

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

I.A. 1096 of 2021

Under Section 45 r/w Section 70, 71, 72, and 73 of the
Insolvency & Bankruptcy Code, 2016

Mr. Jayanti Lal Jain,
The Liquidator

...Applicant

V/s

Mr. Manharlal Shantilal Mehta
& Others

...Respondent

In the matter of
C.P.(IB) No. 1523/MB/2019
Standard Chartered Bank Limited

...Financial Creditor

Vs.

K. K. Welding Limited

...Corporate Debtor

Order delivered on: 21.01.2025

Coram:

Shri Prabhat Kumar
Hon'ble Member (Technical)

Justice Shri V.G. Bisht
Hon'ble Member (Judicial)

Appearances:

For the Applicant

: Adv. Mitali Bhatt

For the Respondent : Adv. Mansha Khemka a/w Twinkle Khemka

ORDER

Per: Coram

1. The Company petition i.e. 1523/2019 was filed by a Financial Creditor Standard Chartered Bank Limited under Section 7 of the Insolvency and Bankruptcy Code 2016 (the "Code") against the Corporate Debtor. This Tribunal vide an Order dated 28 August 2019 admitted the petition resulting into initiation of Corporate Insolvency Resolution Process.
 - 1.1. Mr. Anil Virjdas Rajkotia was appointed as an IRP and subsequently confirmed as the Resolution Professional.
 - 1.2. During the course of CIRP, Transaction Auditor viz. M/s. Parekh Shah & Lodha (Chartered Accountants) were appointed to undertake the transaction audit of the books of the Corporate Debtor for the period from 01 April 2016 to 28 August 2019 (insolvency commencement date).
 - 1.3. Vide Order dated 07 January 2021 passed by this Tribunal, the Liquidation Process of the Corporate Debtor was initiated and the applicant was appointed as the liquidator.
 - 1.4. The Corporate Debtor was established on 29 November 2001 and is engaged in trading of welding electrodes, welding rods, welding cables, safety equipment's, grinding wheels and welding accessories.
 - 1.5. It is stated by the Applicant that the Respondents are the key managerial personnel and the suspended Directors who are directly responsible for the undervalued transactions and falsification of books of accounts.
 - 1.6. The shareholding pattern of the Corporate Debtor comprises of 14,85,000 shares held by:
 - a. Respondent No. 1 constituting 31.72% shareholding.
 - b. Respondent No. 2 constituting 13.80% shareholding.
2. This Application IA 1096/2021 was filed under Section 45,70, 71, 72 and 73 r/w Section 26 of The Insolvency and Bankruptcy Code, 2016 ("Code"), seeking following reliefs :

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- a. *Require the persons as detailed in this above, to pay such sums i.e. Rs. 23.99 lacs by each of the Respondents (aggregating to Rs. 119.97 lacs) as stated herein above in respect of benefits received by them from the Corporate Debtor as the Hon'ble Tribunal may direct;*
 - b. *Pass appropriate directions/orders in terms of Section 45, 70, 71, 72 and 73 of the Code including for recovery/restoration of legitimate amounts due to the Corporate Debtor;*
 - c. *And for such other/ further order and/or direction (s) as the facts and circumstances of the case may warrant.*
3. The Applicant submits that the respondents have been regularly engaging in the selling the products at substantially lower than normal rates which clearly triggers the provisions of section 45 of the Code and the said transactions are "undervalued. Annexure 1 of the transaction audit report, which is annexed to this Application, clearly provides 103 instances when the Respondents have indulged in a deliberate undervalued transaction vis-à-vis the average sale prices thereby leading to avoidable financial loss to the Corporate Debtor.
- 3.1. On perusal of the transaction audit report it is evident that in most cases the material was sold at a substantially lower value, in fact less than 10% of the realisable value which is nothing else but diversion of funds and loss of substantial assets of the Corporate Debtor for the personal gains and benefits of the Respondents. The modus operandi of the Respondents is as such that it has led to substantial financial deterioration of the Corporate Debtor and huge losses to the secured financial creditors. Resultant, the Corporate Debtor is now undergoing liquidation.
- 3.2. Further, it is not out of place to mention that most of the transactions undertaken are at a value less than 50% of the realisable value and many transactions are even below 10% of the realisable value. Accordingly, the Applicant has submitted that it is imperative for this Tribunal to take cognisance of these facts and calls for appropriate action against the Respondents so as to direct them to make good the substantial financial loss suffered by the Corporate Debtor as an act of misuse of the fiduciary powers of the Respondents as the then Directors of the Corporate Debtor. The estimated loss is of Rs. 119.97 lacs as can be seen at internal page 38 of the transaction

audit report and the Respondents ought to be directed to contribute equally and be brought back to the account of the Corporate Debtor maintained by the Applicant Liquidator.

- i. Respondent No. 1: Rs. 23.99 lacs
- ii. Respondent No. 2: Rs. 23.99 lacs
- iii. Respondent No. 3: Rs. 23.99 lacs
- iv. Respondent No. 4: Rs. 23.99 lacs
- v. Respondent No. 5: Rs. 23.99 lacs

Aggregating to Rs. 119.97 lacs

4. At the outset it is important to refer to the provisions of section 45 of the Code which are extracted hereunder:

"45. Avoidance of undervalued transactions.

(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.

