

**IN THE NATIONAL COMPANY LAW TRIBUNAL**

**KOCHI BENCH**

**KOCHI**

**IA(IBC)/206/KOB/2022**

**IN**

**CP(IB)/25/KOB/2021**

*(Under Section 43(1) read with Section 44 of IBC, 2016)*

*In the matter of M/s. Tenny Jose Limited:*

**MEMO OF PARTIES:**

**PRATHAP PILLAI,**

IBBI/IPA-003/ICAI-N-00371-2021-22/13822

Resolution Professional of M/s. Tenny Jose Limited,

BLRA 15, Bridge Lane, Medical College P.O.,

Trivandrum – 695 001.

**...Applicant**

**-Versus-**

1. **TENNY JOSE**, Villa No:29, Noel fragranz, Shihab Thangal Road, Vidya Nagar Colony, Thrikkakara, Edapally, Ernakulam – 682 021.
2. **ELSA TENNY**, Villa No:29, Noel fragranz, Shihab Thangal Road, Vidya Nagar Colony, Thrikkakara, Edapally, Ernakulam – 682 021.
3. **ARUN C TENNY**, Villa No:29, Noel fragranz, Shihab Thangal Road, Vidya Nagar Colony, Thrikkakara, Edapally, Ernakulam – 682 021.
4. **GOPINATH SREEKUMAR**, #7, Indian Express Layout, Kodigehalli, Vidyaranyapura, Banglore, Karnataka – 560 097.
5. **KIRAN C TENNY**, Noel fragranz, Shihab Thangal Road, Vidya Nagar Colony, Thrikkakara, Edapally, Ernakulam – 682 021.
6. **PAPTRADE INDIA PRIVATE LIMITED**, 39/2475-B1, Suite #94, LR Towers, SJRRA 104, S Janatha Rd., Palarivattom, Kochi, Ernakulam – 682 025.

**... Respondents**

**-In-**

***In the Matter of:***

**Korea Trade Insurance Corporation,**

**...Operational Creditor**

**-Versus-**

**Tenny Jose Limited,**

**...Corporate Debtor**

***Coram:***

Shri P. Mohan Raj : Member (Judicial)

Shri Satya Ranjan Prasad : Member (Technical)

***Appearances (through video conferencing)***

For Applicants : Mr. Hari Kumar G Nair, Adv  
Mr. Akhil Suresh, Advocate

For Respondents 1 to 3 and 5 : Mr. Pradeep Joy, Advocate  
Mr. Rohan Kumar, Adv

**Order reserved on: 11.11.2022**

**Order pronounced on:25.01.2023**

**ORDER**

1. This application has been filed under section 43(1) R/w 44 of IBC 2016 for preferential transactions and return of amount.

**Brief facts of Petition: -**

2. The Applicant /resolution professional filed this application. The CIRP order was passed against the corporate debtor Tenny Jose Limited, in the petition filed under section 9 of IBC 2016 by Korea Trade Insurance Corporation on

21.12.2021. Mr.Krishna Raj was appointed as interim resolution professional then, the applicant was appointed as resolution professional on 14.03.2022. After his appointment he started to function then with the approval of 4<sup>th</sup> committee of creditors meeting dated 21.06.2022 the applicant appointed M/s. Jackson Abraham Thekkekara, Chartered Accountant as forensic Auditor on 02.04.2022 the forensic Auditor submitted his report on 04.06.2022, the copy of the report was served on the erstwhile directors of the corporate debtor for their objections if any. From the said Audit report the applicant came to know that the respondents/suspended Board of Directors of the Corporate Debtor had deliberately and *mala fide*ly acted and made transactions with the sole intention to defraud the creditors of the Corporate Debtor.

