

IN THE NATIONAL COMPANY LAW TRIBUNAL,

KOLKATA BENCH,

KOLKATA

I.A.(IB) No. 208 /KB/2021

IN

C.P (IB) No.204/KB/2019

**In the matter of**

*(An application under 43 and 60(5) of the Insolvency and Bankruptcy Code, 2016).*

And

**In the matter of:**

**Kotak Mahindra Bank Limited .**

*... Financial Creditor*

Versus

**In the matter of:**

**Multiple Hotels Private Limited.**

*...Corporate Debtor*

And

**In the matter of**

Jitendra Lohia

*...Applicant/ Resolution Professional*

Versus

Nikhil Chowdhury and 13 others

*... Respondents*

Date of hearing : 28/03/2022

Order Pronounced on : 06/05/2022

**Coram:**

***Mr. Rohit Kapoor, Member (Judicial)***

***Mr. Harish Chander Suri, Member (Technical)***

**Counsels appeared through Video Conference**

Ms. Manju Bhuteria, Adv.

] For the RP

Mr. Jitendra Lohia,RP in person

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Mr. Pratik Ghose, Adv.	] For CoC
Mr.Avishek Roy Chowdhury, Adv.	]
Mr. Shaunak Mitra, Adv.	] For R-1,R-2,& R-7 to R-11
Mr. Soham Bandyopadhyay,Adv.	]
Mr. Shounak Chandra, Adv.	] For R-3, R-4 & R-6
Mr. Aditya Chaturvedi, Adv.	] For R-12 & R-14

**ORDER**

**Per: Harish Chander Suri, Member (Technical)**

1. The Court is convened by video conference today.
2. This IA (IB) No. 208/KB/2019 has been filed by the Resolution Professional in C.P.(IB) No. 204/KB/2019. It is submitted that the CIRP in this matter was commenced vide order dated 4<sup>th</sup>October, 2019 and the IRP appointed in this matter was confirmed as RP in the first meeting of the CoC on 9<sup>th</sup> January, 2020, when the RP/applicant herein intimated the suspended board of Directors i.e. Respondent No.1 and 2 about the CIRP and sought necessary information, details of assets as well as other records pertaining to the Corporate Debtor.
3. The applicant further appointed a Transaction Auditor to carry out investigation into the transactions of the Corporate Debtor and the Report was provided by the Transaction Auditor, wherefrom it is clear that several transactions have been carried out in favour of the related parties i.e. Respondent No.2 and 3 to 14 in the three years preceding the commencement of the CIRP and that such transactions would amount to preferential transactions in terms of section 43 of the Code.
4. It is submitted that the Transaction audit Report also highlighted various other actions undertaken by the suspended board of directors that are in violation of the provisions of the Companies Act. The

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RP/applicant has further submitted that necessary orders may be passed for investigation into the affairs of the Corporate Debtor, for which the present application under section 43 read with section 60(5) of the Code has been filed.

5. The applicant has placed on record the following preferential transactions, which are as under:-

“(a) That amount received from various related parties and few debtors amounting to Rs.1,20,58,852/-, the substantial portion of such receipt amounting to Rs.1,01,74,773/- was transferred to the related parties mainly to Camellia Infrastructure Limited, Multiple Resorts Private Limited and Winston Fashion Private Limited within a span of a day or two from days of receipt. The total payments to related parties reported in the Transaction Audit Report includes such aggregate transfers, which is within the took back period of 2 years preceding from 5<sup>th</sup> October, 2017 to 4<sup>th</sup> October, 2019.

(b) Details are being shown through chart below:

Particulars	Withdrawals	Depositing	Net payments
CAMELLIA INFRASTRUCTURE LTD	82,60,000.00	2,10,000.00	80,50,000.00
MULTIPLE RESORT PVT LTD	30,60,000.000	15,05,000.00	15,55,000.00
WINSTON FASHION PVT LTD	5,69,773.00	--	5,69,773.00
Total	1,18,89,773.00	17,15,000.00	1,01,74,773.00

6. It is further submitted by the applicant that the respondent has submitted its reply to the points raised by the Transaction Auditor but could not satisfactorily substantiate whether the Transactions were done in the ordinary course of business.

7. It is submitted that various other discrepancies were observed by the Transaction Auditor. However, Transaction Auditor has not classified

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any such transaction under sections 43, 45, 50 and 66 of the Code.

8. It is submitted that the Respondents are creditors to the Corporate Debtor and as such any transactions made to them during the look back period of two years amounts to preferential transaction in terms of section 43 of the IBC. It is further submitted that relevant data and documents were not provided by the Corporate Debtor justifying the transaction, as such it is apparent from that the transactions were preferential transactions to ensure that no funds were available with the Corporate Debtor, which could be appropriated by the creditors to satisfy their outstanding dues and thus the transactions were carried out just to defraud the creditors of the Corporate Debtor. It is further submitted by the applicant that all these transactions ought to be reversed so as to reflect the correct balance in the Corporate Debtor account as on the CIRP initiation date.
9. It is submitted that the Respondents knowingly carried on business in a detrimental manner and are obliged to make such contribution to the assets of the Corporate Debtor as deemed fit and proper.
10. The applicant has further submitted that the affairs of the Corporate Debtor were not being managed in a diligent manner. It is further submitted that the suspended board of Directors were also not fully cooperating with the applicant and have not provided clear and complete books of accounts and other relevant information and, therefore, in these circumstances investigation into affairs of the Corporate Debtor in terms of section 213 of the Companies Act, 2013 may be ordered.
11. The applicant has further sought directions upon respondent no.3 to 6 to jointly and severally contribute and pay a sum of Rs.80,50,000/- in term of section 44 because Respondent No.3 to 6 have received the benefit by completely depriving the secured Financial Creditor. It is further submitted that Respondent Nos. 7 to 11 be directed to jointly

and severally contribute and pay a sum of Rs.15,55,000/- to the company in terms of the section 44 of the Code. Since they have received the benefit preferentially by completely depriving the secured Financial Creditors and similarly Respondent No.2 and 12 to 14 be directed jointly and severally to contribute a sum of Rs. 5,69,773/- in terms of section 44 of the Code, since these respondents have received the benefit preferentially by completely depriving secured Financial Creditor.

