

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

**MA No. 4137/2019**

**In**

**C.P. (IB)-1042/(MB)/2017**

Under Section 60(5) of the Insolvency and  
Bankruptcy Code, 2016

**Mr. Udupi Vasudev Ganesh Nayak  
(Liquidator of P& S Jewellery Limited)**

Having address at- 303/305, Rajmata CHS  
Ltd, Near R.T.O, Four Bungalows, Andheri  
(West), Mumbai- 400053

**.... Applicant**

**Vs.**

**1. Paresh Chhabildas Shah  
Director of the Corporate Debtror**

Having address at- 52A, Sudha Kalash  
Building, J. Mehta road, Walkeshwar,  
Mumbai- 400006

**2. Nandlal Kisandas Pokharna  
Director of the Corporate Debtror**

Having address at- 103, Senate Wing A,  
Lokhandwala Complex, Akruli Road,  
Kandivali East, Near Mahindra,  
Mumbai-400101

**3. Sushila Gautam Shrimali  
Director of the Corporate Debtror**

Having address at- 57/2599, Gandhi  
Nagar, Bandra (East), Mumbai- 400051

**.... Respondents**

*In the matter of*  
**P & S Jewellery Limited**

**...Corporate Applicant**

**Order Delivered on :- 20/03/2024**

***Coram:***

**Mr. Anil Raj Chellan**  
**Member (Technical)**

**Mr. Kuldip Kumar Kareer**  
**Member (Judicial)**

***Appearances:***

For the Applicant : Adv. Pulkit Sharma a/w Ms. Smriti Shahani

For the Respondent No.1 : Adv. Ankit Lohia a/w Adv. Sharad Bansal  
& Adv. Satsang Tailor

**ORDER**

***Per: - Kuldip Kumar Kareer, Member (Judicial)***

1. The Applicant is the Liquidator in respect of the Corporate Debtor who was appointed pursuant to the order dated 30th July 2018 passed by this Hon'ble Tribunal in the captioned Company Petition.
2. The Applicant submits that a Corporate Insolvency Resolution Process in respect of the Corporate Debtor was initiated pursuant to an order dated 29th May 2017 passed by this Hon'ble Tribunal in the captioned Company Petition filed by the Corporate Debtor under Section 10 of the Code.

3. Pursuant thereto, on or about 25th October 2018, the Applicant learnt from one M/s NEC Technologies India Private Limited that it had made certain payments to the tune of Rs.37,90,500/- to the Corporate Debtor sometime in September 2017 i.e. after the initiation of the CIRP process against the Corporate Debtor. However, the said amount paid by the said company did not reflect in the books of accounts of the Corporate Debtor.
4. Thereafter, the Applicant learnt that the Respondents, being the ex-Directors of the Corporate Debtor, had fraudulently opened a separate bank account in the name of the Corporate Debtor sometime on or about 19th September 2017 with NKGSB Co-op Bank Limited ("NKGSB Bank") and the signatories to this Bank account were the Respondents, being the Directors of the Corporate Debtor. It is submitted that such an act on the part of the Respondents is in clear breach and violation of Sections 14,66,68,69 and 70 of the Code.
5. It is further submitted that vide letter dated 2th November 2018, the Applicant requested the NKGSB Bank to provide details pertaining to the opening of the aforesaid Bank account by the Respondents. Vide a letter dated 2<sup>nd</sup> November 2018 addressed to the Applicant, the said NKGSB Bank forwarded details about the bank statement of Current Account No. 064110100000104 ("the said Bank Account").
6. It is submitted that vide another letter dated 5<sup>th</sup> November 2018, the Applicant requested the said NKGSB Bank for details of documents submitted for opening of the account and also detail of the credits and debits in the bank account.

