IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA

IA (IB) No. 1277/KB/2020
In
C.P. (IB) No. 1400/KB/2018

In the matter of:
Application under section 25 (2)(j) read with sections 66 and 67 of the Insolvency and Bankruptcy Code, 2016.

And

In the matter of:
Stressed Assets Stabilization Fund

…Financial Creditor

Versus

Ispat Profiles India Limited

…Corporate Debtor

And

In the matter of:
Rajiv Kumar Agarwal [Resolution Professional of Ispat Profiles India Limited]

… Applicant

Versus

1. Namdeo Shankar Zagade, suspended board of director of Ispat Profiles India Limited
2. Basant Singh Himalian, suspended board of director of Ispat Profiles India Limited
3. Nitin Chakradhar Borkute, suspended board of director of Ispat Profiles India Limited
4. Surendra Garg, suspended board of director of Ispat Profiles India Limited

...Respondents

Order reserved on: 20.04.2022
Order pronounced on: 29.04.2022

Coram:
Shri Rohit Kapoor : Member (Judicial)
Shri Harish Chander Suri : Member (Technical)

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IA (IB) No. 1277/KB/2020
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Appearances (via video conference):

For the Applicant/RP:

Appearances (via video conference):

1. Ms Mamta Binani, Advocate
2. Ms Anshumala Bansal, Advocate
3. Mr Rohit Kesri, CS
4. Mr Rajiv Kumar Agarwal, Resolution Professional

ORDER

Per: Rohit Kapoor, Member (Judicial)

1. This Court convened through video conferencing.
2. This is an Application under section 66 of the Code, *inter alia,* praying for the following reliefs;
   a. A direction on the respondent no. 1 to deposit the amount of Rs.11,79,651/- receivable from him;
   b. A direction on the respondents to jointly and/ or severally deposit the amount of Rs. 44,72,929/- advanced to various companies;
   c. A direction on the respondent nos. 1 to 4, jointly and/ or severally to deposit the amount of trade receivable as for Rs.6,59,26,391/-
   d. A direction on the respondents to jointly and/ or severally deposit the amount of Rs 33,63,716/- recoverable from the creditor but written off by the respondents;
   e. A direction on the respondent nos. 1 to 4, both jointly and severally to deposit the amount of advances for Rs98,86.79.496/-;
   f. A direction on the respondent nos. 1 to 4, both jointly and severally to deposit the amount of inventories for Rs.17,23,57,138/-;
   g. A direction on the respondent nos. 1 to 4, both jointly and severally to deposit the amount of advance payment to vendors for Rs 2.01.02.640/-;

h. A direction on the respondent nos. 1 to 4, both jointly and severally to deposit the amount of trade payables for Rs.96,08,59,854/-;

i. A direction on the respondent no.1 to deposit Rs. 102,000 which was paid to him in preference to the secured lenders. during 2 years preceding the insolvency commencement date A direction on the respondents to jointly and/ or severally deposit the amount of Rs 61,65,000/- paid preferentially as payment of unsecured loan:

3. By an order dated 28 November, 2019, this Adjudicating Authority admitted Ispat Profiles India Limited ***('Corporate Debtor')*** into Corporate Insolvency Resolution Plan ***('CIRP')***. Mr. Rajiv Kumar Agarwal ***('Applicant')*** was appointed as the Interim Resolution Professional ***('IRP').*** Subsequently, the Applicant was appointed as the Resolution Professional ***('RP').*** Thereafter, the Applicant undertook all the steps in compliance with the provision of the Insolvency and Bankruptcy Code ***('IBC').***

4. The Committee of Creditors ***('CoC')*** was constituted on 23 December, 2019 with SASF and State Bank of India ***('State bank of India')*** being the two Financial Creditors and the members of the CoC. Advertisement for expression of interest ***(EOI)*** was published on 16 June, 2020. In pursuance of such advertisement, the Applicant received Three Resolution Plans.

Submissions by the Applicant

5. The last audited account of the Corporate Debtor was for the year ended on 31 March, 2011. Thereafter, the accounts have not been maintained properly nor audited. In the 3rd CoC meeting, held on 26 February, 2020, the Applicant appointed Prakash Shah & Lodha ***('forensic auditor')*** to conduct a forensic audit of the accounts of the Corporate Debtor. The forensic auditor submitted his transaction audit report to the Applicant on 04 November, 2020.

a) The Transaction Audit Report (TAR) has summarised that the following amounts are receivable from various related parties since a very long period, which was unrecovered during the entire audit period.

i. A sum of Rs.11,79,651/- was receivable from Namdeo Shankar Zagade,

ii. A sum of Rs.20,63,077/- was receivable from Ispat Industries Ltd.

iii. A sum of Rs.17,97,505/- was receivable from Ispat Alloys Ltd

iv. A sum of Rs.3,82,305/- was receivable from Ispat Alloys Limited

v. A sum of Rs.17,97,505/- was receivable from Ispat Alloys Ltd.

