

Through Videoconference

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT No. - I

*** **

IA No. 734/MB/2021

in

C.P. (IB) No. 1399/MB/2017

Formation Textiles LLC
a limited liability company incorporated
under the laws of the United States of
America, having its principal office at
16 Arcadian Way, Paramus,
New Jersey 07625, United States
of America.

... *Applicant*

V/s

1. Bank of Baroda, a body corporate constituted by and under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, with its head Office at Baroda House, Mandvi Branch, Gujarat and acting through its Corporate Financial Services Branch, 3rd floor, 10/12, Mumbai Samachar Marg, Fort, Mumbai – 400 001.
2. Mandhana Industries Limited (GB Global) a public limited company incorporated under the Companies Act, 1956 and having its registered office at Plot No. C-3, M.I.D.C., Tarapur Industrial Area Boisar, Maharashtra 401 506, India
3. Mrs. Charu S. Desai
The Resolution Professional (RP)
for Respondent No. 1, having Insolvency
Professional Registration No.
IIBI/1PA-001/IP-P00434 2-17-18/19757

having address at Ernst & Young LLP,
17 Floor, The Ruby,
29 Senapati Bapat Marg,
Dadar (W), Mumbai – 400 028.

4. Dev Land and Housing Pvt Ltd
10th Floor, Dev Plaza, Opp. Andheri,
Fire Station S. V. Road, Andheri (West),
Mumbai – 400 058.
5. Indian Bank
Prabhadevi Branch,
No. 1, Sane Guruji Premises,
386, Veer Savarkar Marg,
Opp. Siddhi Vinayak Temple,
Prabhadevi, Mumbai – 400 025.
6. State Bank of India
IFB, Andheri, 102 Natraj,
194, Sir M. V. Road,
W.E. Highway Metro Junction,
Andheri (E), Mumbai – 400 069.
7. Punjab National Bank (Bangalore)
Large Corporate Branch,
Centenary Building, 28 M. G. Road,
Bangalore – 560 001.
8. Axis Bank Limited,
Axis House, 7th Floor,
C-2 Wadia International Centre,
Pandurang Budhkar Marg,
Worli, Mumbai – 400 025.
9. Allahabad Bank,
Industrial Finance Branch,
2nd Floor, Allahabad Bank Building,
37, Mumbai Samachar Marg,
Fort, Mumbai – 400 023.

10. Corporation Bank Limited
Mid – Corporate Branch,
Veena Chambers, 21, Dalal Street,
Fort, Mumbai – 400 023.
11. Bank of India Limited
Large Corporate Branch,
4th floor, Bank of India Building,
Fort, Mumbai – 400 001.
12. Saraswat Cooperative Bank Limited
SME Branch – Dadar,
B-1, G 01, Marathon Innova Nextgen,
Lower Parel, Mumbai – 400 013.
13. Canara Bank,
Treasury & investment, 6th floor,
Canara Bank Building, BKC,
Bandra – 400 051.
14. L&T Financial Services,
802, 8th floor, Swastic Chambers,
CST Road, Chembur, Mumbai – 400 071.
15. Indian Overseas Bank (Chennai)
Treasury (Domestic) Central Office,
763, Anna Salai, Chennai – 600 002.
16. Karur Vyasya Bank,
Unit Nos. 1 & 2, Everest Grande,
Mahakali Caves Road, Andheri (E),
Mumbai – 400 093.
17. Small Industries Development
Bank of India, 1 & 2 Dhana Laxmi
Residency, Near Hotel Tip Top Plaza,
L.B.S. Marg, Thane (West) – 400 602.

18. Balakrishna Industries Limited,
BKT House, C-15, Trade World,
Kamla Mills Compound, Senapati
Bapat Marg, Lower Parel, Mumbai
400 013.
19. ICICI Bank Limited,
Shop No. 2, 4, 5, Centre Point Building
Baba Saheb Ambedkar Road,
Currey Road, Mumbai – 400 012.
20. Purshottam Mandhana
154-155, Kewal Industrial Estate,
Senapati Bapat Road,
Mumbai – 400 013.
21. Bombay Rayons Fashion Limited,
3rd Floor, DLH, Mangal Murti Building,
Linking Road, Santacruz (West),
Mumbai – 400 054.
22. Bloomcraft Apparels Private Limited,
SW 49/50 KIADB Apparel Park,
Arehalli Guddadahalli,
Karnataka – 561 205.