7. It is further submitted that the aforesaid letter dated 6<sup>th</sup> November 2018 was responded to by the said NKGSB Bank vide its letter dated 14<sup>th</sup> November 2018 whereby the Application form submitted for opening the said Bank Account by the Respondents was provided to the Applicant.
8. From a bare perusal of the bank statements of the said Bank Account, it is clear and evident that during the period from 19<sup>th</sup> September 2017 to 5<sup>th</sup> November 2018, monies to the tune of Rs. 57,75,993 /- were deposited in the said Bank Account of the Corporate Debtor and monies to the tune of Rs.57,65,650/- were withdrawn from the said Bank Account of the Corporate Debtor.
9. Further, it is pertinent to note an amount of Rs.27,60,000/- has inter alia been paid to one M/s Aashita Gems. It is further submitted that the said M/s Aashita Gems is a creditor of the Corporate Debtor as per its books of accounts since 2013, having purchased loose diamonds from them.
10. The Applicant submits that the entire charade of (i) opening a bank account in the name of the Corporate Debtor after the initiation of a Corporate Insolvency Process, (ii) accepting deposits in the said bank account and (iii) withdrawing monies from the said Bank Account, is wholly illegal, fraudulent, contrary to the provisions of the Code and with a clear attempt to defraud the Creditors of the Corporate Debtor. It is submitted that these transactions have been carried out without the Applicant's knowledge, let alone any consent taken from the Applicant. It might also be pertinent here to note that the Respondents have also been declared as 'wilful defaulters' by the financial creditors of the Corporate Debtor.

11. The Applicant, therefore, submits that it is just, necessary and essential that the aforesaid monies withdrawn from the said Bank Account of the Corporate Debtor during the CIRP process be repaid by the Respondent to the Corporate Debtor and stringent punitive directions be passed against them.
12. In the circumstances aforesaid, the Applicant prays for the following reliefs:
  - (a) That the Respondents be directed to jointly and severally make contributions to the liquidation estate of the Corporate Debtor to the tune of Rs.57,65,650/-, which were illegally and fraudulently withdrawn from the said Bank Account of the Corporate Debtor during its Corporate Insolvency Resolution Process.
  - (b) That the maximum punishment be imposed upon the Respondents for the wilful breach of Sections 14, 66, 68, 69 of the IB Code, 2016.

**Reply filed on behalf of the Respondents:-**

13. It is submitted that neither Applicant / liquidator nor forensic auditor sought any views / input from the answering respondent on the forensic audit report after the same was finalized for consideration by the Hon'ble Tribunal. In this view of the matter, the entire report stands vitiated.
14. It is further submitted that the respondent was appointed as a director w.e.f. 16.10.2015 and as per catena of judicial pronouncements, a person who was not a director at the relevant time ought not to be held liable for the same. This contention stands vindicated by insertion of section 32A in the Code. In its judgement, the Hon'ble Apex Court, while upholding the validity of Section 32A of IBC has said that it was important for the IBC to attract bidders who would offer reasonable and fair value for the corporate debtor to

ensure the timely completion of corporate insolvency resolution process (CIRP). Such protection, the court said, must also extend to the assets of a corporate debtor, which form a crucial attraction for potential bidders and helps them in assessing and placing a fair bid for the company, which, in turn, will help banks clean up their books of bad loans.

15. It is further submitted that Applicant failed and neglected to comply with Regulation 35A (2) & (3) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 which entails that 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 and where the resolution professional makes such determination, 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.
16. It is submitted that Forensic Auditor/Liquidator fell in grave error by not understanding the law that the transactions concluded in the ordinary course of business ought not to classify as ones covered within the mischief of section 43, 45 or 66 of the Code.
17. It is further submitted that in terms of provisions of the 'I&B Code' the transactions in question, cannot be treated to be made 'one or two year . preceding the Insolvency Commencement Date (ICD)' if they have taken place after the ICD. It is most humbly submitted that Liquidator has gone

beyond the mandate of Law and considered some transactions which took place after ICD and hence, the same are outside the scope and jurisdiction under IBC.

18. It is submitted that unlike applications under Section 43 and 45 of the Code, the law has not conferred any power on Liquidator to file an application under Section 66 of the Code. It is most respectfully submitted that the provisions of Section 66 does not contemplate filing of an application by Liquidator. It is only the Resolution Professional who is empowered to move an application under Section 66 of the IB Code, 2016.
19. In the end, the Respondents has prayed that the present application is devoid of any merits and is liable to be dismissed forthwith.

