

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, COURT NO. II
KOLKATA**

I.A. (IB) No. 314 of 2022
In
C.P. (IB) No. 1172/KB/2019

***An application under Section 43 and 66 of the Insolvency and
Bankruptcy code, 2016.***

IN THE MATTER OF:
State Bank of India

... Financial Creditor.

Versus
Adi Ispat Private Limited (Under CIRP)

... Corporate Debtor.

And
IN THE MATTER OF:
**Daulat Ram Jain, Resolution
Professional (RP) of Adi Ispat Private
Limited**

... Applicant.

Versus
**1. Amit Kumar Sarawgi, Suspended
Director of Adi Ispat Private Limited**

**2. Sumit Kumar Sarawgi,
Suspended Director of Adi Ispat
Private Limited**

... Respondents.

Date of Pronouncement: May 02, 2024.

CORAM:
SMT. BIDISHA BANERJEE, HON'BLE MEMBER (JUDICIAL)
SHRI. D. ARVIND, HON'BLE MEMBER (TECHNICAL)

APPEARANCE:
For the RP: Mr. Snehasish Chakraborty, Adv.
Ms. Tripti Agarwal, FCA.

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ORDER

Per: D. Arvind, Member (Technical):

1. The Court congregated through a hybrid mode.
 2. Heard Ld. Counsel appearing on behalf of the Resolution Professional.
 3. This is an application preferred by **Mr. Daulat Ram Jain**, the **Resolution Professional** of **Adi Ispat Private Limited** (hereinafter referred as “**Applicant/Resolution Professional**”) against **Amit Sarawgi** and **Sumit Kumar Sarawgi**, the suspended directors of Adi Ispat Private Limited (hereinafter referred as “**Respondent No. 1 and 2**” respectively).
 4. This application has been preferred in terms of Section 43 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as “**Code**”) which deals with preferential transactions and Section 66 of the Code which deals with fraudulent transactions.
 5. This application seeks the following reliefs:
 - i. To condone the delay for filing this application;*
 - ii. To declare that the transactions amounting to Rs. 52,54,980/- as reflected in the PART -B of the application are preferential transactions in terms of Section 43 of the Code, 2016 and also direct for the repayment of the same amount;*
 - iii. To pass appropriate orders in terms of Section 44 of IBC, 2016;*
 - iv. To declare that the transactions as reflected in the PART-C of the application are fraudulent transactions in terms of Section 66 of the Code, 2016;*
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- v. To pass necessary order declaring the written off entry to the tune of Rs. 88,71,440 as wrongful & fraudulent transactions as defined under section 66 of the Code, 2016 and restore to the pre-transaction position;*
- vi. To pass necessary order for declaring the suspicious cash receipts and payments as fraudulent, suspicious and wrongful trading u/s 66 of the Code and pass an order for the reversal of said amount of receipts and payments in the books of accounts;”*

Factual Matrix:

- 6.** Adi Ispat Private Limited, the corporate debtor herein was put to Corporate Insolvency Resolution Process (IRP) on 22.11.2019, by this Tribunal under Section 7 of the IBC.
 - 7.** The erstwhile resolution professional utilised 81 days out of 180 days of the CIRP period but could not complete due to initiation of CBI proceedings against him.
 - 8.** This Tribunal passed an Order dated 21.09.2021, replacing the erstwhile resolution professional and appointing the present applicant to act as a resolution professional. The delay in completing the CIRP was allowed by this Tribunal *vide* Order dated 10.01.2022, as per the CIRP Regulations.
 - 9.** The erstwhile resolution professional formed an opinion on avoidance transactions before 75th day after the commencement of CIRP as required under CIRP Regulations, under Section 43, 45, 50 and 66 of the Code. However, before he could proceed further, he was replaced due to reasons mentioned in Para 7 above.
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- 10.** Further, it is claimed that there was delay in forensic audit due to delay on the part of erstwhile directors in handing over the books of accounts and other relevant documents to the applicant/resolution professional. In fact, applicant had to file application under Section 19(2) against the respondent and the statutory auditor, for the purpose of securing relevant documents. After considerable delay, the Applicant could secure most of the documents if not all
 - 11.** Considering the time lost in replacement of Applicant/resolution professional in place of erstwhile resolution professional, delay in getting documents from the erstwhile directors and delay in getting forensic audit report, the Applicant admits that there has been a delay in filing this avoidance application.
 - 12.** This application seeks condonation of delay in view of reasons stated hereinabove.
 - 13.** The applicant has made out his case in four parts:

 - Part A – Dealing with deviation between the books of accounts, audited financial statements and Income Tax returns of the corporate debtor;
 - Part B – Dealing with preferential transaction under Section 43;
 - Part C – Dealing with fraudulent transactions under Section 66;
 - Part D – Dealing with wrongful trading under Section 66;
 - 14.** Sum and substance of grounds taken by the applicant are stated hereunder as tables apart from listing deviations between books of accounts captured in tally and audited financials. In addition, it is
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the claim of the Applicant that all the cash transactions are suspicious and therefore, seeks that such transactions may also be held as fraudulent.

Table I (Preferential Transactions)

Date	Particulars	Amount	Remarks
19.07.2018	Amit Sarawgi	4,00,000/-	Payment of Rs.
30.11.2018	(Director of	17,000/-	4,17,000/- was
04.01.2019	Corporate Debtor)	7,15,000/-	made without any subsequent bill.
01.06.2019	Kore Security	1,06,800/-	Payment made
02.07.2019	Force	1,04,000/-	were around Rs.
04.08.2019		1,02,800/-	50,000/- p.m.,
05.08.2019		1,04,400/-	before May 2019
01.09.2019		1,05,200/-	but since May 2019 payments made around Rs. 1,04,000/- to 1,07,200/-. All payments were made in cash only.
19.09.2019	Ashok Jha	5,34,800/-	—
21.10.2019			
15.11.2019			
18.09.2019	Anekit Kumar Verma	75,000/-	—
01.04.2019	Golu Mushadi	24,980/-	—

DAULAT RAM JAIN
PROFESSIONAL

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31.05.2019	Manish kumar	19,00,000/-	—
28.12.2018	Poddar Traders	3,50,000/-	—
05.01.2019	Santosh Gupta	7,15,000/-	—

Table II- Fraudulent Transactions

a.	J.S. Metals (debit balance)	Rs. 46,85,720
b.	Devendra Prashad (credit balance)	Rs. 12,35,700
c.	Devnandan Kumar (credit balance)	Rs. 24,25,000
d.	Golu Mushadi (credit balance)	Rs. 5,25,020

Ld. Counsel for the Applicant:

- 15.** Ld. Counsel for the applicant submits that there are deviations in the books of accounts of the corporate debtor. Ld. Counsel submits that there are four charges existing on the MCA portal out of which the liability to the Bank of Baroda does not exist in the tally/books of accounts of the corporate debtor.
- 16.** Ld. Counsel also submits that there are differences in the amount furnished in the income tax return for the Financial Year 2016-2017 and Financial Year 2017-2018, when compared with audited financials for the same period.
- 17.** Ld. Counsel also submits that liability of Rs. 48 lacs towards rent for the FY 2017-2018 and FY 2018-2019 have not been provided in audited books of accounts which has been signed by the auditors

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whereas, the same is present in tally data/books of accounts provided for conducting the forensic audit.