The applicant stated that the respondents indulged in preferential transactions. In the application the applicant set out that the respondent indulged in preferential transactions to the extent of Rs.6,35,61,367/- The transactions were carried out between 27.12.2019 and 25.02.2022, which directly falls within the corridors of section 43 of IBC 2016. All the payments were made in extinguishment of dues/credit of the respondents. The respondents/creditors were placed in a beneficial position than it would have been in the event of the distribution of the assets made in accordance of section 53 of IBC 2016. The corporate debtor made a sale transaction worth Rs.12,68,707.71/- to Paptrade a related party.

**Brief facts of the reply of Respondents Nos.1 to 3 and 5:**

3. The application is not maintainable; all the contentions of the application are based on the transaction audit report and there is no independent determination of any fraudulent transactions by the RP. The application is filed on 15.07.2022 after expiry of 208 days from the date of CIRP. As per the time line of CIRP the RP is required to form an opinion within 75 days of the commencement of CIRP and based on that opinion to be formed he has to make determination on or before the 115<sup>th</sup> day of CIRP. But in the instant case the RP has not compiled the time limit set out in Regulation 35 (A) of Insolvency and Bankruptcy regulations 2016. The present application is merely an afterthought of the applicant there is no valid reason to file the application belatedly. At the time of transaction, the loan accounts were not defaulted by the corporate debtor, the account of the corporate debtor became NPA on 23.02.2021. Therefore, when there is no default in payment to the financial creditors, the applicant cannot allege transactions as preferential transactions which were made in the ordinary course of business. The down fall of business of corporate debtor was due to covid 19. The question of preferential transaction does not arise. The transactions alleged by the applicant are made in transparent manner hence the application is liable to be dismissed.

**The Points for determination are: -**

- 1) Whether the application is barred by limitation?
- 2) Whether the applicant/RP has not filed the application on his own determination?

3) Whether, the Respondents indulged in preferential Transactions? If yes whether the applicant is entitled for refund of amount?

**Point No. 1 and 2:-**

4. The corporate debtor was ordered to CIRP on 21.12.2021. This application was filed on 15.07.2022. On the respondent side taken plea that since this application is not filed within the time limit prescribed under Regulation 35-A of the Insolvency and Bankruptcy Board of India and (Insolvency Resolution Process for Corporate Persons) Regulation 2016, is not maintainable. It is true that as per Regulation 35-A of the Insolvency and Bankruptcy Board of India and (Insolvency Resolution Process for Corporate Persons) Regulation 2016, Resolution Professional has to from an opinion within 75 days from the date of CIRP, and made determination within 115 days and has to file an application within 135 days, from the date of commencement of CIRP. From the available materials it appears that after the initiation of CIRP on 21.12.2021, the Resolution Professional appointed Forensic Auditor on 02.04.2022. Forensic Auditor submitted his report on 23.09.2020, there after the Resolution Professional determined that the Respondents deliberately and malafidely acted with sole intention to defraud the creditors of the corporate debtor, then he filed this application, after expiry of 135 days from the date of initiation of CIRP.

5. On the application side argued that this application is maintainable even though it is filed after 135 days from the date of CIRP. The time line mentioned in Regulation 35-A of Insolvency Bankruptcy and (Insolvency Resolution Process for

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Corporate Persons) Regulation 2016 is directory in nature because no consequential effect is mentioned therein for non-compliance of time limit. This view is expressed and fortified in Madras High Court Judgment Shahji Purushutom -vs- Union of India, there it is observed that when there is no consequential result is prescribed it will consider as only a directory. In this regard on the applicant side relies upon the NCLAT-Delhi order passed in company Appeal (AT) Insolvency No.583 of 2021 order dated 06.04.2022, **Aditya Kumar Tibrewal Vs Om Prakash Pandey and Orsin** here the NCLAT clearly held that the application filed by the resolution Professional relating Sections 43 and 45 read with Sections 66 and 60(5) of the Code is not to be rejected filed beyond the period of 135<sup>th</sup> days of Insolvency Commencement date only on the ground of non-compliance of Regulation 35A of CIRP Regulations, 2016, further held that the expression “shall” in regulations 35A(1),35A(2) and 35A(3) is not mandatory and requirement of “forming an opinion” under section 35A(1)” make a determination” under Section 35A(2) and “shall apply to the adjudication authority for appropriate relief on or before 135<sup>th</sup> day of the Insolvency Commencement date” are only directory. It is well settled proposition of law that one should not be allowed to take advantage of his own wrong. Thus, the applicant has vividly described the reason for maintenance of application. As per Section 5 of the Limitation Act, if the applicant satisfies the court that he had sufficient cause for not making the application within time, the delay to be condoned. The Apex Court held in Sesh Nath Singh and another -vs- Baidyabati Sheora phuli co-operative Bank Ltd. and another in Civil Appeal No. 9198 of 2019 order dated 22.03.2021 that delay can be condoned irrespective of

