IN THE NATIONAL COMPANY LAW TRIBUNAL, DIVISION BENCH – II, CHENNAI

IA/326(CHE)/2021
in
CP(IB)/1325/2019

(Filed under Section 25 & 66 of the Insolvency and Bankruptcy Code, 2016)

In the matter of ***Cura Healthcare Private Limited.***

Ms. Jayashree S Iyer
Resolution Professional of
Cura Healthcare Private Ltd.,
New No.10, Old No.41, Kirupasankari Street,
West Mambalam,
Chennai — 600 033.

... *Applicant*

Vs.

1. Mr.Deepak Mittal,
Ex-Director, Cura Healthcare P Ltd.,
Flat No.1503,15th, Floor, Julian Alps, B-Wing,
Bhakti Park, Wadala,
Mumbai — 400 037.

2. Mr.Arjun Ananth,
Ex-Director, Cura Healthcare P Ltd.,
Sal Villa, Plot No.500, 4th South Main Road,
Sri Kapaleswarar Nagar,
Neelankarai,
Chennai — 600 041

3. Mr.Kannan Neelakanta,
Ex-Director, Cura Healthcare P Ltd.,
C-6, Kottur Villa, 5, Lock Street,
Varathapuram, Kottur Gardens Area,
Chennai — 600 085.

4. Mr.Meenakshi Sundaram Balasubramaniam,
Ex-Director, Cura Healthcare P Ltd.,
No.5, 3rd Floor, Darshan Apartments,
1, Tiger Varadhachary Road,
Besant Nagar,
Chennai — 600 090.

5. Ms.Pratima Ram,
Ex-Director, Cura Healthcare P Ltd.,
Apt 32, Maple-A, Prestige Greenwoods,
Varthur Road, Nagavarapalaya,
C.V.Raman Nagar,
Bengaluru — 560 093.

6. Mr.Sajal Manoj Kumar,
Ex-Director, Mis.Cura Healthcare P Ltd., E-73/74,
Shravasti CHS,
Off New Link Road, Opp Inorbit Mall,
Malad (West),
Murnbai — 400 064

7. Mr.Velapakkam Ganapathy Somasekhar
Ex-Director, Cura Healthcare P Ltd.,
No.66, 81h Cross Street,
Shenoy Nagar, Chennai — 600 030.

8. Mr.Ranganath Nuggehalli Krishna
Ex-Director, Mis.Cura Healthcare P Ltd.,
Apt 5, Sreshtha Apartments,
Old No.57, Subramaniya Street, Abhiramapuram,
Chennai — 600 018.

9. Mr. Sri Venugopala Rao Chittoory
Ex-Director, Mis.Cura Healthcare P Ltd.,
Plot No.8, 10th Cross Street,
6th Main Road, AGS Colony,
Velachery, Chennai — 600 042.

10. Mr.Sriram Parthasarathy
Ex-Director, Mis.Cura Healthcare P Ltd.,
No,29/16, Flat No. 4, Block B,
Padmavathiar Road,
Durgamba Apartment,
Gopalapuram,
Chennai — 600 086.

11, Mr. Ajith Ambika Jagannathan Nair
Ex-Director, Mis.Cura Healthcare P Ltd.,
Jagambika DRA-47, Devinagar,
Manacaud P.O.,
Thiruvananthapuram — 695 009.

12. M/s. IVES Healthcare P Ltd.,
Having Registered Office at

DP No.56, 3rd Main Road,
SIDCO Industrial Estate,
Thirumudivakkam, Chennai — 600 044.

13. Mr.S.Viswanathan
Director, Ws.IVES Healthcare P Ltd.,
201, NSR Brindavan, 1st Cross,
Reliable Residency Layout,
Somasundrapalya, Haralur Road,
Bangalore — 560 102.

14. M/s.Concept Integrations (India) P Ltd.,
Having Registered Office at
DP No.56, 3rd Main Road,
SIDCO Industrial Estate, Thirumudivakkam,
Chennai — 600 044.

15. Mr.Deepak Mittal
Director, Mis.Concept Integrations (India) P Ltd.,
Flat No.1503, 15th Floor, Julian Alps,
B-Wing, Bhakti Park, Wadala,
Mumbai — 400 037.

