IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA

IA (IB) No. 750/KB/2020
in
CP (IB) No. 1635/KB/2018

In the matter of

An application under sections 43 and 44 of the Insolvency and Bankruptcy Code, 2016 read with section 25(2)(j) of the Insolvency and Bankruptcy Code, 2016

And

In the matter of

Section 10 Insolvency and Bankruptcy Code, 2016.

And

In the matter of

Suraj Fabrics Industries Limited

...Corporate Debtor

And

In the matter of

Santosh Choraria, Resolution Professional of Suraj Fabrics Industries Limited

… Applicant

Versus

1. Bipin Kumar Vohra

… Respondent No. 1

2. Sanjukta Vohra

… Respondent No. 2

3. Arjun Kumar Santhalia

… Respondent No. 3

4. Bengal Recyclers & Fabrications Private Limited [CIN: U51506WB2000PTC091537]

… Respondent No. 4

5. Embee Resources Private Limited [CIN: U51505WB1987PTC041870]

… Respondent No. 5

6. Bengal India Global Infrastructure Limited [CIN: U70101WB2002PLC095018]

… Respondent No. 6

7. Rolex Commercial Private Limited [CIN: U51900WB1985PTC132208]

… Respondent No. 7

Order reserved on: 07.01.2021

Order pronounced on: 18.02.2021

Coram:

Shri Rajasekhar V.K., Member (Judicial)

Shri Harish Chander Suri, Member (Technical)

Appearances (through video conferencing):

For the Applicant

1. Mr. Rahul Auddy, Advocate

For the Respondent No. 1 to 3

1. Mr. Ratnanko Banerji, Senior Advocate
2. Mr. Kanishk Kejriwal, Advocate
3. Ms. Shivangi Thard, Advocate

For the Respondent No. 4

1. Ms. Sristi Barman Roy, Advocate

For the Respondent No. 5

1. Ms. Shreeradha Ghosh, Advocate

2. Mr. Ramendu Agarwal, Advocate

For the Respondent No. 7

1. Ms.Urmila Chakraborty, Advocate
2. Ms. Sweta Mohanty, Advocate

ORDER

Per Rajasekhar V.K., Member (Judicial)

1. This court convened *via* video conferencing.
2. I.A. (IB) No. 750/KB/2020 has been filed Mr. Santosh Choraria, Resolution Professional of Suraj Fabrics Industries Limited seeking directions to be passed upon Respondents to jointly and severally to repay a sum of Rs.11,83,12,330 to the Corporate Debtor in terms of Section 44 of the Insolvency and Bankruptcy Code, 2016 [“Code”].

Brief facts of the case

3. The Adjudicating Authority *vide* an order dated 01.07.2019 admitted the petition i.e. C.P. (IB) No. 1635/KB/2018 initiating Corporate Insolvency Resolution Process [“CIRP”] of Suraj Fabrics Industries Limited, the Corporate Debtor.
4. The Applicant was appointed as Interim Resolution Professional [“IRP] on 01.07.2019 and the Applicant was confirmed as the Resolution Professional [“RP”] by the Committee of Creditors [CoC] in the 1st CoC meeting held on 30.07.2019.
5. The CoC in its 2nd meeting held on 23.08.2019 directed the RP to increase the look back period and take fresh quotes for appointment of forensic auditors. On 09.09.2019, the CoC in its 3rd meeting directed the RP to conduct a forensic audit in the affairs of the Corporate Debtor and approved the appointment of PD Rungta & Co., Chartered Accountants as Forensic Auditor to undertake forensic audit of the Corporate Debtor.
6. The RP appointed PD Rungta & Co. on 12.09.2019 to undertake forensic audit of the Corporate Debtor for the period 01.04.2012 to 30.06.2019.
7. The Forensic Audit submitted a report dated 10.01.2020, certain clarifications were sought by the CoC from the auditor. Thereafter, the Forensic Auditor submitted its detailed report on 12.03.2020 dated 11.03.2020.

