

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV**

In the matter of

IA-399/2022

Mr. Saurabh Kumar Tikmani

... Applicant

V/s.

Talwalkars Club System Private Limited

... Respondents

IN

CP (IB) No.1056/MB-IV/2020

Under Section 7 of the IBC, 2016

In the matter of

Axis Bank

... Financial Creditor

V/s.

Talwalkar Healthclubs Limited

... Corporate Debtor

Order Pronounced on: **02.08.2023**

Coram:

Mr. Prabhat Kumar

Mr. Kishore Vemulapalli

Hon'ble Member (Technical)

Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Applicant:

Mr. Yashish Chandra a/w mr.
Ramakant Rai, Mr. Ravin Kapur,
and Mr. Shivam Sharan, Adv.

For the Respondents:

None present.

ORDER

Per: Kishore Vemulapalli, Member (Judicial)

1. The present Application is filed by Mr. Saurabh Kumar Tikmani, the Resolution Professional (RP) of Talwalkars Better Value Fitness Limited (Corporate Debtor) under Section 45 of the Insolvency and Bankruptcy Code, 2016 (Code) read with Rule 11 of the National Company Law Tribunal Rules, 2016 (NCLT Rules). Later on, the Corporate Debtor was ordered to be liquidated and Mr. Gajesh Labhchand Jain was appointed as Liquidator, who came to be substituted as the applicant in the present application.
2. The applicant has determined the notional loss to the Corporate Debtor, arising out of interest free advances extended by the Corporate Debtor to its related companies, at the rate of 12% per annum for the period from the date the money was advanced till the date of realization to be in nature of undervalued transactions under section 45 of the IBC. The details of such amounts is as under –

Sr. No.	Respondent/Party Amount	(in INR Crore)	
1.	Omnibus Infrastructure Private Limited	2.81	
2.	Dr. Mickey Keki Mehta	0.67	
3.	Dr. Mickey Mehta's 360 Degree Wellness Temple Private Limited	0.36	
4.	Talwalkars Club Systems Private Limited	6.39	
	Total	10.23	

1. The Corporate Debtor is a listed public company and incorporated on 24.04.2003 under the Companies Act, 2013, with the Registrar of Companies (RoC), Maharashtra, Mumbai, Its Corporate Identity Number (CIN) is L92411MH2003PLC140134. Its registered office is at 801-813, Mahalaxmi Chambers 22, Bhulabhai Desai Road, Mumbai-400026. While the registered office was allegedly changed to Ground Floor, Mangal Simran, Off Turner Road, 20" Road, Bandra West, Mumbai - 400050", however the Hon'ble Civil Court of Greater Bombay vide order dated 27.10.2020 has stayed the change of the registered address of the Corporate Debtor.
2. Pursuant to the appointment of Applicant as the RP of the Corporate Debtor, the transaction auditor was appointed by the Applicant, namely Mazars Business Advisors Private Limited (Transaction Auditor). The Transaction Auditor, on 21.12.2021, submitted its audit report in the corporate insolvency resolution process (CIRP) of the Corporate Debtor (Transaction Audit Report). The Transaction Audit Report highlighted amounts shown as receivable as 'loans and advances given' in balance sheet of the Corporate Debtor for the financial year 2018-19 and subsequently adjusted the receivable amount on the basis of books of account for the subsequent period.
3. The Applicant has claimed that these loan and advances were extended free of interest while the Corporate Debtor was incurring interest on the loans obtained by it from the Financial Creditors. Accordingly, the applicant has computed notional loss of income on account of not charging interest on the basis of 12% (taking average landing rate of SBI for the year of 2018 as bench mark). On the basis of these facts the applicant has filed this application for directions to the Respondents to pay sums as stated in column 4 of the table at para 2 herein above. The applicant has also sought directions to the respondents to pay the amount stated in column 3 of the aforesaid table.
4. This bench has perused the material on record and heard the counsel.
5. Sections 45 and 46 of the IBC reads as follows:

45. Avoidance of undervalued transactions.

(1) If the liquidator or the resolution professional, as the case may be, on an examination of the transactions of the corporate debtor referred to in sub-section (2) determines that certain transactions were made during the relevant period under section 46, which were undervalued, he shall make an application to the Adjudicating Authority to declare such transactions as void and reverse the effect of such transaction in accordance with this Chapter

(2) A transaction shall be considered undervalued where the corporate debtor-

(a) makes a gift to a person; or

(b) enters into a transaction with a person which involves the transfer of one or more assets by the corporate debtor for a consideration the value of which is significantly less than the value of the consideration provided by the corporate debtor. and such transaction has not taken place in the ordinary course of business of the corporate debtor.

46. Relevant period for avoidable transactions -

(1) In an application for avoiding a transaction at undervalue, the liquidator or the resolution professional, as the case may be, shall demonstrate that-

(i) such transaction was made with any person within the period of one year preceding the insolvency commencement date; or

(ii) such transaction was made with a related party within the period of two years preceding the insolvency commencement date.

(2) The Adjudicating Authority may require an independent expert to assess evidence relating to the value of the transactions mentioned in this section"

6. Section 45 of the Code considers a transaction as undervalued where it is entered for a consideration which is significantly less than the value of the consideration provided by the Corporate Debtor. In the present case it is undisputed fact that the money advanced to the related party as stated in the table above are recoverable from them irrespective of the fact whether they

are undervalued transaction or not. Accordingly, this bench is of the view that these amounts, still being the property of the Corporate Debtor as receivable, those transactions cannot said to have resulted into transfer of any asset of the Corporate Debtor hence, this bench feels that these amounts cannot be held to be in nature of undervalued transaction u/s 45 of the Code. Nonetheless, the Corporate Debtor is entitled to recover these amounts as its assets from these parties.

7. As regards claim of notional interest being in nature of undervalued, this bench is of the considered view that grant of loans without stipulation of interest thereon, per se, cannot said to be resulting into undervalued transaction. The applicant has made out its case on the basis of finding of transaction auditors and has not brought on record any cogent evidence to substantiate its claim that the said transaction has not taken place in the ordinary course of business of the Corporate Debtor. Nonetheless, this bench finds that section 66 of the Code provides that if the business of Corporate Debtor has been carried on for any fraudulent purpose, the persons who are knowingly parties to such purpose can be made liable to make contributions to the assets of the Corporate Debtor. This bench finds that section 186 (7) of the Companies Act, 2013 prohibits a company from giving a loan to any person at a rate of interest lower than the prevailing yield of government security closest to the tenor of the loan. Accordingly, this bench is of the view that grant of unsecured loan without stipulation of interest thereon is in contravention of the Companies Act, 2013 and such act can be said to be a fraudulent purpose under section 66 of the Code.
8. In view of the aforesaid discussion, this bench does not feel that the present transactions are classifiable u/s 45 of the Code. Instead, this bench is of the view that the loss of notional interest, as claimed in the present petition, can be recovered from the directors of the Corporate Debtor as contributions u/s 66 of the Code because they were the persons responsible for such fraudulent act of granting unsecured loan to the related parties.

9. The IA-399/2022 is **allowed** in terms of aforesaid directions **and disposed** of accordingly.

Sd/-

PRABHAT KUMAR
Member (Technical)

02.08.2023

Sd/-

KISHORE VEMULAPALLI
Member (Judicial)