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IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH (Court-I)
KOLKATA

I.A. No. 1253/KB/2020

In

CP(IB) No. 1175/KB/2019

*An Application under sections 43, 44,66 and 60(5) of the Insolvency and
Bankruptcy Code, 2016 read with rule 11 of the National Company Law
Tribunal Rules, 2016*

In the matter of:

Outlook Tracom Private Limited

....Financial Creditor

Versus

Toshniwal Enterprises Controls Limited

.....Corporate Debtor

And

In the matter of:

Mr. Kamal Nayan Jain, Resolution Professional for Toshniwal Enterprises
Controls Limited

.... Applicant

Versus

1. **Mr. Rajesh Tohniwal;**
2. **Ms. Kusum Toshniwal;**
3. **Mr. Ganga Bhawani Badarla;**
4. **Mr. Narasimha;**
5. **Mr. Raghav Toshniwal;**
6. **Mr. Toshniwal Enterprises;**
7. **Holdwell Tradecon Private Limited;**

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In the National Company Law Tribunal,
Kolkata Bench (Court- I)

Kamal Nayan Jain vs. Rajesh Toshiwal & Ors.
I.A. (I.B.C.) 1253/KB/2020 in C.P (IB) 1175/KB/2019

8. Nandlal Kamal Kishore Vyapaar Private Limited;
9. Digital Live Ads Limited

....Respondents

Date of pronouncing the order: 10.08.2023

Coram:

Rohit Kapoor : Member (Judicial)
Balraj Joshi : Member (Technical)

Appearances (via video conferencing/ physical):

For the Liquidator:

Mr. Shaunak Mitra, Advocate

For the Respondents:

None for the Respondents

ORDER

Rohit Kapoor, Member (Judicial)

1. This Court convened through hybrid mode.
2. The interlocutory application being I.A. No. 1253/KB/2020 has been filed by the liquidator under sections 43, 44, 66 and 60(5) of the Insolvency and Bankruptcy Code, 2016 (IBC) seeking the following reliefs against the suspended board of Directors and other Respondents herein:
 - a) *That this Adjudicating Authority be pleased to pass an order directing Respondent No. 1. Mr. Rajesh Toshniwal to pay Rs. 9,27,028/- in the account of the account of the Corporate Debtor;*
 - b) *That this Adjudicating Authority be pleased to pass an order directing Respondent No. 6. Toshniwal Enterprises, represented by Mr. Rajesh Toshniwal in his capacity as the son and heir apparent of the erstwhile proprietor, Late Kamal Kishore Toshniwal to pay Rs. 71,82,600/- in the account of the account of the Corporate Debtor;*

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- c) *That this Adjudicating Authority be pleased to pass an order directing Respondent No. 7. M/s HoldwellTradecom Pvt. Ltd. to pay Rs. 1,12,000/- in the account of the account of the Corporate Debtor;*
- d) *That this Adjudicating Authority be pleased to pass an order directing Respondent No. 8. M/s Nandlal Kamal Kishore Vyapaar Pvt. Ltd. to pay Rs. 1,16,79,000/- in the account of the account of the Corporate Debtor;*
- e) *That this Adjudicating Authority be pleased to pass an order directing the suspended board of directors being Respondent No. 1 to 4 to pay jointly or severally a sum of Rs. 7,49,07,638/- or any other amount as this Adjudicating Authority may deem fit on account of payments made to related parties from the accounts of the Corporate Debtor;*
- f) *That this Adjudicating Authority be pleased to pass an order directing Respondent No. 5 to contribute a sum of Rs. 7,30,000/- or such other sum as this Adjudicating Authority may deem fit;*
- g) *That this Adjudicating Authority be pleased to pass an order directing Respondent No. 9 to contribute a sum of Rs. 5,42,77,010/- or such other sum as this Adjudicating Authority may deem fit;*
- h) *That this Adjudicating Authority be pleased to pass an order directing the suspended board of directors being Respondents No. 1 to 5 to make such contributions to the assets of the corporate debtor as this Adjudicating Authority may deem fit;*
- i) *That this Adjudicating Authority may be pleased to pass an order or orders as may be deemed necessary for investigation into the affairs of the corporate debtor;*

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j) *For such further and other reliefs as this Adjudicating Authority may deem fit and proper in the facts and circumstances of this case.*

3. **Submissions in the Application filed by the Applicant are summarized hereinafter:**

3.1 The case of the Applicant herein is that *vide* order dated 22nd November 2019, this Adjudicating Authority admitted the Corporate Debtor into Corporate Insolvency Resolution Process ('CIRP') and appointed the Applicant as the Interim Resolution Professional (IRP).

