

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

**IA No.2359/2022**

**In**

**C.P. (IB) No. 427/MB/2019**

Under Section 45,46,49 and 66 of Insolvency and Bankruptcy Code, 2016 Regulation, 2016, read with Section 60(5) of the Insolvency and Rule 11 of the NCLT Rules, 2016

**Mr. Ritesh Prakash Adatiya**

Having address at- B-404, The First, B/h ITC Hotel, B/s Keshavbaugh Party Plot, Vastrapur, Ahmedabad-380005.

**.... Applicant**

**Versus**

**Sanjay Kumar Chakrabarty**

701, Dreamland Apartments,  
18, Ambedkar Road, Khar (West),  
Mumbai-400052.

**.... Respondent No.1**

**Ashish Narender Lala**

701, 7<sup>th</sup> Floor, Bhoomi Arkade Tower,  
Sheetal Nagar, Kandiwali East,  
Mumbai 400101

**.... Respondent No.2**

**In the matter of**

**Outdoor Advertising Professional**

**(India) Private Limited**

**..... Operational Creditor**

V/s

**Graphene Media Private Limited**

**..... Corporate Debtor**

**Order Delivered on :- 03.04.2024**

***Coram:***

**Mr. Anil Raj Chellan  
Member (Technical)**

**Mr. Kuldip Kumar Kareer  
Member (Judicial)**

***Appearances:***

For the Resolution Professional : Adv. Aniruth Purusothaman a/w  
Adv. Aditya Sharma  
For the Respondent No.1 & 2 : Adv. Joshua Borges i/b  
Adv. Yash Sarvaiya

**ORDER**

***Per: - Anil Raj Chellan, Member (Technical)***

1. The instant Application has been filed by. Mr. Ritesh Prakash Adatiya, the Resolution Professional ('RP') of Graphene Media Private Limited ('the Corporate Debtor') under Sections 45, 46, 49 and 66 read with Section 60(5) of the Insolvency and Bankruptcy Code, 2016 ('the Code') and Rule 11 of the National Company Law Tribunal Rules, 2016 ('NCLT Rules') seeking a declaration that certain transactions are fraudulent and wrongful and are undervalued transactions, and a direction to reverse certain transactions and issue of directions to the Respondents.

**The facts of the case as stated by the RP in the Application.**

2. This Tribunal vide order dated 25.01.2022 initiated Corporate Insolvency Resolution Process ('CIRP') against the Corporate Debtor and appointed the Applicant as the Interim Resolution Professional ('IRP') of the Corporate Debtor. The IRP was subsequently confirmed as RP.
3. The IRP caused public announcement inviting proof of claims from creditors, constituted Committee of creditors ("CoC"), appointed registered valuers, invited Expression of Interest ('EOI') and took other steps as per the process stipulated under the Code and the IBBI (Corporate Insolvency Resolution Process) Regulations, 2016 ('CIRP Regulations'). During the process, the RP received a Resolution Plan in consortium with the suspended directors of the Corporate Debtor, on 09.06.2022 which was put to vote in the CoC conducted between 21.06.2022 and 29.06.2022 in which only 54% of the CoC voted in favour. Subsequently, at the request of one of the members of the CoC, Moneywise Financial services Private Limited, the same Resolution Plan was put for voting in which 75% of the CoC voted in favour and the Application for approval of the Resolution Plan is pending consideration in IA. No.2279 of 2022 before this Tribunal.
4. The RP, based on the Transaction Audit Report dated 18.07.2022 ('TAR') and the Resolution passed by the CoC with 100% voting filed the present Application in respect of the avoidance transactions reported in the TAR.

5. It is submitted that M/s. S L Gupta and Associates ('Transaction Auditor'), examined the books of accounts of the Corporate Debtor for the period from 01.04.2019 to 31.03.2021 and submitted Transaction Audit Report dated 16.07.2022 (TAR). On perusal of the TAR and other records of the Corporate Debtor, the Applicant has formed an opinion that the Corporate Debtor has been subjected to many transactions covered under Sections 43 and 66 of the Code as under:

- (i) The Corporate Debtor had issued an advance of Rs. 57,59,688/- to the employees of the Corporate Debtor and at the end of financial year (FY) 2020-21, the advance was adjusted with the salary payable during the year to the extent of Rs.12,24,051/- and the balance amount was written off from the books of the Corporate Debtor and booked as a loss by the Corporate Debtor. It is further submitted by the Applicant that the analysis of the ledger account of the Corporate Debtor shows that the Corporate Debtor had diverted funds by way of advance to employees which are simultaneously written off by way of 'bad debt' to the extent of Rs.45,50,637/-. This transaction is stated to be in the nature of fraudulent trading transaction or wrongful trading transaction as per Section 66 of the Code.
- (ii) It is submitted that the Corporate Debtor has capitalized deferred revenue expenditure of Rs.4,04,51,172/- and Rs.4,83,83,545/- during FY 2017-18 and FY 2018-19 respectively and written off the overall amount of Rs. 9.60

Crore in the FY 2020-21. It is also submitted that the Corporate Debtor has capitalized Rs.2.71 Crore and Rs. 6.1 Crore towards the salary expenses mainly to the promoter directors to the extent of Rs.1.57 crore each in FY 2017-18 and FY 2018-19, though the Corporate Debtor did not have appropriate business operation during the period. Huge payments to the directors as salary during the downfall period show the malefide intention to dupe the creditors.

- (iii) It is also submitted that huge expenses were incurred by the management of the Corporate Debtor for the development of software and just after 1 year, the whole amount was written off without taking any due preventive measure.
- (iv) It is submitted that the Corporate Debtor has capitalized Rs. 25.58 Lakhs and Rs.41.88 Lakhs towards consultancy fees for the development of software. The TAR reported that the sum of Rs.26,10,000/- and Rs.27,88,336/- are recorded in the books of the Corporate Debtor as bogus expenses and the beneficiaries of such payment are relatives of the promoters / directors of the Corporate Debtor. It is also submitted that fake entries were passed to book expenses during FY 2017-18 and FY 2018-19 to divert funds from the Corporate Debtor to the extent of Rs. 53.68 Lakhs for the benefit of the erstwhile directors of the Corporate Debtor / the Respondents. It is stated that the payment of Rs 53.68 Lakhs shall fall within the ambit of section 66 of the Code.

- (v) It is submitted that an amount of Rs.27.88 Lakhs and Rs.13.57 Lakhs were capitalized for the development of software for new business development expenditure. As per the TAR, an amount of Rs.19.69 Lakhs was recorded for the benefit of the erstwhile directors of the Corporate Debtor.
- (vi) It is also stated that there is a sudden decline in the Net Book Value and fixed assets of the Corporate Debtor during FY 2021 by 85% on account of writing off from the books of the Corporate Debtor without any justifiable narration or details and not making any attempt to sell the assets. It is also submitted that the assets of the Corporate Debtor were mishandled by the erstwhile management by recording entries for write off in the books of the Corporate Debtor thereby causing a loss of Rs.47,30,714 which shall fall within the ambit of Section 45 and 46 of the Code and those transactions are to be reversed and recovered from the Respondents.

**Submissions of the Respondents in the Reply Affidavit**

6. The suspended directors/Respondents stated that the Corporate Debtor is an MSME (designated as a small enterprise on 21.02.2019 and as a micro enterprise on 20.06.2022). The Respondents denied all the averments made by the Applicant and stated that MSL Investment Consultant LLP in consortium with the Respondents has filed a Resolution Plan on 09.06.2022 which is pending for approval by the Tribunal. They stated that the Respondents had given a detailed response to all the queries raised by the Transaction Auditor and no

transaction had been undertaken in violation of any of the provisions of the Code by the Corporate Debtor during their management that would result in the filing of any application against the Respondents.

7. It is the submission of the Respondents that the total net salary advances in the hands of employees from April, 2017 amounted to Rs.57.74 lakhs, the share of net advance to the directors was Rs.41.20 lakhs and the amount of Rs.12 lakh was repaid in March, 2018, the balance amount was paid back by the Respondents during FY 2018-19 by way of deductions from salary drawn. It is submitted that the Respondents did not avail any excess funds from the Corporate Debtor. With respect to the writing off of the bad debt in the unaudited balance sheet of the Corporate Debtor for the FY 2020-21, it is submitted that this did not accrue any financial gain to the Respondents. The calculation shown in unaudited balance sheet is not correct and the advance paid to the Respondents had already been recovered, therefore, the question of write-off should not arise.
8. The Respondents submitted with respect to the consultancy fees and new business development expenditure that an amount of Rs.26.1 lakhs for the FY 2017-18 and Rs.27.88 lakhs for the FY 2018-19 were stated as per the unaudited balance sheet. It is further stated that the figures quoted for FY 2018-19 are not factually correct because no consultancy related payment had been recorded in the bank's statement in the months from December, 2018 to March, 2019. The Respondent stated that the actual consultancy fees paid to the Consultants during the FY 2017-2018 and FY 2018-19 stands at Rs 26.1 lakh and Rs 22.6 lakhs resp. (total Rs.48.7 lakhs)