- 18.** Ld. Counsel submits that an audit fee of Rs. 1 lac provided for the FY 2018-2019, in the audited accounts, whereas the same is not present in the tally data.
- 19.** Ld. Counsel further submits that as per tally data, during the period 2015-2016 and 2016-2017, the corporate debtor made a sale of Rs. 4,20,08,032/- and Rs. 1,27,62,124/- respectively, which has not been shown in the income tax return filed by the corporate debtor in the said Financial Year.
- 20.** Ld. Counsel further submits that the bank statement of SBI records that the fixed deposit to the tune of Rs. 39,49,608/- has been adjusted against the loan account in January 2015 whereas, it is shown as an asset of the corporate debtor till 31.03.2019.
- 21.** Apart from the above deviations, the Ld. Counsel for the applicant submits, relying on the transaction audit report the details of preferential transactions and transactions under Section 66 of the IBC as per the details provided in the table hereinabove at para 13 of this order. He has also pointed out cash transactions which he believes are wrongful trading in terms of Section 66 of the code. Ld. Counsel relies on the transaction audit report for justifying his contentions.

Ld. Counsel for the Respondents:

- 22.** Ld. Counsel for the respondents submits that the above transactions are neither preferential nor fraudulent transactions. Non-existence in tally back up does not evaporate the liability towards Bank of
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Baroda. Difference between the ITR and balance sheet can be treated, at the most as non-compliance of the applicable provisions under the Income Tax Act and under Companies Act. Rent liability not shown in Balance Sheet as liability but present in Tally back-up as liability does not prejudice anyone. Such entries in the books are on account of errors. A sale not shown in ITR, but in the books maintained is factually an error in accounting and in any case such deviation is at the most a violation of the Income Tax Act. Since the bank has adjusted the FD without the consent and knowledge of the Corporate Debtor the same was still shown as asset in Balance Sheet of the Corporate Debtor till 2019.

- 23.** Ld. Counsel submits that it is alleged that Rs. 4,17,000/- was paid to Mr Amit Sarawagi during the F.Y. 2018-19 without any subsequent bills. The said amount was paid towards reimbursement of several expenses and in the ordinary course of business. The account of the Corporate Debtor became NPA in October 2014. As such, there is no question of any bank loan involved in these transactions and such payments are from the funds infused by the promoters themselves. Further, other payments made to several parties relates to usual business of the Company.
- 24.** Ld. Counsel further submits that Debit balance of creditors are wrong accounting entries as there cannot be any debit balance of creditors. There are no underlying transactions. As such, the same cannot be held as fraudulent transaction. It has been alleged that several debit and credit balance has been written off in tally. The same are wrong accounting entries only and there is no transaction in that regard. If the RP/Liquidator feels that the same can be recovered, the RP or Liquidator may take initiative to recover the said
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amount where debit balance appears in the creditors account or to make the payment to the creditors which were written off/back as per the code.

- 25.** Ld. Counsel for the respondents also submits that Transactions carried in violation of Income Tax does not amount to defrauding any creditor and the applicant himself stated that the same are wrongful trading. As such, the interest of no creditor is prejudiced because of wrongful trading in the year 2018 much after the account became NPA. There are no fake entries of power & fuel bills as alleged at all and the same are not substantiated by the auditor. Further, the Applicant himself stated that the same are wrongful trading and not fraudulent transactions. Receipt of payment in cash and making payment in cash is only a violation of Income Tax and not fraudulent transactions, as long as they are in the usual course of business.

Analysis and findings:

- 26.** Before getting into the merits of the case, we have to examine whether the delay in filing this application merits condonation. As per Regulation 35A of CIRP Regulations, 2016, the resolution professional shall form an opinion whether the corporate debtor has been subjected to any transaction covered under Section 43, 45, 50 and 66 of IBC, within 75 days from the commencement of the CIRP.
- 27.** Where the resolution professional is of the opinion that corporate debtor has been subjected to any transactions covered under Sections mentioned above, he shall make a determination on or before the 115th day from the date insolvency commenced. In this case, the CIRP commenced on 22.11.2019 whereas, this application

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has been filed on 21.06.2022. Therefore, on the face of it there has been a considerable delay in filing this application.