5. The Counsel for the Respondent made submissions and Respondent is stated to have filed their Reply, however, the same was not found on the DMS Portal. The Counsel had submitted following in defence –

- a. The transaction period i.e. 01st April, 2016, to 28th August 2019 exceeds the maximum review period allowed under Section 46(1) of IBC, 2016 i.e. 28th August, 2018, to 28th August, 2019.
- b. In order to qualify a transaction as undervalued, the value of consideration should be significantly less than the value of consideration PROVIDED by the corporate debtor, whereas the auditor has compared the sales rates of goods sold to certain parties with sales rates of identical goods sold to other parties. The auditor should

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- have compared the sales rate with cost to (i.e. consideration provided by) the corporate debtor, instead of comparing it with sale rate offered to other parties.
- c. The auditor has in fact failed to specify any reason as to why the transactions of goods sold at different rates to different parties should be treated as undervalued transaction. The auditor has failed to understand a business practice normally prevalent across many sectors that many entities sell goods to different parties at different rates, which is nothing, but the business prudence of the entity.
- d. The transactions were made in the ordinary course of business.
6. We have considered the submissions of the Counsel for both the Parties and perused the material on record.
- 6.1. It is case of the Applicant that the transactions undertaken are at a value less than 50% of the realisable value and many transactions are even below 10% of the realisable value. Per contra, the Respondent has contested the findings of the Transaction Auditor stating that the auditor has compared the sales rates of goods sold to certain parties with sales rates of identical goods sold to other parties whereas, the auditor ought to have compared the sales rate with cost to (i.e. consideration provided by) the corporate debtor, instead of comparing it with sale rate offered to other parties.
- 6.2. The Transaction Auditor at Para 5.1 of its Report has stated as follows –
- We have analyzed the sales transactions on test check basis on several finished goods sold by the company during the audit period. During the said verification, we have observed multiple cases, wherein wide deviations were observed in the Sales Rates of the underlying material sold to some parties, with the sales made to other parties in the same period.*
- For the purpose of our analysis we have considered the Sales Registered maintained in the Tally Software, detailed material description of the goods sold, sales rates applied on the goods sold, sales rates of the identical material in the similar period by the company to the other parties. During the course of our analysis **we have come across 103 instances, on test check basis, wherein total short revenue of Rs 119.97 Lacs was observed during the audit period.***
- Considering that there are large volume of undervalue sales transactions, especially repeated transactions with few of the parties, at a price which is found much lower than the comparative prices with other parties, there is a reasonable cause to believe for existence of parallel unaccounted transactions with these parties. **All these instances are covered as Undervalued Transactions, under Section 45 of IBC- 2016.***
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- 6.3. On perusal of the Annexure 1 forming part of the Transaction Report, we find that the Transaction Auditor has compared the sale rate of each of 103 transactions listed there

in with nearest Sale rate of each of material description. Though comparable rate taken by the Transaction Auditor as basis has not been challenged by the Respondent, but the Respondents have submitted that each sale instance ought to have been compared with the cost of each such item in its hand, however, the Respondents have failed to bring on record the cost of each such item in its hand and has contested the observation of Transaction Auditor on the basis of bald statement.

6.4. Section 45(2) of the Code provides that “*A transaction shall be considered undervalued where the corporate debtor 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*”.

6.5. In the present case, there is clear finding that the Corporate Debtor sold its inventory at price lower than by 50% to 90% and such has not been controverted on facts by the Respondent but has only been contested on the basis of comparable adopted by the Transaction Auditor without providing any details to the Transaction Auditor how such sale transactions had not taken place at a price significantly lower than the realisable value. Needless to say, such details have also not been produced before this Tribunal also. Accordingly, we are of considered view that the sale transactions in question fall within the scope of Section 45 of the Code and has caused loss to the Corporate Debtor.

6.6. Section 48 of the IBC provides for Order in case of Undervalued transactions. It reads as under –

The order of the Adjudicating Authority under sub-section (1) of section 45 may provide for the following:—

(a) require any property transferred as part of the transaction, to be vested in the corporate debtor;

(b) release or discharge (in whole or in part) any security interest granted by the corporate debtor;

(c) require any person to pay such sums, in respect of benefits received by such person, to the liquidator or the resolution professional as the case may be, as the Adjudicating Authority may direct; or

(d) require the payment of such consideration for the transaction as may be determined by an independent expert.

- 6.7. The clause (b) is not applicable to the present facts. The transferee(s) i.e. buyer(s) of inventory in each sale transaction are not party respondent to this application, accordingly, no order can be passed in terms of (a), (c) and (d). Further, the applicant has stated the possibility that cash sales were undertaken and has been pocketed by the Respondents, however, there is no material on record to vouch for such possibility and such statement is no more than a surmise. Accordingly, in the absence of any any benefit accruing to the Respondents from such transactions, an order in terms of clause (c) also cannot be passed against the Respondents.
- 6.8. As regards prayer for directions/orders in terms of 70, 71, 72 and 73 of the Code, Section 236 of the Code provides for commencement of prosecution for offences under the IBC. Section 236(1) vests the jurisdiction in the Special Court established under Chapter XXVIII of the Companies Act, 2013 and Section 236(2) bars cognizance of offence by a Court save on a complaint made by the Board or the Central Government or any person authorised by the Central Government in this behalf. Accordingly, this Tribunal may only refer the matter to the Board to take appropriate action or direct the Resolution Professional/Liquidator to do so.
- 6.9. At para 15 of the Application, the Applicant has sought levy of penalty in terms of Section 70, 71, 72 & 73 of the Code. As discussed above, the fine can only be levied by the Special Court in terms of Section 236 of the Code on a complaint made by Central Government or the Board or any person authorised by Central Government in this behalf. Accordingly, we consider it appropriate to direct Applicant herein to submit a statement of allegations and findings to IBBI for further investigation in the matter and for taking appropriate action in terms of Section 236(2) of the Code, if Board finds it fit to do so.
7. In view of foregoing, IA 1096 of 2021 is partly allowed and disposed of accordingly.

Sd/-
Prabhat Kumar
Member (Technical)

Sd/-
Justice V.G. Bisht
Member (Judicial)