

IN THE NATIONAL COMPANY LAW TRIBUNAL

KOCHI BENCH

IA (IBC)/373/KOB/2022

IN

IBA/11/KOB/2020

(Under Section 45(1) and 60(5)(c) of the Insolvency and Bankruptcy Code, 2016 r/w Regulation 35(A) of IBBI (Insolvency Resolution of Corporate Persons) Regulations 2016, and Rule 11 of NCLT Rules, 2016.)

Memo of Parties

C.A. ANNIE ABRAHAM

Liquidator of M/s. MIR Realtors Private
Limited (in liquidation)
2nd Floor, Pine Gardens, VRM Road,
Ravipuram, Kochi- 682016

...Applicant/ Liquidator

Versus

ARUN KUMAR K

1108, Sunny Palace,
Changampuzha Samadhi Road,
Edappally, Kochi- 682024

...Respondent

In the matter of:

Federal Bank Limited : Applicant

Versus

M/s Mir Realtors Pvt Ltd : Respondent

2. The Corporate Insolvency Resolution Process for the Company was initiated by an order of this Hon'ble Tribunal on 16/11/2021, in IBA/11/KOB/2020. The Committee of Creditors, in its 2nd meeting held on 16/03/2022, decided to conduct a forensic audit covering a look-back period of 5 years. Subsequently, upon stakeholders' request, the period was extended to 10 years, encompassing the period from 2011-12 to 2020-21, up to the insolvency commencement date of 18/12/2021. This decision was ratified in the 3rd meeting of CoC held on 26-04-2022. According to the CoC's decision, the then Resolution Professional appointed CA Sreenivasan P R of PSDY & Associates, Chartered Accountants, Kochi for the forensic audit assignment.

3. The forensic audit uncovered various irregularities, particularly concerning the sale of a Motor Vehicle with Registration No. KL-07-CC991, a Toyota Fortuner (2014- 4x2 model). Despite being purchased on 30/11/2014 for a sum of Rs 27.29 lakhs and disclosed as a fixed asset in the books of the Corporate Debtor until the Financial Year 2019-20, it was noted that depreciation entries were not recorded. Additionally, insurance expenses and maintenance costs were recorded in the books of account. The sale agreement dated 01/02/2019 between the Corporate Debtor and Shibu Peter stated the sale of the vehicle for Rs 11,00,000/-. As per the records, the sale consideration was received on 15/12/2020 based on sale agreement dated 01/02/2019. However, it was observed that a sum of Rs 11,00,000/- was shown as the sale price with the narration "Amount received from MD". As per the observation in the Forensic

audit report, the details of the cheque number alone were available, but not the name of the payee/ Transferee. Furthermore, the sale price in the books contrasted significantly with the current market value obtained from various sources, indicating a substantial loss incurred by the Corporate Debtor.

4. The forensic audit assessed the current market value of the vehicle in OLX from three different dates: 30/05/22, 19/05/22, and 27/05/22 which indicated values of Rs 17.75 Lakhs, Rs 21.5 Lakhs, and Rs 15.85 Lakhs respectively. By averaging the market prices from the three dates, the calculated value was Rs 18,36,666/-. This difference between the recorded sale price and the calculated market value suggests that the vehicle was sold at a significant loss of Rs 7,36,666/- (Rs 18,36,666/- less Rs 11,00,000/-) by the Respondent, without any change in ownership details to date.
5. Additionally, there is no mention of Toyota finance in the Corporate Debtor's records. And further stated that both the Respondent and Mr. Shibu Peter serve as common directors in Orbit Nidhi Limited and Orbinfin Chits Private Limited. The transaction falls under an undervalued transaction, under Section 45(2)(b) of the IBC 2016, as it was conducted at a significantly lower value.
6. The Respondent filed a reply stating that the sale agreement was executed between the Corporate Debtor and Mr. Shibu Peter on 01/02/2019. They further argue that the forensic audit report lacks clarity regarding the transfer of funds from the Respondent's account.

7. The Respondent submitted that the Forensic Auditor derived a valuation by conducting a simple search for 'Toyota Fortuner' on the OLX platform but OLX represents vehicles purchased on different dates, some being first-time owners, others second-hand, with varying total kilometres travelled and differing in several aspects. Therefore, relying on prices provided by different sellers on OLX cannot be conclusively deemed as 'significantly less in value' based on such an analysis. Various factors, including the vehicle's condition and market dynamics, could result in a lower price from a buyer, or an urgent sale may have been necessitated to meet the Corporate Debtor's needs.
8. Moreover, the construed date of transaction falls within the two-year look-back period specified for transactions with 'Related Parties' under Section 46 of the Code. Consequently, the Application is deemed non-compliant with the provisions of the Code.
9. The Applicant submitted a rejoinder indicating that the sale agreement was dated 1/02/2019, and the receipt of the money into the book of Accounts of the Corporate Debtor was on 15/12/2020, However, the recording of the sale in the Corporate Debtor's books occurred on 31/03/2021. Since the Respondent failed to provide reasons for recording the sale on 01/02/2019 or 15/12/2020, the date of the transaction in the books of account must be considered as the date of sale, as it was recognized and disclosed in the financial statements signed by the Respondent and Statutory Auditor. Additionally, the Applicant argued that following the recording of the

transaction on 31/03/2021, the liquidator is legally bound to accept this date as the transaction date, rendering the look-back period of 1 or 2 years before the commencement of insolvency (18/11/2021) irrelevant. Moreover, the Applicant has taken the prevailing market prices from a widely used website for trading used vehicles and compared them with the actual sales figure.