3.2 In performance of his duties as the Resolution Professional, the Applicant contacted the erstwhile directors of the Corporate Debtor and requested them to provide him with the necessary information and records of the Corporate Debtor. Further, in the first meeting of the Committee of Creditors (CoC), the Applicant informed the Committee of Creditors regarding the reluctance of the suspended board to cooperate with the Applicant. Furthermore, it was also brought to the notice of the CoC that the Applicant had sought details of related party transactions, however no information had been provided to the Applicant. The Applicant further informed the COC of his intention to file an application under Section 19 (2) of the Code.

3.3 Pursuant to the said application under Section 19 (2) of the Code, this Adjudicating Authority, *vide* order dated 16th January 2020, directed the officials of corporate debtor to cooperate with the Applicant. However, in spite of the said order and subsequent directions, the Corporate Debtor did not render any cooperation to the Applicant.

3.4 As per directions given by this Adjudicating Authority *vide* order dated 5th March 2020, the Applicant visited the office of the Corporate Debtor but was unable to retrieve any information due to the unorganized state of the office. Accordingly, the Applicant requested the Respondent No. 1 to organize the files and provide the Applicant with the requisite

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information. However, the Respondent No. 1 did not provide any such information. The suspended board of directors failed to provide the details regarding the statutory compliances, income tax returns, GST returns, valuation of stock and complete books of accounts despite repeated requests made by the Applicant.

- 3.5 Accordingly, the Applicant, after having informed the CoC, appointed a forensic auditor, being M/s S Poddar & Co to conduct forensic audit of the Corporate Debtor. The Forensic Auditor carried out the audit of the Corporate Debtor on the basis of the information and documents as was made available to the Applicant from the financial creditors, debtors, suppliers of goods and services, customers and secured creditors of the Corporate Debtor and submitted an interim report with Applicant. The same was sent to the Respondent No.1 to provide details upon the perusal of the said interim report. However, due to failure on part of the Respondent No.1 in giving a reply to the queries of the Applicant, the Forensic Auditor concluded its audit and submitted its final report (hereinafter referred to as "Forensic Audit Report").
- 3.6 Upon perusal of the Forensic Audit Report so submitted, it was ascertained by the Applicant that numerous preferential transactions with related parties had been carried out and that the business of the Corporate Debtor was carried out with the intent to defraud the creditors of the Corporate Debtor. According to the Applicant, the Forensic Audit Report along with its annexures reveal that a sum of ₹1,23,12,600/- had been paid to related parties being Respondent No. 1, Respondent No.6, Respondent No. and Respondent No.9 from the account maintained by the Corporate Debtor with Oriental Bank of Commerce and that a sum of ₹6,25,95,038/- has been paid to related parties being Respondent No.1, Respondent No.5, Respondent No.7, Respondent No.8 and Respondent No.9.

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4 Submissions in the Reply-Affidavit filed on behalf of the Respondents
No. 1 & 2 are summarized hereinafter:

- 4.1 The present application has been wrongly filed by the Resolution Professional, without affording any right of representation to the Respondents.
- 4.2 The transactions put in question by the Applicant have been entered and executed by the erstwhile management of the Corporate Debtor in the ordinary course of business and as such, all the Financial Creditors constituting the Committee of Creditors were always aware about such transactions.
- 4.3 The records, books of accounts and all other details of the Corporate Debtor along with details of the related party companies has been seized by the Muchipara Police Station prior to initiation of Corporate Insolvency Resolution Process of the Corporate Debtor in relation to numerous cases of dishonor of cheques under Section 138 of the Negotiable Instruments Act, 1881.
- 4.4 The records of all the group companies and related party companies of the Corporate Debtor was also maintained in the computer systems of the Corporate Debtor. Accordingly, with the seizure of all the documents, computer systems etc., the answering respondent is not in a position of place on record the relevant documents and evidence in order to prove that all the transactions in question by the applicant were executed in the ordinary course of business and that the committee of creditors were aware about the said financial transactions done by the erstwhile management of the corporate debtor prior to initiation of CIRP.
- 4.5 All the transactions in question were made in the ordinary course of business of the Corporate Debtor and the Committee of Creditors are completely aware about the said transactions.

