IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-V
I.A. No. 5768 of 2020
IN
Company Petition (IB)No.814/ND/2019

In the matter of:
The Insolvency and Bankruptcy Code, 2016

AND
In the matter of:
Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

AND
In the matter of :

POOJA BAHRY
(Resolution Professional for NTL Electronics India Private Limited)
59/27 Prabhat Road,
New Rohtak Road,
New Delhi- 110005
Email- rp.ntlelectronicsindia@gmail.com ... APPLICANT

VERSUS

1. **Mr. Praveen Gupta**
   C-PH2, Pearls Gateway Towers,
   Plot No D8-A,Sector- 44,
   Noida ... RESPONDENT No. 1

2. **Mr. Arun Gupta**
   Villa No. 2, ATS Greens Village,
   Sector 93A, Noida-201304 ... RESPONDENT No. 2

3. **Mr. Udal Singh**
   567, Sector-37,
   Arnn Vihar, Naida -201303 ... RESPONDENT No. 3

4. **GVR Consulting Services Pvt. Ltd.**
   having its registered address at:
   A - 58 Sector 65,
   NOIDA, Gautam Buddha Nagar,

AKS

Uttar Pradesh ... RESPONDENT No. 4

5. **Keshika Exports Private Limited**
having its registered address at:
305, Guru Amar DassBhawan
78, Nehru Place, New Delhi
Email: pgnrl8@gmail.com ... RESPONDENT No. 5

6. **Dyna Rasayan Udyog Private Limited**
having its registered address at:
G-66/2 First Floor,
Gautam Nagar, New Delhi ... RESPONDENT No. 6

7. **GVR Electronics Pvt. Ltd.,**
having its registered address at:
A - 58 Sector- 65,
NOIDA, Gautam Buddha Nagar,
Uttar Pradesh ... RESPONDENT No. 7

ORDER DELIVERED ON: 02.03.2022

CORAM :
Sh. Abni Ranjan Kumar Sinha, Hon'ble Member (Judicial)
Sh. Avinash K. Srivastava, Hon'ble Member (Technical)

PRESENT: -
For the Applicant: Mr. Gaurav Arora, Advocate

For the Respondent: Mr. Gurkamal Hora Arora and Mr. Ajay Kumar Arora, Advocates, counsels for Respondent No. 6 and Adv. Nidhi Vardhan, counsel for Respondent No. 4 and 7

ORDER

AS PER: SH. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)

The present application is filed by Pooja Bahry, Resolution Professional of ("RP"/"Applicant") of NTL Electronics India Private Limited ("Corporate Debtor") under Section 43, Section 44, Section45, Section 46, Section 66 and Section 67 of the Insolvency and Bankruptcy Code, 2016 ("Code") for avoidance of certain preferential transactions, undervalued transactions and seeking contribution for certain fraudulent and wrongful trading undertaken

by the Corporate Debtor prior to the insolvency commencement date and for issuance of appropriate orders from under the Code by this Adjudicating Authority against the Respondents in relation to such transactions.

2. The Applicant prays for the following:

a. Direct Respondent No. 1 to refund the sum of INR 1,97,50,000 on account of preferential transactions under section 43 of the Code;

b. Direct Respondent No.2 to refund a sum of INR 90,00,000 to the Corporate Debtor on account of preferential transactions under section 43 of the Code;

c. Direct Respondent No.4 to refund the sum of INR 1,00,00,000 to the Corporate Debtor on account of preferential transactions under section 43 of the Code;

d. Direct Respondent No.5 to refund the sum of, INR 2,49,338 to the Corporate Debtor on account of preferential transactions under section 43 of the Code;

e. Direct Respondent No.6 to refund the sum of INR 1,57,29,987 to the Corporate Debtor on account of preferential transactions under section 43 of the Code;

f. Direct Respondent No.7 to refund the sum of INR 90,00,000 to the Corporate Debtor on account of preferential transactions under section 43 of the Code;

g. Direct the Respondent No. 1, 2 and 3 to justify the undervalued transaction undertaken by the Corporate Debtor in terms of Section 45 of the Code and pass appropriate directions against those persons to whom assets were sold in case it is determined that the said transaction is undervalued;

h. Direct the Respondent N o.1, 2 and 3 to pay INR 20,00,000 in the account of the Corporate Debtor towards the fraudulent transactions under Section 66 of the Code.

3. The Corporate Debtor is a Public limited company and is engaged in the business of LED Lighting & lighting electronics in India and is currently doing Job work activity involving complete Lamp making right from electronic driver, LED Module, Lamp assembly and packing etc.

4. Respondent No. 1 and 2 were the Managing Directors of the Corporate Debtor up till the commencement of the CIRP and were in control of the Corporate Debtor's day to day to actions for the entire period of the transaction audit.

5. Respondent No.3 is Mr. Udal Singh, was a director of the Corporate Debtor from 3 October 2018 up till the insolvency commencement date.

6. Respondent No. 4, 6 and 7 are unrelated party to the Corporate Debtor.

7. Respondent No. 5 is Keshika Exports Private Limited, a related party to the Corporate Debtor.

8. Brief Facts of the case are as follows:

i. That vide an order dated 27.08.2019, corporate insolvency resolution process ("CIRP") of the Corporate Debtor was initiated and Ms. Preeti Jaiswal was appointed as the Interim Resolution Professional ("IRP").

ii. That during the first meeting of the Committee of Creditors ("CoC") held on 30.10.2019, Ms. Preeti Jaiswal was replaced by the Applicant as the RP of the Corporate Debtor by 100% voting share and same is confirmed by this Adjudicating Authority vide order dated 18.12.2019.

iii. That after receiving the order on 27.12.2019, the Applicant took the management and control of the Corporate Debtor.

iv. That the Applicant has appointed Pipara & Co. ("Transaction Auditor") as the Transaction/Forensic Auditor to review the

books and records of the Corporate Debtor for the period from 01.04.2016 till 27.08.2019.

v. That the Transaction Auditor has conducted the transactional audit of the Corporate Debtor for the period from 01.04.2016 till 27.08.2019 based on the data/documents provided by the employees and management of the Corporate Debtor, documents available in public domain and documents provided by the lenders of the Corporate Debtor and submitted its final report to the Applicant on 9.09.2020.

vi. That on review of the Transaction Auditor Report (herein after referred to as TAR), examination of the books and other relevant records of the Corporate Debtor, certain transactions undertaken by the Corporate Debtor were discovered, which in the opinion of the Applicant fall within the scope of the preference transactions, undervalued transaction and fraudulent or wrongful trading within the meaning of the provisions of the Code.

vii. TAR highlighted that during the relevant period provided in Section 43 (4) of the Code, the following repayment/transfer were made by the Corporate Debtor to its related parties from 27.08.2017 to 27.08.2019 and to non-related parties from 27.08.2018 to 27.08.2019 to discharge its antecedent liability:

Date	Name of the Party	Amount (INR)	Purpose
Repayment to Related Parties			
A. Arun Gupta			
06.09.2017	Unsecured Loan - Arun Gupta A/c	20,00,000	Repayment of unsecured loan of directors
07.10.2017	Unsecured	10,00,000	Repayment of

	Loan - Arun Gupta A/c		unsecured loan of directors
22.11.2017	Unsecured Loan - Arun Gupta A/c	20,00,000	Repayment of unsecured loan of directors
05.12.2017	Unsecured Loan - Arun Gupta A/c	40,00,000	Repayment of unsecured loan of directors
15.06.2018	Unsecured Loan - Arun Gupta A/c	3,50,000	Repayment of unsecured loan of directors
	TOTAL (A)	90,00,000	
B. Praveen Gupta			
19.12.2017	Unsecured Loan - Praveen Gupta A/c	1,00,000	Repayment of unsecured loan of directors
16.01.2018	Unsecured Loan - Praveen Gupta A/c	2,00,000	Repayment of unsecured loan of directors
22.02.2018	Unsecured Loan - Praveen Gupta A/c	7,00,000	Repayment of unsecured loan of directors
22.02.2018	Unsecured Loan - Praveen	70,00,000	Repayment of unsecured loan of

	Gupta A/c		directors
27.03.2018	Unsecured Loan - Praveen Gupta A/c	85,00,000	Repayment of unsecured loan of directors
19.07.2018	Unsecured Loan - Praveen Gupta A/c	20,00,000	Repayment of unsecured loan of directors
26.10.2018	Unsecured Loan - Praveen Gupta A/c	7,00,000	Repayment of unsecured loan of directors
02.03.2019	Unsecured Loan - Praveen Gupta A/c	2,00,000	Repayment of unsecured loan of directors
	Total (B)	1,97,50,000	
C. Keshika Exports Private Limited			
31.08.2018	Keshika Exports Private Limited	2,49,338	Payment of interest on unsecured loan
	Total (C)	2,49,338	
	Total (A+B+C)	**2,80,99,338**	

Repayment to Non-Related Parties			
D. Dyna Rasayan Udyog Private Limited			
27.08.2018	Dyna Rasayan	40,00,000	Repayment of

	Udyog Private Limited		unsecured loan
28.08.2018	Dyna Rasayan Udyog Private Limited	45,00,000	Repayment of unsecured loan
29.08.2018	Dyna Rasayan Udyog Private Limited	7,29,987	Repayment of interest on unsecured loan
29.08.2018	Dyna Rasayan Udyog Private Limited	65,00,000	Repayment of unsecured loan
	TOTAL (D)	1,57,29,987	
E. GVR Electronics Private Limited			
27.08.2018	GVR Electronics Private Limited	25,00,000	Repayment of unsecured loan
29.08.2018	GVR Electronics Private Limited	25,00,000	Repayment of unsecured loan
31.08.2018	GVR Electronics Private Limited	25,00,000	Repayment of unsecured loan
04.09.2018	GVR Electronics Private Limited	15,00,000	Repayment of unsecured loan
	Total (E)	90,00,000	
F. GVR Consulting Services Ltd.			
04.09.2018	GVR Consulting Services Ltd.	10,00,000	Repayment of unsecured loan
11.09.2018	GVR Consulting	25,00,000	Repayment of

	Services Ltd.		unsecured loan
24.09.2018	GVR Consulting Services Ltd.	25,00,000	Repayment of unsecured loan
25.09.2018	GVR Consulting Services Ltd.	15,00,000	Repayment of unsecured loan
12.10.2018	GVR Consulting Services Ltd.	25,00,000	Repayment of unsecured loan
	Total (F)	1,00,00,000	
	Total (D+E+F)	**3,56,29,987**	
	Grand Total (A+B+C+D+E+F)	**6,37,29,325**	

viii. The details of the transaction undertaken by the Corporate Debtor with each party is set out below.

1. Respondent No.1, Mr. Praveen Gupta:

(a) On examining of the ledger account of Respondent No.I, Mr. Praveen Gupta, maintained by the Corporate Debtor from 27.08.2017 to 27.08.2019, it was observed by the Applicant that the Corporate Debtor had a payable balance of INR 4,10,00,000 as on 27.08.2017 towards unsecured loan given by the Respondent No. I to the Corporate Debtor. This payable balance increased to INR 17,41,12,032 as on 30.07.2019.