16. Mr.Kannan Neelakanta
Director, M/s.Concept Integrations (India) P Ltd.,
C-6, Kottur Villa, 5, Lock Street,
Varathapuram, Kottur Gardens Area,
Chennai — 600 085.

17. Mr.Saurabh Kumar Jain
Director— Concept Integrations (India) P Ltd.,
F1, Raghav Apts., No.7, 4th Main Road,
Rajlaxmi Nagar, Velachery,
Chennai — 600 042.

18. M/s.Adonis Medical Systems P Ltd.,
Having Registered Office at
E 70, Phase VIII Industrial Area, Mohali,
Punjab 160 055.

19. Mr.Arun haul
Director Mis.Adonis Medical Systems (P) Ltd.,
House No.153B, Kendriya Vihar, Sector 48B,
Chandigarh — 160 047.

20. Mr.Virender Singh Beth
Director Mis.Adonis Medical Systems (P) Ltd.,

H.No.1519, Sector 34 D,
Chandigarh — 160 022 ... *Respondents*

Order Pronounced on 27th June 2022

CORAM:

JUSTICE (RETD) S.RAMATHILAGAM, MEMBER (JUDICIAL)
ANIL KUMAR B, MEMBER (TECHNICAL)

For Applicants : Mr.B.Dhanaraj, Advocate

For Respondents: Mr.V.V.Sivakumar, Advocate
Mr.V.P.Raman, Advocate
Mr.G.Pranav, Advocate
Mr.K.M.Anand, Advocate
Mr.A.S.Sathish Kumar, PCS

ORDER

***Per:* ANIL KUMAR B, MEMBER (TECHNICAL)**

The above application has been preferred by Resolution Professional of Cura Healthcare Private Ltd under Section 25 & 49 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "IBC, 2016") r/w Rule 11 of NCLT Rules, 2016 seeking relief as follows;

a) *Declare that the 1st to 11th Respondents have carried on business of the Corporate Debtor with an intent to defraud the creditors of the Corporate Debtor*

b) *Declare the 1st to 11th Respondents have not exercised due diligence in minimizing the potential loss to the Creditors of the Corporate Debtor.*

c) *Direct the 1st to 11th Respondents under Sec.66(2) IBC along with 12th and 13th Respondent under Sec.66(1) IBC to make payment of monies to the tune of Rs.4,92,00,000/- into the account of the Corporate*

Debtor, on account of unauthorized investments from SBI CC Account Funds.

d) Direct the 1^{st} to 11^{th} Respondents under Sec.66(2) IBC along with 18^{th}, 19^{th} and 20^{th} Respondent under Sec.66(1) IBC to make payment from monies to the tune of Rs.1,12,00,000/- in to the account of the Corporate Debtor, on account of unauthorized investments from SBI CC Account Fund.

e) Direct the 1^{st} to 11^{th} Respondents under Sec.66(2) IBC along with 12^{th} and 13^{th} Respondent under Sec.66(1) IBC to make payment of monies to the tune of Rs.5,44,08,000/- into the account of the Corporate Debtor, towards exorbitant Share Price paid out of Corporate Debtor's equity share capital and loan account.

f) Direct the 1^{st} to 11^{th} Respondents under Sec.66(2) IBC along with 14^{th}, 15^{th}, 16^{th} and 17^{th} Respondent under Sec.66(1) IBC to make payment of monies to the tune of Rs.3,67,98,575/- in to the account of the Corporate Debtor , towards exorbitant Share Price paid out of Corporate Debtor's Equity Share Capital and Loan Account.

g) Direct the 1^{st} to 11^{th} Respondents under Sec.66(2) IBC along with 18^{th}, 19^{th} and 20^{th} Respondent under Sec.66(1) IBC to make payment of monies to the tune of Rs.14,61,02,467/- in to the account of the Corporate Debtor, towards Share Price paid out of Corporate Debtor's Equity Share Capital and Loan Account.

h) Direct the 1^{st} to 11^{th} Respondents under Sec.66(2) IBC along with 14^{th}, 15^{th}, 16^{th} and 17^{th} Respondent under Sec.66(1) IBC to make payment of monies to the tune of Rs.60,00,000/- in to the account of the Corporate Debtor , towards unsecured loan advanced out of Corporate Debtor's Cash Credit Loan Account.

i) Direct the 1^{st} to 11^{th} Respondents under Sec.66(2) IBC along with 18^{th}, 19^{th} and 20^{th} Respondent under Sec.66(1) IBC to make payment of monies to the tune of Rs.1,50,00,000/- in to the account of the Corporate Debtor , advanced by the Corporate Debtor but converted in to Equity Share Capital During CIRP.

j) Pass such further or other orders as may be deemed fir and proper in the facts and circumstances of the case.

