

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH, COURT II**

IA. No. 183/2021

**In
CP(IB)No. 1796/MB/C-II/2017**

*Application filed under section 60(5), 66, 67, 47 and
73 of Insolvency and Bankruptcy Code, 2016 r/w Rule
11 of NCLT Rules, 2016.*

Ambit Finvest Private Limited

...Applicant

V/s

Rakesh Niranjana Ranjan & Ors.

... Respondents

In the matter of

Hallmark Metals Private Limited

...Operational Creditor

V/s

Anand Teknow Aids Engineering India Limited

...Corporate Debtor

Order Pronounced on :- 17.06.2022

Coram:

Hon'ble Member (Judicial) : Justice P.N. Deshmukh (Retd.)

Hon'ble Member (Technical) : Mr. Shyam Babu Gautam

Appearances (through video conferencing)

For the Applicant : Mr. Aniruth Purusothaman

For the RP : Mr. Saahil Menon

For the Respondent No. 1

/Successful Resolution Applicant : Mr. Gaurav Shrawat

For the Respondent No. 10,11,12 & 14 : Ms. Rathina Maravarman

ORDER

Per- Shyam Babu Gautam, Member Technical

1. It is an application filed by the Ambit Finvest Private Limited (Dissenting Financial Creditor) under sections 60(5), 66, 67, 47 and 73 of IBC read with Rule 11 of NCLT Rules, against the Rakesh Niranjana Ranjan (Resolution Applicant/Erstwhile Director) and others, seeking following reliefs:
 - i.) Declare that the avoidance transactions have been committed by the Respondent no. 1, 4 to 7 being a part of the erstwhile management of the Corporate Debtor
 - ii.) To reverse the effects of such avoidance transactions and cast the liability to bring Rs. 2,28,30,000/- upon the Respondent no.1, 4 to 7 to the Corporate Debtor.

- iii.) To reject the resolution Plan proposed by the Respondent no.1 and 2 which was approved by the Committee of Creditors.
- iv.) Declare that the Resolution Applicant i.e. Respondent no.1 and 2 is disqualified u/s 29A of the Code.
- v.) Pass an Order u/s 47 of the Code requiring Board to initiate disciplinary proceedings against Respondent no. 3.

2. On perusal of the Application, it reveals that the applicant has prayed for the dismissal of the Resolution Plan proposed by the Respondent no.1 and 2, which was duly approved by the Committee of Creditors as such Respondents are disqualified u/s 29A of the Code.

3. The Applicant have submitted that as per the Forensic Audit Report the Corporate Debtor has booked the entry of sales twice against invoice no. 160020 dated 01.09.2016 and 06.09.2016 in the name of Technical Parts LLC. Further submitted that the said report also in its finding has come across Fictitious Sales recorded amounting to Rs. 39,00,000/- (Thirty-Nine Lakhs) between the period from April 2016 till 04.10.2018. The said amount was noted during the Reconciliation between Sales and Debtors in order to verify whether actual sales or Fictitious sales were recorded in the Books of Accounts. It is clear that the Directors of the Corporate Debtor only wanted to show a rosy

picture of the receivables in order to misrepresent their Financial standings and defraud the Creditors. It is of pertinence to note that the Forensic Auditor had noted that no plausible explanation was provided by the erstwhile management for the fictitious sales of Rs 39,00,000/- booked by them to falsify the accounts and commit fraud upon the creditors by way of misrepresentation.

In relation to undervalued transactions, the Applicant has stated that the Corporate Debtor has invested an amount of Rs. 50.85 Lakhs and Rs. 138.45 Lakhs in Anand Tecknow ILC Oman who is a related party of the Corporate Debtor. Further submitted that the transfer of Rs.1,89,30,000/- (Rupees One Crore Eighty-Nine Lakhs Thirty Thousand Only)/- was not in the ordinary course of business and that it was in the nature of gift and hence it is an undervalued transaction as per Section 45 (2) of the IBC 2016. The Counsel for the Applicant argued that the Resolution Professional has neither reported these transactions nor allowed the Applicant to make appropriate and adequate representations before the meetings of the Committee of Creditors.