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- 4.6 The transactions with Mr. Rajesh Toshniwal, amounting to a sum of Rs. 9,27,028/- was made arising out of repayment of loan extended by Mr. Rajesh Toshniwal to the Corporate Debtor and that the Committee of Creditors are aware about the said transaction.
- 4.7 The transactions amounting to a sum of Rs. 71,82,600/- were paid to Toshniwal Enterprises towards purchase of goods by the Corporate Debtor. Further, the amounts of Rs. 1,12,000/- and Rs. 1,16,79,000/- was made to Holdwell Tradecom Private Limited and Nandlal Kamal Kishore Vyapaar Private Limited respectively arising out of the repayment of advances extended by such companies to the Corporate Debtor.
- 4.8 The payment to the tune of Rs. 7,30,000/- was made to Mr. Raghav Toshniwal towards his salary for rendering his services to the Corporate Debtor. The payment of Rs. 5,42,77,010/- was made to one M/s. Digital Ads Limited towards the services rendered by the said company to the Corporate Debtor.
- 4.9 The allegations with reference to the irregularities in the monthly stock statements between the audited and financial statements and stock statements shared with United Bank of India solely arise as the due date for submission of stock statement is 10th of every month and as such, the books of accounts were not reconciled and/ or the entries were pending at the end of the month. The same does not evidence any malpractice or mala fide on the part of the erstwhile management of the Corporate Debtor. The irregularities in the purchase and sales as depicted in the monthly stock statement and the audited financial statements for the financial year 2017-2018 is also attributed due to the same reason.
- 4.10 The mismatch in shareholding information is due to the fact that after sudden demise of Mrs. Susila Devi Toshniwal, *i.e.*, the mother of the promoter and member of the suspended board of director,

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initially it was decided that the shares shall be transfer to her grandson, however, since there were other properties to be mutated shares of Susila Devi Toshniwal were ultimately transferred to Mr. Rajesh Toshniwal. Due to the said change in transfer of shares, there is a mismatch in the shareholding, however the same is completely unintentional and owing to the reasons stated hereinabove. There there have been no high value transactions made from Account No. 301505010039329 maintained with United Bank of India.

- 4.11 The applicant ought to have mentioned the transactions in question so that the answering respondent could have explained the transaction. However, the applicant has failed to question a single transaction and has vaguely only mentioned that transactions worth Rs. 1.47 Crore are high valued, without any substantiation or cogent reasoning.
- 4.12 The shares of M/s. Techniche Consulting Services Private Limited were bought by the Corporate Debtor keeping in mind the value unlocking for both the companies. However, later on, with an arrangement with M/s. Techniche Consulting Services Private Limited the shares were sold by the Corporate Debtor, wherein the Corporate Debtor's liabilities of sundry creditors were agreed to be paid.
- 4.13 The absence of the access to the records of the Corporate Debtor, it is not possible for the answering respondent to place all the documents and evidence which shall clearly demonstrate that all the transactions in question were done in the ordinary course of business of the corporate debtor and there is no intention to defraud the creditors of the corporate debtor.

5 Submissions in the Rejoinder filed on behalf of the Applicant are summarized hereinafter:

- 5.1 The Applicant has submitted that the opposition has filed on behalf of all the Respondents without placing on record any document