(b) The antecedent liability of the Corporate Debtor towards Respondent No. 1 (as on 27.08.2017) was discharged by the Corporate Debtor by making repayment of the loan in the following manner:

Date	Amount (INR)	Purpose
19.12.2017	1,00,000	Repayment of unsecured loan
16.01.2018	2,00,000	Repayment of unsecured loan

22.02.2018	7,00,000	Repayment of unsecured loan
22.02.2018	70,00,000	Repayment of unsecured loan
27.03.2018	85,00,000	Repayment of unsecured loan
15.06.2018	3,50,000	Repayment of unsecured loan
19.07.2018	20,00,000	Repayment of unsecured loan
26.10.2018	7,00,000	Repayment of unsecured loan
02.03.2019	2,00,000	Repayment of unsecured loan
Total	1,97,50,000	

2. Respondent No.2, Mr. Arun Gupta:

(a) On examining of the ledger account of Respondent No.2, Mr. Arun Gupta, maintained by the Corporate Debtor from 27.08.2017 to 27.08.2019, it was observed by the Applicant that the Corporate Debtor had a payable balance of INR 70,00,000 as on 27.08.2017 towards unsecured loans given by the Respondent No.2 to the Corporate Debtor. This payable balance increased to INR 16,02,92,084/- as on 30.07.2019.

(b) The antecedent liability of the Corporate Debtor towards Respondent No. 2, Mr. Arun Gupta (as on 27.08.2017) was discharged by the Corporate Debtor by making repayment of the loan in the following manner:

Date	Amount (INR)	Purpose
06.09.2017	20,00,000	Repayment of unsecured loan
07.10.2017	10,00,000	Repayment of unsecured loan

22.11.2017	20,00,000	Repayment of unsecured loan
05.12.2017	40,00,000	Repayment of unsecured loan
Total	90,00,000	

3. Respondent No.4, GVR Consulting Services Pvt. Ltd.-

(a) The Corporate Debtor entered into a Loan Agreement dated 17 August 2017 with Respondent No.4, GVR Consulting Services Pvt. Ltd. wherein Respondent No.4, GVR Consulting Services Pvt. Ltd. agreed to lend an amount of INR 2,00,00,000 to the Corporate Debtor at an interest of 8% per annum. The said loan was secured by way of issuance of postdated cheques of the principal amount equivalent to the total loan outstanding. The term of the Loan Agreement was 2 years.

(b) On examining of the ledger account of Respondent No. 4, GVR Consulting Services Pvt. Ltd. from 27 August 2017 to 27 August 2019 maintained by the Corporate Debtor, it was discovered that the antecedent liability was discharged by the Corporate Debtor in the following manner:

Date	**Amount (INR)**	**Purpose**
04.09.2018	10,00,000	Repayment of unsecured loan
11.09.2018	25,00,000	Repayment of unsecured loan
24.09.2018	25,00,000	Repayment of unsecured loan
25.09.2018	15,00,000	Repayment of unsecured loan
12.10.2018	25,00,000	Repayment of unsecured loan
Total	1,00,00,000	

4. Respondent No.5, Keshika Exports Private Limited

(a) On examining of the ledger account of Respondent No.5, Keshika Exports Private Limited maintained by the Corporate Debtor from 27.08.2017 to 27.08.2019, it was observed by the Applicant that the Corporate Debtor had a payable balance of INR 3,20,02,688, as on 27 August 2017, towards unsecured loans given by the Respondent No.5, Keshika Exports Private Limited to the Corporate Debtor.

(b) The antecedent liability of the Corporate Debtor towards Respondent No. 5, Keshika Exports Private Limited (as on 27.08.2017) was discharged by the Corporate Debtor by making repayment of the loan in the following manner:

Date	Amount (INR)	Purpose
31.08.2018	2,49,338	Payment of interest on unsecured loan

5. Respondent No.6, Dvna RasavanUdyog Private Limited:

(a) The Corporate Debtor had entered into a Loan Agreement dated 5.12.2015 with Respondent No.6, Dyna Rasayan Udyog Private Limited, wherein Respondent No.6 agreed to lend an amount of INR 3,00,00,000 to the Corporate Debtor at an interest of 10% per annum. The term of the Loan Agreement was 1 year.

(b) As per the ledger of Respondent No.6, Dyna Rasayan Udyog Private Limited maintained by the Corporate Debtor from 27.08.2017 to 27.08.2019, the Corporate Debtor had a payable balance of INR 2,04,48,767 as on 27.08.2017. The aforesaid antecedent liability of the Corporate Debtor towards Respondent No. 6 (as on 27.08.2017) was discharged by the

Corporate Debtor by making repayment of the loan in the following manner:

Date	Amount (INR)	Purpose
27.08.2018	40,00,000	Repayment of unsecured loan
28.08.2018	45,00,000	Repayment of unsecured loan
29.08.2018	7,29,987	Repayment of interest on unsecured loan
29.08.2018	65,00,000	Repayment of unsecured loan
Total	1,57,29,987	

6. Respondent No.7, GVR Electronics Pvt. Ltd.-

(a) Corporate Debtor had entered into a Loan Agreement dated 17.08.2017 with Respondent No.7 wherein Respondent No.7 agreed to lend an amount of INR 2,00,00,000 to the Corporate Debtor at an interest of 8% per annum. The said loan was secured by way of issuance of post-dated cheques of the principal amount equivalent to the total loan outstanding.

(b) On examining of the ledger account of Respondent No.7, GVR Electronics Pvt. Ltd. maintained by the Corporate Debtor from 27.08.2017 to 27.08.2019, it was observed by the Applicant that the Corporate Debtor had a payable balance of INR 1,00,00,000 as on 27.08.2017 towards unsecured loans given by the Respondent No.7, GVR Electronics Pvt. Ltd. to the Corporate Debtor.

(c) The antecedent liability of the Corporate Debtor towards Respondent No. 7 (as on 27.08.2017) was discharged by the

Corporate Debtor by making repayment of the loan in the following manner:

Date	Amount (INR)	Purpose
27.08.2018	25,00,000	Repayment of unsecured loan
29.08.2018	25,00,000	Repayment of unsecured loan
31.08.2018	25,00,000	Repayment of unsecured loan
04.09.2018	15,00,000	Repayment of unsecured loan
Total	90,00,000	

ix. That upon inquiring from Mr. Praveen Gupta/Respondent No. 1, Mr. Arun Gupta/Respondent No. 2 and Mr. Udal Singh/Respondent No.3 about the aforesaid transactions, the above Respondents Mr. Praveen Gupta/Respondent No. 1, Mr. Arun Gupta/Respondent No. 2 responded stating the following:

(a) In the year 2015-2016, the company started facing financial constraints as it was unable to operate at minimum level. To ensure the company is run as a going concern, they arranged for unsecured loans from various parties including their friends and relatives.

(b) Such loans were received to support the functioning of the company in the normal course of business and financial affairs of the company. Moreover, there were commitment cheques issued by the company under their signature against these kinds of loans, in the form of Post-dated Cheques, which is not

honoured would have created criminal breach of trust on the company.

(c) The usage of the money (s) so borrowed was for the business purposes of the company and these were customary intercorporate deposits which are generally raised by the companies in their normal course of business to meet business requirements.

(d) The repayment of unsecured loan availed from non-related parties was funded by them, out of their own sources to safeguard the credibility of the company and ourselves. The fact may be reverified upon analysis of the ledger accounts and bank accounts of the promoter (Mr. Praveen Gupta) which demonstrates that any repayment towards unsecured loan made to any party (whether related or not) was first funded to NTL and then repayment was made.

(e) That the auditor have considered only the debit transactions while reporting the repayment of unsecured loans taken from them viz. Praveen Gupta and Arun Gupta and the amount introduced by them into the company during the period under review has not been taken into consideration. They had introduced funds into the company whenever required in order to ensure that the company is kept as a going concern in the interest of all the stakeholders and funds are available to meet the expenses and towards working capital.

9. That the Applicant further contended that the response submitted by Respondent No. I, Mr. Praveen Gupta and Respondent No.2 and Mr. Arun Gupta itself shows that certain repayment were made by the Corporate Debtor to Respondent No.1, Mr. Praveen Gupta, and Respondent No.2 Mr.

Arun Gupta and non-related parties in discharge of their antecedent liabilities. Therefore, the Corporate Debtor discharged its liability towards related parties (Respondent No. 1, Respondent No 2 and Respondent No. 5) and non-related parties (Respondent No. 4, Respondent No. 6 and Respondent No. 7) in preference to the dues of the financial creditors.

10. The Applicant is of the opinion that the Corporate Debtor has given preference to its related parties (Respondent No. 1, Respondent No 2 and Respondent No. 5) and non-related parties (Respondent No. 4, Respondent No. 6 and Respondent No. 7) for the following reasons that:

(a) the Corporate Debtor made a transfer of its assets (by making repayments) to its related parties (Respondent No. 1, Respondent No 2 and Respondent No 5) and non-related parties (Respondent No. 4, Respondent No. 6 and Respondent No. 7);

(b) the aforesaid repayment were made by the Corporate Debtor on account of the antecedent financial debt/liability owed by the Corporate Debtor its related parties (Respondent No. 1, Respondent No 2 and Respondent No 5) and non-related parties (Respondent No. 4, Respondent No. 6 and Respondent No. 7);

(c) the aforesaid repayment were made to related parties (Respondent No. 1, Respondent No 2 and Respondent No 5) at a relevant time as per Section 43 (4) (a) of the Code i.e. during the period of two years preceding the insolvency commencement date, i.e. 27.08.2019;

(d) the aforesaid repayment were made to non-related parties (Respondent No. 4, Respondent No. 6 and Respondent No. 7) at a relevant time as per Section 43 (4) (b) of the Code i.e. during the period of one year preceding the insolvency commencement date, i.e. 27.08.2019;

(e) Such payment had the effect of putting related parties (Respondent No. 1, Respondent No 2 and Respondent No 5) and non-related parties (Respondent No. 4, Respondent No. 6 and Respondent No. 7) of the Corporate Debtor in a beneficial position then it would have been in the event of distribution of assets of the Corporate Debtor being made in accordance with Section 53 of the Code.

11. It is further submitted that the payments made by the Corporate Debtor to its related parties (Respondent No. 1, Respondent No 2 and Respondent No 5) and non-related parties (Respondent No. 4, Respondent No. 6 and Respondent No. 7), do not fall under any of the exceptions set out in Section 43 (3) of the Code. These payments were not made in the ordinary course of the business or financial affairs of the Corporate Debtor.

