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Advance Multisystem Broadband Communications Limited (hereinafter referred to as AMBC). On 13/01/2020, the prayer of the R.P. to direct the Police Authorities to assist the RP for taking possession of the assets and books of accounts of the Corporate Debtor, was also granted. Accordingly, the RP is stated to have made requests and reminders to the police authorities to comply with the order of this Adjudicating Authority but no positive response was received from the said authorities and thereafter on 24th February, 2020 further directions were issued by this Adjudicating Authority for issuing notice of personal appearance of the directors under section 425 of the Companies Act, 2013.

4. The applicant/ RP has submitted that the authorised share capital of the Corporate Debtor was reflected as Rs.15 Crores in the year 2000, out of which the so-called holding company had 59.61% equity shares and the remaining distributed among “approximate untraceable or dummy 120 numbers of stooges and henchmen”. It is submitted that the holding company admittedly had Respondent no. 2 and 3 as controlling directors and Respondent No. 4 and 5 as other directors. It is submitted that the declaration of assets submitted to the Registrar of Companies have been found fictitious and that no access to documents and books of accounts has been allowed to the RP.

5. It is submitted that Respondent No. 1 holding company and the guarantor of loan/respondent no.6 have filed fabricated and unsigned documents on the record of this Adjudicating Authority through Form-C (submission of claim by Financial Creditors) dated 18/02/2020 to the RP and posing the holding company as creditor of the subsidiary/ Corporate Debtor herein . It is submitted that the intent is to dominate the COC, so as to restrain from exposing the patent illegality. It is submitted that the liability of the guarantor and borrower is co-extensive and consolidated liability. It is submitted that Respondent No. 4 and 5 by collusive letter dated 7th February, 2020, clearly refused to

disclose anything or to cooperate with the RP. The total claim received from creditors is Rs.10.70 Crore i.e Financial Creditor consisting of Indian Bank Rs.0.74 Crore and Operational Creditors totalling Rs.9.96 Crore consisting of Star India Pvt. Ltd. i.e. Rs.5.21 crore, Soni Pictures Networks India Private Limited is Rs.4.65 Crore, ESIC Rs.0.09 Crore. It is submitted that assets of the Corporate Debtor for the period 01/04/2016 to 31/03/2017 as per MCA Records is Rs.10.01 crores.

6. According to the applicant, Section 25 of the Code casts a duty upon the RP to file avoidance application in accordance with chapter III of the Code. Section 66 of the Code casts a duty to file an application in case he finds a fraudulent and wrongful transaction and Section 20 (1) of the Code mandates and requires the RP to make every endeavour to protect and preserve the value of the property of the Corporate Debtor.

7. On this application being filed, the applicant has sought to refer to the order of admission passed in the petition on 30th September, 2019 and thereafter order dated 13th January, 2020, which reads as under:-

“ Ld. RP appears, 2nd Progress report is filed. It is on the record. RP states that corporate debtor does not have any assets. CoC is formed. CA(IB) 45/KB/2020 is filed by the RP under section 19 as well as under section 66 read with sub-section (6) of section, IBC. We direct the RP to file separate application under section 19(2) for non-cooperation against the corporate debtor and its directors, employees, etc., if any and supersede application under section 43 read with section 66 of IBC.

We heard the RP. This application is only treated as under section 19(2). We direct the directors and officers of the corporate

debtor to cooperate RP in successful completion of the CIRP in time-bound manner failing which IRP may approach local police for assistance and local police shall assist the RP for taking possession of the assets and books of accounts of the corporate debtor.

It is stated that the CoC did not confirm his appointment as the RP. Since CIRP is a time-bound programme and as CoC failed its statutory duty, we confirm IRP's appointment as the RP. He should proceed with the CIRP, as per rules. CA(IB) 45/KB/2020 stands disposed off. Matter to appear for further consideration on 24.02.2020.”

8. In the said order, this Adjudicating Authority had treated the said application as the one under section 19(2) and directed the directors and officers of the Corporate Debtor to cooperate with the RP in successful completion of CIRP in time bound manner, failing which, the IRP may approach local police for assistance and local police shall assist the RP for taking possession of the assets and books of accounts of the Corporate Debtor.

9. It is reflected from the record placed before us by the applicant that in the 6th meeting of the CoC held on **13th March, 2020**, it was recorded as under:-

“ Item-1

Chairman of the Meeting

Mr. Kuldeep Verma, holding registration no. IBBI/IPA-001/IP-P00014/2016-17/10038, has been appointed as the Resolution Professional (RP) of Advance Multisystem Broadband Communications Limited (hereinafter referred as AMBCL) by the Hon'ble National Company Law Tribunal, Kolkata Bench vide order dated 13/01/2020.As per Regulation 24 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the Resolution Professional shall act as the

Chairperson of the meeting of the Committee of Creditors. Accordingly, Mr. Kuldeep Verma, being the RP chaired the Meeting by welcoming all present.

Item No.3

(a).....