28. The resolution professional submitted that the delay was mainly due to the following four reasons:

- I.** The erstwhile resolution professional took 81 days to conduct the CIRP and immediately after that CBI proceeding against him was initiated due to which, CIRP could not be continued. It is only on 21.09.2021, the NCLT Kolkata Bench passed an Order replacing the erstwhile resolution professional by appointing the present applicant to act as resolution professional.
- II.** An application under Section 19(2) of IBC was filed by resolution professional to collect various documents and registers from the suspended board and after several attempts and delays the applicant could get hold of most of the documents if not all, which also lead to further delay.
- III.** The transaction auditor was appointed on 22.11.2021. After collecting the documents from the suspended board, the transaction auditor submitted the forensic report only on 21.12.2021 and immediately thereafter the same was put up before the CoC for approval for filing this application and once the CoC approved, the application was filed.

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- 29.** We find that the time period under Regulation 35(A) of the CIRP regulations is not mandatory but only directory in character as held by the Hon'ble NCLAT in ***Mr. Tenny Josh Vs. Mr. Prathap Pillai, Resolution Professional of Tenny Josh Limited, in Company Appeal (AT)(CH)(INS.) No. 95/2023***. In this case, we have carefully considered the submissions made by the resolution professional for the delay in filing this application and find it to be a genuine and accordingly, applying the judgment quoted above, we condone the delay in filing this application and proceed to examine the application on merits.
- 30.** We find that there are three parts to the avoidance application which are detailed in Part B, Part C and Part D in the application. Part B deals with preferential transactions, Part C deals with fraudulent transactions and Part D deals with wrongful trading. This is apart from pointing out certain deviations between audited books and tally data provided to them. No amount has been quantified and sought to be recovered on account of deviations and therefore we restrict ourselves to alleged preferential transactions, fraudulent transactions and wrongful trading detailed in Part B, C and D in the application.
- 31.** The ingredients of preferential, fraudulent and wrongful trading are entirely different as held by the Hon'ble NCLAT in ***Md Sadique Islam v. Niraj Kumar Agarwal*** reported in **(2024) ibclaw.in 128 NCLAT**. In the case of preferential transaction where one creditor is given preference to another for payment, the same would fall under preferential transactions, if made to unrelated parties up to one year, and in case of related parties up to two years prior to insolvency commencement date. The only exception is that if transfer to such
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parties were made in ordinary course of business, then as per Section 43(3)(a) of the code, the same stands excluded from the purview of preferential transactions. Whether such payments were made in the ordinary course of business or not can be and has to be proved by the corporate debtor and its suspended board. Otherwise, it is not on the resolution professional to prove that such payments were made in the ordinary course of business.

- 32.** However, in the case of fraudulent transactions, the proceedings are akin to criminal proceedings and therefore, the onus would be on the resolution professional to prove that any business of the corporate debtor has been carried on with an intent to defraud the creditors or for any fraudulent purpose. However, we are of the view that mens rea, is not necessary for maintaining an application under Section 66 of the IBC, though fraudulent nature of the transactions will have to be proved by the Applicant.
- 33.** With the above observations, we now proceed to examine the transactions contained in Part B, C and D in the application.

Part B - Preferential Transactions:

- 34.** In terms of Part B, the applicant is claiming Rs. 52,54,980/- under the head preferential transactions. List of alleged preferential transactions have been mentioned in table mentioned in Para 13 of this order. The payments that have been made to Mr. Amit Sarawgi who was the director of the corporate debtor for an amount totalling to Rs. 11,32,000/- can be treated as preferential transaction. In the absence of any submission in reply other than a mere statement that he was paid in the usual course of business, out of the dues payable to him by the company, the said payments cannot be outside the
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purview of Section 43 of the IBC Code. The question is why he was paid in preference to so many other creditors who have not been paid, has to be answered by the respondent with proper justifications to prove that such payments were made in the due course of business. In this case respondent failed to prove and therefore, we are of the view that the payments made to ex-director in the look back period cannot be treated as payments made in the usual course of business and accordingly, Rs. 11,32,000/- will have to be treated as preferential transaction.

