

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH - I
KOLKATA**

IA (IB) No. 1546/KB/2022

in

CP (IB) No. 1889/KB/2019

An application under section 25(2)) of the Insolvency and Bankruptcy Code, 2016 read with sections 43, 45, 66(1) and 60(5) of the Insolvency and Bankruptcy Code, 2016.

In the matter of:

Ply Com Private Limited

... Operational Creditor

Versus

Nippon Alloy Limited (formerly Narayani Ispat Limited)

... Corporate Debtor

-And-

In the matter of:

Mr. Subodh Kumar Agrawal,

Resolution Professional of Nippon Alloy Limited

... Applicant

Versus

1. Mr. Bivor Bagaria;
2. Mr. Sunil Choudhary;
3. Ms. Swarnalath Mandaleeka

Order pronounced on: 04.09.2023

Coram:

Rohit Kapoor, Member (Judicial)

Balraj Joshi, Member (Technical)

Appearances (physically/ through video conferencing):

For the Respondent in I.A. 1542/KB/2022:

1. Mr. Avishek. Guha, Adv.
2. Mr. Ishaan Saha, Adv.
3. Ms. Arunika Dutta, Adv.

For the Liquidator:

Mr. S.K. Agrawal, Liquidator in person

For the Respondent Nos. 1,2 & 3 in IA. No. 1214 of 2022

1. Ms. Manju Bhuteria, adv.
2. Mr. A. Kataria, Adv.

ORDER

Per Balraj Joshi, Member (Technical)

1. This court convened *via* video conferencing.
2. This is an application filed by the Resolution Professional (RP) of the Corporate Debtor under sections 25(2), 43, 44, 66(1) and 60(5) of the Insolvency and Bankruptcy Code, 2016 (IBC) seeking the following reliefs against the suspended board of Directors and other Respondents herein:

(a) That the Adjudicating Authority be pleased to pass an order directing the Respondent No. 1 to 3 jointly and severally to repay a sum of ₹189.52 Lacs (Rs. One Crore Eighty-Nine Lakh and Fifty-Two Thousand only) to the Company in terms of section 43 of the Code;

(b) That the Adjudicating Authority be pleased to pass an order directing the Respondent no. 1 to 3 jointly and severally to repay a sum of Rs. 33.10 Lacs (Rs. Thirty-Three Lakh and Ten Thousand only) to the Company in terms of Sec 45 of the Code;

(c) That the Adjudicating Authority be pleased to pass an order directing the Respondent no. 1 to 3 jointly and severally to repay a sum of Rs. 25.50 Lacs (Rs. Twenty-Five Lakh and Fifty Thousand only) to the Company in terms of Sec 66(1) of the Code;

(d) The applicant craves leave to add necessary parties if required for proper adjudication;

(e) Such further and/or other order or orders as this Hon'ble Tribunal may deem fit and proper.

3. Submissions in the Application filed by the Applicant are summarized hereinafter:

3.1 The Corporate Debtor was admitted into Corporate Insolvency Resolution Process (CIRP) vide order passed by this Adjudicating Authority on 30.01.2020. The Applicant herein was thereafter appointed as the Resolution Professional (RP) by the Committee of Creditors (CoC) in the 2nd CoC meeting held on 18th March, 2020.

3.2 In the 3rd CoC meeting held on 15th April 2020, the Applicant informed the CoC that transaction Auditor needed to be appointed within 75th day of the Insolvency Commencement date to do the transaction Audit of the Corporate Debtor to determine whether the Corporate Debtor had entered into any transactions which attract the provisions of Sections 43-51 and Section 66(1) of the Code.

3.3 On 12th May 2020, after getting the reasonable quotes, the Applicant appointed, M/s Naveen Ashok Gupta & Co, Chartered Accountants to conduct transaction audit of the books of accounts of the Corporate Debtor for the period 1st January 2018 to 29 January 2020 (the review period).

3.4 The applicant via mail on 14th May 2020 informed the Committee of Creditors that the Transaction auditor was appointed to do the transaction audit of the Corporate Debtor. The scope of the transaction

Auditor to be covered in the report was stated in its engagement letter dated 12th May 2020

3.5 The Transaction Auditor has concluded its Transaction Audit and submitted its final Transaction Audit Report¹ (hereinafter referred to as "the said report") on 14th October, 2020 to the Applicant herein.

3.6 On the basis of such findings in the said report, the Applicant has filed the present Application seeking the avoidance of preferential, undervalued and Fraudulent transactions entered into by the Corporate Debtor with various parties under Sections 43, 45 and 66(1) respectively, of the Insolvency and Bankruptcy Code, 2016, ("Code") during the relevant period (from 1 January, 2018 to 29th January, 2020) and for which the Respondent Nos. 1-3 are responsible and to seek contributions amounting to Rs. 248.11 Lakhs from the respondents.

3.7 For the sake of convenience, the transactions mentioned in the application i.e the transactions entered into by the Corporate Debtor that purportedly fall under the category of preferential, undervalued and fraudulent transactions have been tabulated hereinunder:

Table A			
Respon- dent	Date	Contention	Type of Transaction
Elegant Metals & Minerals Pvt Ltd	14.03.2019	Sale of Capital work in Progress (Block F) at an amount of Rs 1,67,00,000/- plus GST and the fair market value of such asset is Rs 1,64,00,000/- as per the valuation report. The WDV of the asset is Rs 163,65,989.47 as stated in the report.	Preferential

¹ Annexure "B"