... *Respondents*

In the matter of:

Bank of Baroda	...	<i>Financial Creditor</i>
V/s		
Mandhana Industries Limited (now GB Global Limited)	...	<i>Corporate Debtor</i>

Order Dated: 19.05.2021

CORAM:

Janab Mohammed Ajmal, Hon'ble Member (Judicial)
Shri V. Nallasenapathy, Hon'ble Member (Technical)

Appearance:

- For the Applicant: Mr Amrut Joshi with Mr Nikhil Mishra, Mr Ranjit Agashe, Mr Niranjan Karmarkar and Mr Prakhar Tandon, Advocates i/b Sudha Dwivedi and Associates.
- For Respondent No. 1 and Respondent Nos. 5 to 19: Mr Gaurav Joshi, Senior Counsel with Associates.
- For Respondent Nos. 2 & 3: Ms Pooja Mahajan, Advocate with Associates.
- For Respondent Nos. 4 & 22: Mr Shyam Kapadia, Advocate with Associates.
- For Respondent No. 20: Mr Shadab S. Jan, Advocate.
- For Respondent No. 21: Mr Sunil Vyas, Advocate.

Per: V. Nallasenapathy, Member (Technical)

ORDER

1. The Applicant (Formation Textiles LLC/FTL), the former Successful Resolution Applicant of the Corporate Debtor, who could not implement the Resolution Plan, through this Application is before us seeking the following reliefs:

INTERIM PRAYER-

- a. *Pending the hearing and final disposal of this Application, restrain the Resolution Professional and Committee of Creditors of GB Global Ltd. (erstwhile Mandhana Industries Ltd.) from handing over the management of the Corporate Debtor to the New Resolution Applicant.*
- b. *Pending the hearing and final disposal of this Application, this Tribunal be pleased not to pass any orders with regards to approval of Resolution Plan of the new Resolution Applicant.*

PRAYER-

- a. *Declare the New Resolution Applicant as ineligible as prescribed under the provisions of the Code;*
- b. *Reject the IA No. 19 of 2021 filed by the Resolution Professional for approval of Resolution Plan submitted by the New Resolution Applicant;*
- c. *Direct the Resolution Professional to take appropriate actions and file appropriate applications before this Hon'ble Tribunal with regards to the transaction mentioned hereinabove;*
- d. *For costs;*
- e. *Such other and further reliefs as this Hon'ble Tribunal may deem fit in the facts and circumstances of the case.*

2. The learned counsel for the Applicant submits as below:

- a) The Resolution Plan could not be implemented due to the callousness, carelessness, misrepresentation and fraudulent conduct of the Resolution Professional (RP/R3) in connivance with Committee of Creditors (CoC).
- b) R1 & R5 to R19 are the Financial Creditors (FCs) of the Corporate Debtor who are the members of the CoC. R2 is the Corporate Debtor, R3 is RP of the Corporate Debtor and R4 is the new Resolution Applicant (Dev Land and Housing Private Limited (DLH)).
- c) Resolution Plan submitted by the Applicant was approved by the CoC with 80.92% of voting share and was approved by this Authority by order dated 30.11.2018. Thereafter, the Applicant took over the control and management of the Corporate Debtor, w.e.f. 30.01.2019.
- d) The Applicant on analysis of various records of R2 found that some potentially related party transactions were entered into by the Corporate Debtor and the Promoters and Directors of the new Resolution Applicant.

- e) Due to concealment of various facts, information and data by the RP and CoC, the Applicant without prejudice to its rights expressed no objection when this Tribunal allowed withdrawal of the Resolution Plan. Even after the withdrawal of the Plan, the CoC failed to refund ₹. 93.80 Crores infused by the Applicant as per the Resolution Plan, for which an Application bearing IA No. 443 of 2021 taken out by the Applicant is pending for consideration.
- f) R4 submitted a Resolution Plan before the CoC and the same was approved by the CoC with requisite majority. An Application bearing IA No. 19 of 2021 for approval of the Resolution Plan has been heard by this Tribunal and pending for orders.
- g) The following is the list of Directors of the new Resolution Applicant/DLH:

DIN / PAN	Name	Begin Date
00189355	VIJAY THAKORDAS THAKKAR	19/04/2006
00284512	TANAM VIJAY THAKKAR	19/04/2006
07518880	RAGHUNATH VYANKAT CHAVAN	01/04/2017
AWGPT7229N	PRATIKA TAMBOLI	21/09/2020