10. We have heard and considered the submissions presented by the learned counsel for both the Petitioner and the Respondent. From the submissions made by them, the question to be considered here is whether the alleged transaction, ie; the sale of the vehicle Toyota Fortuner bearing Reg No KL-07-CC-991 would constitute an 'undervalued transaction' as envisaged under section 45 of the Code. If so, whether it comes under the look back period of 2 years prior to the CIRP as envisaged under section 46 of the Code. In order to better address this issue, it is necessary to examine the scope of undervalued transaction, which are enumerated under the provisions of the Code.

45. (1) If the liquidator or the resolution professional, as the case may be, on an examination of the transactions of the corporate debtor referred to in sub-section (2) determines that certain transactions were made during the relevant period under section 46, which were undervalued, he shall make an application to the Adjudicating Authority to declare such transactions as void and reverse the effect of such transaction in accordance with this Chapter.

(2) A transaction shall be considered undervalued where the corporate debtor—

(a) makes a gift to a person; or

(b) enters into a transaction with a person which involves the transfer of one or more assets by the corporate debtor for a consideration the value of which is significantly less than the value of the consideration provided by the corporate debtor,

and such transaction has not taken place in the ordinary course of business of the corporate debtor.

46. Relevant period for avoidable transactions

(1) In an application for avoiding a transaction at undervalue, the liquidator or the resolution professional, as the case may be, shall demonstrate that—

(i) such transaction was made with any person within the period of one year preceding the insolvency commencement date; or

(ii) such transaction was made with a related party within the period of two years preceding the insolvency commencement date.

(2) The Adjudicating Authority may require an independent expert to assess evidence relating to the value of the transactions mentioned in this section.

11. Under Section 45 of the Code, a transaction is deemed undervalued if the corporate debtor either gives a gift to or engages in a transaction with a party, resulting in the transfer of one or more assets for a consideration significantly lower than the value provided by the corporate debtor, and if the transaction falls outside the ordinary course of business. Additionally, Section 46 specifies a two-year look-back period for transactions with related parties and a one-year look-back period for transactions involving other parties.

12. In this application, a Forensic Audit was conducted on the Corporate Debtor, revealing an alleged undervalued sale of a Toyota Fortuner. According to the Forensic Audit Report, the vehicle in question was listed as a fixed asset in the company's books of account. It is to be noted that the Forensic Auditor assessed the vehicle's worth by referencing advertisements on OLX, an online platform for buying, selling, and exchanging used goods and services. And there the Forensic Auditor found the average market value of the Toyota Fortuner as 18 Lakhs, whereas the alleged sale occurred only for 11 lakhs and thus undervalued. It is to be emphasized that, the then Resolution Professional and the substituted Liquidator herein are solely relying on the Forensic Audit Report in the present application. One of the key arguments of the Respondent have been the registered owner of the vehicle since December 2014, ie, the date from which the Corporate Debtor ought to have purchased the vehicle. RC details of the alleged vehicle also substantiate the same. Prima facie we found the dispute in the ownership of the alleged vehicle.

13.The fact that in the books of account, the maintenance and other charges of the alleged vehicle were paid by the Corporate Debtor's account, we do not find any discrepancy in such transactions when the Managing Director's vehicle is used for business purposes of the Corporate Debtor. However, in the absence of additional evidence from the side of the Applicant/Liquidator establishing ownership other than the statement provided in the Forensic Audit Report, which mentions that *"Motor vehicle with registration number KL07CC991, Toyota Fortuner (2014-4*2 model), was listed as the company's fixed asset until the financial year 2019-20,"* we are of the view that the Applicant/Liquidator has not sufficiently proven ownership of the vehicle in question.

14.Considering that the Forensic Auditor relied on the OLX platform to determine the value of the alleged vehicle, and the Applicant/Liquidator based their assessment solely on the Forensic Audit Report, we find the valuation lacking authenticity. On platforms like OLX, prices are often indicative and subject to negotiation between prospective buyers and sellers. To corroborate the Forensic Audit Report, the Applicant/Liquidator would have taken an independent expert valuation.

15.Section 3(33) of the Code defines 'Transaction' as follows:

"transaction" includes an agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor;

16.The date of the transaction ie; the date of the agreement of sale or the date on which the Corporate Debtor enters into a transaction was 01.02.2019. In this case, the insolvency commencement date is 18.12.2021, then the look-back period is from 19.12.2019 to 18.12.2021. Since the transaction in question took place on 01.02.2019, it falls outside the scope of the provisions outlined in the Code. Furthermore, we deem it inappropriate to offer any interpretation regarding the term "date of transaction."

17.Hence in view of the above discussions, both issues have been answered negatively, accordingly this **application stands dismissed.**

18.The Registry is directed to send e-mail copies of the order forthwith to the parties and their respective counsels.

19.Let the certified copy of the order be issued upon compliance with requisite formalities.

20.File be consigned to records

SHYAM BABU
GAUTAM

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GAUTAM
Date: 2024.02.22 16:37:43 +05'30'

SHYAM BABU GAUTAM
(MEMBER TECHNICAL)

T.KRISHNAVALLI

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Date: 2024.02.22 16:37:20 +05'30'

T KRISHNA VALLI
(MEMBER JUDICIAL)

Signed on this the 22nd day of February, 2024.

Krishna.