

IN THE NATIONAL COMPANY LAW TRIBUNAL

KOCHI BENCH

KOCHI

IA(IBC)/205/KOB/2022

IN

CP(IB)/25/KOB/2021

(Under Section 45(1) read with Section 46 of IBC, 2016)

In the matter of M/s. Tenny Jose Limited:

MEMO OF PARTIES:

PRATHAP PILLAI,

IBBI/IPA-003/ICAI-N-00371-2021-22/13822

Resolution Professional of M/s. Tenny Jose Limited,

BLRA 15, Bridge Lane, Medical College P.O.,

Trivandrum – 695 001.

...Applicant

-Versus-

1. **TENNY JOSE**, Villa No:29, Noel fragranz, Shihab Thangal Road, Vidya Nagar Colony, Thrikkakara, Edapally, Ernakulam, Pin – 682 021.
2. **ELSA TENNY**, Villa No:29, Noel fragranz, Shihab Thangal Road, Vidya Nagar Colony, Thrikkakara, Edapally, Ernakulam, Pin – 682 021.
3. **ARUN C TENNY**, Villa No:29, Noel fragranz, Shihab Thangal Road, Vidya Nagar Colony, Thrikkakara, Edapally, Ernakulam, Pin – 682 021.
4. **GOPINATH SREEKUMAR**, #7, Indian Express Layout, Kodigehalli, Vidyaranyapura, Banglore, Karnataka – 560 097.
5. **KIRAN C TENNY**, Villa No:29, Noel fragranz, Shihab Thangal Road, Vidya Nagar Colony, Thrikkakara, Edapally, Ernakulam, Pin – 682 021.
6. **STEELLION PREFAB INFRA PVT LTD.**, Ward No. 12 Karukutty Karukutty, Ernakulam – 683 576.
7. **INTERGUM RETAIL PVT. LTD.**, D-75 BIZCOSPACES, 8th Floor, Infra Futura bldg., Seaport Airport Road, Opp. Bharat Matha College, Kakkanad, Ernakulam- 682 021.

... Respondents

-In-

In the Matter of:

Korea Trade Insurance Corporation,

...Operational Creditor

-Versus-

Tenny Jose Limited,

...Corporate Debtor

Coram:

Shri P. Mohan Raj : Member (Judicial)

Shri Satya Ranjan Prasad : Member (Technical)

Appearances (through video conferencing)

For Applicants : Mr. Hari Kumar G Nair, Adv
Mr. Akhil Suresh, Advocate

For Respondents 1 to 3 and 5 : Mr. Pradeep Joy, Advocate
Mr. Rohan Kumar, Adv

Order reserved on: 11.11.2022

Order pronounced on: 25.01.2023

ORDER

1. This application has been filed under section 45 of IBC 2016 for undervalued transaction and return of amount.

Brief facts of Petition.

2. The Applicant /resolution professional filed this application. The CIRP order was passed against the corporate debtor Tenny Jose Limited, in the petition filed under section 9 of IBC 2016 by Korea Trade Insurance Corporation on

21.12.2021. Mr.Krishna Raj was appointed as interim resolution professional, then the applicant was appointed as resolution professional on 14.03.2022. After his appointment he started to function then with the approval of 4th committee of creditors meeting dated 21.06.2022 the applicant appointed M/s. Jackson Abraham Thekkekara, Chartered Accountant forensic Auditor on 02.04.2022 the forensic Auditor submitted his report on 04.06.2022, the copy of the report was served on the erstwhile directors of the corporate debtor for their objections if any. From the said Audit report the applicant came to know that the respondents/suspended Board of Directors of the Corporate Debtor had deliberately and *mala fide*ly acted and made transactions with the sole intention to defraud the creditors of the Corporate Debtor.

The respondents indulged in undervalued transactions. In the application the applicant set out selling of two cars transactions carried out by the respondents are undervalued transactions. It is stated that two cars were sold to lower prices compare to price of OLX website price.

