

IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH, COURT-II

I.A. No. 124 of 2020

In

CP (IB) No. 4367 of 2018

Under Section 43, 44 and 66 of the
Insolvency and Bankruptcy Code, 2016.

IN THE MATTER OF

Mr. Harshad S. Deshpande,

Resolution Professional of M/s. Altair
Industrial Technologies Private Limited,
Office at Shop No.02, Sumedha Apartments,
Shivtirtha Nagar, Paud Road, Kothrud,
Pune-411029.

... Applicant

V/s.

1. Mr. Anoop Anand

2. Mr. Anil Anand

3. Ms. Mahima Anand

All residing at: 6, Nishant Apartments, South
Main Road, Koregaon Park, Pune-411001.

... Respondents

IN THE MATTER OF

**M/s. Altair Industrial Technologies
Private Limited**

... Original Applicant/

Corporate Debtor

Order delivered on: - 20.03.2024.

Coram:

Hon'ble Shri Kuldip Kumar Kareer, Member (Judicial)

Hon'ble Shri Anil Raj Chellan, Member (Technical)

Appearances:

For the Applicant : Adv. Avinash Khanolkar.

For the Respondent No. 1 : Adv. Palak Gupta

For the Respondent No. 2 : Adv. Rahul Pillai

ORDER

Per: - Coram.

1. The present Interlocutory Application is filed by the Applicant named Mr. Harshad S. Deshpande, who is a Resolution Professional of M/s. Altair Industrial Technologies Private Limited seeking, *inter-alia*, the following prayers:
 - a. Direct the Respondent No.01 to remit the amount of INR 28,60,000/- and the Respondent No.03 to remit the amount of INR 13,55,000/- in the account of the Corporate Debtor, which are received by the Respondents No.01 and 03 respectively in preference over the other creditors of the Corporate Debtor;
 - b. Pass an order u/s 66 of the Code directing the Respondent No.01 to remit the amount of INR 1,99,26,112/- in the account of the Corporate Debtor which was withdrawn/mis-appropriated by the Respondent No.01 fraudulently to satisfy his personal expenses and further direct the Respondent No.01 to return the Current Assets of the Corporate Debtor which he has removed from the Registered Office of the Corporate Debtor.

Facts of the Case as per the Applicant:

2. The Corporate Insolvency Resolution Process ('CIRP') commenced against the Corporate Debtor vide Order dated February 26, 2019 passed by this Hon'ble Bench on an application filed by the Corporate Debtor under Section 10 of the Insolvency & Bankruptcy Code, 2016 ("Code") and Mr. Sunil G. Nanal was appointed as the Interim Resolution Professional (hereinafter referred to as 'IRP') of the Corporate Debtor. The Respondents No.01 and 02 are the suspended directors of the Corporate Debtor and the Respondent No.03 is a related party as per the provisions of Section 5(24)(a) of the Code.
3. The IRP made a public announcement u/s 15 of the Code inviting claims and received the following claims

| <u>Sr. No.</u> | <u>Name of the Creditor</u> | <u>Type of Creditor</u> | <u>Amount (in INR)</u> |
|-----------------------|------------------------------------|--------------------------------|-------------------------------|
| 1. | Bank of India | Financial | 35,87,50,098.52/- |
| 2. | SIDBI | Financial | 3,14,01,972.71/- |
| 3. | MT and T Rentals Ltd | Operational | 18,86,141/- |
| 4. | M/s. Suhani Industries Tubes | Operational | 5,73,689/- |
| 5. | M/s. Suttati Enterprise Pvt Ltd | Operational | 15,29,203.43/- |
| 6. | IEW Cranes Pvt Ltd | Operational | 22,00,804/- |
| 7. | M/s. Jaihind Electricals | Operational | 1,70,064/- |
| 8. | M/s. Kothari Heavy Lifters | Operational | 17,65,515/- |