12. Therefore, in view of the aforesaid, in the opinion of the Applicant, the related parties (Respondent No. 1, Respondent No 2 and Respondent No 5) and non-related parties (Respondent No. 4, Respondent No. 6 and Respondent No. 7) of the Corporate Debtor are liable to refund the following amount to the account of the Corporate Debtor:

S. No.	Name of Respondent	Amount (INR)
1.	Respondent No. 1	1,97,50,000
2.	Respondent No. 2	90,00,000
3.	Respondent No. 4	1,00,00,000
4.	Respondent No. 5	2,49,338
5.	Respondent No. 6	1,57,29,987
6.	Respondent No. 7	90,00,000

13. From the review of the TAR, the financial statements of the Corporate Debtor for the FY 2018-2019 and the documents provided by the ex-

management, the Applicant is of the opinion that the Corporate Debtor has undertaken certain undervalued transaction in terms of Section 45 of the Code, as elaborated herein below:

a. On examining the financial statements of the Corporate Debtor for the FY 2018-2019 and the documents related to sale/purchase of assets provided by the ex-management, it was noticed that the assets owned by the Corporate Debtor (Plant and Machinery and Furniture and Fittings) having gross value of INR 17,40,49,410/- were sold to various parties from 25.10.2018 to 15.12.2018.

b. It is imperative to note that as per financial statements for the FY 2018-2019, the written down value/net value of the assets were INR 12,04,000,00/-. However, as per the chart provided by the ex-management showing sale of assets and bills issued by the Corporate Debtor, the assets were sold to various parties for INR 9,11,95,979/ causing a loss of INR 2,92,04,021/- to the Corporate Debtor.

c. On making enquiry and questioning, Mr. Praveen Gupta/Respondent No. 1, Mr. Arun Gupta/Respondent No. 2 and Mr. Udal Singh, Respondent No. 3 about the aforesaid transaction, the above Respondents Mr. Praveen Gupta/Respondent No. 1 and Mr. Arun Gupta/Respondent No. 2 responded stating that the transactions/sale were made at arm's length price to ensure actual realisable value. It was stated that as such the disposal of the assets was made on arm length price and the same was not significantly lower than the price at which the company sold the same and the availing pricing/tentative values. Further, it was stated that the assets were sold on the basis of

quotation received from various parties and the tentative values of the assets provided by the expert.

14. That no supporting documentation is provided by the management to explain what the fair value of the disposed assets were.

15. That the Applicant submitted that fraudulent or wrongful trading was undertaken by the Respondent No, 1,2 and 3 to defraud the creditors of the Corporate Debtor.

16. That the Corporate Debtor had, vide a Sale Agreement dated 21.06.2016, sold a property situated at B-46, Sector 2, NOIDA to one Indian Herbs Traders LLP for a total sale consideration of INR 1,70,00,000. As per the said Sale Agreement, it was agreed between the parties that a sum of INR 30,00,000 shall be held back by Indian Herbs Traders LLP till the Corporate Debtor has completed the pending work to the satisfaction of the Indian Herbs Traders LLP. Further, it records that in case the Corporate Debtor does not fulfil the deliverables, Indian Herbs Traders LLP shall have the right to adjust the outstanding payment against the pending work.

17. The ledger of Indian Herbs Traders LLP maintained by the Corporate Debtor for the period from 27.08.2017 to 27.08.2019 show that a sum of INR 1,50,00,000 was received from the said Indian Herbs Traders LLP. Further, as per the Letter dated 10.11.2016, the Applicant observed that a balance of INR 21,70,000 was withheld by Indian Herbs Traders LLP against the commitment of Corporate Debtor to make repairs.

18. That there were certain deliverables from the CD's side with respect to repairs of the premises. The buyer LLP withheld the sum of Rs. 20 lakh against the commitment of CD which was forfeited and the written off as the same was done in the year ending on 2018-19".

19. That it is pertinent to note that no efforts had been made by the Respondents for the recovery of the said INR 20 lakhs, and the amount was suspiciously written off from the books of accounts of the Corporate Debtor.

20. The Respondents Nos. 1 to 3 contends the following in their reply dated 03.03.2021:

i. That the Respondents were related to the Corporate Debtor in a financial and employment capacity prior to the commencement of the Corporate Insolvency proceedings.

ii. The said Application intends to redistribute the collected monies as per the waterfall mechanism under section 53 of the Insolvency and Bankruptcy Code, 2016 for the benefit of Committee of Creditors (**CoC**) of the Corporate Debtor who have already been paid the outstanding debt under the repayment scheme of the approved Resolution Plan.

iii. That after the approval of resolution plan, the corporate insolvency proceedings stand completed.

iv. The fact of the present case filed by the RP is identical to M/S Venus Recruiters Private Limited v. Union of India and Ors. [2020]159CLA 533 (Delhi), wherein, the Hon'ble Delhi High Court made a detailed note about the lack of maintainability of a avoidance application though filed prior to the approval of the resolution plan, yet pending past approval of a resolution plan.

v. A bare perusal of the section 60(1), (2), (5) read with sections 10, 12, 14, 16, 31 of the IBC, 2016 makes it clear that the Adjudicating Authority is only empowered to take up and conclusively adjudicate an insolvency application in a stipulated statutory time frame, thereby past the approval of the Resolution Plan, this Hon'ble Court can't pursue this matter.

vi. The Said Applicant has no locus standi to appear as a former RP of the Corporate Debtor after the approval of a resolution plan. It is submitted that on a bare perusal of section 23(1) and provision to the section 23(1) of the IBC '16, it is clear that the RP is only empowered during the insolvency process and can't continue to manage the operations after an order approving the Resolution Plan is passed under section 31(1) of IBC 2016, therefore the perusal of the present avoidance application is bad in law.

vii. That a bare perusal of section 35A (3) of IBC, 2016 shows, the RP has to register an avoidance application by the 135th day from the

commencement of the insolvency process, which this matter has exceeded, as the CIRP commences on 27.08.2019 and the Said Application, was filed on 24.08.2020. It is also submitted that the RP, Said Applicant, can't further pursue the Said Application without abiding, mentioning the statutory timeline about the Auditing Report, Reporting, Opinion of the RP, and the registration of the Avoidance Application in the Approved Resolution Plan. It is submitted that Hon'ble Delhi High Court in the case M/S Venus Recruiters Pvt. Ltd. (Supra) observed that a statutory timelines shall be strictly followed by the RP because speeding up of insolvency process is the ethos of the IBC, 2016.

viii. That prima facie, the falsely alleged objectionable transactions can't be found to be apart of the repayment fund for the CoC under the approved Resolution Plan, as per regulation 17 (b), IBBI (Insolvency Resolution Process For Personal Guarantors To Corporate Debtors) Regulations read with section 30 of IBC, 2016, to the NCLT, thereby making the Said Application beyond the scope of the provisions under the IBC, 2016 and other related regulations thereto.

ix. Even if the false allegations about the objectionable transactions are merely presented on Form H, an internal compliance form, attached while submission of the Resolution Plan to the NCLT, the same would lack any court recognition, legal sanction, or eminence in execution of funds for outstanding debts as per the approved Resolution Plan.

x. Section 43, 45, 49, 66 of the IBC, 2016 have different legal enquire that can't be read in a homogeneous manner even if they result in similar liability. Thereby each of said section shall be presented by filing separate application to the NCLT. The Apex Court in the matter, Anuj Jain Interim Resolution JAL vs Axis Bank Limited (2020) 155 CLA 139 (SC) covers similar observation.

21. The Respondents Nos. 4, 5 and 7 in their reply have stated almost same statement as stated by the Respondent no. 1, 2 and 3, except the followings: -

i. That the Respondent No.4, 5 and 7 ('Respondents') were related to the Corporate Debtor in a financial capacity prior to the commencement of the CIR Process.

ii. No cause of action for preference transactions arises in particular against the Respondent No.4, who had sanctioned loans backed by post-dated cheques for two years, in the course of a regular business dealing, prior to the commencement of the corporate insolvency process. It is submitted that these loans are deemed to be secure loans and therefore prima facie any default or pendency in payment would have either attracted criminal liability or deemed the said Respondents as secured creditors having the highest priority under the waterfall mechanism as per section 53 o1 the IBC during the corporate.

22. The Respondent No. 6 in its reply dated 17.03.2021 has also stated almost same statement as stated by the Respondent no. 1, 2 and 3, except the followings:

i. It is submitted that the Supreme Court in M/s Innoventive Industries vs. ICICI Bank & Ors. bearing citation [(2018) 1 sec 407] observed that one of the important objectives of the Code is to bring the insolvency law in India under a single unified umbrella with the object of speeding up of the insolvency process. However filing of present application by the Resolution Professional way beyond the timelines as prescribed in Regulation 35A(3) of the CIRP Regulations is not only an attempt to derail the process beyond his jurisdiction but also an attempt to abuse the court proceedings.

ii. The allegations made in the present application qua the answering respondent does not fulfil the ingredients as specified in Section 43 of the I&B Code.

iii. The transactions between the Corporate Debtor with the answering Respondent was made in the ordinary course of the

business as defined in Section 43 (3) (a) as the Corporate Debtor had admittedly availed a loan of Rs.3,00,00,000/- out of which only Rs. 2,00,00,000/- was disbursed to the Corporate Debtor by the answering Respondent vide Loan Agreement dated 5.12.2015 at an interest rate 10% p.a. for the period of 2 years. It was the Corporate Debtor who failed to pay the loan amount back to the Corporate Debtor. The transaction between the period 27.08.2018 to 29.08.2018 was just a repayment of loan amount alongwith interest that was borrowed by the Corporate Debtor in the year December 2015and the same was already done on 4thDecember, 2017 and the same is covered by Section 43(3)(a) of the I&B Code and cannot be stated to be preferential transactions.

iv. Further on bare perusal of section 43(2), it can be seen that the transactions referred to by the Resolution Professional in its application is neither related to transfer of any property or an interest thereof of the corporate debtor for the benefit of the answering respondent for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor nor the said transfer puts the answering respondent in any beneficial position as the transactions were towards the repayment of Loan advanced by the answering respondent and the answering respondent ceased to be the creditor of the Corporate Debtor as the loan amount was repaid back by the Corporate Debtor.

v. The Hon'ble Supreme Court in the case titled "Jaypee Infratech Limited Vs Axis Bank Limited & Ors." bearing Civil Appeal No. 8512- 8527 of 2019 held that only if twin conditions specified in sub-section (2) of Section 43 are satisfied, the transaction would be deemed to be of preference. The Hon'ble Supreme Court of India further held that merely giving of the preference and putting the beneficiary in a better position is not enough. For a preference to become an offending one for the purpose of Section

43 of the Code, another essential and rather prime requirement is to be satisfied that such event, of giving preference, ought to have happened within and during the specified time,referred to as "relevant time".

vi. It is submitted that the payment made on 27.08.2018 and 28.08.2018 would not come within the meaning of 'relevant time'.

vii. It is submitted that in the present case the Resolution Plan was approved by the Hon'ble Adjudicating Authority vide its order dated 28.01.2021 and as such the present application cannot be prosecuted by Resolution Professional since his mandate has come to an end.

viii. The Respondent No. 6 in its Preliminary submissions submitted that:

a. During December, 2015 the Corporate Debtor had approached the respondent No.6 for financial aid representing that the Corporate Debtor shall return the same with interest that shall be paid quarterly within 2 years. Based on the representation of the Corporate Debtor a loan agreement dated 05.12.2015 was executed between the Corporate Debtor and respondent No.6 wherein the respondent No.6 advanced a loan of Rs.2,00,00,000/- out of Rs.3,00,00,000/- to the Corporate Debtor at an interest rate 10% p.a. for the period of 2 years.