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- authorizing the Respondent No. 1 to affirm the statements on their behalf.
- 5.2 It has been denied that prior to filing of the present application by the Resolution Professional, no right of representation and/or explanation was given to the Respondent No. 1.
- 5.3 It has been submitted that the right was there with the Respondents since the initiation of the Corporate Insolvency Resolution Process (CIRP) on 22nd November 2019 and it is apparent that the Respondent Nos. 1 and 2 not only have willfully disobeyed the order dated 5th March 2020 passed by this Adjudicating Authority but have also failed to render cooperation to the Applicant.
- 5.4 The Respondent Nos. 1 and 2 have failed to provide complete and clear books of accounts and other relevant information as have been sought by the Applicant time and again. It is a matter of record that the Respondent No. 1 in course of the 3rd meeting of the Committee of Creditors held on 11th June 2020 and thereafter had duly been put forth questions based on the Forensic Audit Report, which were left unanswered by the Respondent No. 1. It is a matter of records that a series of questions had been e-mailed based on which explanation had been sought and that the said e-mails were never reverted to by the Responding No. 1. From a perusal of the records and the conduct of the Respondent Nos. 1 and 2, it is evident that the business of the Corporate Debtor was conducted with an intent to defraud the Creditors as well as to siphon off borrowed funds for the purposes other than the intended use.
- 5.5 It has been denied that the Applicant that the transactions highlighted in paragraph 8 to 10 of the Reply Affidavit were made in ordinary course of business. The Respondents, in connivance with each other have suppressed information and have simply made bald statements in terms

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of its opposition without producing any document or statutory records in support of such averments.

- 5.6 Further, from a perusal of the records of the Corporate Debtor maintained on the website of the Ministry of Corporate Affairs, it is apparent that the Respondent No. 1 has been a Director of the Corporate Debtor on and from 11th October 1991 and, all along, has continued to be on the Board of Directors till the date of admission of the CIRP and the simultaneous enforcement of the period of moratorium as envisaged under the Code. The Respondent No. 1 cannot push the liability and onus of the transactions brought forth on the purported erstwhile management of the Corporate Debtor in as much since the Respondent No. 1 remained an integral part of such management.
- 5.7 Further, the application has been filed on the basis of the Forensic Audit Report dated 25th September 2020 and it further a matter of record that the said Forensic Audit Report has been formulated on the basis of limited information made available by the Respondent No. 1 who has been all along in control of the Corporate Debtor. The Respondent No. 1 has all along made a valiant attempt to hide behind the veil of the fact that the records pertaining to the Corporate Debtor has been seized by Muchipara Police Station.
- 5.8 Minutes of the 4th meeting of the Committee of Creditors held on 2nd September 2020 contain the details pertaining to the litigations against the Corporate Debtor. It is manifest from the records that vide a specific order dated 5th March 2020 passed by this Adjudicating Authority pursuant to an application filed under Section 19(2) of the Code, the S.H.O., Muchipara Police Station was directed to provide necessary assistance so that the Resolution Professional in presence of the Suspended Director can extract soft copy of the documents kept under their custody. However, the Respondent No. 1 had refused to accompany the Applicant to the Muchipara Police Station in violation

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of the directives issued by this Adjudicating Authority on some pretext or the other, thereby creating hindrances and/or obstructions in course of the CIRP.

- 5.9 It is a matter of record that the members to the Committee of Creditors have time and again warned the Respondent No. 1 to refrain from misguiding the members since the Respondent No. 1 had been indulging in making false statements in course of its participation in the meeting of the Committee of Creditors. However, the said Respondent No. 1 has refrained from providing cooperation and has chosen to circumvent such investigations and/or specific queries put forth.
- 5.10 Regarding the irregularity in the monthly stock statements between the audited and financial statements and stock statements shared with United Bank of India, it has been submitted that the stock statements for the months of March 2017 and March 2018 reflected a huge variance from what was actually present as per the audited financial statements. The same had been done by the Respondent Nos. 1 and 2 to obtain a higher drawing power from the Bank and obtain false financial leverage.
- 5.11 Further, it is stated that the actual purchases and sales in the Audited Financial Statements varied from the monthly stock statements for the year 2017-18. It has been denied that the mismatch in the shareholding of the Corporate Debtor is completely unintentional and that there have been no high value transactions made from the account no. 301505010039329 maintained with United Bank of India.
- 5.12 Further, from the investment made in M/s Techniche Consulting Services Private Limited it appears that the same have been made with an intention to divert the borrowed funds since the said shares were purchased at a premium of Rs 199/- per share, having a nominal value of Rs. 10/- per share. I say that subsequently, in 2017-18, these shares stood transferred to a related party, M/s X-Calibre Consultants Private

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Limited and one Mr. Dev Ranjan Banerjee and no monetary transaction for such transfer is available in the public domain. It has been denied that the shares were sold by the Corporate Debtor under an arrangement to the effect where sundry creditors of the Corporate Debtor were agreed to be paid.