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whether there is any formal application or not if there are sufficient material on record disclosing sufficient cause for the delay. In this case also even though on the applicant side not filed any formal condone delay application but in the petition the delay is properly and satisfactorily explained.

6. The Division Bench of Delhi High court in **TATA STEEL BSL LIMITED Vs VENUS RECRUITERPRIVATE LIMITED & ORS, LPA 37/2021** dated 13.01.2023 at para 74 held as follows:

*74. The first prong on which the Impugned Judgment holds that avoidance applications, in facts of the present case, are infructuous is because they have not been filed as per the prescribed timelines. However, it is our understanding that the timelines under Regulation 35A are directory and not mandatory in nature. This is because Regulation 35A pertains merely to the RP discharging his statutory burden of filing an avoidance application within an outer limit of 135 days from the commencement of the CIRP. This timeline takes date of commencement of CIRP as the reference point. However, the CIRP process itself is not strictly or mandatorily bound by its own timelines. The same has been held by the Hon''ble Apex Court in Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta, Neutral Citation Number: 2023/DHC/000257 LPA 37/2021 etc. Page 63 of 73 (2020) 8 SCC 531.*

Thus, the catena of supra citations made clear that the Regulation 35A is only directory. The applicant came to know the preferential transactions of respondents only on 04.06.2022 the day on which audit report was submitted to him. From the date of knowledge on 04.06.2022, this petition has been filed on 15.07.2022 within 42 days, hence there is no delay in filing this application, even if there is any delay in filing this application beyond 135 days fixed under Regulation 35-A in view of supra mentioned Apex court Judgment in the absence of any formal application the said delay is here by condoned.

7. On the respondent side it is alleged that the Resolution Professional not acted independently, he had delegated his duty of forming an opinion of determination of preferential transaction to the forensic auditor and such delegation of duty is in contravention to the provisions of IBC. The mere acceptance of auditor's report does not amount to delegation of power of Resolution Professional. It is the exclusive domain of Resolution Professional either to accept the report of forensic auditor report or not. It does not mean that when Resolution Professional accepted the report of auditor, he delegated his duty to auditor. Here the Resolution Professional accepted the Forensic Auditor's report and determined on his own and filed this application. Thus, the contention of the respondents is unsustainable. In this scenario it is answered that the petition is not barred by limitation and Resolution Professional has filed this application on his own.

**Point No. 3:-**

8. On the applicant side stated that the respondents 1 to 3,5, and 6 were indulged in certain preferential transactions. It is primarily stated that the said respondents retrieved their unsecured loans to the extent of Rs.6,35,61,367/-in preference to other creditors of the corporate debtor. The corporate debtor was admitted into CIRP on 21.12.2021, The respondents 1 to 5 are erstwhile directors of the corporate debtor and 6<sup>th</sup> respondent is private company in which respondents 1 to 3 & 5 directors of corporate debtor having shares as such 6<sup>th</sup> respondent and all the respondents are related parties as defined under section 5(24) of IBC 2016. The amounts were withdrawn by the respondents from the accounts of the corporate towards their antecedent loans between 27.12.2019 to 14.02.2021. On the respondent side in their reply denies the allegations and taken a defense plea that most of the transactions were taken even before the account of the corporate debtor was classified as NPA by the South Indian Bank, hence the transactions taken place before the default date cannot be termed as preferential transactions. Further it is stated that the said transactions were made in the ordinary course of business. The down fall of the business of the corporate debtor was due to Covid 19 pandemic and pursuant of lock down.