- h) Mr. Vijay Thakordas Thakkar, who is the Managing Director of the new Resolution Applicant is also a Director in Bloomcraft Apparel Private Limited (BAPL/R22). BAPL is the related party to both new Resolution Applicant and BRFL. That BAPL's current address is located in the same property sold by R2 to BRFL. Hence the new Resolution Applicant, especially its Managing Director, Mr. Vijay Thakordas Thakkar is the related party to BRFL, who had participated in the above fraudulent transaction.
- i) It is submitted that the Corporate Debtor got a free hold land situated at SW-49 & SW-50 in the Apparel Park Industrial Area comprised in parts of Plot Nos. 71, 72 & 76 within village limits of Arehalliguddadahalli, Hobli Kasaba, Taluka Doddaballapura,

Bangalore admeasuring 20,267 sq. mtr., for 10 years from the Karnataka Industrial Area Development Board (KIADB) under a lease cum sale agreement dated 23.06.2008. The lease cum sale agreement made it clear that R2 could sell the land to anyone else only on completion of 10 years. In this regard the Applicant relied on letter dated 14.05.2019 issued by KIADB to R2, requiring R2 to deposit sum of ₹. 76.63 Lakhs towards cost difference of land and other outstanding dues (₹. 69.93 Lakhs towards additional cost of land and ₹. 6,69,080/- towards other expenses) for transferring the said property in the name of the Corporate Debtor.

- j) R2 entered into a Memorandum of Understanding (MoU) with one Bombay Rayons Fashion Limited (BRFL/R21) for the sale of above said land for ₹. 2.25 Crores in year 2010 in violation of the 'ten (10) years' stipulation in the base document. The said amount stands reflected in the Balance Sheet and Annual Returns of the Corporate Debtor and has been admitted by the RP (R3). This transaction is *prima facie* fraudulent in nature.
- k) The transaction is in complete violation of the terms of the lease cum sale agreement dated 23.06.2008 (wrongly mentioned as MoU in the Application), between the Corporate Debtor and the KIADB. The value of the land was approximately ₹. 25 Crores at that time and the land has been sold by R2 to the promoters of the new Resolution Applicant i.e. BRFL at an undervalued price and attracts Section 45 of the Insolvency & Bankruptcy Code, 2016 (the Code).
- l) R3 being aware about the facts should have filed appropriate Applications under Sections 43, 45, 49 & 66 and other relevant provisions of the Code. The omission on the part of R3 to file such Applications shows her *mala fide* conduct and that R3 was hand in glove with the erstwhile Directors of R2 only to help R4. It attracts the

provisions of Section 43 of the Code as the same amounts to a preferential transaction.

- m) The transaction was fraudulently carried out to defraud the creditors of R2 and hence Section 66 of the Code also gets attracted. Accordingly, the Respondents are liable to make contributions to the assets of the Corporate Debtor. R3 failed to file avoidance transaction Application as provided under Section 25(2)(j) of the Code. If such an Application is taken out and ordered by this Tribunal, R4 could stand disqualified under Section 29A of the Code.
- n) Hence, under the provisions of Section 30(2) of the Code r/w Section 29A, the new Resolution Applicant is disqualified under Section 29A to submit a Resolution Plan. It is trite law that if a person has been a Promoter or is in the management or control of the Corporate Debtor in which a Preferential Transaction, Undervalued Transaction, Extortionate Credit Transaction or Fraudulent Transaction has taken place, such person is not eligible to submit a Resolution Plan under Section 29A of the Code. R3 is responsible to conduct Section 29A due diligence and merely submitting an affidavit stating that he/she is eligible under Section 29A to submit a Resolution Plan would not suffice. The CoC should review the due diligence report submitted by RP at the time of approving / disapproving the Resolution Plan. Hence it is submitted that there is no effective 29A due diligence.
- o) Hence the Applicant states that it is a fit case for this Tribunal to exercise its power and jurisdiction under Section 60(5) read with Rule 11 of the National Company Law Tribunal Rules, 2016 (NCLT Rules) to allow the reliefs as prayed for.

3. **Reply of R3 (RP):**

- A. The Applicant who failed to implement its Resolution Plan, thereby derailing the CIRP of the Corporate Debtor, filed this Application to

further jeopardise the process. The averments/allegations made in this Application are denied. The Applicant does not have any *locus standi* to object to the approval of the new Resolution Plan submitted by R4.