12. Ld. Counsel for the applicant has made his best attempts to justify the averments and allegations made in the application, which are completely based on the Transaction Auditor's Report.
  
13. **In reply** to the application, all the respondents have vigorously opposed the averments and allegations made in the application. It is stated that the Transaction Auditor's Report does not bear any definite conclusion in respect of the criteria required to be fulfilled in order to prefer the instant application. It is stated that no independent opinion or determination has been formed by the Resolution Professional in the said application. It is stated that the application and allegations made out are reproduction of what is stated in the Transaction Auditor's Report without application of mind. It is stated that the Transaction Auditor's Report contains several disclaimers /limitations which will appear from the report itself and the same renders the report totally unreliable and even from the report, it is ex-facie clear that no definite conclusion has been formed by the Transaction Auditor and that he has proceeded mechanically without application of mind on the basis of erroneous surmises and conjectures. It is stated that even though it is ex-facie clear from the said application that no definite conclusion has been formed by the Transaction Auditor and that the Transaction Auditor's Report contains several disclaimers/ limitations rendering the report totally unreliable, the Resolution Professional has proceeded mechanically without application of mind on the basis of erroneous surmises and conjectures to prefer the said application. It is stated that

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the said report categorically failed to identify and /or establish any of the alleged transactions within the scope and ambit of section 43 of the said Code, 2016. It is stated that it is evident from the said report that the auditor as appointed has not established the fact whether such transactions had taken place in the nature of ordinary course of business or otherwise. It is stated that the said application has been filed after inordinate delay and beyond the time limit as specified by the Insolvency and Bankruptcy Code, 2016 and its Regulations. It is stated that said application has been made in violation of Rule 35A of the IBBI (Resolution Process for Corporate persons) Regulations, 2016 and is thus not maintainable.

14. It is denied that the transactions were carried out just to defraud creditors of the Corporate Debtor. It is denied that all these transactions ought to be reversed so as to reflect the correct balance in the corporate debtor's account as on the CIRP initiation date. It is denied that the aforesaid transactions are clearly preferential in terms of Section 43 of the IBC, 2016. It is denied that these transactions are clearly within the definition of the transactions in terms of Section 44 of the IBC, 2016 and hence, the application is filed to reverse the effect of such transactions and seek order in respect of the respondents who knowingly carried on business in a detrimental manner and are obliged to make such contribution to the assets of the Corporate Debtor as deemed fit and proper. It is denied that the prayer for necessary direction upon Respondent No.1 & 23 to jointly and severally to contribute or repay a sum of Rs. 1,01,74,773.00 in terms of section 44 of IBC, 2016 should be granted. It is stated that the respondent no.1 & 2 have always rendered co-operation in a time bound manner and diligently and have never knowingly carried on business in a manner detrimental to the other creditors.
15. It is stated that the respondents are not the Creditors of the corporate debtor and no payment as alleged have been made to the respondents

from the Corporate Debtor. It is stated that the payments made to the respondents by the Corporate Debtor are in ordinary course of business and are financial affairs of the respondents. Hence, the question of putting the respondents in a beneficial position over the creditors of the corporate debtor, which is undergoing corporate insolvency resolution process, does not and cannot arise. It is stated that the Transaction Auditor's Report does not bear any definite conclusion in respect of the criteria required to be fulfilled in order to prefer the instant application. It is stated that no independent opinion or determination has been formed by the Resolution Professional in the said application. It is stated that the application and allegations made out are reproduction of what is stated in the Transaction Auditor's Report without application of mind. It is stated that the Transaction Auditor's Report contains several disclaimers/ limitations which will appear from the report itself and the same renders the report totally unreliable and even from the report it is ex-facie clear that no definite conclusion has been formed by the Transaction Auditor and that he has proceeded mechanically without application of mind on the basis of erroneous surmises and conjectures. It is stated that even though it is ex-facie clear from the said application that no definite conclusion has been formed by the Transaction Auditor and that the Transaction Auditor's Report contains several disclaimers/ limitations rendering the report totally unreliable, the Resolution Professional has proceeded mechanically without application of mind on the basis of erroneous surmises and conjectures to prefer the said application

16. We have carefully seen the averments of the application and corresponding reply of the respondents. We have noticed that the allegations made in application do not constitute anything actionable against the respondents. It was the duty of the RP to come to a conclusive determination before filing an application with the Adjudicating Authority. Simply by repeating the extracts or observations made in the forensic auditors report, the RP could not make an

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independent determination about the nature of transactions as required by Regulation 35A (2) of the CIRP Regulations.

17. We are not convinced by the way the RP has proceeded against the respondent by way of this application. The allegations and averments made in the application do not constitute any action or prompt this Adjudicating Authority to proceed against these respondents under the sections under which the application has been moved.
18. We, therefore, do not find any merit in this application, the same is therefore, dismissed.
19. This Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

**(Harish Chander Suri)**  
**Member (Technical)**

**(Rohit Kapoor)**  
**Member (Judicial)**

Order signed on, this 06<sup>th</sup> day of May, 2022

Pj