2. It was averred in the application that CIRP in respect of the Corporate Debtor has been initiated by this Tribunal on 10.12.2019 and the Applicant herein was appointed as an Interim Resolution Professional.

3. It was further averred that in the 3rd meeting of the CoC held on 23.04.2020 the Applicant was re-appointed as Resolution Professional. Pursuant to that the Applicant on 16.05.2020, appointed M/s.Sarath and Associates, Charted Accountants to carry out the transaction audit of the Corporate Debtor for the period from 01.04.2015 to 09.12.2019. Subsequently, the audit report dated 11.12.2020 was prepared.

4. It was submitted by the Learned Counsel for the Applicant that in the above-said Transaction Audit Report, the Auditors records the following transactions are amounting to Fraudulent Trading or Wrongful Trading under Section 66 of IBC, 2016.

(A) Investment in Corporate Debtor's Subsidiaries using SBI's Cash Credit Funds:

i) The Corporate Debtor, Cura Healthcare Private Limited (CHPL) had availed a Cash Credit (CC) Facility from State Bank of India on 20.11.2009.

ii) The Tally Screenshot produced in the Transaction Audit Report reflects the liability of the Corporate Debtor for this CC Secured Loan to the tune of Rs.15,63,27,591.01/- as on 09.10.2019. The CC facility which is to be used only for working requirements had been used by the Company and its Directors for Investment purpose, which shows that there is a diversion of Company's Borrowed Funds to its Related Parties.

iii) On perusal of the CHPL's Books of Accounts and Bank Statement for the period from April 2016 to March 2019, an amount of Rs.6.04 Crore is noted to have been invested as Equity Share Capital by the Corporate Debtor, in its Subsidiary Companies **IVES Healthcare (P) Ltd.**, (IVESHPL) and **Adonis Medical Systems (P) Ltd.,** (AMSPL) out of the said Cash Credit facility availed by the Corporate Debtor from State Bank of India.

iv) The Tally Accounts marked in the Transaction Audit Report reflect Ledger Vouchers dated 15.09.2016 and 25.11.2016 towards Investment in the 12th Respondent IVESHPL, to the tune of Rs.4,24,08,000/- and Rs.68,00,000/- out of SBI Cash Credit Account. Likewise, Ledger Vouchers dated 26.08.2016, 20.10.2016 and 20.10.2016 towards Investment in the AMSPL, to the tune of Rs.50,00,000/-, Rs.36,34,950/- and Rs.26,00,970/- (out of SBI Cash Credit Account. The said Investments are recorded in the Corporate Debtor's Financial Statements as on 31.03.2017. [beyond 2 years]

v) The mandate in Sec.186(5) of Companies Act, 2013 not complied and no Consent has been obtained by the 1st to 11th Respondents from State Bank of India and the above-said acts results in the increase in loss of the Corporate Debtor.

(B) Diversion of Funds with Subsidiaries through Share Purchase Agreements:

Various Share Purchase Agreements (SPA) executed by and between the Corporate Debtor and its Subsidiary Companies IVESHPL, Concept Integrations (India) Private Ltd., and AMSPL during the period from 2014 to 2017, only show that the Corporate Debtor had purchased Shares from the said Companies, amounting to Rs.28.82 Crore Investment as follows

i) Investment in IVESHPL:

1) The SPA dated 28.08.2016 shows that it has been entered between Corporate Debtor and 13th Respondent and his wife Mrs.Madhumathi along with 6 other Shareholders

for the purchase of Sale Shares 6,00,000 Equity Shares of Rs.10/- fully paid up each.