Savitridevi Greenagro Farm LLP	31.08.2018	Sale of land at an amount of Rs 9,61,000/- vide sale deed no 2625/2018 and the WDV of such land is Rs 3,12,868/-.	Preferential
Elegant Metals & Minerals Private Limited	24.03.2019	Sale of land to Respondent as per the sale agreement dated 14.03.2019 at an amount of Rs. 1,45,20,000/- Lakh vide sale deed no 2539/2019 dated 24.08.2019 and the WDV of such land is Rs 9,90,000/- as stated in the report.	Preferential
Balajee Roadways Balajee Roadways is the related party of the Corporate Debtor.	01.01.2020	Sale of one JCB at an amount of Rs. 14,48,160/- Lakhs wherein the Invoice was raised by the Corporate Debtor for Rs. 1,65,000/- plus GST. WDV of such assets is Rs. 12,83,160/-.	Preferential
Elegant Metals & Minerals Pvt Ltd	12.12.2019	Transfer of one plant & Machinery at an amount of Rs.9,40,000/- wherein no invoice was raised. The WDV of such Plant & Machinery is Rs.19,44,257/-. The assets was sold at a loss and also the consideration of such sale was not received in the Bank Statement.	Undervalued
Several parties	06.08.2019 – 26.08.2019	Sale of the motor Vehicles (2 Wheelers) to several other parties at Cash consideration amounting to Rs.99,000/-	Undervalued
N. Agarwal & Associates	01.01.2020	Transfer of one Motor Car (Innova) at an amount of Rs. 3,00,000/- against the professional fees and the WDV of such car is Rs. 6,97,327/-. No invoice was raised by the Corporate Debtor against such	Undervalued

		transaction. The sale of the above assets was at a loss of Rs.3,97,000/- and was adjusted against the professional Services fee. No invoice against the Professional services and no Invoice against the sale of such car was provided by the Corporate Debtor. Only the Journal entry was passed in the books of account.	
Balajee Roadways	30.09.2019 & 22.12.2019	<p>Sale of Two Vehicles i.e. one van at Rs.1,50,000/- and one Crane at an amount of Rs.1,50,000/-.</p> <p>The WDV of the van is Rs.2,10,552/- and the WDV of the crane is Rs.3,58,460/-. No invoice were raised by the Corporate Debtor against such sale.</p> <p>Against such assets, the amount of Rs.3,00,000/- was not received the bank account of the Corporate Debtor. It was adjusted with the balance in the account of the buyer instead of getting payment against such sale. No documentary evidence received whether such payment made or amount received in cash. No invoice against such sale was provided by the Corporate Debtor.</p>	Undervalued
	04.07.2017	<p>An advance for flat at Green City of Rs 3.00 Lakhs was written off by the Corporate Debtor to the Sundry Balance Written off A/C without any reason.</p> <p>The above transaction was shown</p>	Fraudulent

		as Preferential transaction u/s 43 of the IBC, 2016 by the transaction auditor as stated in the report but the applicant was not satisfied as the said transaction was beyond two years and the amount was written off during the review period. So the said transaction cannot be treated as Preferential. The applicant has identified the said transaction as Fraudulent under the sec 66(1) of the IBC, 2016.	
	19.04.2011 & 06.10.2018	Investment made in "gold & silver bullion" by the Corporate Debtor aggregating to ₹9,06,000/- and the same has been booked as expense under the head "Business Promotion Expense A/c in the books of the Corporate Debtor. The above transaction was shown as undervalued transaction u/s 45 of the IBC, 2016 as stated in the Transaction Audit report but the applicant was not convinced and the amount was only booked as expenses during the review period. The applicant has identified the said transaction as Fraudulent under the sec 66(1) of the IBC, 2016.	Fraudulent
	30.09.2019	Several fixed assets like Air Condition Machine, Export Packing Machine, Weigh Bridge etc. amounting to Rs.13,43,716.07 were booked by the Corporate Debtor as loss assets in the books of account and the transaction auditor had	Fraudulent

		reported as Undervalue transaction but the applicant was not convinced. The applicant has identified the said transaction as Fraudulent under the sec 66(1) of the IBC, 2016.	
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4. Submissions in the Reply-Affidavit filed by the Respondents No. 1 to 3 are summarized hereinafter:

4.1 The corporate debtor was involved in the metallurgy industry and its main business was trading in iron and steel products. The operational situation of the Corporate Debtor went into haywire and sometime during the mid of the year 2019, the business of the Corporate Debtor stopped due to the following reasons:-

- a. Stoppage of supply/ MOU by Rashtriya Ispat Nigam Limited (RINL) (One of the main source of materials for Corporate Debtor).
- b. Suspension of Working Capital Limits by the main banker State Bank of India for the Corporate Debtor leading to liquidity stress at large.

4.2 In view of the above, proper books of accounts could not be maintained. The same is evident from the transaction audit report filed by the Learned Resolution Professional as well.

4.3 The RP has failed to exercise its power vested upon him and before determination of a transaction as preferential one, the R.P. without application of mind just mechanically jumped into a conclusion, only on the basis of transaction audit report without considering the materials on record that the corporate debtor made any preferential transactions under Sections 43, 45, 66(1) of the IBC.

4.4 The payment of Rs.1,69,00,000/- received from Elegant Metals & Minerals Pvt. Ltd, in the month of March, 2019 was against the sale of shed. A copy of the Agreement of the same is enclosed in the application filed by the Learned Resolution Professional from pages 73

to 75. However, the real sale bill was raised after the valuation report in June 2019 and the final entry of sale was made after raising invoice² with GST, and the adjustment in the running ledger was done accordingly. The sale was done to bring in liquidity into the company at the end of the Financial Year 2019 and the amount received was used for working capital purpose only. Hence the same cannot be treated as preferential since the intention of the Directors were just to bring in cash flow in the company.

4.5 The land sold to one Savitri Devi Green Agro Farm LLP at an amount of Rs. Rs.9,61,000/- was in terms of the the sale Deed being No.2625 of 2018. The sale was done in the financial year 2018-19 but was entered in the books in FY 2019-20 at the time of receipt of payment. The bank statement³ shows that payments were received by the bank with respect to conveyance of the said land by and between the parties. The answering respondent had received the amount of Rs. 10,00,000/- on 28/06/2019 against the said land sale amount and regular rent receivable from the party i.e., Savitri Devi Green Agro Farm LLP.