Issues

8. The following issues are to be taken into consideration:
   a. Whether the Resolution Professional has filed the application is in consonance with the Code and Regulations governing Corporate Insolvency Process?
   b. Whether this application can survive after the Resolution Plan is approved?

Submission of the Resolution Professional

9. The Ld. Counsel for the RP submits that the forensic audit report was discussed at the CoC meeting held 20.03.2020 and from the perusal of the said report, it appeared that there have been certain transactions which are preferential in nature. The Corporate Debtor had repaid unsecured loans/advances/outstanding balances, details of which are as below:

Entity	Amount	Remark
Bengal Recyclers & Fabrications Private Limited	Rs.7,35,000/-	----
Bengal India Global Infrastructure	Rs.11,12,95,000/-	Out of the above payments amounting to Rs. 10,88,95,000/- were made through series of journal entries and payment routed through Rolex Commercial Private Limited during the period from 07.04.2017 to 07.07.2017.
Rolex Commercial Private Limited	Rs.27,00,000/-	----
Embee Resources Private Limited	Rs.35,82,330/-	-----

10. That the entities are related parties to the Corporate Debtor since the Companies have common Directors and Shareholders. It is further stated that the aforesaid payments have put the unsecured creditors in a beneficial position over the Secured Financial

Creditors, who were not paid or even if paid, at marginal percentage. That the Forensic Auditor in its report has concluded that the repayment of the aforesaid unsecured loans to the related party entities is preferential transaction within the meaning of section 43 of the Code.

Submission of Respondent No. 1 to 3

11. The Ld. Counsel for the Respondent No. 1 to 3 states that the Resolution Professional has filed the Application without forming an opinion as per Section 43(1) of the Code and has relied on the observations of the Forensic Auditor.
12. That the Chartered Accountants have provided a disclaimer in the report that they did not conduct an audit examination and as such they do not provide any opinion, attestation or other forms of assurance in respect to their work or the information upon which their work/report is based.
13. It is further submitted that the Application was affirmed on 25.03.2020 and on 12.08.2020, this Adjudicating Authority approved the resolution plan.
14. The Corporate Debtor has received financial accommodation/advances to the tune of Rs.4,95,000/- from the Respondent No. 4 on different dates in the year 2018-19. In the month of June,2019, an on-account payment of Rs.7,35,000/- was made by the Corporate Debtor, an excess payment of Rs.2,40,000/- made to the Respondent No. 4 was realized in June,2019. It is averred that all these transactions have been done during the normal course of business of the Corporate Debtor and is not a preferential transaction.
15. That the Corporate Debtor had taken an unsecured loan from the Respondent No. 6 in 2012-13 which was payable on demand. That the Corporate Debtor paid Rs.10,88,95,000/- to the Respondent No. 6 through the Respondent No. 7 and Rs.24,00,000/- was repaid directly in the financial years 2017-2018 and 2018-19.
16. The Respondent No. 7 is an NBFC and the Corporate Debtor has taken advances from the Respondent No. 7 in years prior to the review period which were repayable on demand. The Corporate Debtor repaid the amount in 2018-19.
17. State Bank of Bikaner and Jaipur assigned the debt of the Corporate Debtor to Phoenix ARC Private Limited. Payment of Rs.2,84,60,123/- was made by the Respondent No. 5 from the year 2015-16 to Phoenix ARC Private Limited on behalf of the Corporate

Debtor. The Corporate Debtor made a payment of Rs.35,82,330/- to the Respondent No. 5 on 03.07.2018. Such payment was in the nature of reimbursement done in the usual course of business and done as per agreement between the Corporate Debtor and the Respondent No. 5.

18. The Corporate Debtor made the said payments after receiving demand notices from the Respondent Nos. 5, 6 and 7 to avoid legal proceedings. During the look back period, an aggregate sum of Rs.2,55,32,786/- was paid to creditors of the Corporate Debtor who were not related parties, no special treatment was given to the Respondents in repayment of dues.

19. The Respondent Nos. 4,5 and 7 have adopted the submissions of the Respondent No. 1 to 3. Respondent No. 6 was represented by Ms. Anamika Gayen on the previous date i.e. 20.11.2020. .