(b) Hon'ble NCLT, Kolkata Bench order dated 24.02.2020

With the permission of creditors present in the meeting, RP read the Hon'ble NCLT, Kolkata Bench order dated 24.02.2020 which reproduces as below:

*“ Ld. Counsel for the RP appears. Third Progress Report is filed. It is taken on record. Heard Ld. Counsel for the RP. Issue notice to the directors of the Corporate Debtor for appearance before this Bench. **Our order has NOT been complied with by them.** So issue notice under Section 425 of the Companies Act for non-compliance of directions of this Tribunal. RP to serve notice and file affidavit of service. Matter to come up next on 17.04.2020”.*

Actions /Steps taken by the RP vide Hon'ble NCLT order dated 24.02.2020

Pursuance to directions of Hon'ble NCLT vide order dated 24.02.2020, RP served notice under section 425 of the Companies Act for non compliance to all directors of AMBCL through speed post on 04.03.2020. The copy of the notice dated 04.03.2020 is annexed as Annexure-1. Subsequently, RP has filed affidavit of service for the same before Hon'ble NCLT on 12.03.2020”.

10. It was further discussed and recorded in the minutes dated 13th March, 2020 as under :-

Sequence of Events

“ VIII. On request of creditors, present Mr. Dhatt summarized the sequence of events and intent of directors and holding company of AMBCL as per paper trail available.

Star issue demand notice in Form IV on AMBCL in August 2018 as is mentioned in Hon'ble NCLT order dated 30.09.2019.

It appears that as an after-thought following events takes place:-

Local Directors Shri Santimoy Ghosh and Shri Sujit Das- DIR 11 and allegedly resigned from Board of Directors on 04.08.2018. DIR 12 not filed by AMBCL yet.

IMCL appointed Directors-

Mr. Subhasish Mazumdar, nominee director of IMCL on board of AMBCL vide MGT 7 on behalf of AMBCL digitally signed by him on 15.02.2019 containing an attachment of a letter dated 28.12.2018 written by IMCL (holding company of AMBCL) to ROC, Kolkata. A Copy of the letter dated 28.12.2018 is annexed as Annexure 6.1 and copy of MGT 7 digitally signed is annexed as Annexure 6.2.

Mr. N R Koshy and Mr. Subhasish Mazumdar filed DIR 11 claiming to have resigned from the Company on 19.02.2019.

IMCL (holding company of AMBCL)

Entered into a share purchase agreement for sale of 59% (approx.) shares for consideration of Rs.1 lakh only on 29.03.2019 in a private arrangement for a post-dated cheque of 02.05.2019. A copy of agreement is annexed as Annexure-7.

Action and legal remedies available with COC and other creditors

On request of COC and other creditors Mr.Dhatt summarized as follows:

IX. Hon'ble NCLT has already directed police authorities to assist RP as per its order dated 24.02.2020. Request and reminders were made to the said police authorities to comply with Hon'ble NCLT order dated 24.02.2020. No positive response received from the said authorities till date.

X. A clear design of creation of holding /subsidiary layers to insulate the assets of the corporate debtor deliberately and hence being liable for preferential transactions/undervalued transactions/ Fraudulent trading transactions under IBC 2016 even during the twilight period wherein the intention to cause prejudice to the creditors is embedded and thus also prima facie attracts section 49 of the IBC.

XI. Sale of shares of corporate debtor was done by holding company at a distress value without making a public offer to overcome impediment of IBC and that too of the shares of corporate debtor having a non- disposal undertaking with the lender Allahabad Bank.

XII. Mr.Dhatt also opined that complaint can be made to ED for violation of terms and conditions of sanction letter of AB based on Share Purchaser Agreement dated 29.03.2019.

XIII. SPNIPL is of the opinion that transfer of Promoters shares without the consent of Allahabad Bank is a clear cut violation of terms and conditions of AB loan sanction letter.

XIV. The COC and all creditors present were of unanimous view that the share purchase agreement dated 29.03.2019 executed between IndusInd Media & Communication Limited and Mr. Rajendra Prabhakar Padte is void ab initio as it does not have prior consent of Allahabad Bank.

XV. In view of the present circumstances and facts as discussed above, the COC member refused to record any change in ownership of AMBCL as required under section 28(1)(d) of the IBC, 2016.

XVI. AB mentioned that the corporate debtor is under corporate insolvency resolution process (CIRP) and section 14 moratorium is in place, all actions under IBC can be taken by RP. The competent authority of AB is examining legal remedies available with AB as per RBI guidelines including declaring corporate debtor/Director(s)/ Guarantors as wilful defaulters.

XVII. RP mentioned that application for avoidance/preferential transactions/fraudulent transactions is being drafted with legal help from his legal advisor and necessary application will be filed with Hon'ble NCLT soon.

Claim from IMCL

XVIII. RP informed COC that IndusInd Media & Communications Limited has filed Proof of Claim in Form B dated 18.02.2020 amounting to Rs.1,09,80,000/- RP has asked for certain clarification from IMCL. A copy of claim dated 18.02.2020 received from IMCL is annexed as Annexure-8.

11. It is submitted that the RP had received a mail dated 29th November, 2019 from the Company Secretary IndusInd Media and Communications Limited (IMCL) Mumbai that IMCL has sold its whole investment in AMBC to an investor.