4.6 The said land was sold to Elegant Metals & Minerals Private Ltd. and the payment was received in March 2019. The sale agreement⁴ was executed on 14th March 2019 but due to delay in the due diligence the sale was affected late, and at the time of registration at the request of Elegant Metals & Mineral Private Limited which requested to nominate Savitri Devi Green Agro Farm LLP for the registry. The said deed was executed in the name of Savitri Devi Green Agro LLP (General Power of Attorney cum Sale Deed with Delivery of Possession being Deed No. 2539 of 2019). However, in the books of the Corporate Debtor, sale was made to Elegant Metals & Minerals Private Ltd itself and relevant

² Annexure "A"

³ Annexure "A-1"

⁴ Annexure "A-2"

entries were passed in the ledger of Elegant Metals & Minerals Private Ltd. only.

4.7 The JCB was purchased by Balajee Roadways on 01/01/2020 and the major payment of Rs.14.31 Lakhs was received on 10/01/2020 directly in ICICI Bank Account (Loan Account No: LQVPM00037135598) of the Corporate Debtor in which the loan against the said JCB was running and that loan/ Secured financial creditor was cleared and closed by the purchaser directly. The copies of the journal voucher, tax Invoice and running ledger of Balajee Roadways is attached to the Reply Affidavit⁵.

4.8 The Capital- WIP- (F Block) was sold to Elegant metals & Minerals Pvt. Ltd. by means of contract sales, the amount received was adjusted against Sundry Creditors. The payment was received in March 2019 in SBI account. However, no Journal Voucher Adjustment was made.

4.9 The plant and machinery referred to in paragraph 10 (b)(i) on page 16 of the Application incur huge depreciation value and as such the corporate debtor could not sell it at a better price. The consideration money was received in the loan account of South Indian Bank Account against EMIS. An extract of the relevant portion of the South Indian Bank Loan Account showing receivables and adjustment entries is attached to the Reply Affidavit⁶.

4.10 The motorcycles and scooters as pointed out in Paragraph 10 (b) (ii) of the Application were getting old and as such the same were sold at WDV to various buyers in cash. Hence, no invoices were being issued since the amount was very small. In so far as selling off of the Innova car is concerned in sub paragraph (b) (iii) the car was more than 5 years old and had clocked roughly above 2 lakh kilometers. Hence, not being able to receive any buyer, it was sold to one "N Agarwal & Associates" at an amount of Rs.3,00,000/- against professional fees payable to them.

⁵ Annexure "A-3"

⁶ Annexue "A-4"

As such no Invoices were raised. Regarding the sale of vans and cranes as pointed out in sub paragraph (b)(iv), it was submitted that such commercial vehicles do not get a high demand in market. Upon getting old, their value decreases exceptionally. The said vehicles were totally used up. The condition of the corporate debtor had deteriorated so much that it was not even able to pay off its small creditors. Thus, the Corporate Debtor sold at the best rate available and cleared the liability of the company was hence cleared. Copies of the ledger and vouchers showing entries made by us are attached to the Reply Affidavit⁷.

4.11_With respect to the allegations and contentions and/ or imputations made by the applicant in paragraph 10 (c), it is denied that the above transaction is fraudulent. Just because a transaction could not fall under the category and definition of a "Preferential Transaction" does not permit the Resolution Professional to declare it as fraudulent more so. The said amount of Rs.3,00,000/- was received as advance for booking of the said flat at Green City. However, since the deal did not further mature, at the end of the financial year the same was written off as Bad Debts. Copies of the journal entry and the ledger account is attached to the Reply- Affidavit⁸

4.12The gold and silver referred to in Paragraph 10(c)(ii) was purchased in previous years, and was used for business promotion on various occasions by the company, like gifting it to valuable customers/staffs in order to show good gesture and value of relation, and in order to promote our business in large, but the same was stayed in assets in the books. Thus, squared off as business promotion expenses the idea was to record the same as prior period expense for taxation purpose which is done and reflected in the audited accounts for FY 2019-20 of the Corporate Debtor.

⁷ Annexure "A-5"

⁸ Annexure "A-6"

4.13 The sale of fixed assets referred to in Paragraph 10 (c) (iii) is concerned, the answering respondent states that these were assets which were totally used and exhausted. Such assets could not even fetch minimum scrap value. Hence, such assets were disposed off physically and posted at the books at zero at zero realization.

5. Submissions in the Rejoinder filed by the Applicant are summarized hereinafter:

5.1 The Applicant denied that it mechanically jumped into conclusion only on the basis of transaction audit report without considering the materials on record that the Corporate Debtor made any transaction under sec 43, 45, 66 (1) of the IBC, 2016 *i.e.* the Preferential transaction, Undervalued transaction and Fraudulent transaction.

5.2 The applicant had determined the transactions on their merits on the basis of the data/ books of account/ documentary evidence provided by the Corporate Debtor without solely relying on the transaction audit report provided by the transaction auditor and the same is evident in the clause 10 (c) of the present application filed by the applicant where the some of the transactions are covered which are opined by the applicant itself.

5.3 The applicant submitted the fact in the application that Capital Work in Progress Le Block F (sale of Shed) was made to the Elegant Metals & Minerals Pvt Ltd (hereinafter referred to as "Elegant") in the month of June, 2019 at an amount of Rs 1,67,00,000/- plus applicable GST where, the value of such assets was Rs 1,64,00,000/- as per the valuation report dated 04.06.2019 and the amount was adjusted with the Elegant along with several other transactions instead of getting the amount from them. In the reply, the documentary evidence submitted by the respondents has already formed part of the annexure C-1 in the application and based on that only the applicant was not able to identify the specific amount as received against the sale of said shed. The amount received from the Elegant in the month of March, 2019 was

contested by the applicant. The transaction auditor also identified the above transaction as preferential u/s 43 of the IBC, 2016 in the transaction audit report as mentioned in page no 54 of the application.