Now we have to see whether the transactions listed out in the petition mentioned below are preferential transactions:

<b>S. No</b>	<b>Party</b>	<b>Particulars</b>	<b>Number of Transactions</b>	<b>Amount</b>
1.	Tenny Jose	Amount withdrawn from Bank	24	3,66,54,622

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2.	Tenny Jose	Journal adjustment providing credit to Steel House Pvt Ltd, which ultimately results in a bank Transfer from Steel House to Tenny Jose.	2	2,62,000
3.	Tenny Jose	Journal adjustment providing credit to Steel House Pvt Ltd, which ultimately results in a cash payment from Steel House to Tenny Jose.	15	24,88,000
4.	Tenny Jose	Journal adjustment providing credit to Steel House Pvt Ltd, which ultimately results in amount received from trade receivable of Steel House Pvt. Ltd by Tenny Jose into his personal account	1	2,00,000
5.	Tenny Jose	Amount withdrawn from Bank to transfer it to George Kurian who was an ex-employee of a sister concern, Tenny Jose International Trading LLC, Dubai (Refer Sec 2.5 and 3.6.5)	1	50,00,000

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6.	Tenny Jose	Journal adjustment with Tenny Jose Pvt Ltd, enterprise significantly influenced by key managerial personnel	1	2,76,752
7.	Tenny Jose	Journal adjustment with Paptrade India Pvt Ltd, enterprise significantly influenced by relative of key managerial personnel	7	47,13,869
8.	Kiran C Tenny	Amount withdrawn from Bank	8	23,94,728
9.	Kiran C Tenny	Journal adjustment providing credit to Steel House Pvt Ltd, which ultimately results in bank transfer from Steel House Pvt Ltd to Kiran C Tenny	2	4,88,024
10.	Kiran C Tenny	Journal adjustment providing credit to Steel House Pvt Ltd, which ultimately results in cash payment from Steel House Pvt Ltd to Kiran C Tenny	6	4,45,000
11.	Kiran C Tenny	Journal adjustment ultimately resulting in adjustment against sales to Steelion Prefab Infra	1	4,59,191

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		Solutions Pvt. Ltd, an enterprises significantly influenced by relative of a key managerial personnel and prior sales to Director by Steel House Pvt Ltd amounting to Rs 4, 59, 191 shown as amount receivable from Tenny Jose Limited in the books of Steel House Pvt Ltd . In the books of Tenny jose limited the amount is adjusted against loan account of Kiran C Tenny.		
12.	Kiran C Tenny	Journal Adjustment with Steelion Prefab Infra Pvt Ltd, enterprise significantly influenced by relative of key managerial personnel	1	3,52,649
13.	Arun C Tenny	Amount withdrawn from Bank	3	30,39,400
14.	Sree Seetharama Paper Agencies	Amount withdrawn from Bank (Amount received from Sree Seetharama on 8 <sup>th</sup> April, 2019 which is	1	30,00,000

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		accounted as loan, repaid on 27 <sup>th</sup> Jan, 2020)		
15.	Oxyo Financial Services	Amount Transferred from Bank	1	2,79,709
16.	Oxyo Financial Services	Adjusted with Tenny Jose Loan account, which has been subsequently paid to him by Tenny Jose Limited	3	12,70,290
17.	Fullerton India Credit Company Limited	Amount transferred from Bank Account	2	7,90,145
18.	Fullerton India Credit Company Limited	Adjusted with Tenny Jose Loan account, which has been subsequently paid to him by Tenny Jose Limited	2	7,90,494
19.	Fullerton India Credit Company Limited	Journal Adjustment against Paptrade India Pvt Ltd, enterprise significantly influenced by relative of key managerial personnel	2	6,56,494
	<b>Total</b>			<b>6,35,61,367</b>

To attract the transaction as preferential transaction the ingredients laid down in Section 43 of IBC to be full filed.