12. In one of the letters/ email written by the RP to Allahabad Bank dated 19th February, 2020, the RP has written as under:-

*“ To Allahabad Bank
Stressed Asset Management Branch
Kolkata*

*Copy to:
The Company Secretary
IndusInd Media & Communications Limited Mumbai*

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Dear Sir/Madam,

The undersigned has been appointed as Resolution Professional by Hon'ble National Company Law Tribunal, Kolkata Bench vide its order dated 13.01.2020. Advanced Multisystem Broadband Communications Limited (AMBCL) has taken credit facilities from Allahabad Bank, Bandel branch from time to time.

*On perusal of Allahabad Bank sanction letter dated 16.11.2017, it is noted that one of the terms and condition of sanction is that **Shares of Promoters of AMBCL should not be transferred without prior consent of the Bank.** The undersigned is in receipt of mail dated 29.11.2019 from the Company Secretary, IndusInd Media & Communications Limited (IMCL) stating that IMCL has sold its whole investment in AMBC to an investor. The details of the mail sent by Company Secretary IMCL is as per trail mail.*

Kindly confirm whether Allahabad Bank has given prior consent for transfer of Promoters shares to IndusInd Media & Communications Limited (IMCL and if yes, kindly share the consent to undersigned. In case Allahabad Bank has not given prior consent for transfer of shares in AMBCL, then what action Allahabad Bank has taken so far.

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You are requested to revert by end of day 20.02.2020.

Kind regards,

*Kuldeep Verma
Resolution Professional”*

13. The applicant has further placed on record a letter dated 28th December, 2018 written by IMCL to Registrar of Companies, Kolkata as under:-

Sub: Annual General Meeting of Advanced Multisystem Broadband Communications Ltd. CIN No. U64202WB2000PLC091088

Dear Sir,

This is to bring to your kind notice that we, IndusInd Media & Communications Limited (IMCL) through a Shareholders Agreement dated May 18,2012 had invested in a Company Advanced Multisystem Broadband Communications Limited (AMBC), a company having its registered office at Chinsurah, West Bengal and engaged in the business of providing Cable TV services to the subscribers in West Bengal.

IMCL holds 59.61% of the paid up and issued share capital in AMBC and the balance 40.39% share capital is held by the operating shareholders (Local cable Operators) in and around the district of Hoogly, West Bengal.

The day to day running of the business operations of the Company was entrusted in the hands of the local directors namely Mr. Santimoy Ghosh (DIN No. 00884993) and Mr. Sujit Das (DIN No- 00885256) who represent around 121 Local Cable operators who are also the shareholders of the Company.

The 121 shareholders of the company who are also the local cable operators along with the directors Mr. Santimoy Ghosh (DIN No. 00884993) and Mr. Sujit Das (DIN No. 00885256) illegally transferred the business of the Company and shifted the entire Cable TV business to a competitor in Chinsurah, West Bengal and shut down the existing business operations.

After transferring the business to the competitor very conveniently sent resignation letters dated August 4, 2018 in order to absolve themselves from their responsibilities as the directors.

It is worthwhile to mention that on the request of the above directors, IMCL had in April, 2018 provided a loan of Rs.90,00,000/- (Rupees Ninety Lakhs) to AMBC to enable it to pay the outstanding dues of the Company to various parties and promised to return the same to IMCL once the cash flow position of the company improved. But it now appears that it was never their intention to return the money and their intention was to dupe the company and shut down operations of the company which has resulted in huge losses to the company and IMCL being the largest shareholder who funded the business operations.

Mr. Santimoy Ghosh (DIN No. 00884993) and Mr. Sujit Das (DIN No. 00885256) were managing the day to day business affairs of the company and supervising all the business activities and the branch office at Chinsurah, West Bengal for last six years.

The other set of directors appointed by IndusInd Media & Communications Limited namely (Mr. Rouse Koshy and Mr. Subhashish Mazumdar) were based in Mumbai and were advising on strategic aspects, management and technical support and government/regulatory approvals.

In such a circumstance, it was difficult to conduct Annual General Meeting as 121 shareholders comprising of 99.18% of the total shareholders base have illegally shifted their business and abandoned the Company.

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However, we are committed to comply with the statutory filings and therefore we are filing the Financial Statement (Form AOC-4_XBRL) and Annual return (Form MGT-7) without holding AGM in view of the above circumstances.

Kindly acknowledge receipt of the same.

Yours faithfully

For IndusInd Media & Communications Limited

Bijay Kumar

Authorised Signatory”.

14. The main thrust of the applicant in his arguments is that the respondents have not provided any documents and have not cooperated with the RP, and they have entered into vulnerable transactions like inter-se sale of shares of the CD amongst respondents, as preferential, undervalued and fraudulent, and that forensic audit of the so called holding company and subsidiary company be directed to be held. The applicant, however, has stated that there is no other asset of the CD, except the shares which have been transferred by respondent no.1.