4. Based on the claims received and admitted, the IRP had constituted a Committee of Creditors ('CoC') consisting of two Financial Creditors viz. Bank of India having 91.95% voting share and SIDBI having 8.05% voting share. In the first CoC meeting convened on 27.03.2019, it was resolved to replace the IRP with the Applicant as RP and accordingly, an application was moved before this Tribunal for change of resolution professional and this Hon'ble Tribunal vide Order dated 23rd July, 2019 has appointed the Applicant as the Resolution Professional of the Corporate Debtor.
5. In the interregnum period, the IRP had appointed M/s. Kirtane Pandit LLP, Chartered Accountants as Forensic Auditor vide Engagement Letter dated 24th May, 2019 for conducting the forensic audit of the Corporate Debtor for the relevant period as per the provisions of the Code. Accordingly, the Forensic Auditor has evaluated the transactions carried out within the period starting from 27.02.2017 to 26.02.2019. It is observed in the Audit Report that the Corporate Debtor had certain transactions with the related parties i.e. Respondents No. 01 and 03. The nature of these transactions is that as far as the position of Respondent No.01 is concerned, the Respondent No.01 had advanced certain amounts as loan to the Corporate Debtor in the past for business purpose and as far as the position of the Respondent No.03 is concerned, the Respondent No.03 has incurred certain expenses from her own pocket on behalf of the Corporate Debtor for the business purpose.
6. The Forensic Auditor in its report has stated that the Corporate Debtor as on 27.02.2017 owed an amount of INR 1,61,79,000/- to the Respondent No.01. However, during the audit, it was observed that as

on 26.02.2019, the outstanding amount owed by the Corporate Debtor to the Respondent No.01 is INR 1,33,19,000/-. After going through the transactions, it was observed by the Applicant that the Corporate Debtor had made a payment of INR 28,60,000/- to the Respondent No.01 in preference to the other creditors of the Corporate Debtor. During the relevant period, the Forensic Auditor observed that the Respondent No.03 has incurred certain expenses on behalf of the Corporate Debtor amounting to INR 9,91,000/-. However, the payment has been made in excess of amounts spent and as a result, the Respondent No.03 owes to the Corporate Debtor a sum of Rs. 13.55 lakhs as on 26.02.2019. Therefore, the Applicant states and submits that the Corporate Debtor has made a payment of Rs. 42,15,000/- to the Respondent Nos. 01 and 03 in preference to other creditors of the Corporate Debtor and therefore, this amount is to be called back in the Company.

7. It is further observed by the Applicant that the Respondent No.01 has withdrawn an amount of Rs. 1,99,26,112/- from the Kotak Mahindra Bank Account, Koregaon Branch, Pune belonging to the Corporate Debtor during the period from 26.02.2019 to 20.08.2019. The Applicant states that the Respondent No.01 without informing or taking prior consent of the IRP/Applicant has withdrawn the said amounts and misappropriated the said amounts to satisfy his personal expenditures. The Applicant further states that the nature of the transactions performed by the Respondent No.01 during the afore-stated period is a fraudulent one to defraud the creditors of the Corporate Debtor. When the RP came to know this fact, he immediately took steps for change in signatories of the said bank account and then took control of the transactions of the said bank

account of the Corporate Debtor.

8. The Respondent No.01 has removed certain furniture and current assets of the Corporate Debtor from the Registered Office of the Corporate Debtor without any intimation to the Applicant. The Applicant had time and again requested to return the removed assets, however, the Respondent No.01 is not acceding to the requests of the Applicant.
9. Therefore, based on the above-narrated factual matrices of the case, the Applicant herein has preferred this application for necessary directions from this Hon'ble Tribunal.

Reply on behalf of the Respondent No.01:

10. As per Regulation 35A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (being hereinafter referred to as "the **CIRP Regulations**" for the sake of brevity), a resolution professional is required to file an application for avoidance of preferential and fraudulent transaction within 135 days of the commencement of CIRP. In the present case, the CIRP of the Corporate Debtor commenced on February 26, 2019 and thus, the RP ought to have filed the application to avoid any preferential and fraudulent transactions on or before July 11, 2019. However, the above application was filed on December 02, 2019. Hence, the present application is barred by limitation and therefore, the same is liable to be dismissed.
11. As regards the allegations against Respondent No.01 being involved in preferential transactions for an amount of Rs. 28,60,000/- between February 27, 2017 and February 26, 2019, the Respondent No.01

submits that the above allegation is entirely based on the findings of the Forensic Audit Report dated October 31, 2019 and on perusal of the Forensic Audit Report, it is abundantly clear that it has no finding of preferential transaction against the Respondent No.01. The report levels allegations of preferential transaction against the Respondent No.02 i.e. Mr. Anil Anand and not against the Respondent No.01.