6 Analysis and Findings:

- 6.1 The instant interlocutory application was filed way back on 07.12.2020. On 11.01.2021, the Adjudicating Authority gave two weeks' time to the respondents to file their replies. However, since no reply had been filed by the Respondents till 09.08.2021, this Adjudicating Authority, upon insistence of the Ld. Counsel on behalf of Respondent Nos. 1 and 2, allowed a last opportunity was given to file a reply on 09.08.2021. Further, the Adjudicating Authority, vide the said order dated 09.08.2021 directed that the right to file reply for the Respondents no. 3 to 9 stood closed. Thereafter, on 02.11.2021, this Adjudicating Authority noted that in spite of the opportunities afforded to the respondents to file replies in the matter, only Respondent Nos. 1 and 2 has filed Reply Affidavits and as such the Respondent Nos. 3 to 9 were set *ex parte*.
- 6.2 Afterwards, this Adjudicating Authority vide order dated 04.04.2022 allowed for the liquidation of the Corporate Debtor under section 33(1)(a) of the Code.
- 6.3 Afterwards, this Adjudicating Authority, vide order dated 03.08.2022 directed that the matter be listed for final consideration on 31.08.2022. However, on 31.08.2022, the Ld. Counsel for the Respondents sought more time to advance its arguments. Noting that the instant IA was filed in 2020, the Adjudicating Authority allowed for the adjournment of the matter subject to payment of ₹20,000/- as cost. However, on the next date i.e 23.09.2022, there was no representation on behalf of the Respondents and it was also noted that the cost of ₹20,000/- had not been paid.

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- 6.4 Again, on the next date i.e 26.10.2022, none appeared on behalf of the Respondent No. 1 and 2. It was noted that the order dated 23.09.2022 had not been complied with. As such, the Adjudicating Authority directed that if its directions were not complied with before the next date of hearing, necessary orders would be passed. The matter was next listed on 23.11.2022.
- 6.5 On 23.11.2022, again there was no representation on behalf of the respondent Nos. 1 and 2. Further, the Ld. Counsel appearing for the Liquidator pointed out that in para iv at page 18 of the application, there was a typographical error in mentioning the amount and in place of ₹3,70,59,000/- and that the correct amount should be read as ₹1,16,79,000/-. In light of the same, the matter was reserved for final orders.
- 6.6 We have heard the Ld. Counsel for the Liquidator and perused the records.
- 6.7 The Resolution Professional has filed this application seeking reliefs under sections 43, 44,66 and 60(5) and has contended that the aforementioned transactions are preferential and fraudulent in nature. For convenience, each of the transactions as stated by the Resolution Professional, has been tabulated hereunder:

Respondent	Date	Contention	Transactions
Respondent No. 1	11.01.2018	Payment amounting to ₹9,27,028/- to Mr. Rajesh Toshniwal. It is stated in the audited financial statements that Mr. Rajesh Toshniwal had advanced loan to Corporate Debtor in his capacity as the director.	Preferential
Respondent No. 6	Between 11.01.2018	Payment amounting to ₹71,82,600/- to Toshniwal	Preferential

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	and 11.10.2018	Enterprises, a proprietorship of Late Mr. Kamal Kishore Toshniwal. It is stated in the audited financial statements that Toshniwal Enterprises had sold goods to the Corporate Debtor.	
Respondent No. 7	28.12.2018	Payment amounting to ₹1,12,000/- to Holdwell Tradecom Pvt. Ltd. It is stated in the audited financial statements that Holdwell Tradecom Pvt. Ltd had given advances to Corporate Debtor.	Preferential
Respondent No. 8	From 38.11.2017 to 06.10.2018	Payment amounting to ₹1,16,79,000/- to Nandlal Kamal Kishore Vyapar Pvt. Ltd. It is stated in the audited financial statements that Nandlal Kamal Kishore Vyapar Pvt. Ltd had given advances to Corporate Debtor.	Preferential
Respondent No. 5		Payment amounting to ₹7,30,000/- to Raghav Toshniwal	Fraudulent
Respondent No. 9		Payment amounting to ₹5,42,77,010/- to Digital Live Ads Ltd.	Fraudulent
	February 2017 to July 2019	Irregularities in the monthly stock statement submitted with United Bank of India compared to the stock statement presented in the audited financial statements with a variance of Rs. 2138.54 Lakhs for the financial year ending March 2017 and Rs.	Fraudulent