15. In reply to the arguments of the RP, it is submitted by the respondents that the application is not maintainable. It is submitted that the RP has complained about the sale of

the shares held by Respondent No.1 in the Corporate Debtor. It is submitted that there cannot be any restriction with regard to sale of shares held by R-1 in the Corporate Debtor because shares are not the property of the Corporate Debtor and therefore there is no question of transfer of any property of the Corporate Debtor as undervalued or in a preferential manner. It is submitted that the respondents were never promoters of the Corporate Debtor. Respondent No.1 entered into a Share Subscription Agreement dated 18.5.2012, wherein Respondent No.1 paid a consideration of Rs.5,16,07,381/- for allotment of 51% shares and later when the Corporate Debtor required more financial investment , Respondent No.1 paid further sum of Rs.5,15,07,381/- and additional 274070 number of equity shares were allotted thereby increasing the shares held by Respondent No.1 in the Corporate Debtor to 59.61%. Respondent No.1 further advanced a loan of Rs.90 lacs to the Corporate Debtor and in lieu of the same another set of 47835 equity shares were pledged in favour of Respondent No.1.

16.It is submitted by the Respondents that Respondent No.1 was never in control of the working of the Corporate Debtor or in control of the Board of the Corporate Debtor. Respondent No.1 was never a promoter of the Corporate Debtor and the same would be evident from the Agreement dated 18.05.2012 and from the annual returns filed by the Corporate Debtor from time to time.

17.It is submitted that from the annual returns and the aforesaid agreement dated 18.05.2012, it is evident that Respondent No.1 was neither a promoter of the Corporate Debtor and the shares held by Respondent No.1 could not have been subject to the terms and conditions laid down in the sanction letter dated 16.11.2017. Therefore, the transfer of equity shares held by Respondent No.1 in the Corporate Debtor to Respondent No.7 cannot be said to be in violation of the sanction letter dated 16.11.2017. The respondents have further submitted that the petition filed under section 60(5) read with Section 25(2)(j) of the Code is not maintainable as the petition does not have any cause of action because no property of the Corporate Debtor has been sold. Respondent No.1 has transferred its own holding in the

corporate debtor to Respondent no.7 and the same cannot be challenged under the Code. It is stated that these shares were not mortgaged with any Bank or Financial Institutions and were free from any encumbrance.

18.It is further submitted by Respondent No.1, in one of the Board meetings held on 1st February, 2019 (page 77 of the reply), the illegal act, mismanagement and fraudulent act caused by promoters and directors of the corporate debtor has been stated. It is stated that such mismanagement and fraudulent act had caused huge financial losses to the corporate debtor as well as depleted and eroded the investment made by R-1 in the corporate debtor due to the same, respondent no.1 was constrained to sell its shares held in the Corporate Debtor. Respondent No.1 has also filed a complaint before the RoC inter alia stating the illegalities committed by promoters and directors of the Corporate Debtor and the nominee directors in the corporate debtor have also resigned on February 19, 2019. It is submitted that the petition is not maintainable as against Respondent Nos. 1,2,3 and 6 as there has been no illegal or fraudulent transaction done by the said respondent.

19.During the course of arguments, Ld. Counsel for the applicant /RP submitted that IA No. 841/2020 and I.A. No. 1288/2020 are interlinked due to similar facts and evidence and he would like to address the same arguments for disposal of these two applications.

20.It is submitted that in the order dated 13th January, 2020, the respondents were represented and participated but thereafter no compliance of that order has been done. It is submitted that directors of the holding company, being promoters of the Corporate Debtor are the guarantors of loan of the Corporate Debtor with the lender Bank. It is submitted that the shares of the value of 10 crores have been sold at Rs.One lakh only. It is submitted that the Corporate Debtor and the holding companies are listed companies in the same line of business of broadcasting.

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21. It is submitted that the Corporate Debtor is not traceable and all reports filed with the MCA are fictitious, the company has no office, no property, no books of accounts and no staff. It is submitted that the sale of shares itself amounts to sale of spectrum which is also impermissible without security clearance from the Ministry of Information and Broadcasting (Circular No. 1403/20/2013-TV(I) /20). Ld. Counsel for the RP further submits that the Corporate Debtor is the subsidiary of the holding company i.e. IndusInd Media and Communications Limited.

22. The Ld. Counsel for the applicant submitted that in the share purchase agreement, it is admitted that it is selling shares of Corporate Debtor.

23. It is submitted that the directors of the holding company/ Respondent No.6 in IA 1288/2020, who signed the said agreement of sale of the shares of subsidiary along with Respondent No.2 in IA 1288/2020, are even the guarantors of the loan with the lender bank. It is stated that this respondent even attempted to dominate the CIRP by filing vague and bogus Form-C with the RP.

24. The applicant had further submitted that the Directors of Respondent No. 1 have acted in contemptuous violation of the order dated 24th February, 2020 passed by this Adjudicating Authority under section 425 of the Companies Act, 2013.

