IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
KOLKATA
I.A No. 600/KB/2021
In
C.P (IB) No. 1198/KB/2018

An application under Section 66 of the Insolvency and Bankruptcy Code, 2016 read with the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

In the matter of

Asset Reconstruction Company (India) Ltd.

...Financial Creditor

-Versus-

Dagcon (India) Pvt. Ltd.

…Corporate Debtor

And

Mr. Bimal Agarwal (Resolution Professional)

...Applicant

Versus

Arunendu Sarkar & Ors.

... Respondents

Date of Hearing: 19/04/2022
Date of pronouncement: 14/07/2022

Coram:

Shri Rohit Kapoor, Member (Judicial)

Shri Harish Chander Suri, Member (Technical)

Appearances:

For RP	:	Mr. Rishav Banerjee, Adv.
		Mr. Arun Kumar Gupta, PCS
		Mr. Naresh Kr. Agarwala, Adv.
		Mr. Siddhanth Makkar, Adv
For successful Resolution Applicant	:	Mr. Varun Kothari, Adv.
For R-1 in IA/600/2021	:	Mr. Abhidipto Tarafder, Adv.
For R-2 & R-3 in IA/600/2021	:	Mr. Arup Nath Bhattacharyya, Adv.
		Ms. Sayani Das, Adv.
		Ms. Sreetama Biswas, Adv.
For R-4 in IA/600/2021	:	Mr. Aritra Basu, Adv.

O R D E R

Per: Rohit Kapoor, Member (Judicial).

1. The Court convened through hybrid mode.

2. The instant application under Section 66 & 67 of Insolvency and Bankruptcy Code 2016 (hereinafter referred to as the Code) has been filed by the Resolution Professional seeking the following reliefs:

    a. *As this Tribunal may be pleased to allow this instant application and condone the delay in filing the said application due to non-co-operation by the suspended Directors and hardships faced to gather relevant documents/information to determine the doubtful transaction carried out in the name of the Corporate Debtor;*

    b. *To direct Respondent No. 1 & 2 to make deposit of Rs. 10,54,00,00/- reported to have been withdrawn in cash in the account of the Corporate Debtor being A/C No. 01900202148899 maintained with UCO Bank;*

c. To direct Respondent No. 3 to make deposit of Rs. 15,20,000/- reported to have been fraudulently transferred to DAG Creative Media Pvt. Ltd. in the account of the Corporate Debtor being A/C. No. 01900202148899 maintained with UCO Bank;

d. To direct Respondent No. 2 to make deposit of Rs. 1,00,700/- reported to have been fraudulently transferred to Gour Gopal Sarkar, father of Rana Sarkar in the account of the Corporate Debtor being A/C No. 01900202148899 maintained with UCO Bank;

e. To direct Respondent No. 4 to make deposit of Rs. 63,50,000/- reported to have been fraudulently transferred to Snigdha Sarkar, wife of Late Arabinda Sarkar in the account of the Corporate Debtor being A/C No. 01900202148899 maintained with UCO bank;

f. To direct Respondent No. 1 to make deposit of Rs. 26,56,000/- reported to have been fraudulently transferred to Arunendu Sarkar in the account of the Corporate Debtor being A/C. No. 01900202148899 maintained with UCO Banks.

3. Submissions of applicant are summarized herein below;

i. The CIRP commenced vide order dated 20/11/2019 and Applicant was appointed as the Interim Resolution Professional. That in the first COC Meeting, he was confirmed as RP and the Hon'ble NCLT Kolkata vide its order dated 02/01/2020 confirmed his appointment as Resolution professional (Herein after referred as RP).

ii. The suspended Directors of the corporate debtor had been non-co-operative since the commencement of CIRP. Even though the Hon'ble NCLT, Kolkata had directed them to handover the relevant information and documents to the RP pursuant to an application filed under Section 19(2), however till date no relevant information or documents were handed over. It is also pertinent to mention that the Hon'ble NCLAT vide order dated 04.02.2020 in the matter of *Rana Sarkar Versus Asset Reconstruction Company (India) Ltd. & Anr* also had directed the suspended management of the Corporate Debtor to handover the assets and records of the Corporate Debtor immediately. Copy of NCLAT order dated 04/02/2020 is annexed herewith and marked as **Annexure- A5.**

iii. The RP in order to comply with the duties made efforts to collect the bank statements from 20 different banks where accounts were maintained of the corporate debtor and based on the public documents available opined that there were doubtful transactions carried out in the name of the corporate debtor.

