

SL. No.1

**NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH
COURT HALL NO: II**

(PHYSICAL HEARING)

CORAM: JUSTICE TELAPROLU RAJANI – HON’BLE MEMBER (J)

CORAM: SHRI.CHARAN SINGH - HON’BLE MEMBER (T)

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL,
HYDERABAD BENCH, HELD ON 26.06.2023 AT 02:30 PM**

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	IA (IBC)/879/2019 in CP (IB) No.12/10/HDB/2019
NAME OF THE COMPANY	Parikh Fabrics Pvt Ltd
NAME OF THE PETITIONER(S)	
NAME OF THE RESPONDENT(S)	
UNDER SECTION	10 of IBC

ORDER

IA (IBC)/879/2019

This application is dismissed, vide separate orders.

Sd/-
MEMBER (T)

Sd/-
MEMBER (J)

IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH – II

IA No.879 of 2019
in CP(IB) No.12/10/HDB/2019
Under Section 43 & 66 of IBBI, 2016

In the matter of:

Mr. G. Satyanarayana Murty,
Resolution Professional of
M/s. Parikh Fabrics Pvt. Ltd,
Flat No.308B, 3rd Floor,
Sai Tirumala Towers, Hyderguda,
Hyderabad – 500 029.

.... Applicant /
Resolution Professional

Vs.

1. Mr. Nikhil B. Parikh,
Managing Director (Suspended)
2. Mrs. Rita B. Parikh,
Director (Suspended)

....Respondents /
Corporate Debtor

Date of order: 26.06.2023

CORAM:

Hon'ble Justice Smt. Telaprolu Rajani, Member (Judicial)

Hon'ble Sri Charan Singh, Member (Technical)

Counsels present:

For the Applicant : Dr. K.V. Srinivas, Advocate

For the Respondents : Mr. A.S. Sathish Kumar, PCS

Heard on : 06.06.2023

[PER: BENCH]
ORDER

1. This application is filed by the Applicant, Resolution Professional (RP) against the Respondents No.1 & 2 who are the Members of Suspended Board of Directors of the Corporate Debtor, seeking to order the property, being cash, transferred in connection with giving preference, to be vested in the Corporate Debtor; to order for repayment of such sums in respect of benefits received by any person from the Corporate Debtor to the Resolution Professional; to order for restoration of position as it existed before such transaction as the transactions had not been entered into; to order for protecting the interests of creditors of the Corporate Debtor, who are victims of the said transactions; to order the Directors/concerned related parties to make contribution to the assets of the Corporate Debtor.

2. The facts which are stated in the application, briefly, are as follows:
 - a. The CD was taken into CIRP by order dated 08.02.2019. First CoC meeting was held on 07.03.2019 and the IRP was confirmed as RP. The RP has prima-facie opined that the CD has been subjected to certain transaction covered under Section 43,45,50 & 66 of IBC, 2016 in compliance to the Regulation 35A(1) of IBBI (Insolvency

Resolution Process for Corporate Persons) Regulations, 2016 and has ordered transactions audit to be conducted for determination of such transactions in accordance with Regulation 35(2), with the approval of CoC. He also obtained inputs from Forensic Audit Report conducted at the instance of Financial Creditors, in order to form an opinion and to determine certain fraudulent transactions carried on by the CD.

- b. This application is filed as per the provisions of Regulation 35A(c). The inputs in the Forensic Auditors Report are the basis for determination of the transactions as fraudulent. The transactions are as under:

A. i) Transfer of property, being cash, aggregating to Rs.2,41,58,975/- to Ankith & Co. (related party) during FY 2017-18 and subsequently transferred to other related parties/adjustment against liabilities/creation of receivables during the same FY 2017-18. These transfers were made without justifying the purpose and utilization and consequently, these are considered as preferential transactions covered under Section 43(2) of IBC, 2016 as established by Transaction Auditors.

ii) Transfer of Raw Material-Yarn valued at Rs.2,80,00,000/- to generic account styled as "Scr-Pur" on 31.03.2018 by way of Journal Entry with no details as to name of party, purpose of transfer either return or sale or otherwise. Further, the said

transfer of stock out is not included in the relevant schedules to Annual Accounts of FY 2017-18 viz; Schedule 15 or 16. Thus, the total amount recoverable from this account as identified by Transactions Auditors stood at Rs.280 lakhs as on date.

iii) Summarized position of preferential transactions under Section 43(2) as identified and established by Transaction Auditors is given as under:

Financial Year	Particulars	Amount (Rs.)	Aggregate Amount (Rs.)
2017-18	Adjustments to related parties through Ankith & Co: 1. S. Brij Kujmar(HUF) 2. Ankith B. Parikh 3. S. Brij Kumar 4. Madhu Shah	91,00,000 68,42,438 23,61,216 3,44,000	1,86,47,654
2017-18	Adjustment against liability created under OTS: Cutex India	19,11,320	19,11,320
2017-18	Creation of receivables: Adil Textiles Vista Networks Abhi Subrahmanyam Groz Beckert-old.	21,00,000 6,00,000 7,50,000 1,50,001	36,00,001
2017-18	Transfer of Raw-material to generic account styled as "Scr-Pur" 31.03.2018.	2,80,00,000	2,80,00,000
	Total :		5,21,58,975

Relevant extracts from the report of Transactions Auditors on identification of preferential transactions are placed at Annexure I.