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		2156.84 Lakhs for the financial year ending March 2018	
	From 01 April 2017 to 31 March 2018	Irregularities in the purchase and sales as depicted in the monthly stock statement and the audited financial statements for the financial year 2017- 2018. There is a variance of Rs. 682.44 Lakhs in respect to sales and Rs. 692.21 lakhs in respect to purchases.	Fraudulent
	March 2019	Variance of Rs. 3308.73 Lakhs observed in the debtors outstanding as per the confirmations received and the debtor list attached with the stock statements.	Fraudulent
	F.Y. 2016-17	Mismatch in shareholding information as filed with the ROC and as given in the audited financial statements: 82000 shares of one shareholder namely Mrs. Sushila Devi Toshniwal were apparently transferred to Mr. Raghav Toshniwal as per the audited financial statements. however Form MGT filed by the corporate debtor depicts that the same were transferred to Mr. Rajesh Toshniwal.	Fraudulent
	F.Y. 2016-17	Variance in book debts balance as per stock statement and audited financial statements for a sum of Rs. 962.27 Lakhs for the financial year ending March 2017 and a	Fraudulent

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		sum of Rs. 1282.99 Lakhs for the financial year ending March 2018.	
	From 1 st April 2017 to 22 nd November 2017	High Value transactions made by from the Account No. 301505010039329 maintained with United Bank of India being a total sum of Rs.1,47,27,000.00 to unknown persons.	Fraudulent
	F.Y. 2016-17	Investment of Rs. 564.63 lakhs made in shares of one M/s Techniche Consulting Services Pvt. Ltd.. In the audited financial statements for FY 2016-2017 such investment was made out of surplus funds. However upon investigation it has been found that the total borrowings of the corporate debtor for the said financial year was an approximately the same amount as the investment made. Furthermore the shares were bought at a premium of 12.23. Govt. Rs. 199 per share for shares having a nominal value of Rs. 10 per share.	Fraudulent

- 15 The abovementioned transactions have been determined to be preferential and/or fraudulent by the Resolution Professional. We have gone through the application filed by the Resolution Professional and the averments contained therein.
- 16 It is relevant to note here the Resolution Professional, while forming his opinion and determining the nature of the aforementioned transactions, has

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referred to a Forensic Audit Report dated 29th September, 2020, a copy of which has been annexed as Annexure- F to the application in pages 98-629. In paragraph (k) on page 16 of the Application, it is further stated that the Respondent No.1 had failed to give any reply to the queries raised by the Applicant in pursuance of the Interim Report prepared by the Forensic Auditor.

- 17 From paragraph (i) on page 15 of the Application, it also appears that apart from relying on the said Forensic Audit Report dated 29th September 2020, there is independent application of mind by the liquidator in filing this application.
- 18 Further, the primary defence taken by the Respondent No. 1 and 2 in their Reply- Affidavit is that the documents of the Corporate Debtor were seized by the police. The Respondents in their reply have attempted to explain the discrepancies but the same has not been backed by any evidence.
- 19 Further, the intent of the Respondents is immaterial while determining if the transactions in question fall under the category of preferential transactions under section 43. In this regard, we would like to rely on the decision taken by the Hon'ble National Company Law Tribunal (NCLAT) in the matter of ***GVR Consulting Services Pvt. Ltd. and Ors. vs. Pooja Bahry (Earstwhile RP of NTL Electronics India Pvt. Ltd.) and Ors.***¹

".....The intent of the Corporate Debtor is not relevant since the Section 43 envisages statutory fiction as has been noted above. Whether the Act is voluntary or not has no relevance while coming to the conclusion whether transaction is preferential or not. Learned Counsel for the Resolution Professional has rightly referred to Section 43, sub-section (3) proviso." (Para 45)