iv. Thereafter the RP appointed Neha B Agarwal and Co. as the transaction auditor to conduct the transaction audit for the corporate debtor. Upon receiving the transaction audit report, the Resolution Professional determined the following truncations as fraudulent transactions and preferred this application.

v. Large sum of money amounting to Rs. 10.54 crores was withdrawn in cash from FY 2011-12 to 2015-16. It was observed from the bank statement, during the said financial years, the corporate debtor had been realizing certain amounts from the sundry debtors and huge amounts were being withdrawn in cash. The summary of cash withdrawal is as follows:

Sl. No.	***Financial Year***	***Amount of Withdrawal (in lakhs)***
1.	2011-12	693.00
2.	2012-13	203.00
3.	2013-14	60.00
4.	2014-15	09.00
5.	2015-16	89.00
	Total	***1054.00***

vi. Moreover, with no sufficient explanation received from the suspended Directors, withdrawing huge amount of cash in different financial years by the suspended Directors with no sufficient reason ensures that the act was done with an intention to siphon off funds.

vii. It was further observed that Rs. 15.20 lacs were refunded as unsecured loan to Dag Creative Media Pvt. Ltd. That payment received from Dag Creative Media Pvt. Ltd. was Rs. 52,60,000/-, whereas payment from the account of the corporate debtor to Dag Creative Media Pvt. Ltd. was Rs. 67,80,000/-. It is submitted that Rs. 15,20,000/- was paid in additional to the amount received from such creditor. It is very important to mention that Dag Creative Media Pvt. Ltd. was incorporated on 07/10/2010 and it could be observed from the ROC records of Dag Creative Media Pvt. Ltd. that Mr. Rana Sarkar, the suspended Director of the corporate debtor was also the Director of Dag Creative Media Pvt. Ltd.

viii. It could be further observed from the ROC records that Mr. Rana Sarkar resigned from Dag Creative Media Pvt. Ltd. on 27/05/2016. That from the ROC records of Dag Creative Media Pvt. Ltd. it is clear that the additional amount transferred to Dag Creative Media Pvt. Ltd. was with an intention to siphon off money from the account of the corporate debtor, thereby defrauding the creditors.

ix. It is said that Rs. 63,50,000/- was taken as an unsecured loan from Snigdha Sarkar and the same was refunded in full in F.Y. 2012. It is pertinent to mention that the corporate debtor had also availed loan facilities from Indian Overseas Bank. The account of the corporate debtor was declared as a Non-Performing Asset on 29th March, 2012. It is very important to mention that Snigdha Sarkar is the wife of one of the suspended Directors namely Arabinda Sarkar, now deceased and therefore Snigdha Sarkar should be considered as a related party to the corporate debtor. It is submitted that the payment made to Snigdha

Sarkar ignoring the secured financial creditor is an act to maliciously siphon off funds thereby defrauding the secured creditors.

x. Further that a payment of Rs. 26.56 lakhs were made to Mr. Arunendu Sarkar as reimbursement of different expenses made by him for company's work (mostly paying to suppliers). It is determined that Arunendu Sarkar had made payment of Rs. 56,57,000/- to the HDFC account of the corporate debtor and the payment received from the same account of the corporate debtor was Rs. 83,12,800/-. It is therefore submitted that Rs. 26,55,800/- was paid in additional to Arunendu Sarkar. Further based on the reply of the suspended Director that Rs. 26,55,800/- was paid as an advance to be paid to the suppliers in unsatisfactory per se. It is submitted that bank accounts are maintained in the name of the corporate debtor and any payment to suppliers relating to business should be made from the bank accounts of the corporate debtor and the same should not be paid as an advance to the Director in order to make payment to the suppliers. It is thereafter submitted that the act is done with a malicious intention to siphon off money from the account of the corporate debtor and thereby defraud the creditors of the corporate debtor.