b. The Corporate Debtor started defaulted in paying the loan amount back to the Corporate Debtor within the period of 2 years. It is submitted that various meetings were held between the parties with respect to the outstanding of more than Rs.2 Crores on part of the Corporate Debtor. During these meetings the officials of the Corporate Debtor assured respondent No.6 that the outstanding dues

on behalf of the Corporate Debtor shall be paid by March, 2018.

c. Despite the assurances of the Officials of the Corporate Debtor, the Corporate Debtor failed to clear the outstanding amount and as such the Corporate Debtor vide letter dated 20.04.2018 called upon the Corporate Debtor to clear the outstanding amount of Rs.2,04,43,836/- including interest due till 01.04.2020. No heed was paid by the Corporate Debtor and as such further reminder letters dated 14.05.2018 and 16.07.2018 was sent to the Corporate Debtor by the Respondent No.6.

d. The Corporate Debtor vide telephonic conversation confirmed the respondent no. 6 that the Corporate Debtor shall clear the dues of the answering Respondent by August 2018 and it was then by August 2018 the transactions were carried out by the Corporate Debtor towards the payment of loan amount alongwith interest borrowed by the Corporate Debtor from the answering Respondent in December, 2015. It is submitted that the transaction of Rs. 7,29,987/- made by the Corporate Debtor was towards the interest amount to be paid by, the Corporate Debtor on the principal amount for the period from 01.04.2018 to 29.08.2018. The said amount was transferred by the Corporate Debtor after deducting the TDS of Rs. 81,110 on Rs. 8,11,097/-. However, the Corporate Debtor failed to deposit the TDS against the said amount and as such the Respondent no. 6 vide email dated 07.06.2019 also called upon the Corporate Debtor to deposit the TDS as the same is not reflecting in Form 26AS of the Respondent no.6.

e. The transactions were done by the Corporate Debtor during its regular Course of Business towards the repayment of Loan amount borrowed by the Corporate Debtor from the Respondent no. 6 during September 2015 and does not fall under the purview of Section 43 of the I&B Code.

23. The Applicant by filing her rejoinder to respondent nos. 1, 2 and 3 dated 31.03.2021 has stated almost same statement as stated by her in the application except the following:

i. That the Resolution Plan was approved vide order dt. 28.01.2021 passed in I.A No. 4588 of 2020, and same is rectified on 11.03.2021

ii. That the Section 43, Section 45, Section 51 and Section 66 of the Code, empowers the resolution professional to report certain preference transaction, undervalued transaction, extortionate transaction and fraudulent and wrongful trading with the Adjudicating Authority. In the event, the Adjudicating Authority determines that the corporate debtor has been subjected to any such transactions, it may pass an order under Section 44, Section 46 and Section 51, Section 66 and Section 67 of the Code for reversal of such transactions and/or seeking contribution for such transactions. Notably, the Code and the underlying regulations do not provide any time frame within which the Adjudicating Authority is required to adjudicate such applications.

iii. That Section 26 of the Code provides that the pendency of an avoidance application will not affect any of the proceedings of the corporate insolvency resolution process ("CIRP"). The adjudication of avoidance transaction are separate and independent proceedings and shall not affect any proceedings of the CIRP including but not limited to

application for approval of the resolution plan filed by the resolution professional.

iv. As far as Venus Judgment is concerned, the facts of the Venus Judgment are distinguishable from the present case. In that case, the avoidance application was filed by the resolution professional after the application for approval of the resolution plan was filed under Section 30 (6) of the Code. Whereas, in the present case, the Applicant filed the avoidance application on 24.09.2020 i.e. prior to the application for approval of the resolution plan which was filed on 28.09.2020.

v. The resolution plan in the present case provides that the benefit from such applications will be passed through to the Financial Creditors and therefore, the application is not for the benefit of the Corporate Debtor.

vi. The resolution plan was approved by this Adjudicating Authority after considering and examining the above clause related to avoidance transaction and the same is binding on all the creditors, stakeholders, ex-management of the Corporate Debtor.

vii. The Hon'ble Supreme Court of India, in the case of Arcelor Mittal India Private Limited v. Satish Kumar Gupta & Ors., (2019) 2 SCC 1, has observed that the model timelines have to be followed as "closely as possible".

viii. In case of Brilliant Alloys Private Limited v. Mr. S. Rajagopal & Ors, 2018 SCC Online SC 3154, the question which arose for consideration before the Hon'ble Apex Court was whether withdrawal is permissible after the issuance of invitation for expression of interest in light of Regulation 30A of the CIRP Regulations. The Hon'ble Supreme Court held that "According to us, this Regulation has to be read along with the main provision Section 12A

which contains no stipulation. Accordingly, this stipulation can only be construed as directory depending on the facts of the case. "

ix. That the Code does not prescribe any time period within which the application for avoidance has to be filed by the resolution professional of the corporate debtor. The time period within which the application has to be filed by the resolution professional is prescribed under Regulation 35A of the CIRP Regulation. However, in light of the above Judgement of Hon'ble Supreme Court, the regulation must be read along with the Code which does not prescribe any time period within which the application has to be filed by the resolution professional for avoidance of certain transaction.

x. The Applicant would also like to place on record certain facts to explain as to why the present Application could not be filed within the 135th day timeline:

a) During the first meeting of the Committee of Creditors ("CoC") held on 30.10.2019, it was proposed to replace Ms. Preeti Jaiswal (the IRP) and appoint the Applicant as the RP of the Corporate Debtor. The Applicant was confirmed as an RP by this Hon'ble Adjudicating Authority vide order dated 18.12.2019 which was received by the Applicant on 27.12.2019. Therefore, the Applicant could take control over the Corporate Debtor only on 27.12. 2019, i.e. the 122nd day.

b) Pursuant to her duties under Section 25 (2) (j) of the Code, the Applicant took steps to determine if the Corporate Debtor has undertaken any preferential, undervalued, extortionate or fraudulent transactions. For such purpose, given the technical nature of the transactions, it was

proposed that a Transaction Auditor be appointed to assist the Applicant. Notably, the CoC approved the appointment of the Transaction Auditor only on 19.02.2020, i.e. the 176th day and the Transaction Auditor was appointed on 19.02.2020.

c) In the meanwhile, due to outbreak of Covid 19, lockdown was imposed by the Central Government which caused hindrance in the CIRP of the corporate debtor, including the audit process.

d) The draft TAR was submitted by the Transaction Auditor only on 06.07.2020, which was reviewed by the Applicant to form an opinion and determine whether the Corporate Debtor is subject to any avoidance transaction under Regulation 35A of the CIRP Regulations. On review of the TAR, examination of the books and other relevant records of the Corporate Debtor, certain transactions undertaken by the Corporate Debtor were discovered, which in the opinion of the Applicant fall within the scope of the preference transactions, undervalued transaction and fraudulent or wrongful trading within the meaning of the provisions of the Code.

e) Thereafter a copy of the TAR was also shared with the Respondents Nos. 1, 2 and 3, for them to submit their responses for the transactions identified by the Transaction Auditor. The Respondents Nos. 1, 2 and 3 from time to time submitted their response on 13.07.2020, 12.08.2020, 30.08.2020, 31.08.2020 and 01.09.2020.

f) After taking into account the responses of Respondents Nos. 1, 2 and 3, and further

discussions between the Applicant and the Transaction Auditor, the final TAR was submitted only on 09.09.2020, i.e. the 252th day.

g) The Applicant upon receiving the final TAR proceeded with filing the present Application on 24.09.2020.

ix. No separate applications are required to be filed for each transaction under different sections.

24. The Applicant in its rejoinder to respondent nos. 4 dated 08.04.2021 contends that:

i. The Applicant on review of the TAR, financial statements and books of account of the corporate debtor came to know about the following transaction:

a) The Corporate Debtor had entered into a Loan Agreement dated 17.08.2017 with Respondent No. 4, GVR Consulting Services Pvt. Ltd. wherein Respondent No.4, GVR Consulting Services Pvt. Ltd. agreed to lend an amount of INR 2,00,00,000 to the Corporate Debtor at an interest of 8% per annum. The said loan was secured by way of issuance of post-dated cheques of the principal amount equivalent to the total loan outstanding. The term of the Loan Agreement was 2 years.

b) On examining the ledger account of Respondent No. 4, GVR Consulting Services Pvt. Ltd. from 27.08.2017 to 27.08.2019 maintained by the Corporate Debtor, it was discovered that the antecedent liability was discharged by the Corporate Debtor by making repayment of INR 1,00,00,000/- from 04.09.2018 to 12.10.2018. The Applicant is of the opinion that the Corporate Debtor has given

preference to Respondent No. 4, GVR Consulting Services Pvt. Ltd. in the relevant period. Further, such payment had the effect of putting Respondent No. 4 in a beneficial position than it would have been in the event of distribution of assets of the Corporate Debtor being made in accordance with Section 53 of the Code.

ii. No separate applications are required to be filed for each transaction under different sections.

iii. All the ingredients of section 43 and section 44 are met.

iv. Further the transaction undertaken by the Corporate Debtor was not in the ordinary course of the business or financial affairs of the Corporate Debtor towards the repayment of the loan amount and therefore, does not fall in any of the exceptions set out in Section 43 (3) of the Code. It is submitted that since Respondent No. 4 is not a **related party** of the Corporate Debtor, the relevant period for the purpose of Section 43 (4) of the Code is one year period prior to the insolvency commencement date (from 27.08.2018-27.08.2019).

25. The Applicant in its rejoinder to respondent nos. 5 dated 08.04.2021 contends that:

i. Applicant on review of the TAR, financial statements and books of account of the corporate debtor came to know about the following transaction:

a) On examining the ledger account of the Respondent No. 5, Keshika Exports Private Limited maintained by the Corporate Debtor from 27.08.2017 to 27.08.2019, it was discovered that the Corporate Debtor had a payable balance of INR 3,20,02,688/- as on 27.08.2017 towards the unsecured loans given by the

Respondent No. 5, Keshika Exports Private Limited to the Corporate Debtor.

b) The antecedent liability of the Corporate Debtor towards Respondent No. 5, Keshika Exports Private Limited was charged by the Corporate Debtor by making payment of interest of INR 2,49,338/-. The Applicant is of the opinion that the Corporate Debtor has given preference to Respondent No. 5, Keshika Exports Private Limited in the relevant period to its related party. Further, such payment had the effect of putting Respondent No. 5 in a beneficial position than it would have been in the event of distribution of assets of the Corporate Debtor being made in accordance with Section 53 of the Code.

ii. No separate applications are required to be filed for each transaction under different sections.

iii. All the ingredients of section 43 and section 44 are met.