Brief facts of the reply of Respondents Nos.1 to 3 and 5:

3. The application is not maintainable; all the contentions of the application are based on the forensic audit report and there is no independent determination of any undervalued transactions by the RP. The application is filed in, a belated stage on 15.07.2022 after expiry of 208 days from the date of CIRP. As per the time line of CIRP the RP is required to form an opinion within 75 days of the commencement of CIRP and based on that opinion to be formed he has to

make determination on or before the 115th day of CIRP. But in the instant case the RP has not compiled the time limit set out in Regulation 35 (A) of Insolvency and Bankruptcy regulations 2016. The resolution professional cannot file an application on the sole ground that the price on the same model of vehicles were higher on OLX platform. The price on OLX platform is not in any way an authentic source for determining the value of an asset. The cars were sold on higher than the book value. The audited book value to be considered. It is further submitted that the sold vehicles had many mechanical faults, and damaged during the flood. Both the vehicles were registered outside Kerala, since cars were not in running condition, the cars were sold at proper prices.

There is no mala fide intention of the respondent, while making transactions nor was any transaction done to defraud the creditors. Transactions were carried out in regular course of the business during the good health of the corporate debtor. The allegations are frivolous and baseless, and prayed for dismissal of application.

The Points for determination are: -

- 1) Whether the application is barred by limitation?
- 2) Whether the applicant/ RP not filed the application on his own determination?
- 3) Whether, the Cars were sold in low prices? If yes whether the applicant is entitled for refund of difference of amount?

Point No. 1 and 2:

4. The corporate debtor was ordered to CIRP on 21.12.2021. This application was filed on 15.07.2022. On the respondent side taken plea that since

this application is not filed within the time limit prescribed under Regulation 35-A of the Insolvency and Bankruptcy Board of India and (Insolvency Resolution Process for Corporate Persons) Regulation 2016, is not maintainable. It is true that as per Regulation 35-A of the Insolvency and Bankruptcy Board of India and (Insolvency Resolution Process for Corporate Persons) Regulation 2016, Resolution Professional has to form an opinion within 75 days from the date of CIRP, and made determination within 115 days and has to file an application within 135 days, from the date of commencement of CIRP. From the available materials it appears that after the initiation of CIRP on 21.12.2021, the Resolution Professional appointed Forensic Auditor on 02.04.2022. Forensic Auditor submitted his report on 23.09.2020, there after the Resolution Professional determined that the Respondents deliberately and malafidely acted with sole intention to defraud the creditors of the corporate debtor, then he filed this application after expiry of 135 days from the date of initiation of CIRP.

5. On the application side argued that this application is maintainable even though it is filed after 135 days from the date of CIRP. The time line mentioned in Regulation 35-A of Insolvency Bankruptcy and (Insolvency Resolution Process for Corporate Persons) Regulation 2016 is directory in nature because no consequential effect is mentioned therein for non-compliance of time limit. This view is expressed and fortified in Madras High Court Judgment Shahji Purushutom -vs- Union of India, there it is observed that when there is no consequential result is prescribed it will consider as only a directory. In this regard on the applicant side

relies upon the NCLAT-Delhi order passed in company Appeal (AT) Insolvency No.583 of 2021 order dated 06.04.2022, **Aditya Kumar Tibrewal Vs Om Prakash Pandey and Orsin** here the NCLAT clearly held that the application filed by the resolution Professional relating Sections 43 and 45 read with Sections 66 and 60(5) of the Code is not to be rejected filed beyond the period of 135th days of Insolvency Commencement date only on the ground of non-compliance of Regulation 35A of CIRP Regulations, 2016, further held that the expression “shall” in regulations 35A(1),35A(2) and 35A(3) is not mandatory and requirement of “forming an opinion” under section 35A(1)” make a determination” under Section 35A(2) and “shall apply to the adjudication authority for appropriate relief on or before 135th day of the Insolvency Commencement date” are only directory. It is well settled proposition of law that one should not be allowed to take advantage of his own wrong. Thus, the applicant has vividly described the reason for maintenance of application. As per Section 5 of the Limitation Act, if the applicant satisfies the court that he had sufficient cause for not making the application within time, the delay to be condoned. The Apex Court held in *Sesh Nath Singh and another -vs- Baidyabati Sheora phuli co-operative Bank Ltd. and another* in Civil Appeal No. 9198 of 2019 order dated 22.03.2021 that delay can be condoned irrespective of whether there is any formal application or not if there are sufficient material on record disclosing sufficient cause for the delay. In this case also even though on the applicant side not filed any formal condone delay application but in the petition the delay is properly and satisfactorily explained.

