

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

IA No. 1895/MB/C-I/2022

In

C.P (IB) No.2498/MB/C-I/2018

An application under Section 66(1) of the Insolvency and Bankruptcy Code, 2016

Filed by

**Mr. Udayraj Patwardhan
Liquidator of
Valecha LM Toll Private Limited**

...Applicant

Versus

Dinesh Hariram Valecha and Ors.

...Respondents

In the matter of
Axis Bank Limited

...Financial Creditor

Versus

Valecha LM Toll Private Limited

... Corporate Debtor

Order Pronounced on: 26.04.2024

Coram:

Hon'ble Member (Judicial)	:	Justice V.G. Bisht (Retd.)
Hon'ble Member (Technical)	:	Mr. Prabhat Kumar

Appearances:

For the Applicant LLP	:	Advocate Arjun Sathees i/b Indialaw
For the Respondent No. 8	:	Advocate Shreyas Shrivastava.

ORDER

Per: Prabhat Kumar, Member (Technical)

1. The Applicant has filed the present Application impugning certain transactions as fraudulent under Section 66 the Insolvency and Bankruptcy Code, 2016 ('Code').
The reliefs sought by the Applicant as are follows:
 - a. This Tribunal may allow this Application in terms of Section 66(1) of the Code.
 - b. That this Tribunal be pleased to pass necessary orders directing the Respondent No. 1,2,3,4,5,6 and 7 to make contribution to the asset of the Corporate Debtor to the extent of aggregate amount of Rs.63,12,00,000/- (Rupees Sixty Three Crore and Twelve Lakh only), which is the extent of loss caused to the Corporate Debtor by wrongfully siphoning-off monies from the account of the Corporate Debtor to VEL, and by transacting to facilitate the unjust enrichment of VIL at the expense of the Corporate Debtor with the intent to defraud the creditors of the Corporate Debtor.
 - c. To pass such further and other orders as this Tribunal may deem fit and proper in the facts and circumstances of the case.
2. The Applicant submits that Petition was filed by the Financial Creditor to initiate Corporate Insolvency Resolution Process ("CIRP") and Mr. Udayraj Patwardhan

IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH-I

IA No. 1895 of 2022 In C.P (IB) No.2498 of 2018

was appointed an Interim Resolution Professional ("IRP") of Corporate Debtor vide Order dated 29 March, 2019.

3. It is submitted that no Resolution Plan was approved by the CoC during the CIRP period and subsequently the CoC resolved to liquidate Corporate Debtor. It is further submitted that this Tribunal vide Order dated 27.10.2020 passed an order under section 33 of the Code for commencement of the liquidation process of the Corporate Debtor and was further pleased to appoint the Applicant, the erstwhile Resolution Professional, as the Liquidator of the Corporate Debtor. It is submitted that the Corporate Debtor is a subsidiary company of Valecha Infrastructure Limited ("VIL") (74% shareholding) which in turn is a fully owned subsidiary company of Valecha Engineering Limited ("VEL"), the parent company.
4. It is submitted that Respondent No. 1 was responsible for the day to day affairs of the Corporate Debtor during the period from 22.04.2010 to 01.07.2011 and Respondent No. 2, 3, and 4 were the Erstwhile Directors of the Corporate Debtor before commencement of CIRP. Respondent No. 1 and 5 were the directors of VIL during the period from 06.01.1995 to 09.01.2020 and from 06.01.1995 to 09.01.2020 respectively. It is also submitted that Respondents No. 1, 5 and 6 were the director of VEL during the period from 01.08.2018 to 29.09.2018, from 11.06.2009 to 19.11.2019, and 01.08.2006 to 19.11.2019 respectively. Thereby, it is submitted that Respondents 1 to 4 are equally responsible for the day to day affairs of Corporate Debtor.
5. It is further submitted that the Respondent 7, Valecha Infrastructre Limited is a related party of the Corporate Debtor having 74% shareholding in the Corporate Debtor. It is submitted that Respondent 8, Dilip Buildcon Limited is a construction

IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH-I

IA No. 1895 of 2022 In C.P (IB) No.2498 of 2018

contractor company with whom a sub- contracting agreement was entered into by VEL, the parent company of the Corporate Debtor.