xi. It submitted that Rs. 16.86 lakhs were made to Mr. Arabinda Sarkar as an advance. Mr. Arabinda Sarkar is also a suspended Director, however the advance made to Arabinda Sarkar is not realisable as Mr. Sarkar has expired on 10/01/2021, however, the advance payment as is reflecting is classified as a fraudulent transaction, as huge amount was siphoned off by the suspended Directors of the corporate debtor.

xii. It is further stated in the instant application in pursuant to order passed by this Adjudicating Authority on 2nd of January, 2020, applicant had sent several letters and reminders to erstwhile Directors of the Corporate Debtor on 14.01.2020, 14.03.2020, 17.03.2020, 08.06.2020, 21.07.2020, 01.09.2020 respectively, however no books of accounts or relevant information were made available by the Directors.

xiii. Suspended directors wilfully and deliberately did not cooperate with the applicant and did not provide necessary information and documents in compliance to the orders passed by this Adjudicating Authority and also Hon'ble NCLAT on 2nd of January, 2020 and 4th of February, 2020 respectively.

xiv. The applicant made all efforts by writing to public and private sector banks, visiting the branches to collect bank statements of the Corporate Debtor and upon conducting due diligence the applicant found there were several suspicious transactions conducted by the suspended management. Copy of bank account details of the Corporate Debtor maintained with different banks as collated by Resolution Professional has been annexed as Annexures- A6. With a view to determine these transactions more closely the applicant appointed a transaction auditor vide letter dated 18th of February, 2021.

xv. The transaction auditor conducted the transaction audit and submitted its report on 7th of June, 2021. The said report was prepared based on 20 different bank statements as procured by applicant and documents available on public domain. The report of the transaction auditor has been placed on record with this IA from page 59 to 108 as Annexure – A8. The details of amount found to be fraudulent transaction has been furnished in the tabular form at page 20 of this application. The details of these transactions as to be found fraudulent has been given by the applicant/Resolution Professional at page 21, 22, 23, 24, 25, 26, 27, 28 and is supported by the documents as Annexure – A9 to A18. As is evident from the contends of the applicant in this application each and every transaction has been determined separately by the applicant while concluding the transactions to be fraudulent.

4. There are 4 respondents in the present application and all 4 have filed their separate reply affidavits. The reply filed by respondent is summarized herein below; -

Reply by respondent No. 1:

i. Respondent has denied the allegations as raised by the applicant in the instant application. It is the stand taken by respondent No. 1.

ii. The Resolution Professional has filed its application without looking into records available with him. He did not consider the business of the Corporate Debtor. He did not take into consideration various aspects of construction activities and contracts and the circumstances under which it suffered and finally went into number litigations. The Corporate Debtor was executing number of projects and the details of which are mentioned in the reply.

iii. The Income Tax Department due to non-filing of returns-initiated proceedings against Corporate Debtor and demanded tax on the basis of previous returns so uploaded by the Corporate Debtor. Part of the demand has been realized by the Income Tax Department. In the circumstances as mentioned from page 5 to 22 it cannot be possibly contended that business of the Corporate Debtor was carried for the purposes to defraud the creditors or with an intent to defraud the creditors.

iv. The determination of amount of Rs. 10.54 crores as fraudulent by Resolution Professional is unjustified and without basis. With a view to rebut the contentions of applicant in this regard, respondent No. 1 has denied the opinion of Resolution Professional from page 24 to 36 of its reply. Respondent submitted all the documents as available with him and did not have anything else. Allegation of no non-cooperation by the applicant is in-correct.

v. The respondent has further denied the transactional audit was conducted at all. It is further based merely on the bank statements and the ledger on the basis of the bank transactions only. There was no material before the Resolution Professional to arrive at the opinion as mentioned by him in the instant application.