6. The Division Bench of Delhi High court in **TATA STEEL BSL LIMITED Vs VENUS RECRUITERPRIVATE LIMITED & ORS, LPA 37/2021** dated 13.01.2023 at para 74 held as follows:

74. The first prong on which the Impugned Judgment holds that avoidance applications, in facts of the present case, are infructuous is because they have not been filed as per the prescribed timelines. However, it is our understanding that the timelines under Regulation 35A are directory and not mandatory in nature. This is because Regulation 35A pertains merely to the RP discharging his statutory burden of filing an avoidance application within an outer limit of 135 days from the commencement of the CIRP. This timeline takes date of commencement of CIRP as the reference point. However, the CIRP process itself is not strictly or mandatorily bound by its own timelines. The same has been held by the Hon''ble Apex Court in Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta, Neutral Citation Number: 2023/DHC/000257 LPA 37/2021 etc. Page 63 of 73 (2020) 8 SCC 531.

Thus, the catena of supra citations made clear that the Regulation 35A is only directory.

7. This application is filed alleging that the respondents committed an act of fraudulent/ undervalued Transactions. As per Section 17 of the Limitation Act 1963 for the application based upon the fraud of respondent, the period of

limitation shall not begin to run, until the applicant discovered the fraud. Here, the applicant came to know the fraudulent trading of respondents only on 04.06.2022 the day on which audit report was submitted to him. From the date of knowledge of fraud on 04.06.2022 this petition has been filed on 15.07.2022 within 42 days, hence there is no delay in filing this application, even if there is any delay in filing this application beyond 135 days fixed under Regulation 35-A in view of supra mentioned Apex court Judgment in the absence of any formal application the said delay is here by condoned.

8. On the respondent side it is alleged that the Resolution Professional not acted independently, he had delegated his duty of forming an opinion determination of fraudulent transaction to the forensic auditor and such delegation of duty is in contravention to the provisions of IBC. The mere acceptance of auditor's report does not amount to delegation of power of Resolution Professional. It is the exclusive domain of Resolution Professional either to accept the report of forensic auditor report or not. It does not mean that when Resolution Professional accepted the report of auditor, he delegated his duty to auditor. Here the Resolution Professional accepted the Forensic Auditor's report and determined on his own and filed this application. Thus, the contention of the respondents is unsustainable. In this scenario it is answered that the petition is not barred by limitation and Resolution Professional has filed this application on his own, determination.

Point No 3: -

9. In respect of undervalued transactions, it is stated that the respondents sold two cars (i) Benz ML250 CDI 2012 Model on 31.10.2021 for a sum of Rs.5,08,598/- much below the market Price of Rs.21,00,000/- and (ii)BMW car 55Series 52OD 2012 model on 07.12.2021 for a sum of Rs.5,50,000/- much below the market price of Rs.13,50,000/-. On the applicants' side relies upon the value of similar vehicles depicted in OLX website. The method adopted by the applicant has no legal backing, the vehicle is not valued by qualified registered valuer, in such a situation the value mentioned by the applicant on the basis of OLX website is not acceptable. On the respondents' side replied that the cars had mechanical defect due to flood and stated that as on the date of sale they were not in running conditions. The book value of the cars mentioned in the audited statement is ignored by the applicant. Without ascertaining the condition of the vehicle as on the date of sale, it is difficult to say that the vehicles were sold in under value. In the absence of Production of any valid valuers report, the value of the cars and it's working conditions could not be ascertained. In the circumstances on the applicants' side failed to prove that two cars were sold to lower prices.

10. In the application or in annexure V there is no iota of reference about 4th respondent, it is informed that he was appointed as an independent director in non-executive cadre on 18.06.2018 and resigned as such from office on 12.07.2021.

11. In the circumstances it is concluded that applicant side failed to prove that the two cars were sold to low prices hence the application is **DISMISSED**.

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12. 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,

13. Certified Copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

SATYARANJAN PRASAD Digitally signed by SATYARANJAN PRASAD
Date: 2023.01.25 12:42:46 +05'30'

Satya Ranjan Prasad
Member (Technical)

PANDIAN Digitally signed by PANDIAN
MOHAN RAJ
Date: 2023.01.25 13:01:51
+05'30'

P. Mohan Raj
Member (Judicial)

Signed on this 25th day of January, 2023.

Supriya-P. s