2) The SPA shows the said purchase by the Corporate Debtor in 3 tranches for a consideration of Rs.5,44,08,000/- as follows

a) Sale Shares Tranche 1 — 4,80,000 Equity Shares collectively held by Mr.Suresh Rajan, Mr.Srinivasan.R, Mr.V.P.Ravichandran, Ms,Kavitha Ramasubramaniam, Mr.Abhay Santoshwar and Mr.Suraj Kudchadkar, which constituted 80% Total Issued and Fully Paid Up Equity Share Capital of the Company, for the Purchase Consideration of Rs.4,24,08,000/-.

b) Sale Shares Tranche 2 — 1,20,000 Equity Shares i.e., 58334 Equity Shares held by 13th Respondent Mr.S.Viswanathan and 61666 Equity Shares held by Mrs.Madhumathi Viswanathan, which constituted 20% Total Issued and Fully Paid Up Equity Share Capital of the Company, for the Purchase Consideration of Rs.1,20,00,000/-.

3) The above Agreement dated 28.08.2016 has been subsequently amended by the 1st Amendment Agreement dated 13.09.2016 with respect to determination of Purchase Consideration for Tranche 2 as set out in Schedule 1 therein.

4) On calculating the value of 12th Respondent's Shares, Sales Value per Share is Rs.906.80/- and Book Value per Share as per 31.03.2016 Financials is Rs.46.91. It is

pertinent to point out that the Corporate Debtor had purchased the Shares of the 12th Respondent for a value 19 times higher than the Book Value.

5) Another SPA dated 06.06.2019 entered between the 13th Respondent Mr.S.Viswanathan as the purchaser and the Corporate Debtor as the Seller and the IVESHPL reveals Sale of 6,76,984 Equity Shares by the Corporate Debtor for a total Sale Consideration of Rs.74,00,000/- in 2 Tranches as follows:

a) Sale Shares Tranche 1 — 3,45,833 Equity Shares for Cash Consideration of Rs.35,00,000/-.

b) Sale Shares Tranche 1 — 3,31,151 Equity Shares for Cash Consideration of Rs.39,00,000/-.

6) The Corporate Debtor originally purchased 6,00,000 Equity Shares from the Shareholders of the 12th Respondent IVESHPL for Rs.5,44,08,000/- but sold 6,76,984 Equity Shares to the 13th Respondent Director of IVESHPL for Rs.74,00,000/-, at a loss of Rs.4.70 and is a diversion of funds by the management of both the Corporate Debtor and 12th Respondent IVESHPL.

ii. Investment in Concept Integrations (India) Private Limited (CIIPL):

1) The Corporate Debtor has sanctioned a Short Term Loan / Inter Corporate Deposit of Rs.60,00,000/- in favour of the 14th Respondent **CIIPL** (Subsidiary of CD) vide Loan Agreement dated 04.04.2014.

2. In the said loan agreement, the Managing Director Mr.Arvind Pralhadrao Savargaonkar and Director Mr.Rajendra

Wamanrao Kadu Director of **CIIPL** have executed an Agreement for Pledge of Shares as Security on 25.04.2014.

3. It is however noted from the SPA dated 17.04.2014 entered by the Corporate Debtor with Mr.Arvind Pralhadrao Savargaonkar (Managing Director) and Mr.Rajendra Wamanrao Kadu (Director) of **CIIPL** along with 10 other Shareholders for Purchase of Sale Shares (10,00,000 Paid Up Equity Shares of Rs.101- each) for a total Purchase Consideration of Rs.3,72,00,000/-.

4. A Supplemental Agreement dated 30.05.2014 has also been entered in order to incorporate Revised Payment Structure in continuation to the said SPA dated 17.04.2014.

5. On computation of the value of the 1 **CIIPL** Shares, Book Value per Share as per 31.03.2014 Financials is Rs.14.64. It is pertinent to point out that the Corporate Debtor had purchased the Shares of the **CIIPL** for a value 2.5 times higher than the Book Value. It is inferred that the Inter Corporate Deposit 1 Short Term Loan of Rs.60 Lakhs is Unsecured since Shares stated to be pledged by the Directors of the **CIIPL** were already purchased by CHPL.