6. The CoC in the first meeting held on 02.05.2019 passed a resolution to appoint M/s. Batliboi & Purohit, Chartered Accountants ("Transaction Auditors") to conduct a transaction audit of Corporate Debtor and identify if there were any transactions involving the Corporate Debtor that fall within the ambit of sections 43, 45, 46, 49, 50 and 66 of Code. It is submitted that Batliboi & Purohit, Chartered Accountants ("Transaction Auditor") conducted transaction audit from 01.04.2017 to 31.03.2019 ("Audit Period") and submitted their Report ("Transaction Report") on 18.10.2021 along with Corrigendum dated 01.02.2022.
7. Based on the aforesaid report the Applicant identified certain transactions entered into by the Respondents in connivance with each other, which falls under the purview of section 66 of the Code.
8. The Applicant has impugned the transaction wherein a sub Contract was entered into with an intent to defraud the Creditor. It is submitted that, Corporate Debtor was incorporated in the year Special Purpose Vehicle (SPV) for designing, engineering, construction, finance, operation and maintenance of four lane roads from Lebad to Manpur in Bhopal, Madhya Pradesh. It is also submitted that for this very purpose a Concession Agreement dated 04.05.2010 was entered between Corporate Debtor and Madhya Pradesh Road Development Corporation ("MPRDC") ("Concession Agreement") for a Contract Price of Rs.2,45,00,00,000/- (Rupees Two Hundred and Forty-Five Crores Only), wherein Corporate Debtor was to construct the aforementioned roads and recover the costs incurred through levy of fees/toll revenue over a period of 25 years commencing from 27.10.2010.

IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH-I

IA No. 1895 of 2022 In C.P (IB) No.2498 of 2018

9. The Applicant submits that despite the fact that the Corporate Debtor was an SPV incorporated specifically for the purpose of constructing roads, the Corporate Debtor transferred the Concession Agreement to VEL via Lump-sum EPC Contract Agreement dated 12.05.2010 for the same contract price of Rs.2,45,00,00,000/- (Rupees Two Hundred and Forty-Five Crores Only). Thereafter, VEL then entered into a back-to-back sub-contracting arrangement via Agreement dated 01.07.2010 with Dilip Buildcon Ltd., the Respondent No. 8 herein, at a contract price of Rs.2,10,00,00,000/- (Rupees Two Hundred and Ten Crores Only) ("Sub-contracting Agreement"), thereby earning a gross profit of Rs.35,00,00,000/- (Rupees Thirty-Five Crores Only) from the aforementioned transaction.
10. The Applicant submits that the Corporate Debtor could have directly sub-contracting agreement with Respondent 8., instead an indirect approach was adopted, whereby the Corporate Debtor first transferred the Concession Agreement at the same price to its parent company, VEL, who then sub-contracted the work to Respondent 8 at a lower price of Rs.2,10,00,00,000/- (Rupees Two Hundred and Ten Crores Only). This indirect approach lead to diversion of profits amounting to Rs.35,00,00,000/- (Rupees Thirty-Five Crores Only) to VEL, the parent company of the Corporate Debtor with an intent to defraud the Creditors of Corporate Debtor. It is submitted that since VEL, through VIL, has majority shareholding in the Corporate Debtor, and since Respondent No.1 was the director of both, the Corporate Debtor and VEL during the period of Transaction-1, the Respondents cannot claim lack of knowledge of the Sub-contracting Agreement entered into with Respondent 8.

IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH-I

IA No. 1895 of 2022 In C.P (IB) No.2498 of 2018

11. It is submitted that in relation to the Concession Agreement, the Corporate Debtor had sought for and was sanctioned a Term Loan via Sanction Letter dated 26.10.2010 by State Bank of India for Rs.1,11,00,00,000/- (Rupees One Hundred and Eleven Crores Only) and Sanction Letter dated 22.10.2010 by Axis Bank Ltd. for Rs.1,00,00,00,000/- (Rupees One Hundred Crores Only) aggregating to Rs.2,11,00,00,000/- (Rupees Two Hundred and Eleven Crores Only) (hereinafter collectively referred to as "Banks"). It is submitted that for availing the aforesaid loans, the Respondents on behalf of the Corporate Debtor had submitted the Project Cost as Rs.2,81,00,00,000, out of which Rs.70,00,00,000/- (Rupees Seventy Crore) was to be infused by the promoters/Corporate Debtor and Rs.2,11,00,00,000/- (Rupees Two Hundred and Eleven Crores only) was sanctioned by the banks. The applicant submits that banks were not informed of the sub-contracting agreement entered into with Respondent No.8.
12. The second transaction impugned by the Applicant relates to issuance of share to related party without premium. It is submitted that in furtherance of infusing Rs.70,00,00,000/- (Rupees Seventy Crores Only) as capital in Corporate Debtor by the promoters, Shareholders Agreement dated 23.12.2010, Subscription Agreement dated 23.12.2010 ("Subscription Agreement") and Supplement to the Subscription Agreement dated 30.04.2011 was entered into by the Corporate Debtor, VIL, and Piramal Infrastructure Pvt. Ltd. (now Miranda Tools Private Limited) ("Piramal'). As per Clause 2 of the Subscription Agreement, Piramal was to subscribe 26,00,000 (Twenty Six Lakhs) Equity Shares for a total sale consideration of Rs.12,48,00,000/- (Rupees Twelve Crore Forty Eight Lakhs Only) arrived at face value of Rs.10/- (Rupees Ten Only) per Equity Share plus premium of Rs.38/- (Rupees Thirty Eight

IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH-I

IA No. 1895 of 2022 In C.P (IB) No.2498 of 2018

Only) per Equity Share and 1,31,10,000 (One Crore Thirty One Lakhs Ten Thousand) Compulsory Convertible Debentures ("CCD") having face value of Rs.10/- (Rupees Ten Only) each for a total consideration of Rs.13,11,00,000/- (Rupees Thirteen Crore Eleven Lakhs Only) in exchange for 26% share capital on fully diluted basis in the Corporate Debtor.

13. Thereafter, it is submitted that pursuant to Subscription Agreement, VIL was to subscribe 74,00,000 (Seventy Four Lakhs) Equity Shares having a face value of Rs.10 (Rupees Ten only) each for a total consideration of Rs.7,40,00,000/- (Rupees Seven Crore Forty Lakhs Only) having face value of Rs.10 (Rupees Ten Only) per Equity Share and 3,73,10,000 (Three Crores Seventy Three Lakhs Ten Thousand Only) CCDs having face value of Rs.10 (Rupees Ten Only) for a total sale consideration of Rs.37,31,00,000/- (Rupees Thirty Seven Crore and Thirty One Lakhs Only) in exchange for 74% share capital on fully diluted basis in Corporate Debtor.
14. The Applicant submits that the initial contribution to be made by Piramal is detailed under Clause 2.5 of the Subscription Agreement, wherein Piramal would subscribe initially to 13,00,000 (Thirteen Lakhs) equity shares of Corporate Debtor, at a face value of Rs.10/- (Rupees Ten Only) and premium of Rs.38/- (Rupees Thirty-Eight Only) per share. It is further submitted that as per clause 2.6 of the Subscription Agreement, initially VIL would subscribe to 37,00,000 (Thirty-Seven Lakhs) equity shares of Corporate Debtor at face value of Rs.10/- (Rupees Ten Only) per share. Subsequently, as provided in Clause 2.4 (b) read with Clause 6 of the Subscription Agreement, Piramal then subscribed to 13,00,000 (Thirteen Lakhs) equity shares of Corporate Debtor, at a face value of Rs.10/- (Rupees Ten Only) and premium of

IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH-I

IA No. 1895 of 2022 In C.P (IB) No.2498 of 2018

Rs.38/- (Rupees Thirty-Eight Only) per share. And at the same time, VIL had subscribed to 37,00,000/- (Thirty-Seven Lakhs) equity shares of Corporate Debtor at face value of Rs.10/- (Rupees Ten Only) per share. Therefore, the total equity shares subscribed by Piramal is 26,00,000 (Twenty-Six Lakhs) and VIL is 74,00,000 (Seventy-Four Lakhs).