5.4 The respondent merely mentioned that an amount of Rs 10,00,000 was paid on 28.06.2019 as shown in Bank Statement which forms part of the Application in Annexure C-2 (page 102) against the sale of land to M/s Savitri Green Agro Farm LLP as per the sale deed dated 31.08.2018. There is also no mention of sale of land in the financial statement of Corporate Debtor for the financial year 2018-19. From the reply-affidavit, the same cannot be identified as the amount as was received by the Corporate Debtor was against the sale of such land. Further the respondent failed to clarify on such documentary evidence provided by them in the reply.

5.5 The respondents failed to submit the documentary evidence in their reply whether the amount of Rs 145.20 lacs was received from the M/s Elegant against the sale of land to M/s Savitri Devi Green Agro Farm LLP vide General Power of Attorney dated 24th August, 2019. Submission of sale deed and power of attorney cannot be merely sufficient that the amount was not adjusted with the buyer against the said land. Even, no invoice was raised by the Corporate Debtor against Sale of Land. However, the value of the assets was Rs 9.90 Lakhs whereas the land was sold at the value of Rs 145.20 Lakh and the transaction falls under Preferential transaction u/s 53 of the IBC, 2016 as per the transaction audit report as mentioned in page no 54 of the application.

5.6 The JCB amounting to Rs 14.48 Lacs was sold to one of the related parties of the Corporate Debtor named M/s Balajee Roadways Pvt Ltd and the invoice was raised only for an amount of Rs 1.65 Lakhs (exclusive of GST) which is lower than the book value and Invoice raise vide no NISSER/0059/1920 dated 01st Jan, 2020 which form part of the application in annexure- C4 (pg-126). The WDV of such assets is

Rs 12.83 Lakhs as per the Journal Voucher provided by the respondent of the Corporate Debtor. Even the respondent admitted that the amount was adjusted against the loan account of one of the Creditors named ICICI Bank on which the applicant had questioned that how can the respondent adjust the amount received from the parties with the loan account of Bank instead of getting the funds in the bank account of the Corporate Debtor. Mere submission of ledger cannot deny the fact that the adjustment was made and preference was given to one of the Creditors as there are many other creditors to whom the default in payment was made by the Corporate Debtor. Even the Transaction auditor in the Transaction Audit Report identified the above-mentioned transaction as Preferential Transaction under Sec 43 of the IBC, 2016 in Page no 54 and the report form part of the application.

5.7 The consideration against the sale of Plant & Machinery was not received in the bank account of the Corporate Debtor and the same was adjusted with the loan account of secured creditors named South Indian Bank as per the statement and the Journal Voucher submitted by the respondent in their reply. Despite that, no invoices were raised by the Corporate Debtor except one Invoice against the sale of Car Invoice no NISSER/0058/1920. The respondent sold the assets of the company at an amount of Rs 9.40 lakhs which was at loss whereas the WDV of such assets is Rs 19.44 lakhs as identified in the Transaction Audit Report. The said transaction falls under the ambit of undervalued transaction u/s 45 of the IBC, 2016 as per Resolution Professional and as per the transaction audit report submitted by the transaction auditor. The Corporate Debtor cannot set off the receivable with the amount due to the Secured Creditors directly without getting the money into the bank account of the Corporate Debtor.

5.8 The two vehicles which were in the name of the Corporate Debtor, were sold at a price of Rs 0.99 lakhs and the consideration was received in cash without routing through the bank account of the Corporate Debtor.

No Proof was on record whether the amount was received against the said parties to whom the sale was made or normal adjustment entry was passed by the respondent for such sale. Even the sale was made without raising any invoice in absence of which the assets sold to whom cannot be identified. The assets of the company were sold without any basis, without any value and there is no proof of receipt of amount. The respondent provided the Journal voucher which form part of the Application in Annexure-C6.

5.9 The respondent sold the vehicles to M/s N. Agarwal & Co at a loss of Rs 3.97 lakhs where the WDV of such assets was Rs 6.97 Lakhs as per the Journal Voucher and as per the identification of transaction auditor in the report which form part of the application. Instead of selling the assets at WDV, the respondents sold the assets at a lower value, no invoice was raised against such sale and the consideration was adjusted with the professional fees for the service rendered by M/s N Agrawal & Co, instead of getting the amount into the account of the Corporate Debtor. The said matter is reflected in the ledger of the Books of Account of the Corporate Debtor form part of the Application in Annexure -C7. The above transactions falls under the ambit of undervalued transaction as per RP and also in the transaction audit report which form part of the application. The respondent itself accept the fact in their reply which was also mentioned by the applicant in the instant application.

5.10 Two vans and a crane were sold to M/s Balajee Roadways (related party) at a very lower price Le less than the WDV of such assets and the consideration amount due was adjusted with the Buyer account. Further, no invoice was raised by the Corporate Debtor against the sale of such assets, neither did the respondent provide any documentary evidence in their reply regarding the receipt of consideration in the bank account of the Corporate Debtor. The RP as well as the transaction auditor reported the above transactions as undervalued transaction u/s

45 of the IBC, 2016 as the assets were sold lower price than the WDV of such assets.