- B. i) Share application money amounting to Rs.2,58,37,000/- held in the books of company identified by both Forensic Auditors and Transaction Auditors had been adjusted and returned to various parties during FY 2015-16 without the consent of Financial Creditors whose accounts have been in default.
- ii) Fictitious sundry creditors amounting to Rs.47,43,000/- lakhs have been identified by Transaction Auditors during FY 2015-16 by way of book entry by debiting to Profit and Loss account.
- iii) Certain payments made by Corporate Debtor during FY 2016-17 to directors/family members/related parties amounting to Rs.1,61,92,668/- identified by both Forensic Auditors and Transaction Auditors were adjusted against unaffected OTS with secured lenders, were carried on with intent to defraud creditors.
- iv) Certain transactions amounting to Rs.12,35,84,850/- identified by both Forensic Auditors and Transaction Auditors have been deliberately carried out without showing any realization through revenue account and are written off against secured loans in the name of OTS by passing journal entries in the books during FY 2016-17 on various dates. All these transactions were done in order to keep the assets/stocks/receivables beyond the reach of Financial Creditors.

- v) Certain other fraudulent transactions amounting to Rs.35,00,000/- have been identified by Transaction Auditors during FY 2016-17 which were done in order to keep assets/receivables beyond the reach of Financial Creditors.
- vi) Summarized position of fraudulent transactions identified by Forensic Auditors and also by Transaction Auditors during FY 2015-16 and 2016-17 is given as under;

Financial Year	Particulars	Identified By FA/TA	Amount (Rs.)
2015-16	Share application money returned to related parties/other without consent of financial creditors.	Both FA & TA - B(i)	2,58,37,000
2015-16	Creation of Sundry Creditors without identifying name to whom CD owes money and payments to related parties.	TA B(ii)	47,43,000
2016-17	Related parties accounts written off.	Both FA & TA - B(iii)	1,61,92,668
2016-17	Stocks written off.	Both FA & TA - B(iv)	5,28,10,000
2016-17	Sundry creditors created- 3 accounts.	Both FA & TA - B(iv)	1,28,90,345
2016-17	Advances written off.	Both FA & TA - B(iv)	4,58,50,623
2016-17	Debit balances written off.	Both FA & TA - B(iv)	72,20,052
2016-17	Creditors with debit balances written off (other than taxes).	Both FA & TA - B(iv)	48,13,830
2016-17	Payment made to Ankith & Co (wrongly debited to Sundry Creditors).	TA - B(v)	35,00,000
	Total :		17,38,57,518

Relevant extracts from the Report of Forensic Auditors on identification of fraudulent transactions are placed at Annexure II. Relevant extracts from the Report of Transaction Auditors on identification of fraudulent transactions are placed at Annexure III.

- c. The above mentioned transactions are covered under Section 43(2) as preferential transactions. The above referred journal entries are entered in the books of accounts during the Financial Years 2015-16 & 2016-17 during the two years before commencement of the Corporate Insolvency Resolution Process (CIRP), with an intention to defraud the Financial Creditors and are treated as fraudulent transactions under Section 66. Hence, this application, with the above mentioned reliefs.
3. The Respondents filed Counter denying the averments of the Petition and further contending that according to Regulation 35A, the Resolution Professional shall: on or before the 75th day from the insolvency commencement date, form an opinion whether the Corporate Debtor has been subjected to any of the transactions like preferential, undervalued, fraudulent or extortionate and if he is of the opinion that the CD has been subjected to any such transactions, he must make a determination thereof on or before 115th day of the insolvency commencement date under intimation

to the Board and when he makes a determination to the Board, he must apply to the Adjudicating Authority on or before the 135th day of the insolvency commencement date.

- a. The Applicant has mentioned that he has formed a prima facie opinion and has ordered Transactions Audit to be conducted. The Code and the rules use the terminology 'opinion', meaning it as a conclusive opinion but not a 'prima facie' opinion.
- b. Going by the timelines laid down under Regulation 35, the Applicant should have formed his opinion on or before 23.04.2019. As per the minutes of the 6th meeting of the CoC held on 04.06.2019, the Applicant has initiated appointment of the Auditors which is after 75th day of the insolvency commencement date and the timeline for submission of the Transaction Audit Report was fixed as 21.06.2019 which is the 133rd day from the insolvency commencement date, which is again a violation of the timeline stipulated under Regulation 35A.
- c. The Applicant has not mentioned whether he has intimated to the IBBI about the transactions, as required under Regulation 35A(2).