Timeline of events

20. Before entering into the merits of the case, it is important to consider whether the RP has adhered to the timeframe in bringing the case for avoidance of preferential transactions in light before us, hence, it is important to note the timeline of the present application. Regulation 35A of the Insolvency and Bankruptcy Board of India [Insolvency Resolution Process for the Corporate Persons] Regulations, 2016 [CIRP Regulations] provides specific time frame within which the RP has to form an opinion and apply before the Adjudicating Authority. To make it simpler, a chart to show whether the RP has followed the timeframe is given below:

Sl. No.	Event	Timeline according to CIRP Regulations	Expected Date	Actual Date	Days from 01.07.2019
1.	Initiation of CIRP	-----	-----	01.07.2019	----
2.	Appointment of IRP	-----	-----	01.07.2019	0 days
3.	Appointment of RP	-----	-----	30.07.2019	29 days

Sl. No.	Event	Timeline according to CIRP Regulations	Expected Date	Actual Date	Days from 01.07.2019
4.	Resolution passed for appointment of forensic auditor	01.07.2019 + 75 days	13.09.2019	09.09.2019	70 days
5.	Forensic Auditor Appointed	-----	-----	12.09.2019	73 days
6.	Report Submitted	-----	-----	11.03.2020	254 days
7.	Application for approval of Resolution Plan	-----	-----	14.07.2020	379 days
8.	Application under section 43 filed on	01.07.2019 + 135 days	13.11.2019	24.07.2020	389 days
9.	Approval of Resolution Plan	----	-----	12.08.2020	408 days

Findings

21. Before entering into the merits of the case, it is important to examine whether the RP has adhered to the timeframe in bringing the application for avoidance of preferential transactions under section 44 of the Code. From the above table, it is clear that the timeline as provided in regulation 35A CIRP Regulations have not been adhered to. That RP has filed the application on the 389th day of the CIRP period. Moreover, the most vital essence of regulation 35A(3) of the CIRP Regulations is missing in the present case, i.e., the determination to be made by the RP that there are preferential transactions. The RP has heavily relied on the Forensic Auditor's Report and has not given any independent reasons for determination of preferential transactions other than the explanation as per the Forensic Auditor's report. We are also satisfied with the explanations preferred by the Respondents in regard to the transactions in question.
22. We cannot avoid the fact that the RP had filed an application for approval of the Resolution Plan on 14.07.2020 and thereafter filed an application under Section 43 of the Code on 24.07.2020. The Resolution Plan was approved on 12.08.2020. On perusal

of the order dated 12.08.2020, it is apparent that the RP had prayed for urgent hearing of the application for approval of the Resolution Plan. The RP was duty bound to file the application for preferential transaction within time and also seek for urgent hearing of the application before the plan is approved. Once the Resolution Plan is approved, the Corporate Debtor is managed by a new management and the RP becomes *functus officio*. An application for avoidance of preferential transaction cannot be carried on by the Resolution Professional on behalf of the Corporate Debtor. The order passed by the Hon'ble High Court of Delhi in ***Venus Recruiters Private Limited* v. *Union of India and Others*[1],** (paras 73, 77, 80, 89, 92) is crystal clear with respect to the second issue.

23. The feeling is inescapable that the RP has filed the application under section 43 read with section 44 of the Code only to avoid adverse scrutiny on the part of the IBBI and not with any real intention to pursue the alleged preferential transactions to their logical end. That may be the only plausible reason for filing the section 43 application after filing the application for approval of resolution plan.
24. Given the circumstances of the case, we are satisfied that the prayer made in the IA should not be allowed.
25. Therefore, the **I.A. (IB) No. 750/KB/2020** shall stand dismissed.
26. 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.
27. Certified Copy of this order may be issued, if applied for, upon compliance of all requisite formalities
28. File be consigned to the records.

[Harish Chander Suri]
Member [Technical]

[Rajasekhar V.K.]
Member [Judicial]

18th day of February, 2021.

GGRB[LRA]

[1] 2020 SCC Online Del 1479, dated 26.11.2020