- B. The Applicant even failed to disclose under which clause of Section 29A of the Code, R4 is disqualified. The Applicant despite taking control of the affairs of the Corporate Debtor failed to clear the outstanding dues of CIRP-1 (from the date of admission of petition till the date of Applicant's Resolution Plan was approved) costs, hence R3 was constrained to file an Application bearing MA No. 2124 of 2019, seeking release of unpaid CIRP-1 costs by the Applicant.
- C. The Applicant filed an Application bearing MA No. 2223 of 2019 seeking leave to revise his offer / bid and to reduce the same from what was stated in the approved Resolution Plan. The CoC filed an Application bearing MA No. 2326 of 2019 against the Applicant to implement the Resolution Plan without any modifications or deviations. Alternatively, the CoC prayed for the recommencement of the Corporate Insolvency Resolution Process (CIRP) of the Corporate Debtor and for permission to invite fresh bids with the aim of reviving the Corporate Debtor as a going concern and to prevent it from going into liquidation. Apparently MA No. 2223 of 2019 is pending and MA No. 2326 of 2019 has been partly allowed as per order dated 05.02.2020.
- D. The Applicant also filed an amendment Application seeking setting aside / recall of the order of approval of the Resolution Plan dated 30.11.2018 and also expressed that the Applicant had no objection to handover the possession of the Corporate Debtor back to the CoC without prejudice to its rights and contentions. Thereafter this Adjudicating Authority vide order dated 05.12.2019 as an interim measure handed over the possession of the Corporate Debtor to the

CoC and CIRP of the Corporate Debtor was restored and R3 was directed to continue as the RP of the Corporate Debtor.

- E. Thereafter with the due approval of the CoC fresh Resolution Plans were invited and Resolution Plan of R4 was approved by the CoC and the approval of this Adjudicating Authority is pending *vide* Application bearing IA No. 19 of 2021.
- F. R4 submitted an Affidavit confirming its eligibility under Section 29A of the Code to submit the Resolution Plan and the contents of the Affidavit were found to be in order. R3 arrived at the opinion that R4 is not disqualified under Section 29A of the Code.
- G. During the hearing of IA No. 19 of 2021, the Applicant tried to intervene and sought copy of the R4's Resolution Plan. However, this Adjudicating Authority declined to hear the Applicant on the ground that he does not have any *locus standi* to intervene.
- H. The Corporate Debtor has already suffered enormously because of the negligence of the Applicant in implementing its Resolution Plan. The Insolvency and Bankruptcy Board of India (IBBI) has initiated investigation against the Applicant for such failure.
- I. The Applicant after taking over the Corporate Debtor on approval of its Resolution Plan, completely mismanaged the affairs of the Corporate Debtor and incurred losses, created liabilities, funded the losses from the working capital pool inherited at the time of handover. The Applicant abandoned the Corporate Debtor with impunity and left it saddled with huge liabilities / losses. R3 has filed an Application bearing IA No. 561 of 2021 seeking directions against the Applicant to pay for the liabilities incurred during the period when the Applicant was in management and control of the Corporate Debtor. Bank of Baroda (R1) has also filed an Application seeking payment of compensation for losses to the CoC due to the non-implementation of

the Resolution Plan. Thus the Applicant has no *locus standi* to question the Resolution Plan of R4.

- J. The Applicant filed frivolous Applications against the RP (R3) as well as the CoC to camouflage its misdoings. IA No. 443 of 2021 has been filed by the Applicant seeking refund of ₹. 93.82 Crores which it claims to have infused under the Resolution Plan. Now the Applicant has come up with this Application questioning the eligibility of R4 under Section 29A of the Code without demonstrating the reasons therefor.
- K. The so called transaction dates back to 2010, beyond the time period required for the RP to take any action under Section 43 or related sections. Therefore, the insinuation against the RP by the Applicant in that regard is ill founded.
- L. An Application under above referred sections for avoidance transaction in accordance with Chapter III of the Code have to be filed after arriving at an opinion by the RP. Neither the Code nor the Regulations envisage any role for third party like the Applicant in making such determination or filing such Application in respect of avoidance transactions.
- M. The Corporate Debtor had, during the CIRP-1, entered into certain avoidable transactions as is revealed from the Forensic Audit Report dated 22.06.2018, submitted by M/s T R Chaddha & Co. Accordingly R3 has filed Application bearing MA No. 690 of 2018 under Sections 66 & 67 of the Code. On 22.10.2018, R3 filed another Application bearing MA No. 1254 of 2018, under Section 43 of the Code. These Applications are pending consideration.
- N. R3 diligently performed her duties and already filed appropriate Applications pursuant to Section 25(2)(j) of the Code seeking contributions of over INR 1000 Crores from the ex-Management of the Corporate Debtor. The forensic audit report did not question the transaction presently impugned and thus R3 had no occasion to suspect