6. Details of Receivables from **CIIPL** as per Books of Accounts of CHPL at 31.03.2019 include Branch I Divisions Balances of Rs.98,15,399/-, Inter Company Transfers of Rs.4,61,85,236/-, Investment of Rs.3,67,98,575/- and Interest of Rs.1,07,80,404/-. However, no payment has come into CHPL from **CIIPL** towards Interest agreed as per the Loan Agreement.

That the Applicant refers to Sec. 186(7) of the Companies Act 2013 which mandates that the Loan and Investment by a Company clearly specifies that there be charged a certain rate of Interest on the loan given. The Respondents 1 to 11 wilfully neglected to claim Interest for the Loan advanced to the **CIIPL**.

Above act shows the fraudulent diversion of funds by the management of both the Corporate Debtor and **CIIPL**, in the pretext of Purchase of Shares at an exorbitant rate over and above the Book Value.

iii. Investment in Adonis Medical Systems Private Limited (AMSPL):

1. The Share Purchase Agreement dated 05.04.2015 entered by the Corporate Debtor with the 19th and 20th, Directors of the 18th Respondent **AMSPL** (Subsidiary of CD), as regards Purchase of Sale Shares (4,50,020 Paid Up Equity Shares of Rs.101- each constituting 90.02% of the Company's Total Paid Up Share Capital). The said Agreement expresses consent of the Corporate Debtor to buy/acquire the balance 49,910/- Paid Up Equity Shares of Rs.10/- each constituting 9.98% Company's Paid Up Share Capital.

2. The total Sale Consideration for acquisition of 4,99,930 Equity Shares was fixed at Rs.15,50,00,000/-, payable in 4 tranches upon corresponding Share Transfer and the last Tranche was to be paid within 90 days from the closure of FY 2018-19.

3. In the said Agreement, the Corporate Debtor has agreed to pay/settle all the Liabilities of the **AMSPL** as disclosed in the Statement of Assets and Liabilities (Unaudited) as at 31.03.2015 enclosed with the Agreement. Further, the Land and Building having book value of Rs.21,93,577/- as on 31.03.2015, mentioned in the Agreement, which is a collateral with **AMSPL** Bankers, was to be transferred in favour of the Promoters of **AMSPL** by the Corporate Debtor on or before 31.03.2019.

4. The above Agreement dated 05.04.2015 has been amended by the Amendment Agreement dated 31.10.2017 with respect to Purchase Consideration and Terms of Payment i.e., total Sale Consideration for acquisition of 4,99,930 Equity Shares was Rs.19,70,00,000/- payable in 4 tranches. The last instalment of Rs.4,46,98,212/- has not been paid by the Corporate Debtor and a sum of Rs.14,61,02,467/- is paid by Corporate Debtor , excluding the Investment of Rs.1.12 crore.

5. As on 05.04.2015, Book Value per Share of **AMSPL** was Rs.30.66 and post amendment, the Book Value was Rs.48.67. It is pertinent to point out that the Corporate Debtor had purchased the Shares of the **AMSPL** for a value 7 times higher than the Book Value as on 05.04.2015 and in addition, by the said amendment, the Share price was further increased at 5 times the Book Value as on 31.10.2017. Also, despite the decline in Earning Price per Share of **AMSPL**, the Corporate Debtor has paid higher consideration to procure the Shares of **AMSPL**.

6. The Corporate Debtor's acceptance to transfer the Land and Building, a major fixed asset in the Books of **AMSPL**, to the Promoters of Adonis has only caused a considerable reduction in the value of the Company **AMSPL**.

Thus, the Funds of the Corporate Debtor to an extent of Rs.28.82 crore have been diverted as Investments in its Subsidiary Companies, who have wilfully contributed to the increase in loss of the Corporate Debtor.

iv. Mismatch of Related Party Transactions:

The Related Party Transactions reflecting in the Corporate Debtor's Financial Statements for the FY 2017-18 not reflects the respective Financials of such Related Party. The Related Party Transactions as disclosed by the Corporate Debtor reveal a Closing Balance - investment to the tune of Rs.10,62,35,920/- in its Subsidiary **AMSPL.** However, the Financials of **AMSPL** for FY ended 31.03.2018 do not disclose / record the said transaction under Clause 28 on Related Party Disclosures. Likewise, while the Corporate Debtor discloses a Closing Balance - Investment to the tune of Rs.3,48,00,000/- and Equity Investment during the year FY 2017 -18 for Rs.1,98,00,000/- in favour of its Subsidiary DE Healthcare (F) Ltd., the Financials of the said Subsidiary DE Healthcare (P) Ltd., for FY ended 31.03.2018 records nil Closing Balance — Investment and a sum of Rs.50,00,000/- towards Equity Investment. The said differences in the Reported Disclosures shows that the accounts submitted were not reconciled with the said Subsidiary.

v. Diversion of CD's Funds to Its Subsidiaries and Branches:

1. The Source of Funds for the Corporate Debtor includes Shareholders' Contribution at Rs.91.39 crore, SBI Secured Loan Outstanding at Rs.15.63 crore and Non-Cash Expenses at Rs.15.39 crore, which in total stands at Rs.122.41 crore as on 31.03.2019. On verification of the Corporate Debtor's Books of Accounts shows payment of Rs.69.86 crore and Rs.25.80 crore to the Subsidiaries by the Corporate Debtor. About 78.14% of the Funds seem to have been diverted from the Corporate Debtor to the Subsidiaries under Loans & Advances and Reimbursement Expenses.

2. Details of Amounts paid by the Corporate Debtor for the Expenses of Subsidiaries to the tune of Rs.2.04 crore reflect in the Corporate Debtor's Tally Account and produced in the Transaction Audit Report. Such payments are treated as Working Capital Support for Subsidiaries in the nature of Loans and Advances. However, such Advances have not been reported in the Financials under Disclosure Requirement of "Particulars of Loan, Guarantees and Investments under Section 186 CA 2013",

vi. Corporate Debtor's Share Purchase against liability of its Subsidiary AMSPL

1. As on 31.03.2019, the Equity Share Capital brought in by the 100% Holding Company Peepul Capital Fund III LLC was Rs.168.06 crore and SBI Secured (Cash Credit) Loan of Rs.15.63 crore.

2. The MCA records shows, an extract of the Special Resolution passed on 30.11.2019 at the EOGM of **AMSPL** revealed that the Shareholders of **AMSPL** gave their assent to issue and allot 23437 Equity Shares at a price of Rs.640/- per Share to the Corporate Debtor, in lieu of the Advance of Rs.1,50,00,000/- received from the Corporate Debtor for an Order for supply of Goods and Services, which was subsequently cancelled by the Corporate Debtor.

3. The Explanatory Statement dated 02.11.2019 filed under Sec.102 of the Companies Act 2013 is duly signed by the 19th Respondent for the 18th Respondent.

4. A proposal to convert the Advance payment of Rs.1,50,00,000/- into Equity Capital of the 18th Respondent was consented to by the Corporate Debtor by an Email as informed by the 18th Respondent.

5. The Proposal for Advance Conversion to Equity Share Capital was placed before the Members of the 18th Respondent for their approval by way of a Special Resolution to allot Shares in favour of the Corporate Debtor.

6. The Share Valuation Certificate dated 18.03.2019 is issued by one M A P S A & Co, Chartered Accountants, Chandigarh. It is noted that Fair Market Valuation of Shares of **AMSPL** is done on the basis of Discounted Cash Flow Method. The value determined is exorbitant and does not reflect the true value of Shares.

7. The Form PAS-3 for Return of Allotment of Shares is noted to bear the digital signature of the 19th Respondent Mr.Arun Kaul on 21.08.2020.

8. That the arrangement between the Corporate Debtor and its Subsidiary **AMSPL** is an attempt by Respondents 1 to 11 along with Respondents 19 & 20 to cancel the right of the Corporate Debtor to claim the Debt of Rs.1.50 Crores but divert the funds to the 18th Respondent Subsidiary, especially during the pendency of adjudication of the Sec.9 Application in IBA 1325/2019. Such transaction has occurred within two years preceding the Corporate Insolvency Commencement Date; 10 days before the CIRP initiation on 10.12.2019.