12. The Corporate Debtor conducted its business through its account with Bank of India. However, due to the financial crunch faced by the Corporate Debtor, Bank of India froze the said account and refused to allow any transactions on the same. This created an extremely difficult situation for the Corporate Debtor as without its bank account being operational, it was unable to conduct its day to day business. As a result, the ongoing projects of the Corporate Debtor were getting severely affected. In these circumstances, the Corporate Debtor was left with no other option but to use its account with Kotak Mahindra Bank in order to complete its ongoing projects. By an Order dated 26.02.2019, CIRP was initiated against the Corporate Debtor. In the first CoC meeting held on March 27, 2019, it was decided to replace the IRP and thus, IRP was of the opinion that since his appointment was not confirmed by the CoC, he could not take any major step in respect of the Corporate Debtor. Though the IRP looked after affairs of the Corporate Debtor, he did not take any active steps to run the business. Despite CoC's decision to replace the IRP, the RP was not appointed immediately. It is pertinent to note that at this stage, it was necessary for the Corporate Debtor to continue its operations to prevent a situation where the Corporate Debtor would be put into liquidation. Under these circumstances, the operation of Kotak Bank Account continued to remain in Respondent No.01's control until the

RP was appointed. There was full co-operation by the Respondent No.01 and employees of the Corporate Debtor with the IRP and no grievance was raised in this regard either by the IRP or the CoC at the relevant time.

13. Various transactions were undertaken in the Kotak Bank Account until appointment of the RP to keep the Corporate Debtor as a going concern. Had these transactions not been undertaken, the Corporate Debtor would have defaulted on various contractual obligations in the ongoing projects of the Corporate Debtor and it would not have been possible for the Corporate Debtor to remain as a going concern. Moreover, the said transactions were done with complete knowledge and consent of the IRP. In fact, the payments were made from the Kotak Account at the instructions of the IRP. The Respondent No.01 has annexed the copy of certain emails to show that the payments were made at the instructions of the IRP.
14. None of the payments made from the Kotak Bank Account during the CIRP of the Corporate Debtor were intended to defraud the creditors of the Corporate Debtor or any other person or for any other fraudulent purpose. In fact, all payments were made towards the expenses of the Corporate Debtor. Moreover, during the period in question, the Corporate Debtor received payments for an amount of approximately Rs. 1,89,14,041/- from various clients of the Corporate Debtor in the Kotak Bank Account. Thus, it is evident that the business of the Corporate Debtor was being run in usual course wherein the monies were not only debited from the company's bank account but also credited with the revenue earned by the company. This demonstrates that Kotak Bank Account was used for the bona fide purpose of

keeping the Corporate Debtor as a going concern.

15. From the Kotak Bank Statements produced by the RP for the relevant period, it is evident that an amount of Rs. 87,28,558/- was paid to the vendors of the Corporate Debtor. An amount of Rs. 44,53,718/- was paid towards the staff salaries or other employee payments of the Corporate Debtor. An amount of Rs. 1,37,527/- was paid to the insurance companies. An amount of Rs. 12,93,200/- was paid towards the rental expenses and a sum of Rs. 24,26,289/- was paid towards various site expenses. Rs. 6,00,096 was paid towards the credit card bills of the Corporate Debtor. The statement of Kotak Bank Account evidences that at least an amount of Rs. 30,435/- was debited from the account towards the bank charges. Rs. 2,67,000/- were incurred towards legal fees on behalf of the Corporate Debtor as the Corporate Debtor was undergoing several legal proceedings including the proceedings before the Hon'ble Tribunal. Total expenses incurred towards the CIRP costs from Kotak Bank Account during the relevant period amounts to Rs. 7,27,250/-. The Respondent submits that these payments were made for conducting the CIRP of the Corporate Debtor and therefore, the same cannot be treated as fraudulent transactions.
16. The Corporate Debtor had ongoing projects in Goa (JMC projects), Indian Air Force, Pune (Bhagyashree Infrastructure) and Aonla, Bareilly (IFFCO Ltd) during the relevant period and for the said projects, the personnel of the Corporate Debtor had to undertake travel on behalf of the Corporate Debtor. During the relevant period, an amount of Rs. 1,40,800/- was paid towards the conveyance and travelling for the afore-stated purposes. The Respondent No.01 submits that an amount of Rs. 8,96,503/- was incurred from the Kotak