- 35.** With reference to payments made to Kore Securities from 01.06.2019 to 01.09.2019 on a monthly basis, the applicant's submission is that they were paid Rs. 50,000/- per month till May 2019 whereas, from the month of June 2019 onwards they were paid Rs. 1,04,000/- per month. To this the respondents in their reply have stated that Kore Securities Force Agency had to employ additional force from June 2019 to protect the assets of the corporate debtor due to threats received from unpaid creditors, in view of unhealthy financial conditions of the corporate debtor.
- 36.** We are of the view that this response appears to be reasonable and acceptable and accordingly, hold that the payments to Kore Securities for an amount of Rs. 5,41,200/- mentioned in the table to be treated as transfer made in the ordinary course of business and hence covered by Section 43(3)(a) of the Code. However, for violation of provisions contained in the Income Tax Act for making cash payments in excess of the limits prescribed, corporate debtor is liable to the consequence provided in the said Act.

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37. With reference to payments made to Ashok Jha, Anekit Kumar Verma, Golu Mushadi, Manish Kumar, Poddar Traders and Santosh Gupta as detailed in the table attached to Part B of the application (para 13) neither the resolution professional in its application nor the transaction auditor has indicated the nature of transaction. Even in reply, the respondents have not come out with clear justification to be covered under Section 43(3)(a) of the Code, other than making sweeping statement that such payments are relating to usual business of the company. While we are not weighed by the fact that some of such expenditures were made in cash, we are certainly weighed by the non-justification of such payments during the look back period by the respondents with the nature of expenditure, proof that they are required and incurred in continuance of business as a going concern etc. Only the suspended board can be expected to provide justification that such expenses and payments were made in the ordinary course of business and prove that such payments are covered under Section 43(3)(a) of the code. Having not proved, we hold that total amount made on account of such payments as detailed in the table above to the tune Rs. 35,32,280/- will have to be treated as preferential transactions. Thus, out of the amount claimed as preferential transaction to the tune of Rs. 52,54,980/-, we hold that the transactions representing a sum of Rs. 48,34,580/- as preferential transactions under Section 43 of the code. Except the payments made to Kone Security, all other transactions mentioned in the table I of para 13 of this Order are held as preferential transactions.

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Part C – Fraudulent Transaction:

38. Main allegation is that account balances of four parties have been written off in the books of accounts. In the application three parties who are sundry creditors namely, Devendra Prashad, Devnandan Kumar and Golu Mushadi shown to have credit balance whereas, one party namely JS Metals shown to have debit balance. Relevant portion of the table mentioned as SL No. 27 in the application is reproduced:

a)	J. S. Metals (debit balance)	Rs. 46,85,720/-
b)	Devendra Prashad (credit balance)	Rs. 12,35,700/-
c)	Devnandan Kumar (credit balance)	Rs. 24,25,000/-
d)	Golu Mushadi (credit balance)	Rs. 5,25,020/-

39. The applicant has not mentioned whether the four parties belong to sundry creditors or not. However, in the transaction audit report attached to the applications, parties have been shown as creditors other than the financial creditors. This would mean that these parties are suppliers of goods and or services to the Corporate Debtor. Whenever a Sundry Creditor is shown to have credit balance that would mean that the corporate debtor is liable to pay such creditor the amount shown as balance on account of supply of goods or services. If these balances are “written off” (In the accounting parlance it should have been “written back”), then such amounts are not anymore payable to such creditors, consequently such write off is beneficial to corporate debtor and cannot be treated as fraudulent transactions.

40. One of the sundry creditors namely JS Metals account shows debit balance. This would mean that the Corporate Debtor has been paid

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in advance even before the supply of goods or services or the corporate debtor has issued debit note on such creditor for deficiency in supply of goods or services in the past.