26. The Applicant in its rejoinder to respondent nos. 6 dated 31.03.2021 contends that:

i. the Applicant on review of the TAR, financial statements and books of account of the corporate debtor came to know about the following transaction:

a) The Corporate Debtor entered into a Loan Agreement dated 5.12.2015 with Respondent No. 6, Dyna Rasayan Udyog Private Limited, wherein Respondent No. 6 agreed to lend an amount of INR 3,00,00,000 to the Corporate Debtor at an interest of 10% per annum. The term of the Loan Agreement was one year.

b) As per the ledger of Respondent No. 6, Dyna Rasayan Udyog Private Limited, maintained by the Corporate Debtor from 27.08.2017 to 27.08.2019, the

Corporate Debtor had a payable balance of INR 2,04,48,767 as on 27.08.2017. The aforesaid antecedent liability of the Corporate Debtor towards Respondent No. 6 (as on 27.08.2017) was discharged by the Corporate Debtor by making repayment of INR 1,57,29,987 from 27.08.2018 to 29.08.2018.

c) Since Respondent No. 6, Dyna Rasayan Udyog Private Limited, is **not a related party** of the Corporate Debtor, the relevant period for purpose of Section 43 (4) of the Code is one year period prior to insolvency commencement date (from 27.08.2018 – 27.08.2019). Further, such payment had the effect of putting Respondent No. 6 in a beneficial position than it would have been in the event of distribution of assets of the Corporate Debtor being made in accordance with Section 53 of the Code.

ii. No separate applications are required to be filed for each transaction under different sections.

iii. M/s Venus Recruiters Private limited v. Union of India and Ors. is not applicable to the present case.

27. The Applicant in its rejoinder to respondent nos. 7 dated 08.04.2021 contends that:

i. The Applicant on review of the TAR, financial statements and books of account of the corporate debtor came to know about the following transaction:

a) The Corporate Debtor entered into a Loan Agreement dated 17.08.2017 with Respondent No. 7, wherein Respondent No.7 agreed to lend an amount of INR 2,00,00,000 to the Corporate Debtor at an interest of 8% per annum. The said loan was secured by way of issuance of post-dated cheques of the principal

amount equivalent to the total loan outstanding. The term of the Loan Agreement was 2 years.

b) On examining the ledger account of Respondent No. 7 from 27.08.2017 to 27.08.2019 maintained by the Corporate Debtor, it was discovered that the antecedent liability was discharged by the Corporate Debtor by making repayment of INR 90,00,000/- from 27.08.2018 to 04.09.2018.

c) The Applicant is of the opinion that the Corporate Debtor has given preference to Respondent No. 7 in the relevant period. Further, such payment had the effect of putting Respondent No. 4 in a beneficial position than it would have been in the event of distribution of assets of the Corporate Debtor being made in accordance with Section 53 of the Code.

ii. Further the transaction undertaken by the Corporate Debtor was not in the ordinary course of the business or financial affairs of the Corporate Debtor towards the repayment of the loan amount and therefore, does not fall in any of the exceptions set out in Section 43 (3) of the Code. It is submitted that since Respondent No. 7 is **not a related party** of the Corporate Debtor, the relevant period for the purpose of Section 43 (4) of the Code is one year period prior to the insolvency commencement date (from 27.08.2018-27.08.2019).

28. The Applicant has filed Final Affidavit dated 20.07.2021 states that:

i. Vide an order dated 14.07.2021, The Applicant was directed to place on record the status of the corporate insolvency resolution process ("CIRP") of the Corporate Debtor along with the submissions distinguishing the facts of the present case from the facts of M/s Venus Recruiters

Private Limited v. Union of India and Ors. 2020 159 CLA 533(Delhi).

ii. **Status of the CIRP**: The list of dates and events relevant for the adjudication of the present case are as follows:

Dates	Events
27.08.2019	Commencement of CIRP of the Corporate Debtor
18.12.2019	This Hon'ble Adjudicati.ng Authority appoints the Applicant as the Resolution Professional ("RP") of the Corporate Debtor (uploaded on the website on 27.12.2019)
09.09.2020	The Transaction Auditor, i.e. Pipara & Co., appointed by the RP to conduct the audit of the Corporate Debtor for the period 01.04.2016 till 27.08.2019, submitted the final Transaction Audit Report ("TAR"). The TAR was also placed before the members of the Committee of Creditors ("CoC")
22.09.2020	Final resolution plan ("Resolution Plan") submitted by the consortium of Mr. Onkar Nath Agarwal and Mrs. Saroj Agrawal ("Successful Resolution Applicants").
24.09.2020	Application filed by the RP before this Hon'ble Adjudicating Authority under Section 44, 45,46, 66 and 67 of the Code ("Avoidance Application") seeking avoidance of certain transactions entered into by the Corporate Debtor and discovered through the TAR.
23.09.2020-25.09.2020	E-voting conducted upon the Resolution Plan. The Resolution Plan was approved by 100%.
28.09.2020	Application, bearing IA No. 4588 of 2020, filed by the RP under Section 31(1) and 30(6), of the Code seeking approval by this Hon'ble

	Adjudicating Authority of the Resolution Plan.
28.01.2021 11.03.2021	IA No. 4588 of 2020 was allowed vide an order dated 28.01.2021, which was rectified vide an order dated 11.03.2021 (together "Plan Approval Order")

iii. As per the Plan Approval Order read along with the Resolution Plan; and upon my confirmation, the Applicant was appointed as the Monitoring Professional of the Corporate Debtor for the purposes of the implementation of the Resolution Plan.

iv. The Resolution Plan specifically dealt with the treatment of Avoidance Application and the proceeds, if any, received from the same.

v. In accordance with the provisions of the Resolution Plan, the Successful Resolution Applicants made a total payment of INR 22 Crores ("Resolution Amount") between 04.02.2021 to 13.04.2021 towards the CIRP Cost and payments to the creditors under the Applicant's supervision as the Monitoring Professional. Though the complete payments had been made by the Successful Resolution Applicants, payments to some creditors had been returned due to changes in the bank details/incorrect bank details/merger of various banks due to which the IFSC Codes had changed, though those payments were also subsequently made. Further, certain payments made towards the dues of foreign entities had also not been credited (till the meeting of the Monitoring Committee) to the concerned accounts due to technical issues and close of market, though those payments were also subsequently made. It is reiterated that the payments had been made from the end of the Successful Resolution Applicant.

vi. Further as per the Resolution Plan, the existing board of directors have been removed and been reconstituted. As on date, Mr. Onkar Nath Aggarwal, Smt. Saroj Aggarwal and Mr. Vipin Kumar Aggarwal have taken over as the new board of directors of the Corporate Debtor. After payment of the complete Resolution Amount. The Applicant have also handed over the Original Share Certificate of investments made by the Corporate Debtor, copy of all records/documents available with me in pen drive and physical possession of the assets of the Corporate Debtor, along with all movables/inventory/machines, to the Successful Resolution Applicant. As on date, the Resolution Plan stands implemented.

vii. The 5th meeting of the Monitoring Committee of the Corporate Debtor was held on 15.04.2021. During the meeting, discussions were held regarding who would pursue the Avoidance Application.

29. The Applicant in its written submissions dated 07.08.2021 submitted that:

i. While the role of the RP comes to an end with the passing of the order approving the Resolution Plan, the Venus Judgement itself carves an exception to the rule.

ii. A reading of the Venus Judgement reveals that the rationale for holding that avoidance applications cannot continue beyond plan approval is that as per the Hon'ble Delhi High Court, the avoidance applications are meant to give some benefit to the creditors of the corporate debtor and the same is not meant for the corporate debtor in its new avatar. The Court noted that any property which is subject to such applications would have to form part of the final resolution plan and the resolution plan would have to take into consideration such amounts and benefits which

can be given to the corporate debtor for the benefit of the CoC. The benefit of avoidance application is not meant for the corporate debtor, after the resolution plan is considered by the CoC and approved by the NCLT.

iii. In the present case, the details regarding avoidance transactions were duly placed before the CoC at the time of consideration of the Resolution Plan and the CoC specifically directed the Resolution Applicant to include the above provision in the Resolution Plan. It is but obvious that the CoC was cognizant that the Avoidance Application may continue beyond plan approval and therefore, directed provision to be made for any realization in future. Further, it is also obvious that the CoC desired that these Avoidance applications should continue so that any future benefit could be distributed to the Financial Creditors.

iv. The Respondent's submissions are contrary to the Code and the approved Resolution Plan. The total value of the Avoidance Application is INR 9,49,00,000, which the Resolution Plan proposes to distribute amongst the financial creditors of NTL. In case the Avoidance Application is held to be infructuous, the erstwhile promoters and relevant counter-parties would be unjustly enriched at the expense of the financial creditors of NTL. Further, CoC would not be able to get the benefit of the proceeds of the Avoidance Application in future, which the CoC had kept in mind while approving the Resolution Plan. This would be contrary to the approved Resolution Plan and would negate the commercial wisdom of the CoC while approving the Resolution Plan. Further, it would defeat the objective of the Code in balancing the interest of the stakeholders as the parties to the avoidance transaction will benefit at the expense of the financial creditors.

v. The timelines for filing such avoidance applications are directory and not mandatory and the applicant has place reliance upon the following decisions:

30. Arcelor Missal India Private Limited v. Satish Kumar Gupta & Ors., (2019) 2 SCC 1, In Brilliant Alloys Private Limited v. Mr. S. Rajagopal & Ors., 2018 SCC Online SC 3154,

31. Apart from the above the applicant in her written submissions has also averred those statement, which she has stated in her application and rejoinder, therefore, it is needless to repeat the same.

32. Respondent Nos. 1,2 and 3 in its written submissions dated 09.08.2021 have stated almost same statement on the point of maintainability of the application as they have stated in their reply except the followings:

i. The RP had received the final audit report on dated 09.09.2020 pursuant to which filed the aforesaid application for avoidance transactions on 24.09.2020. The resolution professional after filing of the said application in the 20th COC meeting held on 25.09.2020 had merely informed the COC about the present application, however as such no explicit voting or consent of the CoC was taken prior to filing of the said application.

ii. The resolution professional deliberately kept the present application pending for a period of three months from 24.09.2020 till the resolution plan was approved by this Tribunal on dated 28.01.2021.

iii. As such no clause explicitly has been mentioned in the resolution plan wherein the pendency of the said application was mentioned or the same was not brought in the knowledge of the adjudicating authority before approval of the said resolution plan. In light of the said fact the Resolution Professional does not have the locus standi to pursue the aforesaid application.

iv. The respondents rely upon the observations made in the case of M/S Venus Recruiters Pvt. Ltd. wherein the Hon'ble

Delhi High Court has specified that the NCLT lacks the jurisdiction beyond the CIRP that has come to an end after the resolution plan is approved.

33. We have heard the learned counsel appearing for the applicant as well as the respondents and perused the averments made in the application, reply and rejoinder filed by the respective parties and written submissions filed on behalf of the applicant and the Respondents No.1, 2 and 3.