Bank towards the administrative expenses such as stationery, telephone bills, IT expenses, food and electricity bills, etc. on behalf of the Corporate Debtor. The administrative expenses were also incurred in the usual course of business of the Corporate Debtor and the same were not made to defraud any person or for any other fraudulent purpose. Material Transport Charges of Rs. 1,68,436/- was paid towards transport of material during the operations of Corporate Debtor and an amount of Rs.89,000/- was paid from the Kotak Bank Account to a customer of the Corporate Debtor i.e. Grasim India Ltd. The refund of money was on account of delayed supply of goods and services to the customer. An amount of Rs. 20,000/- was paid from the Kotak Bank Account during the relevant period towards the Earnest Money Deposit on behalf of the Corporate Debtor. This EMD was paid for a proposed contract with the Indian Air Force, Pune for obtaining bid documents and other formalities.

17. As against the alleged expenses of Rs. 1,99,26,112/-, the Kotak Bank Account was credited with Rs. 1,89,14,041/- towards revenues earned by the Corporate Debtor during the said period. This evidences that the Corporate Debtor's business was being run as a going concern. The Respondent No.01 submits that it is settled law that in order to demonstrate fraudulent transactions, the RP is required to prove the fraudulent intent. The amounts were debited from the Kotak Bank Account in the usual course of business and there was no intent to defraud the creditors of the Corporate Debtor or any other person. The RP has failed to make any averment in the IA to demonstrate that the Respondent No.01 had any intention to defraud the creditors of the Corporate Debtor or any other person.

18. Further, as regards to the allegations as to the removal of furniture from the office of the Corporate Debtor, the Respondent states that the RP had failed to protect the assets of the Corporate Debtor and failed to take steps to keep the assets in a safe place. Hence, the Respondent No. 1, at his own expense, moved the assets from the rented office to the warehouse only to maintain the value of the assets of the Corporate Debtor.
19. The Respondent No.01 states that his bona fide intents with respect to the Corporate Debtor becomes evident from the fact that he has submitted a resolution plan for the Corporate Debtor, which has been approved by the CoC. The Applicant has filed an application for approval of resolution plan by the Adjudicating Authority u/s 30 & 31 of the Code. If the above-captioned IA is allowed, the same would derail entire resolution plan submitted by the Respondent No.01. Therefore, in the interest of CoC, other creditors as well as the Corporate Debtor, it is necessary that the above IA is dismissed.

Reply by Respondent No.02:

20. The present application filed by the Applicant is time barred under Regulation 35A of the CIRP Regulations as it has been filed after 135 days from the insolvency commencement date.
21. As per the Forensic Audit Report, an amount of Rs. 28,60,000/- paid by the Corporate Debtor to the Respondent No.02 amounts to preferential transaction. In this regard, Respondent No.02 submits that at the relevant time, he was working for the Corporate Debtor as its Managing Director and the same is evident from the Employment Agreement dated September 30, 2011 executed between the Corporate

Debtor and Respondent No.02. Under the Employment Agreement, Respondent No.02 was entitled to salary and certain allowances from the Corporate Debtor, and during the relevant period of 24 months from February 27, 2017 to February 26, 2019, Respondent No.02 was entitled to the remuneration of INR 29,52,000/- as computed in the table below:

| <u>Sr. No.</u> | <u>Particulars</u> | <u>Amount Per Month (INR)</u> | <u>Total Amount Payable in 24 months</u> |
|----------------|------------------------|-------------------------------|--|
| 1. | Basic Salary | 1,00,000 | 24,00,000 |
| 2. | Conveyance Allowance | 8,000 | 1,92,000 |
| 3. | Special Allowance | 10,000 | 2,40,000 |
| 4. | Leave Travel Allowance | 5,000 | 1,20,000 |
| | | TOTAL | 29,52,000/- |