9. The Respondents submitted a brief profile of the Consultants and submitted that all the five consultants are highly accomplished in their professional space and the Corporate Debtor needed such talent for planning of projects, development of inhouse talent and business growth. Even if the Corporate Debtor had hired from outside, it would have ended up paying similar consultancy fees.
10. As regards the new business development expenditure of Rs. 19.69 lakhs, the Respondents stated that the TAR does not contain the complete break-up of the figures quoted and hence they are unable to respond with details.
11. It is submitted that the accusation of fund diversion defies logic and any reasonableness. It is submitted that the Respondents during the period between 2019-20 had lent huge amounts of money to the extent of Rs.58 lakhs and reduced the liability of about Rs. 2 Crore from the books of the Corporate Debtor.
12. With respect to the sudden decline in the fixed assets in FY 2020-21 by 85%, it is submitted that depreciation was not calculated and the depreciated value of these assets as of December, 2020 would have been down by Rs.18.34 lakhs and the outstanding unpaid rent for the office premises amounted to Rs. 29 lakhs which was settled against the fixed assets in the office as the Corporate Debtor was not in a position to settle the dues by cash. The value of vehicle in the audited balance sheet of FY 2017-18 was Rs. 8.78 lakhs and the derived book value would be approximately Rs 8. lakhs. The outstanding loan against the vehicle was Rs.3 lakh and the said vehicle was in the possession of

Respondent No-2 who had taken over the vehicle with the outstanding liability and no salary was paid to Respondent No. 2 in December, 2018. It is further submitted that a 6-year-old SUV which had done almost 1 lakh kilometer would not have fetched Rs. 8 lakh.

13. The Respondents denied all the allegations made in the Application and stated that no transaction had been carried out which is in the nature of fraudulent transaction or wrongful transaction or undervalued transaction and stated that the Application ought to be dismissed.

### **Analysis and Decision**

14. We have heard the Counsel for the Parties and perused the documents on record.
15. It is the case of the Applicant that the Transaction Auditor examined the books of accounts of the Corporate Debtor for the period from 01.04.2019 to 31.03.2021 and submitted the TAR. Upon perusal of the TAR and on verification of records of the Corporate Debtor, it is stated that the Applicant formed an opinion and determined that the Corporate Debtor has been subjected to many transactions which are covered under Sections 43,44 and 66 of the Code which will make the Respondents liable to make contributions to the assets of the Corporate Debtor. We, therefore, proceed to examine the transactions stated in the Application.

### **Salary Expenditure**

16. It is averred in the Application that during the period from 01.04.2019 to 31.03.2021, the Corporate Debtor had issued advance of Rs.57,89,688/- out of which net advances to the Respondents amounted to Rs.41.20 lakhs. There was diversion of funds by way of advance to employees which were simultaneously written off by way of bad debt to the extent of Rs. 45,50,637/-. On the contrary, it is stated by the Respondents that the calculation shown in the unaudited balance sheet is incorrect, and the advances paid to the Respondents had already been recovered. In support thereof, the Respondents submitted the salary statements of employees for FY 2017-18 and FY 2018-19 and the salary release instructions to the Bank. It is further stated that writing off of the bad debt in the unaudited balance sheet of the Corporate Debtor for the FY 2020-21 is incorrect which could have been rectified had the complete statutory audit had been conducted. When the advances paid to the Respondent directors had already been recovered, it is a clear case of accounting oversight rather than diversion of funds. The Counsel for the Respondents also submitted that it did not result in the accrual of any financial gains to the Respondents.
  