34. The learned counsel appearing for the parties have raised all the facts and law referred to in the application, reply, rejoinder and the written submissions filed by the respective parties. On the basis of the averments made in the application, reply and written submission, we observe that the main defence of the respondents is that the application is barred in terms of Regulation 35(A) and in terms of the decision of the Hon'ble Delhi High Court in the matter of **M/s Venus Recruiters Pvt Ltd Vs. Union of India & Ors in WP(C) No. 8705/2019.**

35. We further notice that other grounds are that the applicant has made a composite prayer, which is not maintainable in terms of the decision of the Hon'ble Supreme Court in the Anuj Jain case. Apart from that the respondents have also objected the prayer on the ground that the application is not maintainable as all the transactions were done in the ordinary course of the business. The further contention of the respondents is that, since the resolution plan has already been approved by this Adjudicating Authority on 28th January, 2021, and the same was rectified vide order dated 11th March, 2021, therefore, the present application is not maintainable.

36. On the other hand, the contention of the applicant is that the present application was filed prior to the approval of the resolution plan by the CoC and since then the matter is pending for consideration before the Adjudicating Authority. It is further contended that during the pendency of this application, the Resolution plan was approved by the CoC as well as by the Adjudicating Authority, therefore, the decision of the Hon'ble Delhi High Court in the matter of **M/s Venus Recruiters Pvt Ltd Vs. Union of India & Ors in WP(C) No. 8705/2019** is not applicable.

37. It is further contended that the matter regarding the avoidance transactions were placed before the CoC and CoC after considering the same, directed the resolution applicant to include this fact in the resolution plan and the same is included.

38. It is further contended that the timeline is not mandatory. Now in the light of that contentions we consider the prayers.

39. It is admitted fact that the resolution plan is approved by the CoC as well as by the Adjudicating Authority and the same was approved during the pendency of this application, as this application was filed on 24th September, 2020 after receiving the Transaction Audit Report on 09th September, 2020.

40. The RP further contended that the delay in filing the application is due to outbreak of Covid-19 because the appointment of the Transaction Auditor was made on 19th February, 2020 but due to Covid-19, he could not submit the report in time rather he submitted on 09th September 2020 that is the reason, there is delay in filing the application.

41. Now in terms of the aforesaid facts, at first, we consider this fact whether the application is maintainable or not?

42. Since the main contention of the respondent is that the application is not filed as per the Regulation 35(A) and in terms of the decision of the Hon'ble Delhi High Court in the matter of **M/s Venus Recruiters Pvt Ltd Vs. Union of India & Ors in WP(C) No. 8705/2019.**

43. Therefore, at first, we would like to consider this aspect. The Regulation 35(A) and the decision of the Hon'ble Delhi High Court, both were considered by the Coordinate Bench-II of the NCLT, Delhi in **IA/102/2021 in (IB) 984 (ND)/2019** in the matter of **M/s AC Goel Distributing Company Private Limited... ...Operational Creditor Versus M/s Web Tech Packagings (INDIA) Private Limited... ...Corporate Debtor** and in the matter of **Mrs. Ashu Gupta, Resolution Professional V/s. Mr. Sunil Tangri**. and Member (Judicial) was the Author of that order. Therefore, at this juncture, we would like to refer to the order passed in **IA/102/2021 in (IB) 984 (ND)/2019** in

matter referred to supra. The Relevant paragraphs of that decision are reproduced below: -

> **"13. On perusal of the pleadings of the parties, we notice that the main ground taken by the respondents is that, the application filed by the applicant is barred by limitation, in view of the Regulation 35 A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and in support of that, Ld. Counsel for the respondents have placed reliance upon the decision of Hon'ble Delhi High Court in the matter of M/s Venus Recruiters Pvt Ltd Vs. Union of India & Ors in WP(C) No. 8705/2019. The other ground taken by the respondents is that the prayer of the applicant is based upon the Forensic Audit report (FAR) and the applicant has not formed his own opinion, therefore, the present application is not maintainable.**
>
> **16. Whereas, the claim of the RP is that the timeline given in the Regulation 35 A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016 is not mandatory rather directory in nature and in support of his contention, Ld. Counsel for the RP has placed reliance upon the two decisions of the Hon'ble Supreme Court, Surender Trading Company reported in (2003) 8 SCC 498 and another in the matter of Brilliant Alloys Private Limited and submitted that Hon'ble Supreme Court, in the two decisions, have held that the Regulations are not mandatory rather they are directory in nature.**
>
> **17. Therefore, before considering the prayer of the applicant, we would like to consider this objection of the respondent that whether the application is maintainable in terms of Regulation 35A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016 or not?**
>
> **18. The relevant Regulations 35 A and 40 A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016 are quoted below:-**
>
> ***"[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.]

[40A. Model time-line for corporate insolvency resolution process.

The following Table presents a model timeline of corporate insolvency resolution process on the assumption that the interim resolution professional is appointed on the date of commencement of the process and the time available is hundred and eighty days:

Section / Regulation	Description of Activity	Norm	Latest Timeline
Section 16(1)	Commencement of CIRP and appointment of IRP	.....	T
Regulation 6(1)	Public announcement inviting claims	Within 3 Days of Appointment of IRP	T+3
Section 15(1)(c) / Regulations 6(2)(c) and 12 (1)	Submission of claims	For 14 Days from Appointment of IRP	T+14
Regulation 12(2)	Submission of claims	Up to 90th day of commencement	T+90
[12][Regulation 13(1)	Verification of claims received under regulation 12(1)	Within 7 days from the receipt of the claim	T+21
	Verification of claims received under regulation 12 (2)		T+97]
Section 21(6A) (b) / Regulation 16A	Application for appointment of AR	Within 2 days from verification of claims received under regulation 12(1)	T+23
Regulation 17(1)	Report certifying constitution of CoC		T+23
[12][Section 22(1) / Regulation 19(2)	1st meeting of the CoC	Within 7 days of filing of the report certifying constitution of the CoC, but with five days' notice.	T+30]
Section 22(2)	Resolution to appoint RP by the CoC	In the first meeting of the CoC	T+30
Section 16(5)	Appointment of RP	On approval by the AA	.....
Regulation 17(3)	IRP performs the functions of RP till the RP is appointed.	If RP is not appointed by 40th day of commencement	T+40
[13][Regulation 27	Appointment of valuer	Within 7 days of appointment of RP, but not later than 47th day of commencement	T+47]
Section 12(A) / Regulation 30A	Submission of application for withdrawal of application admitted	Before issue of EoI	W
	CoC to dispose of the application	Within 7 days of its receipt or 7 days of constitution of CoC, whichever is later.	W+7
	Filing application of withdrawal, if approved by CoC with 90% majority voting, by RP to AA	Within 3 days of approval by CoC	W+10
Regulation 35A	RP to form an opinion on preferential and other transactions	Within 75 days of the commencement	T+75
	RP to make a determination on preferential and other transactions	Within 115 days of commencement	T+115
	RP to file applications to AA for appropriate relief	Within 135 days of commencement	T+135
Regulation 36 (1)	Submission of IM to CoC	Within 2 weeks of appointment of RP, but not later than 54th day of commencement	T+54
Regulation 36A	Publish Form G		T+75
	Invitation of EoI	Within 75 days of commencement	
	Submission of EoI	At least 15 days from issue of EoI (Assume 15 days)	T+90
	Provisional List of RAs by RP	Within 10 days from the last day of receipt of EoI	T+100
	Submission of objections to provisional list	For 5 days from the date of provisional list	T+105
	Final List of RAs by RP	Within 10 days of the receipt of objections	T+115
Regulation 36B	Issue of RFRP, including Evaluation Matrix and IM	Within 5 days of the issue of the provisional list	T+105
	Receipt of Resolution Plans	At least 30 days from issue of RFRP (Assume 30 days)	T+135
Regulation 39(4)	Submission of CoC approved Resolution Plan to AA	As soon as approved by the CoC	T+165
Section 31(1)	Approval of resolution plan by AA		T+180

AA: Adjudicating Authority; AR: Authorised Representative; CIRP: Corporate Insolvency Resolution Process; CoC: Committee of Creditors; EoI: Expression of Interest; IM: Information Memorandum; IRP: Interim Resolution Professional; RA: Resolution Applicant; RP: Resolution Professional; RFRP: Request for Resolution Plan.]

39

19. **On conjoint reading of these two Regulations, we observe that the word 'on or before the seventy fifty day of the insolvency commencement date' in Regulation 35A (1) of IBBI (Insolvency Resolution Process for Corporate Persons)**

Regulations 2016 , 'on or before the one hundred and fifteenth day of the insolvency commencement date' in Regulation 35A (2) and 'on or before the one hundred and thirty-fifth day of the insolvency commencement date' in Regulation 35A (3) are based upon the Model timelines given in the Regulation 40A. It is seen in Regulation 40A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016, the model timelines prescribed in respect of Regulation 35A is, 75th day of the insolvency commencement date, 115th day of the insolvency commencement date and 135th of the insolvency commencement date as referred to in sub Regulation 1, 2 & 3 of Regulation 35A respectively.

20.It is further seen that the model timeline for the Corporate Insolvency Resolution Process shown in Regulation 40A are based on the assumption that the CIRP should be completed within 180 days (one hundred and eighty days), as it is mentioned in Regulation 40A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016 same is reproduced below:- ***"The following Table presents a model timeline of corporate insolvency resolution process on the assumption that the interim resolution professional is appointed on the date of commencement of the process and the time available is hundred and eighty days"***

21.It is further seen that the IBBI has made this Regulations by exercising its power under Section 5, 7, 9, 14, 15, 17, 18, 21, 24, 25, 29, 30, 196 and 208 read with Section 240 of the IBC, 2016.

22.Whereas, Section 12 of the IBC, 2016 has prescribed the time limit for completion of the Corporate Insolvency Resolution Process. For better appreciation of the provision of law, the said section is quoted below:-

> ***IBC Section 12- Time-limit for completion of insolvency resolution process.***
> ***(1) Subject to sub-section (2), the corporate insolvency resolution process shall be***

completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process.

(2) The resolution professional shall file an application to the Adjudicating Authority to extend the period of the corporate insolvency resolution process beyond one hundred and eighty days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of sixty-six per cent. of the voting shares.

(3) On receipt of an application under sub-section (2), if the Adjudicating Authority is satisfied that the subject matter of the case is such that corporate insolvency resolution process cannot be completed within one hundred and eighty days, it may by order extend the duration of such process beyond one hundred and eighty days by such further period as it thinks fit, but not exceeding ninety days:

Provided that any extension of the period of corporate insolvency resolution process under this section shall not be granted more than once.

Provided further that the corporate insolvency resolution process shall mandatorily be completed within a period of three hundred and thirty days from the insolvency commencement date, including any extension of the period of corporate insolvency resolution process granted under this section and the time taken in legal proceedings in relation to such resolution process of the corporate debtor:

Provided also that where the insolvency resolution process of a corporate debtor is pending and has not been completed within the period referred to in the second proviso, such resolution process shall be completed within a period of ninety days from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019.