22. In view of the above, Respondent No.02 submits that the payments were received by him from the Corporate Debtor during the relevant period towards the remuneration as an employee of the Corporate Debtor and were made in the ordinary course of business. Therefore, the allegation that Respondent No.02 is a party to preferential transactions with the Corporate Debtor is completely baseless. The payments made by the Corporate Debtor to Respondent No.02 have not been made on account of any antecedent financial or operational debt but have in fact been given only in his capacity as an employee of

the Corporate Debtor.

23. Respondent No.02 has filed a Supplementary Affidavit stating, *inter-alia*, that various erroneous entries have been made in the ledger on which the forensic audit report is based, wherein Respondent No.02 is neither a party nor concerned with those transactions recorded in the ledger in the name of Respondent No.02. For example, payment of Rs. 2 Lakhs made by the Corporate Debtor to one Mr. Taranpreet Singh Muchal on March 10, 2017 has been recorded in Respondent No.02's ledger maintained by the Corporate Debtor. From the narration of the said entry of Rs. 2 lakhs, it is evident that the amount of Rs. 2 lakhs were neither paid to Respondent No.02 nor paid towards the repayment of loan advanced by Respondent No.02 to the Corporate Debtor. The total of such transactions amount to Rs. 30,98,000/-, whereas the allegation of preferential transaction is only to the tune of Rs. 28,60,000/-. Thus, the allegations of preferential transactions against Respondent No.02 are misconceived based on incorrect ledger entries.

Reply filed by Respondent No.03

24. As per Regulation 35A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (being hereinafter referred to as "the **CIRP Regulations**" for the sake of brevity), a resolution professional is required to file an application for avoidance of preferential and fraudulent transaction within 135 days of the commencement of CIRP. In the present case, the CIRP of the Corporate Debtor commenced on February 26, 2019 and thus, the RP ought to have filed the application to avoid any preferential and fraudulent transactions on or before July 11, 2019. However, the above

application was filed on December 02, 2019. Hence, the present application is barred by limitation and therefore, the same is liable to be dismissed.

25. The allegation made against Respondent No.03 is that certain payments have been made by the Corporate Debtor to Respondent No.03 during the relevant period for a total amount of Rs. 13,55,000/- The said contention is entirely based on the forensic audit report.
26. Respondent No.03 submits that she was employed with the Corporate Debtor and made various payments on behalf of the Corporate Debtor from her personal bank account to the vendors and employees of the Corporate Debtor amounting to Rs. 69,40,092/-. However, the Forensic Auditor has failed to consider it before giving his forensic audit report. When these payments are considered, a large amount would be due and payable by the Corporate Debtor to Respondent No.03 and the allegations of preferential transaction will not survive. However, as the Respondent is a related party of the Corporate Debtor, she is not claiming it. In view of the aforesaid submissions, the Respondent has prayed that the application shall be dismissed and no adverse order be passed against her.

FINDINGS

27. We have heard counsel for the parties and have gone through the records.
28. During the course of arguments, it has been pointed out by the Counsel for the Applicant that there is a typographical mistake in para nos. 16 to 20 of the Application and inadvertently Respondent No. 1 has been mentioned instead of Respondent No. 2 and therefore, in these

paragraphs (16 to 20) Respondent No. 2 should be read instead of Respondent No. 1.

29. The Counsel for the Applicant has further argued that by way of this Application repayment of Rs. 28.60 lakhs and Rs. 13.55 lakhs have been sought from Respondents No. 2 and 3 respectively on account of preferential transactions made by them with the Corporate Debtor and therefore, Respondents no. 2 and 3 be directed to repay the aforesaid amounts to the Corporate Debtor.