**Analysis and decision:-**

20. We have heard the Counsel for the parties and gone through the record.
21. During the course of arguments, Counsel for the Applicant/Liquidator has argued that the CIRP in this case commenced on 29.05.2017. Counsel for the Applicant has further contended that after the commencement of the CIRP, the Respondents, who are the suspended directors of the Corporate Debtor, opened an account with NKGSB Co-operative Bank Limited on 19.09.2017. Counsel for the Applicant/Liquidator has further pointed out that the Respondents withdrew a total sum of Rs. 57,65,650/- from the said account as per the detailed given in para 9 of the application. According to the Counsel for the Applicant/Liquidator, the very act of opening and operating

the account in question and also withdrawing the aforesaid amount is clearly in violation of the moratorium which came into being on 29.05.2017 and, therefore, the transactions are liable to be held as fraudulent in nature and, therefore, the Respondents be directed to refund/restore the amount of Rs. 57,65,650/- in the account of the Corporate Debtor.

22. On the other hand, Counsel for the Respondents have argued that the impugned transactions are bona fide and legal which were carried out by the Respondents to keep the company as a going concern. According to the Counsel for the Respondents, in this case, IRP demitted office on 26.06.2017 as his appointment was not confirmed by the CoC. Counsel for the Respondent has further contended that thereafter RP approved and appointed by the CoC took charge on 29.11.2017 and during the intervening period, there was nobody at helm to look after the affairs of the Corporate Debtor. Counsel for the Respondents has further pointed out that one of the transactions is deposit of Rs. 37,90,500/- in the account of the Corporate Debtor which was received from M/s NEC Technologies India Private Limited as security deposit. Similarly, an amount of Rs. 30,04,617/- was the payment made to Verdantis Technologies as the same was payable to the said entity on account of refund of security deposit as second floor of P& S Corporate House, which was earlier rented out to them, was vacated by them. Counsel for the Respondents has further argued that the rest of the transactions pertaining to some payments made to Aashita Gems who was also one of the Operational Creditors of the Corporate Debtor and the money to the said entity was also paid in the ordinary course of nature. Counsel for the Respondents has further contended that the transactions in question were carried out to run the business of the Corporate Debtor and to keep it as a

going concern as the IRP or RP were not available. Therefore, the transactions in question are bona fide and cannot be termed fraudulent.

23. We have weighed the contentions raised by the Counsel for the parties and also carefully gone through record.
24. It is not disputed that the CIRP commenced against the Corporate Debtor on 29.05.2017 and a new account was opened by the Respondents in the name of the Corporate Debtor on 19.09.2017 with NKGSB Co-operative Bank. In our considered view, after the commencement of the CIRP, the moratorium under Section 14 of the IB Code, 2016 came to be enforced, the Respondents being suspended directors of the Corporate Debtor had no authority or business to open a new account in the name of the Corporate Debtor, when the other account were already there. The very opening of the new account surreptitiously after the imposition of the moratorium by the Respondents smacks of mala fide.
25. Secondly, so far as the argument raised by the Counsel for the Respondents that the account was opened and the transactions were carried out which was otherwise essential as there was nobody to take care of the business of the Corporate Debtor is concerned, the same also does not hold much water. In this regard, it is worth pointing out that the IRP might not have been confirmed by the CoC but the normal rule and practice is that the IRP continues till he is replaced by the newly appointed RP by the CoC. Therefore, the argument that nobody was at the helm of affairs of the Corporate Debtor when the account was opened and transactions were made is also specious.

26. Thirdly, it is worth pointing out that if some transactions were utmost necessary, as claimed by the Respondents, the same could have been done using the already existing account of the Corporate Debtor. There appears to be absolutely no justification for opening a new account surreptitiously by the Respondents. Since all the transactions were carried out by the Respondents without any authority or once the moratorium came into being, the said transactions cannot be justified by any stretch of imagination or explanation.
27. So far as the plea that Liquidator has no power to proceed under Section 66 of IB Code, 2016 is concerned, the same is not tenable. Section 66 (1) of IB Code, 2016 clearly provides that the RP or the Liquidator, as the case may be, can file an application under Section 66 of the IB Code, 2016.
28. Under these circumstances, we are left with no option but to hold that the Respondents had absolutely no authority either to open a new account or to transact any business of the Corporate Debtor and as such the transactions in questions are nothing but fraudulent. Therefore, the Respondents are hereby directed to refund the amount of Rs. 57,65,650/- into the account of the Corporate Debtor within one month from the date of this order. **MA No. 4137/2019 is allowed and disposed of** accordingly in the aforesaid terms.

Sd/-

**ANIL RAJ CHELLAN**  
**(MEMBER TECHNICAL)**

*Sushil*

Sd/-

**KULDIP KUMAR KAREER**  
**(MEMBER JUDICIAL)**