9. The respondents 1 to 5 were directors of corporate debtor and 6<sup>th</sup> respondent company also is a related party advanced/lent certain loans to the corporate debtor as such they were unsecured creditors of the corporate debtor. The corporate debtor transferred amounts from its Bank account to the respondents/creditors to discharge its antecedent operational debts. The payments were made to discharge/ extinguish the credit of the Respondents/creditors in preference to other creditors. By these payments the respondents/creditors were placed in a beneficial position than financial creditors in the event of distribution of the assets made in accordance with section 53 of IBC 2016.

10. To term the transactions as preferential transactions, the transaction must have been taken place within the period mentioned in sub section 4 (a) or (b) to section 43 of IBC 2016. If the transaction is with related parties two years preceding the date of commencement of insolvency, for other than related parties one year preceding the insolvency commencement date. The look-back period is two years preceding insolvency commencement date for related party transaction and look-back period is one year to the non-related party transactions. In our case insolvency commencement date is 21.12.2021 and the transactions were held with related parties, being the respondents are erstwhile directors of the corporate debtor hence the look-back period applicable is two years, accordingly transactions made from 22.12.2019 are covers under the preferential transactions. Here the transactions taken between 27.12.2019 and 12.04.2021 are taken into

considerations. Thus, the period envisaged in sub-section 4(a) of section 43 IBC 2016 is satisfied.

11. Then we have to see whether the impugned transactions do or do not fall within the exclusion provided by sub-section (3) of Section 43 of IBC 2016. i.e. Whether the Transactions were made in the ordinary course of their business or financial affairs of the corporate debtor or the transferee. On the respondents' side taken a plea that the transactions are done in ordinary course of their business. Withdrawn the amounts from the accounts of corporate debtor and appropriating towards the antecedent debt will not amounts to carry out in ordinary course of business of the corporate debtor or in financial affairs of corporate debtor or in the ordinary course of financial affairs of the transferee/ respondents. The corporate debtor not acquired any new value in any property by the transactions. Thus, the impugned transactions are not excepted transactions within the meaning of sub-section 3 of Section 43 of IBC 2016.

12. On the respondent side stated that during the impugned transactions period the account of the corporate debtor was not classified as NPA it was classified as NPA only on 23.02.2021, hence transactions taken long prior to NPA cannot considered as preferential transactions. This submission of the respondents has no legal backing, sub-section 3 of section 43 stated that certain transactions are excepted from the purview of preferential transactions, but there the transactions referred by the respondents i.e., transactions taken prior to date NPA is not excepted.

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13. From the materials furnished it is established that the transactions mentioned below are relating to Respondents 1,3,5, and 6 and benefited by Preferential transactions.

I	Party	Amount
	Serial No. 1 to 4 are relating to R1	Rs. 39,604,622 /-
	Serial No. 13 is relating to R3	Rs. 30, 39, 400/-
	Serial No. 8 to 11 relating to R5	Rs. 3, 786, 943/-
	Serial No. 7 relating to R6	Rs. 47, 13, 869/-
	<b>Total</b>	<b>Rs. 5,11,44,834/-</b>

14. Apart from above the following Preferential transactions are relating to members who are not arrayed as Parties in this application they are as follows:

II	Party	Amount
	Serial No. 5 Relating to Mr. George Kurian (Ex-employee)	Rs. 50,00,000/-
	Serial No. 6 Relating to Tenny Jose Foods Pvt. Ltd	Rs. 2,76,752/-
	Serial No. 12 Relating to Steelion Prefab Infra Pvt Ltd	Rs. 3,52,649/-
	Serial No. 14 Relating to Sree Seetharama Paper Agencies	Rs. 30,00,000/-
	Serial No. 15 and 16 Relating to Oxyo Financial Services	Rs. 15,49,999/-
	Serial No. 17 to 19 Relating to Fullerton India Credit Company Limited	Rs. 22,37,133/-
	<b>Total</b>	<b>Rs. 1,24,16,533</b>