vi. A sum of Rs.3,82,305/- was receivable from Ispat Metallics India Limited

vii. A sum of Rs.2,30,042/- was receivable from Navoday Techno Consultants Ltd

No records were provided to the Auditor regarding the purpose of the loan, mode of payment, repayment terms, end-use, etc, against the loan given to the related party. No interest was charged on the loan amount outstanding to the party. It was observed from the above that the said fund was siphoned off in favour of the party, by defrauding the secured lenders. Therefore, the TAR concludes that the same would qualify as an avoidable transaction and is therefore part of their report under Section 66 of IBC 2016, as fraudulent and wrongful trading. It has now transpired that the companies to whom the loans were given are either amalgamated or defunct

b) The TAR further states that trade receivables for Rs.6.59.26,391/- were unrecovered since a very long period and have been fully provided for the doubtful receivables b. The TAR further states that trade receivables for Rs.6,59,26,391/- were unrecovered since a very long period and have been fully provided for the doubtful receivables. There are no records available to support that these receivables have been accrued due to the genuine trade transactions. Further no proofs made available to the auditor regarding the follow-ups and recovery actions by the management to recover the dues. Hence there are reasonable doubts over the adequate procedure taken by the company to book sales to these parties and to recover the receivables of the corporate debtor from those underlying parties. The TAR therefore opines that this would be qualify as diverting the assets of the corporate debtor and is therefore part of the report under section 66 of the IBC, 2016 as fraudulent and wrongful trading

c) A sum of Rs.33,63,716/- was recoverable from Pradeep Metals Limited as on March 2009. But instead of following for the recovery, the corporate debtor wrote off the balance on 31.03.2009 and hence abandoned the receivable assets. Hence there are reasonable doubts over the adequate procedure taken by the corporate debtor to recover its dues from the party. The write off of the balance is a prima facie instance of abandoning the assets of fie company, against which no records have been provided to the auditor regarding the recovery action taken by the company, settlement document with the party, reason for non-payment of the residual amount by the party, etc. The transaction is thus reported under section 66 of the IBC. 2016.

d) The corporate debtor has accepted advances from clients for a huge amount of Rs.98,86,79,496/-, without any movements for a very long period. There are no records available to support that these advances have been accrued due to the genuine trade transactions. Therefore the TAR concludes that this would be qualify as avoidable transactions and is therefore part of the report under Section 66 of IBC 2016, as fraudulent and wrongful trading.

e) The books of accounts represents the inventories of Rs 17,23,57,138/-, wherein the corporate debtor has made a provision for provision for Rs 8,56,42,767/-. Considering the various discrepancies stock quantity disclosures in the Income Tax Returns, absence of inventory records, proof of regular physical verification by the management and existence of physical availability of the underlying stock items, it appears that there is gross mismanagement in the inventory maintenance by the corporate debtor. Showing Nil inventory in the Returns implies that the entire inventories of Rs.17,23,57,138/- has been diverted. Therefore as per the TAR this would be qualify as diverting the assets of the company and is therefore part of the report under Section 66 of IBC 2016, as fraudulent and wrongful trading.

f) Advance payments have been made to the vendors for supply of goods / services for an amount of Rs.2.01.02.640/- Out of these, the corporate debtor has already made provision for doubtful advances of Rs 1,51.53.651/- in the earlier years. There are no records available to support that these advances have been paid due to the genuine trade transactions. Further no proofs made available to the auditor regarding the follow-ups and recovery actions by the management to recover the dues. Hence there are reasonable doubts over the adequate procedure taken by the corporate debtor in payment of advances and subsequent recovery of the advances/ underlying goods/ services from those underlying parties. Therefore as per the TAR, this would be qualify as diverting the assets of the company and is therefore part of the report under Section 66 of IBC 2016, as fraudulent and wrongful trading.

g) Trade payables for Rs 96,08,59,854/- were unpaid as on 27.11.2019 without any movements for a very long period There are no records available to support that these payables have been accrued due to the genuine trade transactions. Therefore as per TAR, this would qualify as avoidable transactions and is therefore part of the report under Section 66 of IBC 2016, as fraudulent and wrongful trading.

h) A sum of Rs 102,000/- was paid to Mr. Namdeo Shankar Zagade (the Director), in preference to the secured lenders, during 2 years preceding i the insolvency commencement date. Therefore as per TAR, this would qualify as an avoidable transaction and is therefore part of the report under Section 43 and 66 of IBC- 2016, as Preferential and Wrongful Transaction.

i) A sum of Rs 61,65,000/- was outstanding unsecured loan as on March 2009 from M/s Goldline Trac Private Limited, herein which was fully repaid during June 2009 by the corporate debtor, inspite of knowing that the secured lenders and other parties having preference over the unsecured lender were still unpaid at the time of making such repayment of unsecured loan to the party. Hence there are reasonable doubts over the intention of the corporate debtor in making such payments. Therefore as per the TAR, this would be qualify as diverting the assets of the corporate debtor and is therefore part of the report under Section 66 of the Code.