- 5.11 An advance of Rs 3.00 lakhs was given to the unknown parties for booking of flat however, no proof was provided by the respondent for the efforts put by them against the recovery of such advances. The mere fact that the deal did not materialise does not allow the Respondents to write-off such amount whereas no evidence was given for action being taken against the parties for realisation of the amount. Even though the said transaction was determined as preferential transaction by the transaction Auditor and the applicant formed the opinion that it is fraudulent and accordingly treated the above transaction as fraudulent transaction. The applicant stated the reason of their opinion in the present application.
- 5.12 Mere submission of statement that the purchase of gold and jewelry for purpose of business promotion cannot deny the facts that the transaction were fraudulent in nature. No proof was submitted by the respondent as to which year the said assets were purchased, to whom the said gift were given and only a single entry was passed in the journal as Business & Promotion Expenses. The said transaction was squared off within the period of two years from the insolvency commencement date. The applicant has opined the above transactions as fraudulent u/s 66 of the IBC, 2016.
- 5.13 The assets amounting to Rs 13.44 lakhs was booked at loss by the Corporate Debtor and the respondent in their reply submitted that the said assets were destroyed physically and posted at the books at Zero realisation. The Assets could have been sold at some value and moreover no related documents were produced to us. Hence, the applicant in their opinion considered the above transaction as fraudulent transaction u/s 66 of the IBC, 2016 instead of undervalued transaction which was identified by the transaction auditor in the audit report form part of the application in page no 54.

6. Submissions in the Supplementary - Affidavit filed by the Applicant are summarized hereinafter:

6.1 The Applicant, in compliance of the direction passed by this Adjudicating Authority in I.A. No. 1214/KB/2020 in CP (IB) 1889/KB/2018 on 20.01.2023, has filed the instant supplementary affidavit dated 15.02.2023, wherein the Applicant has provided the details of the amount received against the transactions which fall under section 43 of the code. The same has been tabulated hereinunder:

Table B	
Description of Assets	Contention
Capital WIP – (F Block)	<p>Agreement of Sale dated 14.03.2019 was entered between M/s Elegant Minerals and Metals Pvt Ltd & the Corporate Debtor for sale of Shed (page no 73 to 75 of the petition). The said agreement records. receipt of Rs 1,69,00,000/- as advance.</p> <p>Rs-1,69,00,000/- was received by the CD on 14.03.2019 in the account with State Bank of India as advance amount against the said sale.The receipt of amount is reflected in the books of account of the Corporate Debtor (page no 70 of the petition).</p> <p>As per the valuation report, the fair market value is Rs. 1,64,00,000/-. Total amount Including GST is Rs 1,97,06,000/-. The Invoice is dated 05.06.2019.</p> <p>The balance receivable amount of Rs 28.06,000/-was adjusted with the opening credit balance of Elegant Minerals & Metals Private Limited.</p>
Land	<p>Land was sold to 'M/s Savitri Devi Greenagro Farm LLP' for an amount of Rs. 9,61,000/- vide sale deed no. 2625/2018 executed on 31.08.2018.</p>

	<p>The said sale deed records receipt of cheque 801705 through Union bank of India, Visakhapatnam dated 31.08.2018. (Page no 89-100 of the petition). However, it appears that the said cheque was not presented for payment and the payment was made by the party subsequently on 28.06.2019 vide RTGS.</p>
Land	<p>An agreement of Sale was entered into by and between the Corporate Debtor and M/s Elegant Metals & Minerals Pvt. Lid.' For sale of Land at a value of Rs. 1,45,20,000/- on 14.03.2019.</p> <p>The total sum received from the Party was Rs 2.95.93,780/- out of which 1,45,93,780/- was in respect of the agreement dated 14.03.2019. Bank Statement is at page 40 of the reply affidavit.</p>
JCB 3DXXTRA (AP31EJ4077)	<p>The said JCB was sold on 01.01.2020 to M/s Balajee Roadways' at an amount of Rs. 14,48,160/-.</p> <p>An amount of Rs 14,31,034/- was paid by the party on 10.01.2020 directly to the ICICI Bank (Loan Account to the Corporate Debtor) as shown in the books of account of the Corporate Debtor in page no 128 of the petition.</p>
Plant and Equipments	<p>The entire block of Plant and Machinery was transferred to 'M/s Elegant Metals & Minerals Pvt. Ltd. at an amount of Rs. 9,40,000/-.</p> <p>An amount of Rs 2,29,187/- was directly paid to ICICI Bank loan account on 12.12.2019 and Rs 7,10,813/- was directly paid to loan account of South Indian Bank on. 20.12.2019 as per the journal voucher in Page no 136 of the petition.</p>

Vehicles- Motorcycles	All the Motor Cycles (2 wheelers) were sold at Written Down Value to several parties for cash consideration.
Vehicles – car (Innova)	Motor Car (Innova) was transferred to M/s N. Agarwal & Associates' on 01.01.2020 at an amount of Rs.. 3,00,000/- against Professional Fees Payable and no cash was received as adjusted with the fee. (Page no 151 of the petition).
Vehicles – Van	The said Van was transferred to M/s Balajee Roadways' on 30.09.2019 for an amount of Rs. 1,50,000/-. As per the journal voucher, the amount was paid directly to M/s Sharda Transport on behalf of the Company. (Page no 152 of the petition).
Vehicles – Cranes	The said Cranes were transferred to 'M/s Balajee Roadways' on 22.12.2019 for an amount of Rs. 1,50,000/-. The amount is reflected in the cash register of the Corporate Debtor as per the journal voucher. (page no 153 of the petition).
Advance for flat	Advance for flat at "Green City" given on 04.07.2017 was written off by the Corporate Debtor to the Sundry Balance Written off A/C on 30.09.2019 without any reason.
Investment in Gold and Silver	Investment in Gold was made on 19.04.2011 and silver on 06.10.2018. The said investment was charged as Business which Promotion Expenses which was written off on 11.09.2019. No documents/ Invoice regarding the purchase of such assets was provided by the Corporate Debtor and the details as to whom such asset has been given and

	justification for such expenses has not been provided by the corporate debtor.
Various Fixed Assets	Assets which include Air Condition Machine, Export Packing Machine, Weigh Bridge, Activa 125 (SCV) 125H), & Glamour (Hero) were booked as loss on disposal of assets in the books of the Corporate Debtor on 30.09.2019.

