

IN THE NATIONAL COMPANY LAW TRIBUNAL

DIVISION BENCH, COURT NO. II

KOLKATA

I.A. (IB) NO. 219/KB/2023

IN

C.P. (IB) NO. 744/KB/2020

An Application under Section 66 of the Insolvency and Bankruptcy Code, 2016 with Regulation 35A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and Rule 11 of the National Company Law Tribunal Rules, 2016.

IN THE MATTER OF:

Seemant Nahata

... Operational Creditor

Versus

Divyaswarna (OPC) Private Limited

... Corporate Debtor

And

Sudipto Ghosh, Interim Resolution Professional of Divyaswarna (OPC) Private Limited.

... Applicant

Versus

Ankur Verma

... Respondent

Date of Pronouncement of Order: 25th September, 2024

CORAM:

Smt. Bidisha Banerjee, Member (Judicial)

Shri. D. Arvind, Member (Technical)

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e. Costs

f. Such further orders and/or directions be passed as this Tribunal deem fit and proper.

4. Factual Matrix

- 4.1** The applicant conducted a preliminary investigation apropos the transactions entered into by the respondent during the review period, to which he formed an opinion within 75 days from the date of commencement of CIRP that the transactions were in the realm of fraudulent and avoidable transactions.
- 4.2** The IRP after formation of an independent opinion in accordance with Regulation 35A(1) of the CIRP Regulations, has appointed TKR & Associates, Chartered Accountants to conduct a transaction audit of last 2 years prior to the CIRP commencement date i.e, September 7, 2020 to September 6, 2022 in respect of the accounts of the CD.
- 4.3** From the documents, it appeared that the respondent has made several cash withdrawals and self cheque withdrawals during the years 2019-2020 and 2020-2021 i.e, within two years prior to the insolvency commencement date.
- 4.4** The opinion formed by the Applicant points towards fraudulent and wrongful trading in the business of the Corporate Debtor and hence the present application is filed.

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5. Submissions of the Ld. Counsel on behalf of the Applicant

- 5.1** It was submitted that a sum of Rs. 36.75 lakhs were withdrawn by self cheques after receipt of demand notice on 01.02.2020 and after filing of the Application before the Adjudicating Authority on 18.03.2020. Such transactions were made with an intent to siphon away funds from the business of the CD.
- 5.2** That the transaction was not carried out in the usual course of business and was determined as fraudulent transaction under Section 66 of the Code.
- 5.3** That the RP by way of a supplementary affidavit submitted that the respondent has opened a sole proprietorship jewellery business under the name and style of Divya Swarna Jewels, around the same time carrying on same business as that of the CD.
- 5.4** That the last available Audited Balance sheet of the CD was on 31st March, 2019, and for none of the subsequent financial years the accounts were found to be audited.
- 5.5** Further it is submitted that the CD being a One-Person Company, the entire business and its management was in the hands of Respondent i.e, Ankur Verma.

6. Per Contra the Respondent would allege as under

- 6.1** It is contended that no independent opinion has been formed nor any determination been made by the applicant with regard to the transaction entered into by the Respondent and it is only upon the basis of the Transaction Audit Report dated 30th December, 2022 that the present application is filed.

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- 6.2** It is submitted that the RP has failed to form an opinion within 75 days from the CIRP Commencement date. Further the RP appointed TKR & Associates, Chartered Accountants without the CoC approval for conducting the Transaction Audit.
- 6.3** Further it is submitted that the Transaction Audit Report does not indicate any diversion or mis-utilization of the funds and no tangible evidence of siphoning off the funds have been provided by the Transaction Auditor.
- 6.4** That cash was withdrawn by the Respondent in the interest of the CD. Cash withdrawn does not constitute fraud. Further in Transaction Audit Report it is mentioned that F.Y.2019-20 was a normal business year.

7. We have heard the submissions made by both the parties and perused the documents on record.

8. Analysis and Findings

- 8.1** 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 condone the delay in filing this application and proceed to examine the application on merits.
- 8.2** The main allegation is with regard to cash withdrawal by self-cheques of a sum of Rs. 36.75 lakhs after the receipt of the demand notice on 01.02.2020 and filing of Application before this Tribunal on 18.03.2020.

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- 8.3** We would rely on Part II of the Transaction Audit's Report which concluded that :

*'(7) Looking into the personal cash transactions involving the CD's A/C, it transpires that 19-20 was a normal business year involving balanced infusion and withdrawal. 20-21 was a different year which gives us a feeling as if the Promoter was carrying an intent to take out cash from business with motive/focus being not to continue the business though there were steady collections/inflows during the year. **It was observed that about 90% of total withdrawal was 'Cash withdrawal by self'.***

Thus, we find from the Transaction Audit's Report as well as from the major bank transactions of Bank of Baroda which have been given in a tabular form in Page No. 145 of the Application that there have been self-withdrawal of cash and no documents have been substantiated for such withdrawal by the Respondent.

- 8.4** We find that the Respondent in para 15 of the Reply Affidavit admitted the withdrawal of cash during the COVID-19 for making payments to various stakeholders but no documents have been put forward to substantiate those cash withdrawals.

- 8.5** The Auditor's Report in Part IV explicitly states that there have been several transactions which fall within the ambit of Fraudulent Transaction which were intended to deprive/defraud the creditors or other stakeholders.

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8.6 It is evident that the Respondent has started a new proprietorship named Divya Swarna Jewels having the same nature of business as the CD and this new proprietorship started in the year 2020 after proceedings under Section 9 of the I&B Code initiated against the CD.

8.7 We find that though the Respondent denied of opening a proprietorship firm under the name and style of Divyaswarna Jewels but para 19 (Page 15) of the Reply Affidavit contradicts such denial. The para have been quoted hereunder:

*“19.Further , the answering respondent states that there is no bar under any law for the time being in force, from running another business. **The Corporate Debtor is a separate legal entity than that of the proprietorship firm of Ankur Verma.** The answering respondent states that there is a fundamental difference between the One Person Company and the sole proprietorship business”.*

It can be derived from the above para that the respondent admits of owning the proprietorship business.

8.8 Accordingly, we **allow** the prayer of the applicant and direct Respondent to make a total contribution of **Rs. 36,75,000/-** to the account of the Corporate Debtor within two months from the date of the order failing which necessary legal actions may be taken.

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9. Accordingly, **I.A (IB) NO. 219/KB/2023** stands **allowed**.

10. Urgent Certified copies of this order, if applied for, be supplied to the parties, subject to compliance with all requisite formalities.

**D. Arvind
Member (Technical)**

**Bidisha Banerjee
Member (Judicial)**

This Order is signed on this, the 25th Day of September, 2024

Oindrila, K. (LRA)