17. We have weighed the above contentions on the basis of the records produced. It is observed that the advance salary was adjusted with the salary payable to the employees before initiation of CIRP and the salary payments are in the same range since 2014 though there is no reduction even in the downfall period of the Corporate Debtor. We do not see merit in the argument that payment to Respondents at the same range

when the Corporate Debtor did not have appropriate business operation amounted to fraudulent purpose. As regards writing off in the unaudited balance sheet of the Corporate Debtor for the FY 2020-21, the Financial Auditor stated in the Report that this did not cause any financial gains to the Respondents. Since the advance paid to the employees had already been recovered, the question of write-off should not arise and we find strength in the argument of the Respondents that writing off of bad debts, as per the unaudited accounts, is an accounting oversight.

### **Consultation Fee**

18. It is also the case of the Applicant that the Corporate Debtor has capitalized Rs.25.58 lakhs and Rs.41.88 lakhs in FY 2018-19 and FY 2019-20 respectively towards consultancy fees for the development of software out of which entries to the extent of Rs.26,10,000/- and Rs.27,88,336/- are bogus entries and beneficiaries of such payments are none else than the relatives of Respondents. On the other hand, the Respondents stated that there is no basis for an amount of Rs.5.7 lakhs claimed to have been given as consultancy fee between December 2018 and March 2019 as there is no corresponding data to substantiate payment in the bank accounts and claims have been made on the basis of the unaudited balance sheet. The Respondents further contended that the consultancy fee has been rightly paid to five Consultants during the year 2017-18 and 2018-19 stands at Rs.26.1 lakh and Rs.22.6 lakh (total Rs.48.7 lakh) as the said Consultants are highly accomplished persons in their professional space, quite contrary to the claim made by the Applicant.

19. Coming to the submission made by the Respondents with regard to the Consultation fee, we notice the brief profiles of those five Consultants as reported in TAR and the reply of Respondents as under:

Sl.No.	Name	Relation	Age	Designation
1	Ulupi Chakrabarty	Wife of Respondent No.1	59	Home Maker
2	Samyak Chakrabarty	Son of Respondent No.	33	Co-founder of Start up
3.	Samyak Chakrabarty	Daughter of Respondent No.1	25	Student
4.	Jaya Lala	Relative of Respondent No.2		
5.	Narender Lala	Relative of Respondent No.2		

The TAR states that the Consultants are relatives of the Respondents and fake entries were passed to book expenses during FY 2017-18FY 2018-19 to divert funds from the Corporate Debtor for the benefit of the Respondents. The Respondents do not deny the relation of the Consultants with Respondents but only elaborated the profiles to justify the roles. It is further stated in TAR that the Respondent No.1, in

response to a query clarified that the salaries of directors have been reduced to the extent of payments to the Consultants towards Consultancy Services. As noticed above, the Consultants are close relatives of Respondents. Transactions or dealings with relatives are not illegal, but should justify the fee paid by explaining the service rendered or work done or contribution made to the business of the Corporate Debtor. There is absolutely no evidence or statement regarding the service/work rendered by the Consultants, and alleged reduction of salary to the extent of Consultation fee by the Respondents. Considering the facts and evidences on record, we hold that undue benefit has been given to the aforesaid Consultants at the cost of creditors which will make the transaction liable to be classified as fraudulent business/trading to cause loss to the creditors of the Corporate Debtor. Consequently, the Respondents are liable to make contributions to the extent of Rs.53 lakhs for carrying on the business of the Corporate Debtor for fraudulent purpose.

### **New Business Development Expenditure**

20. It is also stated by the Applicant that the Corporate Debtor incurred overall expenditure of Rs.27.88 lakhs and capitalized Rs.13.57 lakhs towards New Business Development Expenditure. It is stated by the Applicant that the records of the Corporate Debtor reveal incurring of expenses to the tune of Rs.19.69 lakhs in the name of Sanjoy Chakrabarty & Sons HUF, and Ashish Narender Lala HUF for the benefit of the Respondents. The Applicant further contended that the payment to HUF is not justifiable as they do not have any business relationship with the Corporate Debtor and those expenses are booked

just before the year when the Corporate Debtor stalled its operations. It is further submitted that it is a clear case of removing the funds of Corporate Debtor at its last stage to benefit the management of the Corporate Debtor or its directors.

21. On the other hand, the Respondents contended that the Services of Chakrabarty & Sons HUF, and Ashish Narender Lala HUF were taken to reach out to large number of potential customers, etc which are normal business practices in the process of new service development. In addition, the Respondents contended that this money has come back to the Corporate Debtor.
  