23. **A bare perusal of the provision shows that in view of Section 12 (1), the time prescribed to complete the CIRP is 180 days from the date of admission of the application to initiate such process but in view of Section 12 (3) read with Section 12(2) of the IBC, on the approval of the Committee of Creditors (CoC) by vote of 66% of the voting shares, the Adjudicating Authority is empowered to extend the period of CIRP beyond the period of 180 days but not exceeding 90 days. And by amendment w.e.f. 16.08.2019, a proviso is added, which extends the total period of CIRP for 330 days.**

24. **We observe that while framing the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016, the IBBI has not exercised its power under Section 12 of the IBC, 2016, which means while making the Regulations for Insolvency Resolution Process for Corporate Persons, though, the IBBI has added the Regulation 40A w.e.f. 04.07.2018 and made an amendment in Regulation 35A w.e.f. 04.07.2018 but has failed to consider, the amended provision, by which the total period for completion of CIRP may extend to 330 days. Whereas, the model timelines are prepared on the assumption of completion of CIRP within 180 days.**

25. **Now, the question is if the legislature after making the amendment in Section 12, has extended the period of CIRP up to 330 days subject to approval of the CoC and the Adjudicating Authority, then under what authority, the IBBI could reduce the time period for completion of the CIRP from 330 days to 180 days?**

26. **Here we notice that the proviso in Section 12 of IBC is added by the Amendment no. 26/2019 w.e.f. 16.08.2019, whereas the model timelines and Regulation 40A and Regulation 35A were inserted/amended w.e.f. 03.07.2018. This shows that after the amendment in Section 12 of IBC, the model timelines in Regulations 35A and Regulation 40A have not been amended by IBBI in terms of the extension of total period for completion of CIRP.**

27. **At this juncture, we would like to refer to Section 240 of the IBC, which says that "the Board may, by notification, make regulations consistent with this Code and the rules made thereunder, to carry out the provisions of this Code."**

28. **On conjoint reading of the Regulation 35A and 40A of the IBBI Regulations and Section 12(3) of the IBC, we observe the Regulations made by the IBBI are not updated and consistent with the provision of Section 12 (3) of the Code.**

29. **At this juncture, we have gone through the decision of Hon'ble Delhi High Court (supra), and we notice that aforesaid facts were not placed before the Hon'ble Delhi High Court.**

30. **We would also like to refer to the two decisions of the Hon'ble Supreme Court (supra) on which the Ld. Counsel for the RP/applicant has placed reliance and it is seen in both the decisions, the Hon'ble Supreme Court, by considering the regulations, held that the Regulations are directory in nature and not mandatory in nature and we find, these two decisions have not been considered by the Hon'ble Delhi High Court in the decision referred to Supra.**

31. **At this stage, we would like to refer to Section 66 of the IBC, 2016, which is quoted below:-**

> ***IBC 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 the 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.

(3) Notwithstanding anything contained in this section, no application shall be filed by a resolution professional under subsection (2), in respect of such default against which initiation of corporate insolvency resolution process is suspended as per section 10A.

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.

32. A bare perusal of the said provision shows that 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.

33. When we read Section 66 of the IBC along with the Regulation 35A and Regulation 40A of the IBBI Regulations, we are of the considered view that the time limit prescribed for consideration of preferential transaction and other transaction is inconsistent with the provision of Section 66, because Section 66 IBC clearly says that the Adjudicating Authority may pass an order, on the application of the Resolution Professional, during the CIRP or a liquidation process. And it is seen that the period of CIRP comes to end after the approval of the Resolution Plan and not before that or the period of liquidation comes to end after the dissolution of the corporate debtor under Section 54 of the IBC. And these facts and law were not placed before the Hon'ble Delhi High Court.

34. Therefore, in our considered view, in view of the decisions of Hon'ble Supreme Court (Supra), the Regulation is not mandatory rather directory in nature.

35. At this juncture, we would also like to consider the reasons submitted by RP for not filing the present application earlier. The applicant/RP in its written submissions has specifically mentioned that despite the repeated request and reminders,

the suspended Board of Directors of the Corporate Debtor did not furnish information or handed over the financial statements. These were provided by the Statutory Auditor of the Corporate Debtor on 13.08.2020 and the Forensic Auditor's Report was finalised on 22.09.2020. Therefore, we are of the considered view that the delay has been explained by the RP, which is due to the non-furnishing of the information by the suspended Board of Directors of the Corporate Debtor.

36. **So, for the reasons discussed above, in view of the decisions of the Hon'ble Supreme Court (supra) in our considered view, the decision upon which the respondents have placed reliance i.e. the decision of Hon'ble Delhi High court, is not applicable in the case in hand.**

37. ***For the reasons discussed above, we have no option but to hold that the present application filed by the applicant is maintainable under the law."***

44. In terms of the decision, now we consider the case in hand, here also the similar objection is raised by all the respondents by filing their reply, we observe that here in the case in hand, the application was filed prior to the approval of the resolution plan and not after the approval of the resolution plan. Of course, during the pendency of this application, the resolution plan was approved by the Adjudicating Authority on 28th January, 2021 which was subsequently rectified on 11th March, 2021.

45. We further notice that the reason for delay in filing the avoidance application was explained by the RP, by filing the rejoinder to the common reply filed by the Respondent No.- 1, 2 and 3 in Para – 17, sub-para (d), (e) and (f) of the Rejoinder at page-9 and the relevant portion of the paragraphs is reproduced below: -

c) In the meanwhile, due to outbreak of Covid 19, lockdown was imposed by the Central Government which caused hindrance in the CIRP of the corporate debtor, including the audit process.

d) The draft TAR was submitted by the Transaction Auditor only on 06 July 2020, which was reviewed by the Applicant to form an opinion and determine whether the Corporate Debtor is subject to any avoidance transaction under Regulation 35A of the CIRP Regulations. On review of the TAR, examination of the books and other relevant records of the Corporate Debtor, certain transactions undertaken by the Corporate Debtor were discovered, which in the opinion of the Applicant fall within the scope of the preference transactions, undervalued transaction and fraudulent or wrongful trading within the meaning of the provisions of the Code.

e) Thereafter a copy of the TAR was also shared with the Respondents Nos. 1, 2 and 3, for them to submit their responses for the transactions identified by the Transaction Auditor. The Respondents Nos. 1, 2 and 3 from time to time submitted their response on 13 July 2020, 12 August 2020, 30 August 202, 31 August 2020 and 01 September 2020.

f) After taking into account the responses of Respondents Nos. 1, 2 and 3, and further discussions between the Applicant and

the Transaction Auditor, the final TAR was submitted only on 09 September 2020, i.e. the 252nd day.

g) The Applicant upon receiving the final TAR proceeded with filing the present Application on 24 September 2020.

III. APPLICANT EXAMINED THE TRANSACTIONAL AUDIT REPORT AND SUBMITTED ITS OPINION

18. It is submitted that Respondent No. 4, GVR Consulting Services Pvt. Ltd. in the reply has raised an objection that the present application is misconceived as there is nothing on record to display that recognition was ever given by the Hon'ble NCLT in any of its orders about the findings of avoidance transactions in the Transactional Auditor Report ("TAR"). At the outset, the submissions made above are false, incorrect and devoid of merits and are not sustainable in law.

19. It is submitted that as per Regulation 35A of the CIRP Regulations, the resolution professional is required to form an opinion whether the corporate debtor has been subjected to any transactions covered under Section 43, 45, 50 or 66 of the Code. In case the resolution professional determines that the corporate debtor is subject to the aforesaid transaction then it shall make an application to the Adjudicating Authority for appropriate relief. Once the application is filed by the resolution professional, it is for the Hon'ble Adjudicating Authority to decide whether the corporate debtor is subject to any transactions

46. When we consider the submission of the respondents in terms of the facts mentioned in the rejoinder referred to Supra then we are of the considered view, that the reasons for delay in filing the application was properly explained by RP and it is specifically mentioned that after receiving the Transaction Audit Report on 06th July, 2020, the applicant resolution professional had reviewed the report and after forming the opinion sent the copy of the report to the respondents and the respondents submitted their reply on 12th August, 2020, 30th August, 31st August, 2020 and 1st September, 2020 and that is the reason, the Transaction Auditor submitted

the final report on 09th September, 2020 and thereafter, the present application is filed on 24th September, 2020.

47. At this juncture, we would also like to refer to the submission raised on behalf of the applicant, the applicant in course of hearing referred to Section 26 of the IBC, 2016 and the same is reproduced below: -

Section 26 of the IBC, 2016

26. Application for avoidance of transactions not to affect proceedings. –

"The filing of an avoidance application under clause (j) of sub-section (2) of section 25 by the resolution professional shall not affect the proceedings of the corporate insolvency resolution process."

48. A bare perusal of the provision shows that mere filing an avoidance application under Section 25 (2), Clause – (J) which relates to the filing of application for avoidance of transaction in accordance with sub-Section 2 of section 25 of the Code shall not effect the proceedings of the Corporate Insolvency Resolution Process. Therefore, in our considered view, since the application was filed prior to the approval of the Resolution plan, of course, not in terms of Regulation 35(A). But so far Regulation 35(A) is concerned, we have already discussed the order passed in **IA/102/2021 in (IB) 984 (ND)/2019 referred to supra** and in terms of that decision, we hold that that Regulation 35(A) is not mandatory. Hence in our considered view, the approval of the resolution plan during the pendency of this application could not affect the merit of the application, especially when there is a specific provision under the approved plan **that the benefit from such applications will be passed through to the Financial Creditors and therefore, the application is not for the benefit of the Corporate Debtor.**

49. Therefore, we find, no force in the contention raised on behalf of the respondents that the present application is filed by the Resolution professional to give additional benefits to the successful resolution applicant. Hence, we are of the considered view on this score, the present application is not liable to be dismissed.

50. Now coming to the other points. The contention of the respondents is that in terms of the decision of the Hon'ble Supreme Court, in Mr. Anuj Jain case, since there is a composite prayer made by the applicant under Section 43, 45 and 66, therefore, the present application is not maintainable. We will consider this submission, while considering the averments made in the application.

51. Now in terms of discussions made above, at first, we consider whether the applicant has succeeded to establish the preferential transactions under Section 43 of the IBC, 2016 or not.

52. At this juncture, we would like to refer to Section 43 of the IBC, 2016 and the same is reproduced below: -

Section 43 of the IBC, 2016

43. Preferential transactions and relevant time. –

(1) Where the liquidator or the resolution professional, as the case may be, is of the opinion that the corporate debtor has at a relevant time given a preference in such transactions and in such manner as laid down in sub-section (2) to any persons as referred to in sub-section (4), he shall apply to the Adjudicating Authority for avoidance of preferential transactions and for, one or more of the orders referred to in section 44.

(2) A corporate debtor shall be deemed to have given a preference, if–

(a) there is a transfer of property or an interest thereof of the corporate debtor for the benefit of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor; and

(b) the transfer under clause (a) has the effect of putting such creditor or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with section 53.

(3) For the purposes of sub-section (2), a preference shall not include the following transfers–

(a) transfer made in the ordinary course of the business or financial affairs of the corporate debtor or the transferee;

(b) any transfer creating a security interest in property acquired by the corporate debtor to the extent that –

(i) such security interest secures new value and was given at the time of or after the signing of a security agreement that contains a

description of such property as security interest, and was used by corporate debtor to acquire such property; and

(ii) such transfer was registered with an information utility on or before thirty days after the corporate debtor receives possession of such property:

Provided that any transfer made in pursuance of the order of a court shall not, preclude such transfer to be deemed as giving of preference by the corporate debtor.