9. The funds of the Corporate Debtor to the tune of Rs.1.50 crore have been diverted to its Subsidiary, with an intent to defraud the Creditors of the Corporate Debtor and especially, with the knowledge of the Directors of both the Corporate Debtor and **AMSPL** who have wilfully contributed to the increase in loss of the Corporate Debtor.

5. It was further submitted by the Ld. Counsel for the Applicant that the 1st to 11th Respondents Ex-Directors of the Corporate Debtor who were aware that the Corporate Debtor's Debt could not be paid when becomes due. The 1st to 11th Respondents have wilfully contributed to the loss of the Corporate Debtor by diverting funds obtained from equity shareholders and SBI loan for the investments instead of meeting working capital requirement of the Corporate Debtor, for purchase of shares of subsidiaries at exorbitant price, for making payments as loans and advances and expenses.

6. It was finally submitted by the Ld. Counsel for the Applicant that the Respondents 1 to 11 under Sec.66(2) IBC, 2016 and Respondents 12 to 20 under Sec.66(1) IBC, 2016 are liable to make contributions to the assets of Corporate Debtor to the tune of Rs.31.87 crore.

7. The Learned Counsel Mr. V.V.Sivakumar appeared on behalf of the Respondents 1, 2, 5, 8, 9 and 15 in counter argued that the present application is based on the Report of M/s.Sarath & Associates dated 11.12.2020 and the same was not placed before the CoC or obtained its consent for filing present application. It was further argued that the alleged transactions have been made in the ordinary course of business and are not fraudulent.

8. The Learned Authorized Representative appeared on behalf of 17th Respondent, in the counter submitted that the CIRP was initiated on 10.12.2019 but the present application under Section 66 of IBC, 2016 is filed only on 23.01.2021 which is much beyond the limitation period. It was further submitted that the Applicant has not given opportunity to the Respondent to raise objection on the Transaction Audit Report, which is arbitrary and violative of natural justice.

9. It was further submitted that the alleged transactions regarding of loan agreement dated 04.04.2014 and the purchase of shares by the Corporate Debtor in 14th Respondent Company

during the year 2014-15 are executed before the look back period of 2 years.

10. The Learned Counsel appeared on behalf of the Respondent 11 in the counter submitted that there is no specific pleadings against the 11th Respondent and no facts and circumstances which would establish his guilt in the alleged transactions. It was further submitted that mere speculation cannot be the basis concluding that the 11th Respondent had been involved in carrying on the business of Corporate Debtor in a fraudulent manner.

11. It is also noted that Respondents 3, 6, 7, 12, 14 and 16 were set *ex-parte* vide this Tribunal order dated 13.12.2021 and other Respondents were marked their presence.

12. Having heard learned counsels for all the parties and on examining the records, it is seen that the application to initiate CIRP was filed by employee of a Corporate Debtor through a Section 9 application for the default of Rs.1,39,756/- only. The demand notice under Section 8 of IBC, 2016 was served on 18.09.2019; subsequently the application was filed on 18.10.2019, and admitted on 10.12.2019.

13. In the present case all the submissions made by the Applicant only relied on Transaction Audit Report dated 11.12.2020, on perusing the report it appears that it was prepared

for the period of 01.04.2015 to 09.12.2019 i.e. for preceding 4 years of CIRP. It is also noted that the Applicant / Resolution Professional has not given opportunity to the Respondents to give their replies on the Transaction Audit Report.

14. The Transaction Report traces the following transactions are fall under the ambit of Section 66(1) and 66(2)

a) Transaction reflected in Ledger Vouchers of Corporate Debtor dated 15.09.2016 and 25.11.2016 towards Investment in the 12th Respondent.
b) Transaction reflected in Ledger Vouchers dated 26.08.2016, 20.10.2016 and 20.10.2016 towards Investment in the 18th Respondent.
c) The Share Purchase Agreement (SPA) dated 28.08.2016, with 13th Respondent.
d) The Share Purchase Agreement dated 17.04.2014, regarding purchases of shares of 14th Respondent.
e) Share Purchase Agreement dated 05.04.2015 entered by the Corporate Debtor with the 19th and 20th Respondents etc.,

We see that the above transactions alleged to be fradulent were occurred much before the initiation of CIRP of the Corporate Debtor.