25. It is submitted that Respondent no.1 is the promoter and holding company of the Corporate Debtor. Respondent no.1 has sold its shareholding in the corporate debtor thereby violating the terms and conditions as stated in the sanction letter dated 16th November, 2017 issued by Allahabad Bank. It is submitted by the applicant that the

transfer of equity shares held by Respondent No.1 in the Corporate Debtor to the Respondent No.7 is a preferential and undervalued transaction.

The Ld. Counsel for the Respondent No.1,2,3 and 6 to 11 in IA No. 1288/2020.

26. In reply to the arguments of the applicant, it is submitted by the respondents that the application is not maintainable. The order dated 13th January, 2020, in respect of which, it has been alleged that the same has not been complied with does not indicate in what manner and how the answering respondents would have to comply with the orders. There are no particular directions given in the said order dated 13th January, 2020. It is further argued that the Respondents were not directors of the Corporate Debtor on 13th January, 2020. Thus, there can be no violation or disobedience of the said order.
27. It is submitted that no application under section 60(5) of the IBC is maintainable. It is submitted that the answering respondents have the highest regard for the order of this Adjudicating Authority and tender their unconditional apology if there has been any inadvertent violation of the order.
28. It is submitted that from the annual returns as well as Subscription Agreement dated 18/05/2012, it is evident that Respondent No.1 was never promoter of the Corporate Debtor. Therefore, shares held by Respondent No.1 in the Corporate Debtor could have never been the subject to the terms and conditions laid down in the sanction letter dated 16.11.2017. Therefore, transfer of equity shares held by Respondent No.1 (a Non promoting shareholder) in the Corporate Debtor, to Respondent No.7 cannot be in violation of the said sanction letter dated 16th November, 2017.

29. Respondent No.1 had duly sold the shares which it had held in the Corporate Debtor, pursuant to a Board meeting of Respondent no.1 held on February 1, 2019. In the said Board meeting, the illegal act and /or mismanagement and fraudulent act caused by the promoters and directors of the Corporate Debtor was discussed. Such mismanagement and/or fraudulent act, had caused huge financial losses to the Corporate Debtor as well as depleted and/or eroded the investment made by Respondent No.1 to the Corporate Debtor. It is submitted that due to the same, respondent no.1 was constrained to sell its shares held in the Corporate Debtor. Respondent No.1 has also filed a complaint before the Registrar of Companies inter alia stating the illegalities committed by the promoters and directors of the corporate debtor. Respondent No.1 has also filed its proof of claim as a Financial Creditor.
30. It is relevant to mention that nominee directors in the corporate debtor had also resigned on February 19, 2019.
31. It would be seen from the Master Data of the Corporate Debtor, that the nominee directors thereof had resigned from Directorship with effect from 19th February, 2019. Therefore, the order dated 24th February, 2020 passed by this Adjudicating Authority was not and could not possibly have been directed against them.
32. The Respondents, therefore, prayed that these two applications are not maintainable as against the respondents because there has been no illegal or fraudulent transaction done by the said Respondents. The said application are, therefore, liable to be dismissed.

33. **During the course of arguments, Ld. Counsel for the Respondent No.4 and 5** submitted that the Corporate Debtor was one of the operating entities between the broadcasters and the Local Cable Operators (LCOs) and was instrumental in carriage revenue and placement fees as well as to comply with certain requirements. Some of the local cable operators (LCOs) in the Hoogly district had joined hands to form a multi System Operator (MSO)/CD.
34. It is submitted that prior to implementation of the Digital Addressable System (DAS) there was an analogue system of cable operation. But with the introduction of DAS, the supply of set top boxes was mandatory. The implementation of the said DAS was divided in 4 phases. However, the LCOs did not have the fund to supply set top boxes to their subscriber base of 3.5 lakh (approx.) In the meantime, respondent No.1 Company (IMCL) expressed its desire to jointly carry on the business in Hoogly with the LCOs. A shareholders cum Operators agreement was executed on 29.03.2012. By virtue of the said agreement, IMCL became majority shareholder with 51% shareholding for implementation of the DAS, the IMCL and the LCOs jointly managed to supply 1.3 lakh boxes only whereas the requirement was 3.5 lakhs boxes to retain their subscribers.
35. It is further submitted that the said boxes were required to be supplied at a subsidised rate of Rs.500/- per boxes to the Corporate Debtor as against the cost of Rs.1650/- . At the same time the charges for supply of signal could be collected Rs.35/- only per box, when the cost was Rs. 65/- to 70/- per boxes per month only to counter the competitors. In this way, the Corporate Debtor started suffering loss. Such loss was

strategically agreed with the anticipation that with implementation of the DAS in all 4 phases, and if Corporate Debtor can retain its subscribers base, all losses incurred shall be recovered. However due to delay in supply of the boxes on time, the competitors barged in and for that reason the subscriber base was reduced substantially. The Corporate Debtor failed to increase its subscriber, as IMCL being the majority shareholders failed and neglected to help the Corporate Debtor to come out of this trouble. Since the business of cable operation was the bread and butter of the LCOs, they have put in all their efforts for survival. They have borrowed funds from the market and even allowed the IMCL to increase their shareholding and took all necessary steps for survival of the business. It is submitted by the =se respondents that nothing, however, worked due to faulty policy of IMCL. The nominees of IMCL in the Board of Directors of the Corporate Debtor were taking all necessary decisions and the affairs of the company were in control of the IMCL from their Mumbai Office. The statutory auditor of the company is from Mumbai appointed by IMCL and all the returns etc. of the Corporate Debtor were filed by IMCL from its Mumbai Office.