Sd/-

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¹ MANU/NL/0371/2023 (24.04.2023 - NCLAT)

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- 20 We have also considered the law laid down by the Hon'ble Supreme Court in the matter of *Anuj Jain vs. Axis Bank Ltd. and Ors*² wherein the Apex Court has analysed the section 43 of the Code and made following observations:

“ 21.1. Looking at the broad features of Section 43 of the Code, it is noticed that as per sub-section (1) thereof, when 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 specified in sub-section (2), to any person/persons as referred to in sub-section (4), he is required to apply to the Adjudicating Authority for avoidance of preferential transactions and for one or more of the orders referred to in Section 44. If twin conditions specified in sub-section (2) of Section 43 are satisfied, the transaction would be deemed to be of preference. As per clause (a) of sub-section (2) of Section 43, the transaction, of transfer of property or an interest thereof of the corporate debtor, ought to be 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 as per clause (b) thereof, such transfer ought to be of the effect of putting such creditor or surety or guarantor in beneficial position than it would have been in the event of distribution of assets under Section 53.

21.2. However, 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

² MANU/SC/0228/2020

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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". The relevant time is reckoned, as per sub-section (4) of Section 43 of the Code, in two ways: (a) if the preference is given to a related party (other than an employee), the relevant time is a period of two years preceding the insolvency commencement date; and (b) if the preference is given to a person other than a related party, the relevant time is a period of one year preceding such commencement date. In other words, for a transaction to fall within the mischief sought to be remedied by Sections 43 and 44 of the Code, it ought to be a preferential one answering to the requirements of sub-section (2) of Section 43; and the preference ought to have been given at a relevant time, as specified in sub-section (4) of Section 43."

- 7 The insolvency commencement date in the instant case is 22 November 2019. Upon perusal of the Forensic Audit Report, it can be seen that the alleged payments were made from the account of the Corporate Debtor between the period of 23 November 2017 to 22 November 2019. As such, the alleged preferential transactions took place within the relevant time prescribed by the Code. It is also noted that no plea has been taken by the Respondents in the Reply Affidavit. Further, the Respondent No. 1 and 2 have only contended that the transactions took place in the ordinary course of business. However, no evidence to that effect has been produced on their behalf. Instead, from the Minutes of the CoC Meetings dated 19th December

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Sd/-

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2019³, 5th March 2020⁴, 11th June 2020⁵ and 6th October 2020⁶, it is clear that the Suspended Directors of the Corporate Debtor had refused to cooperate with the RP, inspite of several reminders from the CoC and express instructions given by the Adjudicating Authority vide order dated 16th January 2020. Further, the Respondents No. 3 to 9 have chose not to contest the instant application at all.

- 8 Coming to the reliefs sought by the Applicant in paragraph 6(f) & (g) of the Application, the Applicant has failed to provide any evidence in support of his averments in relation to the said transactions. Further, the Forensic Audit Report also does not mention these transactions. Therefore, it is not possible to ascertain if and when these transactions took place. As such, the reliefs sought in paragraph 6(f) & (g) cannot be granted.
- 21 Therefore, keeping in mind the aforementioned facts, circumstances, the case laws cited above and in light of the Forensic Audit Report dated 29th September 2020, we are of the view that the Applicant has made out a case for declaring the aforementioned transactions as preferential and fraudulent in terms of sections 43, 45 and 66. As such, all the reliefs sought by the Applicant in the Application, barring the reliefs sought in paragraph 6(f) & (g) therein, are granted. In light of para 6.5 of this order, the relief sought by the Applicant in Paragraph 6(d) of the application is granted to the extent of ₹1,16,79,000/-.
- 22 I.A. No. 1253/KB/2020 is therefore, partly *allowed*, to the extent as indicated above.
- 23 Therefore, the I.A. No. 1253/KB/2020 is *disposed of*.
- 24 List CP(IB) No. 1175 /KB/2019 on 13.09.2023.

Sd/-

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- ³ Annexure A
⁴ Annexure B
⁵ Annexure D
⁶ Annexure G

Sd/-

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- 25 The registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.
- 26 A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

sdt

Balraj Joshi
Member (Technical)

sdt

Rohit Kapoor
Member (Judicial)

Signed this the 10th day of August 2023

SM[LRA]