vi. In rebuttal to contentions of applicant the transactions to be fraudulent, reliance is placed on documents along with this affidavit. Resolution Professional has ignored these documents and the ground realities regarding its construction business and the manner in which it was conducted. Resolution Professional has further ignored various aspects of the transactions alleged to be fraudulent and has formed his opinion without any basis. The respondent is an old aged person and initially there was delay in providing the documents however, the documents whatever were provided by him to the Resolution Professional and there was no intentional non-cooperation.

vii. There is no compliance of 35A of CIRP Regulations 2016. It is denied that reply of directors was not satisfactory. The auditor has not even considered most of the matters and the application could not have filed or that any fraudulent transaction ever happened as alleged. The opinion formed is not an independent opinion as required under law and merely is based on the transaction audit which also lacks any such details or documents to arrive at the conclusions that the transactions were fraudulent.

Reply of Respondent No. 2:

Reply filed by respondent No. 2 is by and large similar to the reply filed by the respondent No. 1 is summarized herein below:

i. The opinion of Resolution Professional as well as the transactional auditor is based on assumptions only. There was no material or record of the company available before Resolution Professional for forming his opinion.

ii. The answering respondent resigned from directorship on 2016 and he did not attend any meetings after his resignation and therefore he cannot be treated as a past director.

iii. Application by RP, which is merely on audit report is not maintainable.

iv. Respondent was a director of Corporate Debtor until 2013 from 2010-11. There were disputes amongst directors which were escalated to such an extent that a general diary was lodged on 24th of January, 2013. The answering respondent was not in control of the affairs of the Corporate Debtor when the disputes arose in 2010-11. There was large outstanding that were due to the company and a series of litigations. The respondent has given reference to various litigations and the expenses incurred by him in conducting these litigations in its reply. The Resolution Professional has not taken these aspects regarding various litigations into consideration while forming its opinion.

v. This application is deserved to be rejected, based on no material.

The reply filed by respondents 3 and 4 are also in similar lines as of respondent Nos. 1 and 2 above. Respondents No. 3 and 4 are summarized as under:

i. It is contented by the respondents in these affidavits that the Resolution Professional has proceeded on merely assumptions and there is no independent formation of his opinion.

ii. This application by RP has been filed beyond the period prescribed under 35A. The appointment of transactional auditor is void as no opinion was formed within period of 75 days under Regulation 35A.

iii. Respondent No. 3 was not given any opportunity to file any document. There is not document available with the answering respondent. Respondent No. 3 never received any preferential benefit from the Corporate Debtor and on the contrary a sum of Rs. 3.76 lacs approximately are due from the Corporate Debtor to respondent No. 3.

The Respondents 3 and 4 denied and disputed the allegations raised in the application.

iv. The instant application lacks any determination of the transaction with respect to respondents and deserves to be dismissed.

ORDERS

5. We have heard the Ld. Counsel for the parties and perused the record. After consideration of the contentions of the parties and the record produced before along with the pleadings, we find that:

A. At page 66 i.e., part of transaction audit reports a methodology of audit for conducting the transaction audit of Corporate Debtor was formulated. One of the important features of this methodology included decides analysing the documents and discussions *with the Resolution Professional.*

B. From the averments contained in the application we findthat opinion of Resolution Professional while filing the instant application is not based merely on the report of the transaction audit as contended by the respondents. It was only after the satisfaction of the Resolution Professional it was thought appropriate to appoint the transactional auditor to determine the transactions more closely and in detail.

It may be apt to refer to law down by Hon'ble Supreme Court in case of ***Anuj Jain vs. Axis Bank Limited and Ors., MANU/SC/0228/2020***, observed in paragraph 29.1 as follows:

"29.1. However, we are impelled to make one comment as regards the application made by IRP. It is noticed that in the present case, the IRP moved one composite application purportedly Under Sections 43, 45 and 66 of the Code while alleging that the transactions in question were preferential as also undervalued and fraudulent. In our view, in the scheme of the Code, the parameters and the requisite enquiries as also the consequences in relation to these aspects are different and such difference is explicit in the related provisions. As noticed, the question of

intent is not involved in Section 43 and by virtue of legal fiction, upon existence of the given ingredients, a transaction is deemed to be of giving preference at a relevant time. However, whether a transaction is undervalued requires a different enquiry as per Sections 45 and 46 of the Code and significantly, such application can also be made by the creditor Under Section 47 of the Code. The consequences of undervaluation are contained in Sections 48 and 49. Per Section 49, if the undervalued transaction is referable to Sub-section (2) of Section 45, the Adjudicating Authority may look at the intent to examine if such undervaluation was to defraud the creditors. On the other hand, the provisions of Section 66 related to fraudulent trading and wrongful trading entail the liabilities on the persons responsible therefor. We are not elaborating on all these aspects for being not necessary as the transactions in question are already held preferential and hence, the order for their avoidance is required to be approved; but it appears expedient to observe that the arena and scope of the requisite enquiries, to find if the transaction is undervalued or is intended to defraud the creditors or had been of wrongful/fraudulent trading are entirely different. Specific material facts are required to be pleaded if a transaction is sought to be brought under the mischief sought to be remedied by Sections 45/46/47 or Section 66 of the Code. As noticed, the scope of enquiry in relation to the questions as to whether a transaction is of giving preference at a relevant time, is entirely different. Hence, it would be expected of any resolution professional to keep such requirements in view while making a motion to the Adjudicating Authority."

Contentions of the applicant as noted and summarized hereinabove which are supported by the record referred hereinabove, we findthat the opinion of Resolution Professional (RP) has been arrived at and in the manner as per the law laid down in the above referred case

The opinion of Resolution Professional has been formed on the basis of the transactions noted individually from page 15 to 28 and supported by various documents in the form of Annexure- A3 to A18. There has been an independent exercise conducted by the Resolution Professional and this is evident from the averments contained in these paragraphs.

C. Further as noted above in summary of arguments, there has been a detailed consideration on various aspects by the Resolution Professional while forming his opinion with respect to these transactions as fraudulent and after affording respondents sufficient opportunity to put forward their case. This is evident from number of E mails referred by RP in this application and noted above.

D. In view of the above, we find the plea of the respondents that the Resolution Professional did not form his independent opinion and merely relied upon the transaction report is explicitly incorrect and is therefore rejected.

E. We also may like to add here, this Appellate Authority does not sit in appeal over the opinion formed by the Resolution Professional. This Adjudicating Authority is only required to see there has been a due compliance of the provisions of law and in the present case we find Resolution Professional has complied with the provisions of law and the parameters laid down by the Hon'ble Supreme Court in above referred judgement while forming his opinion the transactions to be fraudulent.

F. As far as the time limit under Section 35A is concerned, the objection of the respondents is liable to be rejected for the following reasons:

i. Delay on account of pandemic and its consequential effect on overall working was impacted as is evident for the specific averments contained in this context in paragraph 4, 5, 6, 7 of this application. It also be noted here there was non-cooperation by the suspended board of directors in furnishing the required information to the Resolution Professional and the same is reflected from two orders referred above including one order passed by National Company Law Appellate Tribunal.

ii. In view of the circumstances mentioned by the applicant, we hereby condone the delay of the applicant in filing this application. The detailed exercise conducted by the applicant speaks in itself of the reasons that consumed some time while forming his opinion.

iii. Further, as held by Hon'ble NCLAT in ***Aditya Kumar Tibrewal v. Om Prakash Pandey [Company Appeal (AT) Insolvency No. 583 of 2021]*** the period prescribed under Regulation 35A is only directory and not mandatory.

"The expression "shall" in regulation 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 33 Company Appeal (AT) Ins. No. 583 of 2021 Adjudicating Authority for appropriate relief on or before 135th day of the Insolvency Commencement Date" are only directory."

6. For the foregoing reasons, this application is allowed as the transactions referred in application by RP are found to be fraudulent in terms of Section 66 of the Code and as a consequence of which respondents 1 to 4 are directed to deposit amounts as asked for in prayer part of the application and referred herein above along with interest @ 8 % per annum within one month from today, i.e., the date of pronouncement of the Order. IA stands disposed of.

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

Harish Chander Suri
Member (Technical)

Rohit Kapoor
Member (Judicial)

The Order is pronounced on 14th day of July, 2022

S, LRA