36. It is submitted that along with the losses as stated herein above, the Corporate Debtor also suffered huge amount of losses on account of increased fixed broadcasting fees, reduced carriage revenue and placement fee, increase in monthly recurring expenses and increase in interest cost. The LCOs through their representative directors in the Board repeatedly requested IMCL for their intervention to bail out the company. Ultimately IMCL agreed to pay an amount of Rs. 90 Lakhs in exchange of pledge of their entire shareholding of the LCOs. The LCOs having no other alternative but for their survival agreed to the said proposal and allowed IMCL to take over entire shareholding of the company. Since IMCL became 100% shareholding and at the same time since the local money lenders were after the representative directors of the

local cable operators, they have resigned from the Board of the Corporate with effect from 4th August, 2018. The respondent no.4 and 5 have tendered their resignation letters upon all other directors, IMCL did not file the Form No. DIR-12 with RoC the Respondent No.4 and 5 themselves filed the Form No. DIR- 11 on dated 7th August, 2018 to record their resignation from the Board of the Corporate Debtor. As such the respondent no.4 and 5 are no more directors of the said Corporate Debtor and are not part of the suspended board of directors as they have resigned much prior to admission of the petition under section 9 IBC.

37. Since almost all the broadcasters have switched off the signals, the business of the Corporate Debtor almost closed down. Since the business of the Corporate Debtor has almost closed down, the staff etc.who were working have left the company. The said staff could not be paid salaries since there was a huge deficit of funds in the company. After resignation, the respondent no.4 and 5 did not enter into the registered office or any other office of the Corporate Debtor and they have intimated the IMCL as well as their representative directors to take possession of the assets, records etc. of the Corporate Debtor.
38. In view of the above, respondent no.4 and 5 are in no way responsible or in possession of any assets etc. of the Corporate Debtor. At the same time since they have already resigned from the Board they should not be impleaded in any applications as directors of the Corporate Debtor.
39. It is relevant to note that the stand taken by the applicant/RP in the present application particularly in paragraphs 7 and 10, the same are reproduced as under:-

“ 7. The Star India Private Limited/ Operational Creditor issued Demand Notice as per Form IV in August,2018. Upon receipt of the said notice, the said holding company exhibited overwhelming pervasive control over the affairs of defunct subsidiary/ corporate debtor and apparently parted with and transferred by way of preferential & undervalued transactions of the assets of corporate debtor and left the vehicle of fraudulent trading been burdened with liabilities. The holding company in its attempt to project tainted gains as untainted, by letter dated 28th December,2018 communicated the concocted story to the ROC, Kolkata. A copy of the said letter dated 28th December, 2018 is annexed as Annexure-C.

*10. None of the transactions is in compliance of semblance of law and illegalities are patent. The holding subsidiary layers were designed to insulate the assets of the corporate debtor through vulnerable and fraudulent trading even during the twilight period. **The veracity of the transactions and credibility of purchaser or its relation and to reach the genesis and effect, it is necessary to conduct Forensic Audit of both holding and subsidiary company**”. (Emphasis supplied)*

40. From the above, and the relief sought in prayer part, it is clear that the RP himself was not sure as to whether the transactions impugned are wrong as alleged. He himself is seeking a Forensic Audit, as is evident from one of his prayers in the application.

41. We are of the view that the RP can file an application under section 25(2) (j) only after being satisfied about the particular transactions being avoidable, fraudulent or undervalued. Similarly, in terms of Section 25(2)(d), it was incumbent upon the RP to seek assistance of the Forensic Audit if so required, to engage the services of accountants, legal or other professionals with a view to satisfy himself about the transactions being avoidable.
42. In the present case admittedly the RP has not sought the aid of any expert professional if it was required for ascertaining the transaction being avoidable. And for arriving at a complete satisfaction about the transaction to be avoidable, the RP could not have directly approached this Adjudicating Authority for the relief sought by him.
43. The Hon'ble Supreme Court in the case **Anuj Jain Vs Axis Bank Limited and others in Civil Appeal Nos. 8512-8527, 6777-6797 of 2019 and Civil Appeal Nos. 9357-77 of 2019 (Arising out of Diary No. 32881 of 2019 in paras 29 and 29.1 held as under:-**

"Having found that the transactions in question cannot be countenanced, for being of preference during a relevant time to a related party; and having approved the order passed by NCLT in that regard, we do not consider it necessary to deal with the other length of arguments advanced by the learned counsel for parties on the questions as to whether the transactions are undervalued and/or fraudulent too. In the totality of circumstances, we would prefer leaving the said questions at that only, while also leaving all the related questions of law open, to be examined in an appropriate case.