7. **Analysis and Findings:**

7.1 Heard the Applicant and the Ld. Counsel for the Respondents and perused the Record.

7.2 The instant IA has been filed by Mr. Subodh Agarwal, RP of the Corporate Debtor. The suspended board was represented by Ms. Bhuteria. It was brought out by the RP that he had arrived at an independent determination for categorising the aforementioned transactions outlined in the IA which have been tabulated in Table A of this order.

Preferential Transactions under section 43:

7.3 In order to adjudicate upon the issue of the alleged Preferential Transactions, we need to refer to the decision of the Hon'ble Supreme Court in the matter of *Anuj Jain vs. Axis Bank Ltd. and Ors*⁹. The relevant paragraphs from the said judgment are reproduced hereinunder:

28. Although we have analysed the transactions in question on the anvil of Section 43 with reference to the submissions made and the facts of the present case but, before moving on to other aspects, we deem it appropriate to point out the manner in which the provisions concerning preference at a relevant time are expected to be applied, particularly by the resolution professional, in a given case. It could be readily recapitulated

⁹ MANU/SC/0228/2020

that as per the charging parts of Section 43 i.e., Sub-sections (4) and (2) thereof, a corporate debtor shall be deemed to have given preference at a relevant time if the twin requirements of Clauses (a) and (b) of Sub-section (2) coupled with the applicable requirements of either Clause (a) or Clause (b) of Sub-section (4), as the case may be, are satisfied. However, even if the requirements of Sub-sections (4) and (2) are satisfied, a transaction may not be regarded as an offending preference if it falls in either or both of the exceptions provided by Sub-section (3) of Section 43.

28.1. Looking to the legal fictions created by Section 43 and looking to the duties and responsibilities per Section 25, in our view, for the purpose of application of Section 43 of the Code in any insolvency resolution process, what a resolution professional is ordinarily required to do could be illustrated as follows:

1. In the first place, the resolution professional shall have to take two major but distinct steps. One shall be of sifting through the entire cargo of transactions relating to the property or an interest thereof of the corporate debtor backwards from the date of commencement of insolvency and up to the preceding two years. The other distinct step shall be of identifying the persons involved in such transactions and of putting them in two categories; one being of the persons who fall within the definition of 'related party' in terms of Section 5(24) of the Code and another of the remaining persons.

2. In the next step, the resolution professional ought to identify as to in which of the said transactions of preceding two years, the beneficiary is a related party of the corporate debtor and in which the beneficiary is not a related party. It would lead to bifurcation of the identified transactions into

two sub-sets: One concerning related party/parties and other concerning unrelated party/parties with each sub-set requiring different analysis. The sub-set concerning unrelated party/parties shall further be trimmed to include only the transactions of preceding one year from the date of commencement of insolvency.

3 . Having thus obtained two sub-sets of transactions to scan, the steps thereafter would be to examine every transaction in each of these sub-sets to find: (i) as to whether the transaction is of transfer of property or an interest thereof of the corporate debtor; and (ii) as to whether the beneficiary involved in the transaction stands in the capacity of creditor or surety or guarantor qua the corporate debtor. These steps shall lead to shortlisting of such transactions which carry the potential of being preferential.

4 . In the next step, the said shortlisted transactions would be scrutinised to find if the transfer in question is made for or on account of an antecedent financial debt or operational debt or other liability owed by the corporate debtor. The transactions which are so found would be answering to Clause (a) of Sub-section (2) of Section 43.

5. In yet further step, such of the scanned and scrutinised transactions that are found covered by Clause (a) of Sub-section (2) of Section 43 shall have to be examined on another touchstone as to whether the transfer in question has the effect of putting such creditor or surety or guarantor in a beneficial position than it would have been in the event of distribution of assets per Section 53 of the Code. If answer to this question is in the affirmative, the transaction under examination shall be deemed to be of preference within a

relevant time, provided it does not fall within the exclusion provided by Sub-section (3) of Section 43.

6. In the next and equally necessary step, the transaction which otherwise is to be of deemed preference, will have to pass through another filtration to find if it does not answer to either of the Clauses (a) and (b) of Sub-section (3) of Section 43.

7. After the resolution professional has carried out the aforesaid volumetric as also gravimetric analysis of the transactions on the defined coordinates, he shall be required to apply to the Adjudicating Authority for necessary order/s in relation to the transaction/s that had passed through all the positive tests of Sub-section (4) and Sub-section (2) as also negative test of Sub-section (3).

28.2. On a motion made by the resolution professional after and in terms of the exercise aforesaid, the Adjudicating Authority, in its turn, shall have to examine if the referred transaction answers to all the descriptions noted above and shall then decide as to what order is required to be passed, for avoidance of the impugned transaction or otherwise.

7.4 In the Anuj Jain Case (Supra), the Apex Court, has analysed section 43 of the Code and made certain key observations. Regarding the question of intention of the Respondents, the Supreme Court, after analysing section 43 of the Code, stated that the intention of the parties is not important to determine whether the transaction is preferential. Further, for clarity in the categorization of a transaction as preferential, the Apex Court laid down the following steps-

- a. Determining “Relevant Time” concerning Section 43 :-

Two years in case of related party and one year in case of unrelated parties (both to be calculated from insolvency commencement date) ;

- b. Determining whether there has been a transfer of property or transfer of an interest of the Corporate Debtor;
- c. Establishing the fact whether the beneficiary is a creditor or guarantor or surety in the capacity of the Corporate Debtor;
- d. Analysing whether the transaction is made on account of financial debt or an operational debt or any other liability; and
- e. Analysing whether the said transfer puts the transferee in a beneficial position than it would have been in the event of distribution of assets as per section 53 of the Code.

7.5 The RP was directed to file a detailed Affidavit in respect of these avoidance transactions to compare its *bona fide* with the logic arrived at by Hon'ble Supreme court in *Anuj Jain (supra)*. The RP, in compliance of the same, filed the Supplementary Affidavit dated 15.02.2023.