30. As regards Respondent no. 1, it has been argued by the Counsel for the Applicant that Respondent no. 1 operated the account maintained with Kotak Mahindra Bank of the Corporate Debtor during moratorium without any authority from the IRP. Though it has been claimed by Respondent no. 1 that the transactions during the moratorium period were carried out for business purposes but the same cannot be justified being unauthorized transactions. There are certain entries of cash withdrawal also, as reflected in the statement of bank account annexed with the Application regarding which no satisfactory explanation has been rendered by the Respondents. Therefore, according to the Counsel for the Applicant, the Application deserves to be allowed.

31. On the other hand, the Counsel for the Respondents has argued that as per the Forensic Audit Report there is no finding of any preferential transaction as against the Respondent no. 1. and the allegation of preferential transaction of Rs. 28.60 lakhs were made against the Respondent No. 2 only for which Respondent no. 1 cannot be held liable.

32. The Counsel for the Respondents has further contended that the allegation made against the Respondent no. 2 in the audit report regarding preferential transactions of Rs. 28.60 lakhs are also not sustainable. According to the Counsel for the Respondents, as per the ledger, at the beginning of the look back period on 27.02.2017, the Corporate Debtor owed a sum of Rs. 1,61,79,000/- to Respondent no. 2 while on CIRP commencement date i.e. 26.02.2019, the Corporate Debtor owed an amount of Rs. 1,33,19,000/-. The Counsel for the Respondents has further pointed out that there are various erroneous entries in the ledger annexed with the Forensic Audit report wherein Respondent No. 2 is neither a party nor any concern with the entries in the ledger. That being so, no order can be validly passed against Respondent no. 2 on the basis of the Forensic Audit report which is patently wrong.
33. The Counsel for the Respondents has argued that in the forensic audit report it has been alleged against Respondent no. 3 that he incurred certain expenses on behalf of the Corporate Debtor amounting to Rs. 9.91 lakhs and as against the said amount, excess payment of Rs. 13.55 lakhs have been made which Respondent no. 3 is liable to refund. In this regard, it has been submitted that as a matter of fact Respondent no. 3 was employed with the Corporate Debtor and he made certain payments on behalf of the Corporate Debtor which were not accounted for in the ledger maintained by the Corporate Debtor, as reflected in the statements Exhibit A annexed with the reply of Respondent no. 3. The Forensic Auditor has not considered the said payments made by Respondent No. 3 on behalf of the Corporate Debtor. In the light of these facts, the allegations of preferential transactions against Respondent no. 3 cannot survive.

34. The Counsel for the Respondents has further argued that so far as the allegations of fraudulent transactions of Rs. 1,99,26,112/- against Respondent no. 1 are concerned, after the commencement of CIRP on 26.02.2019, an IRP was appointed. However, the CoC in its first meeting held on 27.03.2019 replaced the IRP. While the IRP looked after the affairs of the Corporate Debtor, he did not run the business. In the given circumstances, the Operation of Kotak Mahindra Bank account continued to remain in control of Respondent no. 1 and all transactions from the said account were made with the complete knowledge and consent of the IRP and till date no grievance has been raised either by the IRP or the CoC. The RP appointed by the CoC took charge of the Corporate Debtor in August 2019. During the intervening period, it was crucial for the Corporate Debtor to complete its on going projects and run the business of the Company as going concern and, therefore, Respondent no.1 made various transactions from the Kotak Mahindra Bank account of the Corporate Debtor. The Counsel for the Respondents has further pointed out that during the period in question, the Corporate Debtor received an amount of Rs. 1.89 crores from various clients into the said account. In fact, Respondent no. 1 carried out the transactions with the knowledge and consent of the IRP. The Counsel for the Respondents has further argued that the details of expenses incurred by Respondent no. 1 has been explained in the affidavit in reply filed by the Respondent no. 1. Therefore, the transactions made by Respondent No. 1 cannot be termed as fraudulent as the same were carried out in the regular course of business and to sustain the company as a going concern. Besides, the Applicant/RP has miserably failed to prove the element of fraud in the said transactions. In support of his arguments, the Counsel for the

Respondents has relied upon *Powertech Pvt. Ltd. vs. Wind Constructions Pvt. Ltd. and Ors. (2022) SCC Online NCLAT 3801* whereby it has been held that the aspect of fraudulent trading requires a very high degree of proof which is attached to the fraudulent intent. The Counsel for the Respondents has further relied upon *Hiten R. abhani, IRP of Shiv Shakti Barrels Pvt. Ltd. vs. Jaivik Samratsingh Parihar and ors. (Manu/NC/0046/2023)* whereby it has been held that if the transactions were in the usual course of business of the Corporate Debtor, the same could not be said to be fraudulent.