4. The Applicant has raised further objection to the resolution plan that the Resolution Applicant has proposed a clause in plan that “*all the Personal Guarantees of Shri Rakesh Ranjan, Smt. Ragini Ranjan, Shri Niranjana Prasad Sinha and Smt.*

Sharda Sinha shall continue to be the guarantor for the Resolution debt as envisaged under the Resolution Plan” and has submitted that such a clause of personal guarantee in the resolution plan will extinguish the proceeding against personal guarantors.

Moreover, the Applicant relied on the judgment of Hon’ble Supreme Court in ***Lalit Kumar Jain Vs. Union of India***, wherein it is stated that:

“111. In view of the above discussion, it is held that approval of a resolution plan does not ipso facto discharge a personal guarantor (of a corporate debtor) of her or his liabilities under the contract of guarantee. As held by this court, the release or discharge of a principal borrower from the debt owed by it to its creditor, by an involuntary process, i.e. by operation of law, or due to liquidation or insolvency proceeding, does not absolve the surety/guarantor of his or her liability, which arises out of an independent contract.”

5. Over which the argument of the Respondents is that the Corporate Debtor is a registered MSME entity and this fact has also been recorded vide order dated 04.11.2020. Since the Corporate Debtor is an MSME, provisions of Section 240 A of the Code are applicable and it provide an exemption to the Successful Resolution Applicant from complying the provisions of Section 29A(c) and (h) of the Code.

6. In relation to entry of invoice no. 160020 on 01.09.2016 and 06.09.2016, the Respondent no.1/Successful Resolution Applicant has submitted that the ledger entries relating to this transaction was verified by the Resolution Professional. The entries itself shows that there was a typographical error committed by the accounting team of the Corporate Debtor and accordingly the same sale was reversed in the accounts of the Corporate Debtor on 01.03.2019. Same was verified by the statutory auditor and a copy of the certificate of auditor is produced along with the affidavit in reply filed by the Resolution Professional.

The Respondent no. 1 has submitted that Anand Teknow LLC, Oman is wholly owned subsidiary of the Corporate Debtor and the transactions were carried out in the ordinary course of business for incorporating the wholly-owned subsidiary and towards capital investment. It is submitted that copy of minutes of the board meeting of the Corporate Debtor dated 09.02.2015 have been placed on record by the affidavit in reply of Respondent no. 3.

Moreover, the Respondents have submitted that the report on which applicant is relying have following disclaimers and cannot be relied:

- *“The procedures summarized in our report do not constitute an audit, a review or other form of assurance in accordance with any generally accepted auditing, review or other*

assurance standards, and accordingly, we do not express any form of assurance.”

- *“We have not obtained any information directly from the Target, therefore it is possible that there may be factual inaccuracies in our report.”*
- *“EY does not provide any opinion in respect to the business Entity or individual on whom this research is conducted.”*
- *“Our reports and comments should not be considered a definitive pronouncement on the individual or the Client.”*

7. The Respondents have further stated that the application filed by the applicant under sections 31(1), 60(5), 66, 67, 47 and 73 of the Code is not maintainable as the application under section 66 may be filed only by the resolution professional or the liquidator. In the present case RP was satisfied that there was no cause to file an application under Section 66 of the code and the same was confirmed by the CoC.

8. After looking into the averments, this bench is of the view that the Corporate Debtor is a registered MSME and the provisions of Section 240 A of the Code provide an exemption to the Successful Resolution Applicant from compliance with the provisions of Section 29A(c) and (h) of the Code. So, the resolution plan submitted by the resolution applicant is very much under the provisions of Code.

Moreover, a clause of personal guarantee in the resolution plan will not extinguish the right of creditors to proceed against personal guarantors. Creditors are always at liberty to proceed against personal guarantor separately. The application under section 66 is to be filed only by the resolution professional or the liquidator. Moreover, the applicant herein is not a resolution professional and is only a dissenting financial creditor and in this capacity the Applicant has no right to file the present application. In any case, the present application is liable to be dismissed on the ground of maintainability also, since the transactions which were mentioned in the application under section 47 and section 66 does not qualify the criteria of undervalued or fraudulent transaction. Under these circumstances, we are of the considered opinion that the instant Application is liable to be dismissed and accordingly stands **dismissed**.

Sd/-

SHYAM BABU GAUTAM
(MEMBER TECHNICAL)

Sd/-

JUSTICE P.N. DESHMUKH
(MEMBER JUDICIAL)