Explanation. – For the purpose of sub-section (3) of this section, "new value" means money or its worth in goods, services, or new credit, or release by the transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the liquidator or the resolution professional under this Code, including proceeds of such property, but does not include a financial debt or operational debt substituted for existing financial debt or operational debt.

(4) A preference shall be deemed to be given at a relevant time, if –

(a) It is given to a related party (other than by reason only of being an employee), during the period of two years preceding the insolvency commencement date; or

(b) a preference is given to a person other than a related party during the period of one year preceding the insolvency commencement date.

53. In terms of the provision referred to Supra, it is seen that in order to establish the preferential transaction, the applicant is required to establish that so far the related party is concerned, the transaction was made during the period of two years preceding the Insolvency Commencement Date and so far the unrelated party is concerned, it is made during the period of one year preceding the Insolvency Commencement Date.

54. Admittedly, the CIR Process was initiated on 27th August, 2019, therefore, so far the transactions in respect of the related person is concerned, the said transaction must be made between 27th August, 2017 to 27th August, 2019 and so far the unrelated party is concerned the transaction must be made between 27th August, 2018 to 27th August, 2019. The related party transaction is referred to from page 8 to page 11 of the application and the scanned copy of the same is reproduced below: -

8

Date	Name of the Party	Amount (INR)	Purpose
Repayment to Related Parties			
A. Arun Gupta			
6 September 2017	Unsecured Loan – Arun Gupta A/c	20,00,000	Repayment of unsecured loan of directors
7 October 2017	Unsecured Loan – Arun Gupta A/c	10,00,000	Repayment of unsecured loan of directors
22 November 2017	Unsecured Loan – Arun Gupta A/c	20,00,000	Repayment of unsecured loan of directors
5 December 2017	Unsecured Loan – Arun Gupta A/c	40,00,000	Repayment of unsecured loan of directors
15 June 2018	Unsecured Loan – Arun Gupta A/c	3,50,000	Repayment of unsecured loan of directors
	TOTAL (A)	90.00,000	
B. Praveen Gupta			
19 December 20217	Unsecured Loan – Praveen Gupta A/c	1,00,000	Repayment of unsecured loan of directors

16 January 2018	Unsecured Loan – Praveen Gupta A/c	2,00,000	Repayment of unsecured loan of directors
22 February 2018	Unsecured Loan – Praveen Gupta A/c	7,00,000	Repayment of unsecured loan of directors
22 February 2018	Unsecured Loan – Praveen Gupta A/c	70,00,000	Repayment of unsecured loan of directors
27 March 2018	Unsecured Loan – Praveen Gupta A/c	85,00,000	Repayment of unsecured loan of directors
19 July 2018	Unsecured Loan – Praveen Gupta A/c	20,00,000	Repayment of unsecured loan of directors
26 October 2018	Unsecured Loan – Praveen Gupta A/c	7,00,000	Repayment of unsecured loan of directors
2 March 2019	Unsecured Loan – Praveen Gupta A/c	2,00,000	Repayment of unsecured loan of directors
	TOTAL (B)	1,97,50,000	
C. Keshika Exports Private Limited			
31 August 2018	Keshika Exports Private Limited	2,49,338	Payment of interest on unsecured loan
	TOTAL (C)	2,49,338	
Total (A+B+C)		**2,80,99,338**	

10

Repayment to Non-Related Parties			
D. Dyna RasayanUdyog Private Limited			
27 August 2018	Dyna RasayanUdyog Private Limited	40,00,000	Repayment of unsecured loan
28 August 2018	Dyna RasayanUdyog Private Limited	45,00,000	Repayment of unsecured loan
29 August 2018	Dyna RasayanUdyog Private Limited	7,29,987	Repayment of interest on unsecured loan
29 August 2018	Dyna RasayanUdyog Private Limited	65,00,000	Repayment of unsecured loan
	TOTAL (C)	1,57,29,987	
E. GVR Electronics Private Limited			
27 August 2018	GVR Electronics Private Limited	25,00,000	Repayment of unsecured loan
29 August 2018	GVR Electronics Private Limited	25,00,000	Repayment of unsecured loan
31 August 2018	GVR Electronics Private Limited	25,00,000	Repayment of unsecured loan

11

4 September 2018	GVR Electronics Private Limited	15,00,000	Repayment of unsecured loan
	TOTAL (D)	90,00,000	
	F. GVR Consulting Services Ltd.		
4 September 2018	GVR Consulting Services Pvt. Ltd.	10,00,000	Repayment of unsecured loan
11 September 2018	GVR Consulting Services Pvt. Ltd.	25,00,000	Repayment of unsecured loan
24 September 2018	GVR Consulting Services Pvt. Ltd.	25,00,000	Repayment of unsecured loan
25 September 2018	GVR Consulting Services Pvt. Ltd.	15,00,000	Repayment of unsecured loan
12 October 2018	GVR Consulting Services Pvt. Ltd.	25,00,000	Repayment of unsecured loan
	TOTAL (E)	1,00,00,000	
Total (D+E+F)		**3,56,29,987**	
Grant Total (A+B+C+D+E+F)		**6,37,29,325**	

55. We further observed that in para 17 at page 23 of the application, the applicant has referred to the total amount which the respondents are liable to refund. The scanned copy of para 17 is reproduced below: -

16. That it is humbly submitted that the payments made by the Corporate Debtor to its related parties (Respondent No. 1, Respondent No 2 and Respondent No 5) and non-related parties (Respondent No. 4, Respondent No. 6 and Respondent No. 7), does not fall under any of the exceptions set out in Section 43 (3) of the Code. These payments were not made in the ordinary course of the business or financial affairs of the Corporate Debtor.

17. Therefore, in view of the aforesaid, in the opinion of the Applicant, the related parties (Respondent No. 1, Respondent No 2 and Respondent No 5) and non-related parties (Respondent No. 4, Respondent No. 6 and Respondent No. 7) of the Corporate Debtor are liable to refund the following amount to the account of the Corporate Debtor:

S. No.	Name of the Respondent	Amount (INR)
1.	Respondent No. 1	1,97,50,000
2.	Respondent No. 2	90,00,000
3.	Respondent No. 4	1,00,00,000
4.	Respondent No. 5	2,49,338
5.	Respondent No. 6	1,57,29,987
6.	Respondent No. 7	90,00,000

II. Undervalued Transaction undertaken by the Corporate Debtor

18. That, Section 45 of the Code provides for avoidance of undervalued transactions undertaken by the corporate debtor and empowers the RP to seek directions from this Hon'ble Adjudicating Authority qua such undervalued transactions to get the same declared as void.

56. On perusal of the transactions referred to supra, it is seen that so far related parties transactions are concerned all are made between 27th August, 2017 to 27th August, 2019 and so far the unrelated parties transactions are concerned, the transaction are made between 27th August, 2018 to 27th August, 2019.

57. At this juncture, we would like to consider the contention of the respondents that all these transactions were made in the ordinary course of business, therefore, in terms of Section 43 (3) of the IBC, 2016, the respondents are not liable under Section 43 of the IBC, 2016.

58. In the light of the submissions, we again perused the averments made in the application, reply, rejoinder and written submissions filed by the respective parties and we are of the considered view that the transactions as referred to Supra were not made in the ordinary course of business rather same were made by giving a preference over other creditors.

59. Since the applicant has succeeded to establish that these transactions so far the related parties i.e. Respondents No. 1, 2 and 5 are concerned all have been made within two years preceding the insolvency commencement date and so far the unrelated parties i.e Respondents no. 4 ,6 and 7 are concerned all have been made within one year preceding the insolvency commencement date.

60. Therefore, we are of the considered view, the applicant has succeeded to establish that there were preferential transactions, made during the period prescribed under Section 43 (4) of the IBC, 2016. Hence the respondent no. 1,2, 4,5,6 and 7 are liable to refund the amount, which would be distributed among the creditors, who are entitled to get it, in accordance with provision of law and it shall not be paid to the successful resolution applicant.

61. Now coming to Section 45 of the IBC, 2016, at this juncture, we would like to refer the paragraph 20 at page 26 of the application in which the applicant has specifically mentioned this fact ***"it is most respectfully submitted that all persons to whom the assets were sold by the Corporate Debtor have not been made a party to the present***

Application. In case, this Hon'ble Adjudicating Authority determines that the said transactions is undervalued in terms of Section 45 of the Code, the said persons will be appropriately impleaded and necessary directions will be sought against them under Section 48 of the Code."

62. Here, in terms of the averments made in the application, when we consider the submissions of the respondents that the composite prayer cannot be allowed in terms of the decision of Hon'ble Supreme Court in Anuj Jain case, in our considered view, since the persons with whom the undervalued transactions alleged to have been made are not made proper party in the proceeding, therefore, we agree with the submission made on behalf of the respondents that in terms of the decision of the Hon'ble Supreme Court in Anuj Jain's case, a composite prayer should not be allowed, therefore, we are not inclined to consider the submission of the applicant, so far the transaction made under Section 45 of the IBC, 2016 is concerned, as the necessary and proper party have not been impleaded in this application.

63. Similarly, so far Section 66, fraudulent transaction is concerned, applying the same principle, we are of the considered view, this part of the prayer of the applicant is also not liable to be considered.

64. In sequel to the above, we are of the considered view, so far, the prayer of the applicant under Section 45 and 66 of the IBC, 2016 are concerned, in view of the decision of the Hon'ble Supreme Court in Anuj Jain case referred to supra and in the absence of the specific averments and the proper party, **we are not inclined to allow these prayers, therefore, this prayer of the applicant is hereby rejected.** However, the applicant is at liberty to proceed in accordance with the provision of law for invoking the prayer under these two Sections.

65. So far section 43 IBC 2016 is concerned, as we held transactions made with the respondent no. 1,2, 4,5,6 and 7 come under the preferential transactions under Section 43 of the IBC, 2016. Therefore, Respondent No. – 1 is directed to refund the amount of Rs. 1,97,50,000/-, Respondent No. - 2

is directed to refund the amount of Rs. 90,00,000/- and Respondent No. 5 is directed to refund the amount of Rs. 2,49,338/-. Similarly, the Respondents No. 4, 6 and 7 are also directed to refund the amount of Rs. 1,00,00,000, Rs. 1,57,29,987 and 90,00,000/- respectively. The amounts so received shall be distributed among the creditors, who are entitled to get it, in accordance with provision of law and it shall not be paid to the successful resolution applicant.

66. Accordingly, the respondents no. 1,2,4,5,6 and 7 are directed to refund the amount within three months from the date of order and the applicant is directed to take steps to distribute the said amounts among the the Financial Creditor/ creditors, who are entitled to get it, in accordance with provision of law within a month from the date of receipt of the said amount and submit the compliance report soon thereafter. And if the respondents no. 1,2,4,5,6 and 7 failed to deposit the said amount within the period then same shall be recovered in accordance with the provision of law.

67. **With this the present application stands disposed of.**

Sd/-

Avinash K. Srivastava
(Member Technical)

Sd/-

Abni Ranjan Kumar Sinha
(Member Judicial)