35. We have weighed the contentions raised by the Counsel for the parties and have carefully gone through the records.
36. As regards Respondent no. 2, there is an allegation that on 27.02.2017, which is the starting point of lookback period, the Corporate Debtor owed a sum of Rs. 1,61,79,000/- to Respondent no. 2 whereas on CIRP commencement date i.e. 26.02.2019, the amount stood reduced to Rs. 1,33,19,000/- meaning thereby that a payment of Rs. 28.60 lakhs were made to Respondent no. 2 in preference to the other creditors of the Corporate Debtor. In the Forensic Audit Report, it has simply been mentioned that books of account were reviewed for transactions with vendors, customers and other parties including related parties and the list of related parties was identified from books of accounts, documents and information obtained from the Corporate Debtor. It is further stated in the Audit report that payment register of the relevant period from 27.02.2017 to 26.02.2019 was also extracted from books of accounts to identify transactions falling u/s 43 of the Code, 2016 and it was found that during the relevant period, an amount of Rs. 265.28 lakhs was repaid and the balance of Respondent no. 2 stood reduced

to 133.19 lakhs showing repayment of antecedent financial or operational debt. However, no detail has been given in the forensic report as to how and when the repayments were made to Respondent no. 2 against some antecedent debt. In absence of any detail of such payments, in our considered view, it would be difficult to hold that the alleged payments to Respondent no. 2 were preferential in nature. In reply, it has been claimed by Respondent No. 2 that he was working as managing director of the Corporate Debtor vide employment agreement dated 30.09.2011 and he was entitled to salary and allowances and a sum of Rs. 29.52 lakhs was paid to him and the said payments were made by the Corporate debtor in the ordinary course of business. This fact alleged in the reply by Respondent no. 2 has not been controverted by the Applicant by filing a rejoinder nor any explanation has been given in the written submissions filed by the Applicant. Even otherwise in the absence of any specific detail with regard to any payments made by the Corporate Debtor to Respondent no. 2, it cannot be said that the transactions of Rs. 28.60 lakhs were preferential in nature.

37. As regards to the Respondent no. 3, it has been alleged that Respondent no. 3 incurred expenses of Rs. 9.91 lakhs only on behalf of the Corporate Debtor whereas the books of account of the Corporate Debtor show that as on 26.02.2019 (CIRP commencement date), Respondent no. 3 owed a sum of Rs. 13.55 lakhs to the Corporate Debtor which has been excessively paid to her. In reply, Respondent no. 3 has alleged that during the lookback period, she made various payments from her personal bank accounts to various vendors and employees of the Corporate Debtor and the Forensic Auditor has failed to take the same into account. Respondent no. 3 has further given

detail of the payments made to different vendors and employees amounting to Rs. 69,40,092/-. Respondent no. 3 has further annexed statement of accounts pertaining to her personal bank account maintained with HDFC Bank out of which payments of Rs. 69,40,092/- are shown to have been made. However, Respondent no. 3 has not relied upon any other document to explain and clarify that the aforesaid payments were actually made on behalf of the Corporate Debtor. In the absence of supporting documents such as bills, invoices etc., it would be quite arduous to hold that Respondent no. 3 made the alleged payments on behalf of the Corporate Debtor. In reply also, Respondent no. 3 has not specifically denied that during the lookback period, a sum of Rs. 13.55 lakhs was made to her. Therefore, it can be safely held that the payment of Rs. 13.55 lakhs made to Respondent no. 3 is a preferential transaction and she is liable to refund the same to the CD.