15. It is submitted that since VIL was not charged any premium, the Corporate Debtor has forgone share premium amounting to a sum of Rs.28,12,00,000/- (Rupees Twenty-Eight Crore Twelve Lakhs Only). It is submitted that since VEL, through VIL, has majority shareholding in the Corporate Debtor, and since Respondent No. 1 was the director of both, the Corporate Debtor and VEL during the period of the transaction. The Respondent cannot claim lack of knowledge of the fact that equity shares of the Corporate Debtor were issued at face value to VIL while Piramal was charged a premium. The Applicant contends that the aforesaid transaction is a fraudulent transaction carried out by the Respondents as they same facilitated unjust enrichment of VIL by a sum of Rs.28,12,00,000/- resulting in loss of share premium to Corporate Debtor.

Findings:

16. We have heard the submissions advanced by the Applicant and perused the records.
17. The Respondents No. 1 to 7 have not filed affidavit-in-reply and accordingly have been set-parted vide order dated 21.12.2023. Respondent No. 8 Dilip Buildcon Private Limited is a proforma party and no relief is sought qua them.

IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH-I

IA No. 1895 of 2022 In C.P (IB) No.2498 of 2018

18. We proceed to examine the transactions impugned by the Applicant herein as fraudulent transactions under Section 66(1) of the Code. At this juncture, it is useful to iterate Section 66 of the Code for reference:

66. Fraudulent trading or wrongful trading. –

(1) If during the corporate insolvency resolution process or a liquidation process, it is found that any business of the corporate debtor has been carried on with intent to defraud creditors of the corporate debtor or for any fraudulent purpose, the Adjudicating Authority may on the application of the resolution professional pass an order that any persons who were knowingly parties to the carrying on of the business in such manner shall be liable to make such contributions to the assets of the corporate debtor as it may deem fit.

(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.

[(3) Notwithstanding anything contained in this section, no application shall be filed by a resolution professional under sub-section (2), in respect of such default

IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH-I

IA No. 1895 of 2022 In C.P (IB) No.2498 of 2018

against which initiation of corporate insolvency resolution process is suspended as per section 10A.]

Explanation. – For the purposes of this section a director or partner of the corporate debtor, as the case may be, shall be deemed to have exercised due diligence if such diligence was reasonably expected of a person carrying out the same functions as are carried out by such director or partner, as the case may be, in relation to the corporate debtor.

19. The first transaction impugned by the Applicant herein related to loss caused to the Corporate Debtor amounting to Rs.35,00,00,000/- (Rupees Thirty Five Crores) as the Corporate Debtor transferred the contract amounting to Rs.245,00,00,000/- (Rupees Two Hundred and Forty Five Crore only) to Valecha Engineering Limited i.e. the parent company who in turn then entered into a sub-contracting agreement dated 01.07.2020 with Dilip Buildcon Limited (Respondent No.8) for contract price of Rs.210,00,00,000/-. The Applicant submits that the Corporate Debtor could have directly entered into an agreement with Respondent No.8, however, instead it transferred the contract to VEL, resulting is loss of profit of Rs.35,00,00,000/- to the Corporate Debtor. The Applicant alleges that this was done with the intend to defraud the creditors of the Corporate Debtor as Respondent No.1 was a common director of VEL and the Corporate Debtor at the relevant time when the transaction was executed.
20. Further, the Applicant contends that the Corporate Debtor had sought sanction of credit facilities from State Bank of India and Axis Bank aggregating to Rs.211,00,00,000/- (Rupees Two Hundred and Eleven Crores only), while

IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH-I

IA No. 1895 of 2022 In C.P (IB) No.2498 of 2018

availing the said facilities the Respondents herein had submitted the project cost to be Rs.281,00,00,000/- (Rupees Two Hundred and Eighty One Crores only), out of which Rs.70,00,00,000/- (Rupees Seventy Crores Only) was to be infused by the promoters and the remainder amount of Rs.211,00,00,000/- (Rupees Two Hundred and Eleven Crores only) was sanctioned by the banks. The Applicant contends that if Corporate Debtor had entered into the transaction directly with Respondent No.8 it would have significantly lowered the project costs, thereby reducing the banks exposure.