- 41.** In a company which is under severe financial stress, it is highly improbable that a corporate debtor would have paid advance or allow the balance to lie with the suppliers for several years without recovering the same. Therefore, even this account of JS Metals appears to be a case of wrong accounting entry and not a case of recoverable which has been allegedly written off. The resolution professional failed to prove with iota of evidence that JS Metal has been paid advance or a debit note has been issued for deficiency in service or in supply of goods. When that being the case, we find no merit in applicant's claim for recovery of Rs. 88,71,440/- as fraudulent transactions, in respect of write off (write back) of balances appearing in tally data in respect of the said sundry Creditors

Part D – Fraudulent Trading:

- 42.** We find list of cash receipts and payments made in two years prior to CIRP in Annexure 27 in the application (At Page 78). Taking support of provisions made under the Income Tax Act that any amount received in excess of Rs. 2 lacs in case or any amount in excess of Rs. 20,000/- paid in cash is in violation of the said Act, the applicant argues that all such entries particularly payment entries relating to power and fuel charges had been made with the sole intent of syphoning of funds from the company.

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- 43.** We find from the list, payments were made for salary, security service charges, labour charges, several creditors apart from amounts paid to Prashant Fuel Station.
- 44.** The list of cash payments includes payment made to Mr. Ashok Jah for a sum of Rs. 5,34,800/-, Mr. Anekit Kumar Verma for a sum of Rs. 75,000/- and Golu Mushadi for a sum of Rs. 24,980/-. These transactions have already been held as preferential transactions and recoverable.
- 45.** Out of cash payments, we have also held that amount paid to Kore Securities Force cannot be part of avoidance transaction that leaves us with the balance payments as detailed in Annexure 27. We find that many such cash payments have been made after the commencement of CIRP on 22.11.2019, when the corporate debtor was under the control of erstwhile resolution professional. In respect of these payments, suspended board cannot be faulted unless collusion between erstwhile resolution professional and the suspended board is alleged and demonstrated.
- 46.** In any event, merely based on cash receipts and payments no fault can be attributed as wrongful trading, though the same is in violation of the Income Tax Act as well and the Corporate Debtor /Suspended Board is liable to face consequences for such actions under the said act. On looking at the list of such cash transactions, one can suspect wrongdoing of the Corporate Debtor. However mere suspicion without any other evidence whatsoever for fraudulent activities/trading cannot make the transactions as avoidable transactions. More so, with reference to cash payments made after the commencement of CIRP on 22.11.2019. The Resolution
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Professional should have at least made efforts to contact the parties who have received such payments to furnish invoices and confirmation of receipts of such payments. At least specific direction should have been made by the Resolution Professional to the Corporate Debtor's suspended board for such obtaining such confirmations from parties to whom such cash payments have been made. No income tax assessment on GST assessment reports is available to corroborate the nature of such cash receipts and payments. We find no such efforts have been taken by the Resolution professional and in the absence of which we are unable to corroborate and conclude that these transactions have been made with an intent to defraud the creditors. Hence, we find no merit in the claim of the applicant with respect to cash transactions which is purely based on suspicion and presumptions. Therefore, we reject the claim of the applicant on this count also.

47. In view of above analysis and observations, we pass following Orders:

- I.** We hold that a sum of Rs. 48,34,580/- is preferential transaction covered under Section 43 of the Insolvency and Bankruptcy Code and the same is recoverable from the beneficiaries who received from the corporate debtor and if no recovery is possible for any reason from such beneficiaries, then the respondents will have to make the said payments to the liquidation instead of the corporate debtor within 30 days from the pronouncement of this order.

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II. The applicant claim on account of fraudulent transactions has been rejected for the reasons mentioned in our analysis.

III. Applicants claim for wrongful trading/cash sales and payments is also rejected for the reasons stated in our analysis.

48. Accordingly, this application being **I.A. (IB) No. 314/KB/2022 is partly allowed and disposed of.**

49. Certified copy of this order, if applied for with the Registry, be supplied to the parties in compliance with all requisite formalities.

**D. Arvind
Member (Technical)**

**Bidisha Banerjee
Member (Judicial)**

This Order is signed on 02nd Day of March, 2024.

PH(PS)/ Bose, R K. [LRA]