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15. From the list of impugned transactions mentioned in the petition the corporate debtor made preferential payments to Respondents 1,3,5 and 6 to the extent of amount mentioned below:

- 1) 1<sup>st</sup> Respondent Rs. 3,96,04,622/-
- 2) 3<sup>rd</sup> Respondent Rs. 30,39,400/-
- 3) 5<sup>th</sup> Respondent Rs. 37,86,943/-
- 4) 6<sup>th</sup> Respondent Rs. 47,13,869/-

16. From the materials Produced it is established that the Respondents 1, 3, 5 and 6 in Preferential transaction, and gained unlawfully at the cost of other Creditors, hence they are liable to refund the amount. Further because of the Preferential transactions, the person and companies mentioned in table No- II also unlawfully enriched however since they are not arrayed as parties to this application, no order can be passed against them.

17. The corporate debtor not made any payments to Respondents 2 and 4 and there is no iota of materials to implicate them with the preferential transactions set out in the petition. It is informed that the 4<sup>th</sup> respondent was appointed as an independent director in non-executive cadre on 18.06.2018 and resigned as such from office on 12.07.2021.

18. In the application it is stated that the corporate debtor made a sale transaction worth Rs. 12,68, 707/- to Paptrade with 6<sup>th</sup> respondent. It is stated that this credit sale transaction concluded after the initiation CIRP order. It appears that

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this transaction held during the moratorium Period, in such a situation, the transactions are void ab initio. The transactions carried out during the moratorium period does not fall under Section 43 of IBC. If any transaction carried out by the Erstwhile directors of corporate debtor, the RP can retrieve the assets or he can file appropriate application seeking assistance of Adjudicating authority to retrieve the loss caused to the corporate debtor from the person or persons benefited by such void transaction. Further in this application the applicant has not furnished sufficient materials in this regard; hence no order has been passed in this regard and liberty is granted to the applicant to take necessary steps to recover the amount involved in the sale transaction concluded during the moratorium period.

**19. In the result petition is ordered as follows:**

**The 1<sup>st</sup> respondent is directed to pay a sum of Rs. 3,96,04,622/- (Three Crore Ninety-Six Lakh Four Thousand Six Hundred Twenty-two Only)**

**3<sup>rd</sup> Respondent is directed to pay a sum of Rs. 30,39,400/- (Thirty Lakh Thirty-Nine Thousand Four Hundred Only)**

**5<sup>th</sup> Respondent is directed to pay a sum of Rs. 37,86,943/- (Thirty-Seven Lakh Eighty-Six Thousand Nine Hundred Forty-Three)**

**6<sup>th</sup> Respondent is directed to pay a sum of Rs. Rs. 47,13,869/- (Forty-Seven Lakh Thirteen Thousand Eight Hundred Sixty-Nine)**

To the applicant within one month from today, failing which the amounts mentioned supra will carry 12% simple interest per annum from the date of this order to till the date of realization of amount. Thus, the application is ordered

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against the respondents 1,3,5 and 6, and in respect respondents 2 and 4 the application is dismissed. No cost.

21. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps,

22. Certified Copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

SATYARANJAN PRASAD Digitally signed by SATYARANJAN PRASAD  
Date: 2023.01.25 12:43:40 +05'30'

**Satya Ranjan Prasad**  
**Member (Technical)**

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MOHAN RAJ  
Date: 2023.01.25 13:02:30 +05'30'  
MOHAN RAJ

**P. Mohan Raj**  
**Member (Judicial)**

Signed on this 25<sup>th</sup> day of January, 2023.

Supriya-P. s