21. We find that VEL is the parent company of the Corporate Debtor and also had common directors when the transaction was executed, accordingly, the Respondents herein cannot plead ignorance to the fact that VEL transferred the said contract to Respondent No.8 at a lower price, resulting in gain to VEL. The threshold stipulated in Section 66(1) of the Code to categorize a transaction as fraudulent transaction is that the business of the Corporate Debtor was conducted with the intend to defraud the creditors or for a fraudulent purpose. In the present transaction, it clear that the Corporate Debtor is SPV specifically incorporated for construction of projects and the concession agreement dated 04.05.2010 is issue was executed by the Corporate Debtor as main contract. Thereafter, the said agreement was subsequently transferred by the Corporate Debtor to VEL vide Lump sum EPC contract Agreement dated 12.05.2010, VEL in turn transferred the same to Respondent No.8 vide sub-contracting arrangement dated 01.07.2010 wherein VEL booked profit of Rs.35,00,00,000/- (Rupees Thirty Five Crore Only).

IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH-I

IA No. 1895 of 2022 In C.P (IB) No.2498 of 2018

22. At this juncture, it is relevant to state that the Corporate Debtor had availed credit facilities from State Bank of India and Axis Bank to the tune of Rs.211,00,00,000/- (Rupees Two Hundred and Eleven Crore only) for the purpose of financing the project. The Respondents herein had submitted the project cost to be Rs.281,00,00,000/- (Rupees Two Hundred and Eighty One Crores only), if the Corporate Debtor executed the transaction directly with Respondent no.8 it would have lowered the project cost. However, the Corporate Debtor herein refused to do so and has accordingly defrauded the creditors being SBI and Axis Bank by letting the parent company i.e. VEL make a gain of Rupees Thirty Five Crore. Accordingly, we categorize the first transaction herein as a fraudulent transaction and direct the Respondent No. 1 to 4 to pay the Corporate Debtor Rs.35,00,00,000/- (Rupees Thirty Five Crore) within 30 days from the date of this Order jointly and severally. It is apposite to note that no order can be passed qua Respondent No.5 to 7 in view of the order passed by the Hon'ble Supreme Court in the matter of *Gluckrich Capital Private Limited vs The State of West Bengal and Ors. Special Leave Petition (CRL.) NO. Diary No. 6732 OF 2023* wherein it was held that remedy against a third party is not available under Section 66 of the Code.
23. The second transaction impugned by the Applicant herein relates to issuance of shares to related party i.e. VIL Valecha Infrastructure Limited without premium. The Applicant contends vide the same transaction Piramal was issued shares of the Corporate Debtor at face value of Rs.10/- at a premium of Rs.38/-, however, VIL subscribed to 74,000 equity shares of the Corporate Debtor at face value of Rs.10/- without share premium. Accordingly, the Applicant

IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH-I

IA No. 1895 of 2022 In C.P (IB) No.2498 of 2018

submits that the Corporate Debtor has foregone a share premium amounting to Rs.28,12,00,000/- resulting in loss to Corporate Debtor. We note that transaction undertaken to fund the project and Piramal brought in their capital investment vide subscription to the shares of the SPV. It can be observed that the aforesaid transaction impugned under Section 66(1) of the Code does not in any way effect the rights of the creditors of the Corporate Debtor. The dispute if at all can be qua the shareholders inter se and cannot be stretched so as to bring the same within the purview of fraudulent transactions under the Code.

24. IA No. 1895 of 2022 in CP(IB) No. 2498 of 2018 is **partly allowed**.

Sd/-

PRABHAT KUMAR
MEMBER (TECHNICAL)

26.04.2024

Priyal

Sd/-

JUSTICE V.G. BISHT
MEMBER (JUDICIAL)