- d. In order to adhere to the timeline stipulated under Regulation 35A(3), the Petitioner has hurriedly filed this application which was returned and ultimately it was taken on file on 24.06.2019.
 - e. Notwithstanding the above lapses, the Respondent has fully cooperated with both the Forensic Auditor and the Transaction Auditor and all the transactions were clarified by the Respondent. The Respondent was not given an opportunity of hearing before finalising the reports, which is against the principles of natural justice.
 - f. The Applicant has admitted in his application that he has relied on the Forensic Audit Report and the Transaction Audit Report which only lead to the conclusion that he has not performed any 'meaningful tasks' leading to forming an opinion and has simply relied on the reports. Hence, in view of the above, the application is liable to be dismissed.
4. A rejoinder is filed by the Applicant stating that if the Respondent has any grievance on RP for his acts against the provisions of the Code, it has to be referred to IBBI.

- a. The real fact is that 24.04.2019 is the 75th day after insolvency commencement date and the RP has formed his opinion and sent an email to the Suspended Board of Directors, seeking clarifications on discrepancies noticed on analysis of the books of accounts and based on the annual accounts furnished he filed the application under Section 10 of Code for initiation of CIRP. Despite reminders on 30.04.2019 and 08.05.2019, the Respondent could not give clarification on the discrepancies and finally, a reply was given on 15.05.2019 not covering all the discrepancies raised by the RP. Having found the replies incomplete, RP initiated and appointed Transaction Auditors on 24.05.2019 with the approval of CoC. Thereafter, the RP addressed a mail on 28.05.2019 to the CD personnel to cooperate and provide the information for conduct of audit and completion within the timelines as specified in the Code and Regulations. The draft report submitted by Transaction Auditors was discussed in the 7th CoC meeting held on 18.06.2019 in the presence of Mr. Ankith B. Parikh wherein he readily agreed to provide all the clarifications on findings by 21.06.2019. Hence, RP has complied with all the timelines.
- b. The real fact is that access to the books of accounts was not provided to the Transaction Auditors. However, based on the material, the Auditors have given report.

5. Heard both the Counsel and perused the written submissions which are nothing but the reiteration of the pleadings.
6. The first objection raised is, with regard to the timelines that are specified under Regulation 35A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Regulation 35A is reproduced hereunder:

“35A. Preferential and other transactions.

- (1) On or before the seventy-fifth day of the insolvency commencement date, the resolution professional shall form an opinion whether the corporate debtor has been subjected to any transaction covered under sections 43, 45, 50 or 66.*
- (2) Where the resolution professional is of the opinion that the corporate debtor has been subjected to any transactions covered under sections 43, 45, 50 or 66, he shall make a determination on or before the one hundred and fifteenth day of the insolvency commencement date, under intimation to the Board.*
- (3) Where the resolution professional makes a determination under sub-regulation (2), he shall apply to the Adjudicating Authority for appropriate relief on or before the one hundred and thirty-fifth day of the insolvency commencement date”.*

7. It is clear from the above Regulation that the RP shall form an opinion whether the Corporate Debtor has been subjected to any

transaction covered under Section 43,45,50 & 66 on or before the 75th day of the insolvency commencement date. Even going by the admission made by the RP in the rejoinder that it was only on 24.05.2019 that he has appointed the Transaction Auditors, it would be beyond the 75th day from the date of commencement of Insolvency and according to Clause (2) of the above Regulation, the RP shall make a determination on or before the 115th day of insolvency commencement date under intimation to the Board. There is absolutely no averment made in the application or in the rejoinder that such intimation was given to the Board. Apart from that, the determination was made on 21.06.2019 which is the date on which, the Respondent agreed to provide all clarifications on findings. Even, the said date does not amount to making a determination, since the clarifications are still awaited from the Respondent. The RP cannot be heard to say that due to the Respondents non cooperation, he could not secure the information. It is for him to take proper steps to secure the information and comply with the timelines under Regulation 35A.

8. Apart from the above, only a bald statement is made with regard to the dates pertaining to the preferential transactions. According to Section 43 of IBC 2016, the preferential transaction, in case of a related party, shall be within a period of two years prior to the

insolvency commencement date and in relation to any other person other than related party, it should be within one year. The application mentions only the years but not the dates. The transactions that allegedly took place, which are termed as preferential transactions, are in the years 2017-2018. The insolvency commencement date is 08.02.2019. Hence, unless the exact date is specified with regard to the transactions, it cannot be brought within the purview of the preferential transactions as mentioned under Section 43(4). Some of the transactions are in the years 2015-16 which are beyond two years. The basis was only transaction audit report. It is also stated that the auditors were not given access to the account books and that they gave the report based on the material. Which is the material, is not specified. There seems to be no proper enquiry made on the transactions. Hence, no relief under Section 43 can be given to the Applicant.

9. As regards Section 66, it is true that no look back period is provided. But due to the failure of the RP to comply with the timelines, the application under Section 66 cannot be entertained. Apart from that, mens rea is an essential ingredient of section 66.

Section 66 is extracted hereunder for quick reference:

“Section 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.*

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.”

10. Hence, the above provision is clear on the aspect of intention, which in this case is not proved. It is also clear that the same has to be found, which means that some evidence beyond the auditors report is required. No efforts are made to place any such evidence.
11. Hence, this application is dismissed.

Sd/-

**(CHARAN SINGH)
MEMBER (TECHNICAL)**

Sd/-

**(JUSTICE TELAPROLU RAJANI)
MEMBER (JUDICIAL)**

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