7.6 Coming to the first step mentioned in *Anuj Jain (supra)*, we find that the beneficiary being Balajee Roadways is a related party to the Corporate Debtor. Sunil Choudhary being Respondent No. 2, is a proprietor of Balajee Roadways as has been determined in the Forensic Audit Report. On the other hand, from the perusal of the record before us, it cannot be determined if the beneficiaries being Elegant Minerals and Metals Pvt. Ltd. and Savitri Devi Greenagro Farm LLP are related parties to the Corporate Debtor. As such, they are hereby categorized as non- related parties.

7.7 Upon perusal of the Supplementary Affidavit as well as other records, it is clear to us that all the transactions in question took place within the respective look-back periods *i.e* between 01.01.2018 and 29.01.2020 for the related parties and between 01.01.2019 and 29.01.2020 for the other parties.

- 7.8 The next step mentioned in the Anuj Jain Case is to determine if, transfer of the assets or interest of the Corporate Debtor has taken place. In the instant case, such transfers have been admitted to by the Respondents in the Reply Affidavit. Coupled with the Transaction Audit Report before us, it is clear that there has been a transfer of the Corporate Debtor's property.
- 7.9 However, it is noted that the Applicant while forming his opinion regarding the alleged transactions has not followed the next steps *i.e* steps 3 to 6 given in the **Anuj Jain case** (*Supra*). Point 5 in paragraph 28.1 of the **Anuj Jain judgment (supra)**, dictates that the the scanned and scrutinised transactions that are found covered by Clause (a) of Sub-section (2) of Section 43 have to be examined on another parameter *i.e* whether the transfer in question has the effect of putting such creditor or surety or guarantor in a beneficial position than it would have been in the event of distribution of assets per Section 53 of the Code. Only if the requirements of this parameter are fulfilled, the transaction can be deemed preferential. In the instant case, while while the ledgers indicate the buyers in the alleged transactions were creditors to the Corporate Debtor, the ledgers alone cannot establish that the proceeds from the sale in the alleged transactions were adjusted against the dues of the Corporate Debtor.
- 7.10 On the contrary, the Applicant in the Supplementary Affidavit has also indicated that the proceeds from the said transactions were credited to the Account of the Corporate Debtor. As such, the said payments could not have been utilised ton set off the Corporate Debtor's debt.
- 7.11 Further, enough documents have not been produced on record that can help establish the nature of the said debts of the Corporate Debtor. In absence of the same, the placement of the said debts in the waterfall mechanism under section 53 of the Code remains unclear. As such, it cannot be established whether the buyers had been given preference over other creditors.

7.12 In light of the same, we have made the following observations:

<u>Transaction</u>	<u>Preferential or Not</u>	<u>Reason</u>
Sale of Capital work in Progress (Block F) at an amount of Rs. 1,67,00,000/- plus GST to Elegant Metals & Minerals Pvt Ltd	Not Preferential	The Statement of Account of the Corporate Debtor, specifically the entry on page page 29 of the Reply Affidavit shows that payment of Rs. 169,00,000/- was credited to the account of the Corporate Debtor. As such, the proceeds of the sale were not utilized to set off against the debt due from the Corporate Debtor Further, Point 5 of paragraph 28.1 has not been fulfilled.
Sale of land at an amount of Rs 9,61,000/- vide sale deed no 2625/2018 to Savitridevi Greenagro Farm LLP	Not Preferential	The Statement of Account of the Corporate Debtor on page no. 102 of the application shows that the payment of Rs. 10,00,000/- was credited to the Corporate Debtor from Savitridevi Greenagro Farm LLP. As such the same was not adjusted against the debt due from the Corporate Debtor to Savitridevi Greenagro Farm LLP. The

		Same was affirmed the Applicant in the Supplementary Affidavit. Further, Point 5 of paragraph 28.1 has not been fulfilled.
Sale of land to Respondent as per the sale agreement dated 14.03.2019 at an amount of Rs. 1,45,20,000/- Lakh <i>vide</i> sale deed no 2539/2019 to Elegant Metals & Minerals Private Limited.	Not Preferential	From the Statement of Account of the Corporate Debtor, specifically page no. 30 of the application, it is clear that the payment of Rs. 2,95,93,780/- was credited to the account of the Corporate Debtor from Elegant Metals & Minerals Private Limited. The Applicant in the supplementary Affidavit has clarified that out of the said Rs. 2,95,93,780/-, a sum was Rs. 1,45,93,780/- was received in respect of the agreement dated 14.03.2019. Further, Point 5 of paragraph 28.1 has not been fulfilled.
Sale of one JCB at an amount of Rs. 14,48,160/- Lakhs to Balajee Roadways	Not Preferential	Both the Reply Affidavit as well as the Supplementary Affidavit indicate that the payment for the sale of the JCB was credited directly to the Corporate Debtor's loan account in which the loan

		against the said JCB was running. As such, the same could not have been utilized to adjust against the debt of the Corporate Debtor.
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7.13 Upon going through each of the transactions given in the said Supplementary Affidavit, we find that these do not appear to pass the muster laid down by the Hon'ble Supreme Court in Anuj Jain (Supra) and therefore we deduce that the RP is not right in labelling these transactions as preferential transactions under section 43 of the Code.

Undervalued Transactions under section 45:

7.14 In order to adjudicate upon the issue of the alleged undervalued Transactions, we first refer to the provision of section 45 which is reproduced hereinunder:

45. *Avoidance of undervalued transactions.* –

(1) If the liquidator or the resolution professional, as the case may be, on an examination of the transactions of the corporate debtor referred to in sub-section (2) determines that certain transactions were made during the relevant period under section 46, which were undervalued, he shall make an application to the Adjudicating Authority to declare such transactions as void and reverse the effect of such transaction in accordance with this Chapter.

(2) A transaction shall be considered undervalued where the corporate debtor–

- a. makes a gift to a person; or*
- b. enters into a transaction with a person which involves the transfer of one or more assets by the corporate debtor for a consideration the value of which is significantly less than the value of the consideration provided by the corporate debtor,*

and such transaction has not taken place in the ordinary course of business of the corporate debtor.