38. So far as Respondent no. 1 is concerned, the allegations against him are that Respondent no. 1 withdrew a sum of Rs. 1,99,26,112/- during the period from 26.02.2019 when the CIRP commenced till 28.08.2019, as is evident from the bank account statements Annexure 5 annexed with the Application. A perusal of the said account statement shows that there are entries of withdrawal of cash on many occasions as reflected in the statement. It has also been alleged that Respondent no. 1, being a Member of the Suspended Board of Directors, had absolutely no authority to transact any business of the Corporate Debtor or to operate the account maintained with Kotak Mahindra Bank and therefore, all the transactions are without any authority or justification and are also liable to be treated as fraudulent in nature as the same were carried out to defraud the creditors of the

Corporate Debtor.

39. The explanation and justification rendered by Respondent No. 1 in this regard is that the alleged expenses of Rs. 1,99,26,112/- were made by him to keep the company as a going concern. It has also been claimed by Respondent no. 1 that the amounts were debited from Kotak Mahindra Bank account in the usual course of the business of the Corporate Debtor. It has also been argued on behalf of the Respondent no. 1 that the Bank of India had frozen the account of the Corporate Debtor and refuse to allow any transaction and in the circumstances, the on-going projects of the Corporate Debtor were getting seriously affected and in those circumstances, Respondent no. 1 continued to operate the account maintained with Kotak Mahindra Bank which was done with the consent of the IRP. It has also been argued that had Respondent no. 1 not carried out the transactions, the Corporate Debtor would have defaulted on its contractual obligations and would not have been sustained as a going concern.
40. Having thoughtfully considered the contentions, we are of the considered view that after the imposition of moratorium on 26.02.2019, Respondent no. 1 had absolutely no authority to do any act on behalf of the Corporate Debtor. The alleged consent obtained from the IRP has not been placed on record. Even otherwise, the plea that Respondent No. 1 carried on the business of the Corporate Debtor and also kept operating the bank account of the Corporate Debtor with the alleged tacit consent of the IRP, who had been order to be replaced by the CoC, cannot be accepted at all. It has not been disputed that Respondent no. 1 operated the account of the Corporate Debtor maintained with Kotak Mahindra Bank and made payment to the tune

of Rs. 1,99,26,112/- from the said account which includes entries of cash withdrawal on many occasions. Since Respondent no. 1 had absolutely no authority to act on behalf of the Corporate Debtor nor to operate any of its accounts, we have not hesitation in holding that the said transactions were carried out to defraud the creditors of the Corporate Debtor and are thus liable to be treated as fraudulent transactions. In this context, it is worthwhile to mention that Respondent no. 1 has even failed to give even the details of the transactions carried out by him. Rather, in para no. 42 of the reply filed by the Respondent no. 1, it is stated that Respondent no. 1 is unable to trace and access all the documents pertaining to the said transactions and has tried to shift the onus on to the RP to demonstrate the fraudulent nature of the transactions. Here the shoes seems to be on the other foot. It was for Respondent no. 1 to explain that each and every transaction reflected in the relevant bank account was genuine, but no such explanation is forthcoming from Respondent no. 1. Moreover, as stated above, all the transactions were carried out without any authority during the CIRP period when Respondent no. 1 had been suspended and therefore, it is writ large that the transactions of expenses of Rs. 1,99,26,112/- made by Respondent no. 1 unauthorizedly and without any justification by operating the account of the Corporate Debtor maintained with Kotak Mahindra Bank are fraudulent in nature and under the circumstances, Respondent no. 1 is required to be held liable to refund the amount of Rs. 1,99,26,112/- to the Corporate Debtor.

41. As a result of above discussion, the Application is **partly allowed**, and Respondent no. 1 is directed to remit the amount of Rs. 1,99,26,112/- in the account of the Corporate Debtor within a period of one month

**IN THE NATIONAL COMPANY LAW TRIBUNAL, COURT II,
MUMBAI BENCH**

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positively. Respondent no. 3 is also directed to remit the amount of Rs. 13.55 lakhs to the Corporate Debtor within one month while the Application has against Respondent no. 2 is dismissed. In case Respondent no. 1 and 3 fail to pay the amount within one month, they shall be liable to pay interest at the rate of 8 % p.a. from the date of this order till the date of actual payment.

**Sd/-
ANIL RAJ CHELLAN
Member (Technical)**

**Sd/-
KULDIP KUMAR KAREER
Member (Judicial)**