However, we are impelled to make one comment as regards the application made by IRP. It is noticed that in the present case, the IRP moved one composite application purportedly under Sections 43, 45 and 66 of the Code while alleging that the transactions in question were preferential as also undervalued and fraudulent. In our view, in the scheme of the Code, the parameters and the requisite enquiries as also the consequences in relation to these aspects are different and such difference is explicit in the related provisions. As noticed, the question of intent is not involved in [Section 43](#) and by virtue of legal fiction, upon existence of the given ingredients, a transaction is deemed to be of giving preference at a relevant time. However, whether a transaction is undervalued requires a different enquiry as per Sections 45 and 46 of the Code and significantly, such application can also be made by the creditor under Section 47 of the Code. The consequences of undervaluation are contained in [Sections 48](#) and [49](#). Per [Section 49](#), if the undervalued transaction is referable to sub-section (2) of [Section 45](#), the Adjudicating Authority may look at the intent to examine if such undervaluation was to defraud the creditors. On the other hand, the provisions of [Section 66](#) related to fraudulent trading and wrongful trading entail the liabilities on the persons responsible therefor. We are not elaborating on all these aspects for being not necessary as the transactions in question are already held preferential and hence, the order for their avoidance is required to be approved; but it appears expedient to observe that the arena and scope of the requisite enquiries, to find if the transaction is undervalued or is intended to defraud the creditors or had been of wrongful/fraudulent trading are entirely different. Specific material facts are required to be pleaded if a transaction is sought to be brought under the mischief sought to be remedied by [Sections 45/46/47](#) or Section 66 of the Code. As noticed, the scope of enquiry in relation to the questions as to whether a transaction is of giving preference at a relevant time, is entirely different.

Hence, it would be expected of any resolution professional to keep such requirements in view while making a motion to the Adjudicating Authority”.

44. The aforesaid directions and observations of the Hon’ble Supreme Court directly apply to the facts of this case. We see from the contents of present application filed by RP, there are no **specific material facts as required to be pleaded** if , a transaction is sought to be brought under the mischief sought to be remedied by [Sections 45/46/47](#) or Section 66 of the Code. We also note that there was no enquiry conducted by RP in the present case, as required by Hon’ble Apex court, in relation to the questions as to whether a transaction is avoidable, fraudulent or avoidable. It has been clearly observed by Hon’ble Supreme Court in the above referred case, it would be expected of any resolution professional to keep such requirements in view while making a motion to the Adjudicating Authority.
45. Seen in the background of law laid down by Hon'ble Supreme Court of India, the arena and scope of the requisite enquiries, to find if the transaction is undervalued or is intended to defraud the creditors or had been of wrongful/fraudulent trading are entirely different, we find RP has grossly erred in not considering these aspects while filing this application. And instead has resorted to blame game making allegations against the suspended board of Directors of the Corporate Debtor/respondents and other respondents without conducting any enquiry as stipulated and observed by Hon’ble Supreme Court.
- In the present case, we find that the RP has generalised/ vaguely asserted the facts/allegations and provisions of the Code unmindful of the law laid down by the Apex Court and as contained in provisions of the Code, upon its plain reading.
46. In the facts of the case, the RP should have started off on the basis of the balance

sheets, which were available on the website of MCA/ROC, to acquire and take possession of the assets, if any of the Corporate Debtor or follow up the Sundry debtors if there were any. But he found a way out by simply filing a petition under section 19(2) of the Code and seeking police aid directions from this Adjudicating Authority. He does not seem to have actually availed of those directions or visited the local police to take the police personnel along to the premises of the Corporate Debtor or Directors to fetch the record or take possession of the movable assets or shares of the Corporate Debtor, if any. Simply by writing a few mails, and filing applications under section 19(2) of the Code, the duties of the RP did not end. He has a much larger responsibilities and corresponding powers assigned to him by the Code.

47. Be that as it may, the only material allegation of the applicant against Respondent No.1 is that the said respondent is a promoter and holding company of the Corporate Debtor and that Respondent No.1 has sold its shareholding in the Corporate Debtor which according to the applicant has violated the terms and conditions as stated in the sanction letter dated 16th November, 2017 issued by the Allahabad Bank (page 35 of the application).

48. In reply to this contention of the applicant, respondent no.1 has duly submitted that there was no restriction and could not have been any restriction with regard to the sale of shares held by Respondent No.1 in the Corporate Debtor. The shares are not the properties of the Corporate Debtor and therefore, there is no question of transfer of any property of the Corporate Debtor at undervalued or in a preferential manner. It has specifically been denied by the respondents that they were ever the promoters of the Corporate Debtor. It is stated that Respondent No.1 had entered into a Share Subscription Agreement dated 18.05.2012 whereby Respondent No.1 had paid a consideration of Rs.5,16,07,381/- for allotment of 51% shares and thereafter when the Corporate Debtor required more financial investment, Respondent No.1 had paid a further sum of Rs.5,15,07,381/- and additional 274070 number

of equity shares were allotted to Respondent No.1 thereby increasing the shareholding in CD of Respondent No.1 to 59.61%. Even thereafter, Respondent No.1 had advanced a loan of Rs.90 lacs to the Corporate Debtor and in lieu of the same, 47835 number of equity shares were pledged in favour of Respondent No.1. Respondent No.1 has further stated that Respondent No.1 was never in control of the working of the Corporate Debtor or in control of the Board of Corporate Debtor. Respondent No.1 was never a promoter of the Corporate Debtor and the same would be evident from the aforesaid Agreement dated 18th May, 2012 and the annual returns filed by the Corporate Debtor. Therefore, the shares held by Respondent No.1 in the Corporate Debtor could have never been subject to the terms and conditions laid down in the sanction letter dated 16th November, 2017 (page 35 of the application). Therefore, transfer of equity shares held by Respondent No.1 in the Corporate Debtor to Respondent No.7 cannot be in violation of the said sanction letter dated 16th November, 2017.