7.15 According to the afore-mentioned provision, any transaction entered into by the Corporate Debtor, wherein, transfer of one or more assets by the corporate debtor takes place for a consideration the value of which is significantly less than the value of the consideration provided by the corporate debtor or the written down value (WDV) in the instant case shall be deemed an undervalued transaction.

7.16 Regarding the alleged transactions, the primary defence taken by the Respondents is that the said assets had high depreciation value and that the same could not be sold at a better price. However, the same has not been backed by any evidence. Mere ledgers and vouchers provide no proof towards establishing the Respondent's contentions. As such, the same cannot be taken into consideration.

7.17 In light of the same, our observations about the alleged transactions are as follows:

Transaction	WDV	Undervalued or Not	Reason
<u>Plant and Equipments</u> transferred to 'M/s Elegant Metals & Minerals Pvt. Ltd. at an amount of Rs. 9,40,000/-	Rs.19,44,257/-	Undervalued	Amount of consideration paid by by the purchaser is less than the written-down value (WDV)
Vehicles- Motorcycles All the Motor Cycles (2 wheelers) were sold at Written Down Value to	Rs.99.000/-	Not Undervalued	Amount of consideration paid by by the purchaser is equal to the

several parties for cash consideration.			written-down value (WDV)
Vehicles – car (Innova) Motor Car (Innova) was transferred to M/s N. Agarwal & Associates' on 01.01.2020 at an amount of Rs.. 3,00,000/- against Professional Fees Payable and no cash was received as adjusted with the fee. (Page no 151 of the petition).	Rs. 6,97,327/-	Undervalued	Amount of consideration paid by by the purchaser is less than the written-down value (WDV)
Vehicles – Van The said Van was transferred to M/s Balajee Roadways' on 30.09.2019 for an amount of Rs. 1,50,000/- . As per the journal voucher, the amount was paid directly to M/s Sharda Transport on behalf of the Company. (Page no 152 of the petition).	Rs. 2,10,552/-	Undervalued	Amount of consideration paid by by the purchaser is less than the written-down value (WDV)
Vehicles – Cranes The said Cranes were transferred to 'M/s Balajee Roadways' on	Rs. 3,58,460/-	Undervalued	Amount of consideration paid by by the purchaser is less than the

22.12.2019 for an amount of Rs. 1,50,000/- . The amount is reflected in the cash register of the Corporate Debtor as per the journal voucher. (page no 153 of the petition).			written-down value (WDV)
Total amount realized: Rs.16,39,000/-	Total: Rs. 33,09,596/-		

7.18 In light of the above-mentioned observations, this Adjudicating Authority is satisfied that the Respondents have entered into undervalued transactions which were detrimental to the Corporate Debtor's interests and as such, the said transactions need to be reversed.

7.19 It is noted that Balajee Roadways is a related party of the Corporate Debtor. Further, no payment was ever received from N. Agarwal & Associates for the sale of the Innova car. Furthermore, the said amount of Rs.3,00,000/- was adjusted against payment supposedly due for professional services offered by N. Agarwal & Associates to the Corporate Debtor, the nature of which which remains ambiguous and unexplained. The two wheelers have been sold to various parties at extremely low prices which are also less than the WDV. Lastly, the plant and machinery have also been sold to Elegant Metals & Minerals Pvt. Ltd. at less than half the WDV of the same. Also the only explanation offered by the Respondents regarding the same is that the said plant and machinery have a high depreciation rate. The said defence also remains unsubstantiated as the WDV calculations are supposed to factor in the depreciation as well. In light of the aforementioned circumstances, it is

apparent that the directors of the Corporate Debtor have unjustly benefitted from the aforesaid transactions.

7.20 This is borne out by the fact that out of the total WDV of Rs. 33,09,596/- only a sum of Rs. 16,39,000/- has could be realized for the benefit of the Corporate Debtor, the remaining amount of Rs. 16,70,596/- remains unpaid. As such, we are of the considered opinion that the relief sought by the Applicant, in respect of the afore-mentioned undervalued transactions ought to be granted by way of directing the Respondents No. 1,2 and 3 to deposit an amount of Rs. 16,70,596/- with the Liquidator of the Corporate Debtor, the applicant herein.

Fraudulent Transactions under section 66:

7.21 At this juncture, it relevant for us to refer to the provisions of section 66 of the Code. The said sections are reproduced hereinunder:

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.*

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.

- 7.22 From section 66(1), it becomes clear that the intent of the directors to defraud the creditors is an essential ingredient when it comes to establishing that a transaction is covered under the category of fraudulent transaction under section 66 of the Code.
- 7.23 In the instant case, there are three transactions categorized as fraudulent transactions by the Applicant. As admitted by the Applicant, the said transactions have been categorized as fraudulent instead of preferential or undervalued transactions solely due to the reason of not fitting within the ‘relevant period’ of time. The Transaction Audit Report also does not mention the said transactions as being dubious. No other evidence or document has been produced by the Applicant to support his claims. As such, without any evidence to establish intent of the Corporate Debtor to defraud its creditors, the said transactions cannot be termed as fraudulent and the reliefs with regards to the same cannot be granted.
- 7.24 In light of the aforementioned facts, circumstances and the case law cited above, we hereby direct the Respondents No. 1 to 3 to jointly and

severally deposit a sum of Rs. 16,70,596/- (Rupees Sixteen Lakh Seventy Thousand Five Hundred Ninety Six Only) with the Liquidator within 15 days of the issue of this order.

8. Accordingly, I.A.1546/KB/2022 is hereby *disposed of*.
9. List CP No. 546/KB/2019 on **09.10.2023**.
10. The registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.
11. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Rohit Kapoor
Member (Judicial)

Signed on this, the 4th day of September, 2023

SM[LRA]