22. It is noticed from the records that Chakrabarty & Sons HUF, and Ashish Narender Lala HUF are undisputedly held by Respondent No.1 and 2 respectively. Though the case of the Applicant is that the aforesaid HUFs do not have any business dealings with the Corporate Debtor, the Respondents have not furnished any detail either regarding the business undertaken by the HUFs or the business dealing with the Corporate Debtor. Furthermore, the statement of Respondent that the money given to the HUFs has gone back to the Corporate Debtor amounts to admission that the transfer of money to HUF was not proper. The bank statement furnished by Respondents do not support the claim of return of money to the Corporate Debtor. In view of the above, we see merit in the submissions of the Applicant that the aforesaid HUFs do not have business relationship with the Corporate Debtor and the Corporate Debtor was knowingly carrying on the business in a manner with dishonest intention to defraud creditors of

the Corporate Debtor. The Respondents are, therefore, liable to refund the amount of Rs.19.69 lacs in the account of the Corporate Debtor.

### **Other irregular Transactions**

23. It is submitted that as per the audited financial statements for FY 2016-17, 2017-18 and unaudited financials for FY 2018-19, 2019-20, and 2020-21 that there is sudden decline in the Net Book Value and Fixed Assets during FY 2020-21 by 85%. The detailed breakup of the year wise balance of Fixed assets as per each financial year is as under:

Particular	2016-17	2017-18	2018-19	2019-20	2020-21
	Audited	Audited	Unaudited	Unaudited	Unaudited
Fixed Assets	4832293	5134896	4730714	4730714	754174

It is further submitted by the Applicant that the vehicle owned by the Corporate Debtor is being used by the directors for their personal use. One director left the Corporate Debtor in December 2018 without handing over the vehicle back to the Corporate Debtor. It is further stated that the Respondents mishandled the assets of the Corporate Debtor and caused a loss to the extent of Rs.47,30,714/- by recording write off entries in the books of the Corporate Debtor and such transactions fall under Section 45 of the Code. The Respondents have controverted the same by stating that the unaudited balance sheets for FY 2019-20 and 2020-21 did not factor in the applicable depreciation which would have brought down the value by 18.34 lakhs. Further, the fixed assets of the Corporate Debtor were used to pay off the monthly rent for the office premises since March 2019 (ie, 22 months) at the rate of Rs.1.6 lakh per month aggregating Rs. 29 lakh as the Corporate

Debtor did not have money to pay. As regards the vehicle owned by the Corporate Debtor, it is stated that the said vehicle with value of Rs.8 lakh in the books of Corporate Debtor was in the possession of Respondent No.2 who resigned as director in December 2018 and the vehicle was handed over to him with outstanding loan liability as the Corporate Debtor had no use of the same and the same would have caused further financial burden to the Corporate Debtor.

24. There were no records available with the Corporate Debtor or produced by the Respondents to show that the fixed assets (Computers, furniture and fixtures) were to be given in settlement of the outstanding rent dues. The justification given for handing over of the vehicle to Respondent No.2 was also not justifiable. The transfer of fixed assets and vehicle, within the relevant time just before the commencement of CIRP has the effect of undue preference and squarely falls within the ambit of Section 43 of the Code. As such, we have no hesitation in holding that the transactions are hit by provisions of Section 43 of the Code. property and not in the interest of the creditors.
25. In terms of the above observations, prayers A (ii) and (iii), B and C are hereby allowed. As a result,
- (i) the Respondents 1 and 2 are directed to deposit under Section 66 of the Code:
- (a) An amount of Rs.53.68 lakhs in terms of prayer A(ii); and
  - (b) An amount of Rs.19.69 lakhs in terms of prayer A(iii)

(ii) the Respondents 1 and 2 are directed to deposit under Section 43 and 44 of the Code an amount of Rs.47,30,714/- in terms of prayer C.

(iii) The amounts as mentioned in (i) and (ii) above shall be deposited within one month from the date of the order with the Corporate Debtor.

25. Accordingly, **IA No.2359** is **partially allowed** in terms as above.

**Sd/-**

**ANIL RAJ CHELLAN**  
**(MEMBER TECHNICAL)**

**Sd/-**

**KULDIP KUMAR KAREER**  
**(MEMBER JUDICIAL)**