49.It is surprising that the RP in its 2nd progress report submitted before this Adjudicating Authority that on 13th January, 2020, it had been specifically recorded in the order that “the corporate debtor does not have any assets”. The applicant/RP had filed an application being CA (IB) 45/KB/2020 under section 19 as well as under section 66 read with sub-section (6) of Section, IBC and the bench had directed the RP to “file separate application under section 19(2) for non-cooperation against the corporate debtor and its directors, employees etc. if any and supersede application under section 43 read with section 66 of the IBC”.

50.In spite of the directions, the RP does not appear to have performed his duties.

51. Section 25(2) of the Code enumerates the duties of the Resolution Professional. When the applicant himself made a statement before the bench as far back as 13th January, 2020 that the Corporate Debtor does not have any assets, then what assets he was expecting to be handed over to the applicant by the directors of the company? The applicant has filed along with its application no. 841 /2020, the sanction letter dated 16th November, 2017 issued by Allahabad Bank to the Advance Multisystem Broadband Communications Limited (AMBCL). In Clause 5.0 of this agreement, it is stated as under:-

“ 5.0- SELLER’S CONDITIONS PRECEDENT

5.1. Seller has the power and authority to enter into this SHA and perform its obligations hereunder;

5.2. The execution by Seller of this SHA, will not result in any violation by Seller of any term, condition or provision under any contract, agreement or document to which it is a party, or release any obligation to any person under such contract, agreement or document, or give any person the right to terminate any of its obligations under such contract, agreement or document”.

52. In its reply respondent no.1 and 6 have submitted that, respondent no. 6 was one of the directors of respondent no.1.Ld. Counsel for the respondent submitted that there is no suo motu contempt, because the applicant has not been able to prove any violation done by the respondents. It is submitted that respondent no.1 has sold its own shareholding in the corporate debtor, which was not asset or property of the Corporate Debtor.

53. It is submitted by learned counsel for the respondents that the applicant has filed this application under section 60(5) read with section 25(2)(j) of the Code, 2016. Since

Respondent No.1 has transferred its own holding in the Corporate Debtor to Respondent No.7, the same cannot be said to be an asset of the Corporate Debtor and therefore cannot be challenged under the provisions of IBC, 2016. This act of sale has been performed by Respondent No.1 pursuant to a Board meeting of the Respondent No.1 held on 1st February, 2019 (page 77 of the reply). It is further submitted that there is no order of any Court stopping Respondent no.1 from selling or transferring its own shares. Moreover, as regards alleged contempt, not a single order says or stops respondent no.1 from selling its share, which was done much prior to the order of CIRP. It is submitted that shareholding was its personal property and not the property of the Corporate Debtor. It is settled law that shares are separate and distinct from the assets of the company, and transfer of shares cannot be construed as transfer of assets of the company. No application under Section 60 or any other provisions of the Code, 2013 would lie against respondent no.1 for transferring its own shareholding. The learned counsel further submitted that the annual reports of the Corporate Debtor specifically state that respondent no.1 is not a promoter, and the management was being looked after by AMBCL who were holding 49 per cent shareholding.

54. Respondent No.1 has further submitted that it had filed a complaint before the Registrar of Companies *inter alia* stating that the illegalities committed by the promoters and directors of the Corporate Debtor (page 56 of the application) and the nominee directors in the Corporate Debtor also resigned on 19th February, 2019.
55. After hearing counsel for the parties at length, we, therefore, find that there is no illegal or fraudulent transaction done by the said respondents. When according to the applicant himself there was no asset of the corporate debtor, and the company had

gone into losses and was left with no debtors, the applicant should have performed his duties assigned to him in the Code instead of flogging a dead horse. When the applicant had sought Police assistance, this Adjudicating authority had issued directions, but in spite of that the RP was not diligent enough to make use of it. We do not find any merit in this application (I.A. No.841/KB/2020) and it is, therefore, dismissed.

56. Consequent upon the dismissal of IA No.841/KB/2020, since no violation of any orders of this Adjudicating Authority has been found to have been committed, therefore, I.A.1288/KB/2020 also becomes infructuous and thus dismissed.

57. List rest of the IAs on 30/06/2022.

58. Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

Harish Chander Suri
Member (Technical)

Rohit Kapoor
Member (Judicial)

Order signed on, this 1st day of June, 2022.

PJ.