6. The Applicant further submits that, from the bare reading of the transaction audit report and the summary of findings, it appears on the face of it that the transaction are fraudulent and no satisfactory responses have been provided by the suspended board of directors with respect to such transactions. The Applicant has also lodged a complaint with Sikrapur Police Station on 15 September, 2020 complaining about siphoning of the stocks and machinery by the Suspended board of Directors.

Submissions by the Respondents

7. Nothing in this instant Application shows or proves that the business of the Corporate Debtor was carried on with an intent to defraud the creditors of the

Corporate Debtor or for any fraudulent purpose. Moreover, the allegations contained in the application pertain to transactions which are of a period of time when the concerned respondents could not have known of the commencement of the CIRP, in respect of the Corporate Debtor.

8. The Application does not reflect that the respondents or any of them did not exercise due diligence. Further, the allegations made against the Corporate Debtor in the order dated 28 November, 2019 are denied. It is denied that the Applicant has taken steps in compliance of the provisions of the Code or the Applicant did not receive any cooperation from the suspended board of directors.

9. The Corporate Debtor has been filing its Income Tax Returns regularly and has been filed upto March, 2019. The forensic auditor has not conducted the forensic audit properly. The report is also one sided and does not take into consideration the actual state of affairs.

10. Further, the Respondent No.1 has received a payment of Rs.11,60,540/- until November 2010 for services rendered. The Income Tax Returns of the Respondent No.1 would show receipt of the aforesaid sum as salary. In the books of Corporate Debtor this amount has been shown in ‘General Expenses’. On and from November, 2000 to November 2010, every month, the Respondent No.1 has received payment for services rendered.

11. There were transactions between the Corporate Debtor on one hand and Ispat Industries Limited, Ispat Alloys Limited, Ispat Metalliks Limited and Navoday Techno Consultants Limited on the other upto October, 2000. No step for recovery of the amounts mentioned in paragraph 9 (a) of the application was filed by the Corporate Debtor, in as much as the Corporate Debtor owed enormous sums of money to such entities. Further, the amount mentioned in paragraph 9 (a) are shown in the records of the Corporate Debtor as ‘Trade Payable’. It is denied that these sums were loans, which were given but these are

rather unrecovered trade receivables which are not traceable. These amounts were recoverable by the corporate Debtor between the period 1995 to October 2000, records for such period cannot be expected to be traceable. With reference to the receivable from Pradip Metals Limited, a total sum of Rs.165.64 Lacs as on 01.04.2001 was receivable, out of which a sum of Rs.132 Lacs was recovered and the remaining sum of Rs.33,63,716/- was written off.[1] Writing off the balances is not the instance of abandoning the asset of the Company. In any event, the Corporate Debtor, its directors and employees cannot be faulted, in as much as the concerned transactions and events are of the period prior to October, 2000.

12. With reference to para IV (9)(d) to (i) of the Application, the advanced received from the clients, cannot be brought within the fray of section 66 of the Code. The Applicant ought not to have made the incorrect allegation that there is any discrepancy in the stock quantity because these are matters, over twenty years old, neither can any stock nor any record pertaining thereto can be expected to be available.

13. Advance payments were made to vendor in the usual course of business, immediately prior to the lockout, i.e., November, 2020. In view of the lockout, the Corporate Debtor did not receive the goods. Hence, as per the transaction audit report, these transactions cannot be qualified as diversion of assets of the Company or can be made a part of the report under section 66 of the Code.

14. Payment of Rs.61,65,000/- was made to Goldline Trac Private Limited, in view of the fact that such entity was threatening criminal action against the director of the Company. Further, there was a sum of Rs.49,00,00,000/- outstanding to Goldline Trac Private Limited and in order to buy peace. It is denied that such payments can be treated as preferential transactions.

[1] Annecure – D of the Reply

Observations and Orders

15. We have heard the Ld. Counsel appearing on behalf of the Applicant and the Respondents and also perused the record.
16. Upon perusal it is apparent that the Corporate Debtor was admitted into CIRP on 28 November, 2019 and the Transaction Audit Report (TAR) primarily deals with the transactions held in the year 2009, which is way prior to the CIRP date.
17. Further, the Resolution Professional has not formed any independent opinion or has come to a determination of his own. He has heavily relied only on the Transaction Audit Report (TAR) sent by the forensic auditor appointed by the Resolution Professional. Hence, in light of the above, ***IA (IB) No. 1277/KB/2020*** in ***C.P. (IB) No. 1400/KB/2018*** is ***dismissed***.
18. Certified copy of this order may be issued, if applied for, upon compliance of all requisite formalities.
19. File be consigned to the record.

(Harish Chander Suri)
Member (Technical)

(Rohit Kapoor)
Member (Judicial)

The Order is pronounced on April 29, 2022

S.LRA