15. Here it is relevant to refer to Section 66 of IBC, 2016

"Section 66: Fraudulent trading or wrongful trading-

...

(2) On an application made by a resolution professional during the corporate insolvency resolution process, the Adjudicating Authority may by an order direct that a director or partner of the corporate debtor, as the case may be, shall

be liable to make such contribution to the assets of the corporate debtor as it may deem fit, if—

> *(a) before the insolvency commencement date, such director or partner knew or ought to have known that there was no reasonable prospect of avoiding the commencement of a corporate insolvency resolution process in respect of such corporate debtor; and*
>
> *(b) such director or partner did not exercise due diligence in minimising the potential loss to the creditors of the corporate debtor."*

It makes clear that the Adjudicating Authority may order, when the Director of Corporate Debtor knew that there was no possibility of avoiding the CIRP of the Corporate Debtor at the time of entertaining the transaction. In the present case, at the time of entertaining the above alleged transactions, the Corporate Debtor at no stretch of imagination apprehended of initiation of CIRP against it. In such circumstances, we are of the considered view that there is only negligible possibility of existence of intention to defraud this creditors.

16. Moreover, it is also relevant to refer to relevant provisions of IBBI (Regulation for Corporate Persons) Regulation, 2016

*"**39. Approval of resolution plan.***

...

(2) The resolution professional shall submit to the committee all resolution plans which comply with the requirements of

the Code and regulations made thereunder along with the details of following transactions, if any, observed, found or determined by him: -

(a) preferential transactions under section 43;

(b) undervalued transactions under section 45;

(c) extortionate credit transactions under section 50; and

(d) fraudulent transactions under section 66, and the orders, if any, of the adjudicating authority in respect of such transactions.

..."

The above regulation clearly prescribes that the transactions observed to fall under Section 66 of IBC, 2016 and the orders if any, of this Adjudicating Authority shall be submitted before the CoC at the time of approving the Resolution Plan.

17. It seen that in the minutes of the 11th meeting of CoC, the status of the present case was mentioned as pending and there is no discussion regarding prospect of this pending application was recorded in the minutes while approving the Resolution Plan by the CoC. It is further seen that there is no clear clause in the approved Resolution Plan regarding accruals of the pending litigations.

18. Subsequently, an application has been filed by the Resolution Professional before this Adjudicating Authority for approval of Resolution Plan. In such circumstances this Adjudicating Authority had reserved orders of Resolution Application along with the present application. Considering the object of the code this

Adjudicating Authority had approved the Resolution Plan on 13.01.2022.

19. Here it is relevant to refer decision of the Hon'ble High Court of Delhi in ***Venus Recruiters Private Limited vs. Union of India and Ors,*** wherein it was observed as follows,

> *70. An avoidance application for any preferential transaction is meant to give some benefit to the creditors of the Corporate Debtor. The benefit is not meant for the Corporate Debtor in its new avatar, after the approval of the Resolution Plan. This is clear from a perusal of Section 44 of the IBC, which sets out the kind of orders which can be passed by the NCLT in case of preferential transactions. The benefit of these orders would be for the Corporate Debtor, prior to approval of the Resolution Plan. Any property transferred or sum acquired in an order passed in respect of a preferential transaction would have to form part of the final Resolution Plan. The Resolution Plan would have to take into consideration such amounts and benefits which can be given to the Corporate Debtor for the benefit of the CoC. The benefit of an avoidance application is not meant for the company, after the Resolution Plan is considered by the CoC and approved by the NCLT.*

The above observation clarifies that the fruits of the avoidance application shall accrue to the benefits of the creditors of the Corporate Debtor.

20. Further, this Adjudicating Authority considers that a forensic audit by independent professional may be required to clarify and

conclude few alleged transactions in this application. Since, the Resolution Plan was approved and the Resolution Plan in is in implementation stage, proceeding with any forensic audit at this stage will ruin the process.

21. Considering the circumstances and position of law, we are not inclined to grant the reliefs prayed by the Applicant. In view of the above discussions, this application is **dismissed**.

-SD-

ANIL KUMAR B
MEMBER (TECHNICAL)

-SD-

JUSTICE (RETD) S.RAMATHILAGAM
MEMBER (JUDICIAL)

Gopishankar. D