the transaction and to take action under sections 43, 45, 49 & 66 of the Code. The allegation of *mala fides* is stoutly denied.

- O. It is submitted in respect of the issue relating to KIADB land as follows.
- i. The Corporate Debtor entered into a lease cum sale agreement with KIADB in 2008 (23.06.2008) for allotment of the land for a consideration of ₹. 2.01 Crores. As per the terms the Corporate Debtor was required to setup a factory on the said land within five years of allotment. However, the Corporate Debtor was not in a position to set up the facility or otherwise. Copy of the lease cum sale agreement dated 23.06.2008 between KIADB and the Corporate Debtor is annexed and marked as Annexure – 1.
 - ii. Subsequently, a MoU was entered into between the Corporate Debtor (as transferor) and BRFL (as transferee) on 25.01.2010. Under the MoU, BRFL agreed to purchase and acquire the land from the Corporate Debtor for a consideration of ₹. 2.25 Crores. However, the said MoU was not in accordance with the terms of the KIADB agreement. The Balance Sheet of the Corporate Debtor shows the amount received by it from BRFL as “Deposit under other long - term liabilities”. While the land was given to BRFL, the sale was not concluded and the title deeds of the land were not handed over to BRFL. The land has not been under the possession of the Corporate Debtor since 2010 and BRFL has constructed a commercial building on the said land. The said land was never valued by valuers during CIRP as it was not in possession of the Corporate Debtor and neither the Corporate Debtor had title over it and hence, the liquidation value of the said land is nil. Copy of the MoU dated 25.01.2010 is annexed and marked as Annexure – 2.
 - iii. BRFL reached out to the RP *vide* letter dated 12.05.2020, stating that they continue to control and occupy the land situated at

Doddaballapur, Bengaluru and further requested the RP/CoC to assist in execution of the transfer of the aforesaid land to BRFL. Notably, on perusal of the documents shared by BRFL, it appears that FTL had agreed to complete the transfer of the said land to BRFL. Further, as per the draft sale deed dated 14.06.2019 (at which time, FTL was in management and control of the Corporate Debtor), it appears that KIADB had agreed to transfer the aforesaid land in favour of the Corporate Debtor.

- iv. As per letter dated 14.05.2019 KIADB raised demand against the Corporate Debtor to deposit ₹. 76.63 Lakhs towards cost difference of land and other outstanding dues for transferring the said land in favour of the Corporate Debtor. The Corporate Debtor is in possession of a receipt disclosing payment of the amount. Copy of letter dated 14.05.2019 sent by KIADB to the Corporate Debtor and copy of KIADB receipt are annexed and marked as Annexure – 6 and Annexure – 7 respectively.
- v. Since the appointment of RP post restoration of CIRP, the RP has written to the KIADB authorities to provide the Application submitted by FTL to KIADB for execution of the sale deed by ‘Mandhana Industries Limited’ which was referred in the subject clause of their letter no. IADB/HO/Allot/Secy-1/16240/1764/2019-20 dated 14.05.2019 and their confirmation that all the necessary compliances have been made to their satisfaction to proceed with the land registration and that there are no open conditions or clarifications or money due to be paid to KIADB by the Corporate Debtor. The RP, in her communication, also requested next steps to be followed to complete the registration of transfer of land. Copy of the letter dated 11.06.2020 sent by the RP to KIADB is annexed and marked as Annexure – 8.

- vi. As on date, no response has been received from KIADB. Hence, the Corporate Debtor has not accounted for the various amounts demanded by KIADB as per their letter dated 14.05.2019, due to the uncertainty relating to the action that FTL may have taken regarding the KIADB demand notice referred above. As the said amount is not paid from the bank accounts of the Corporate Debtor and as there is uncertainty relating to the payment till the time response is received from KIADB, the Corporate Debtor has not accounted for the said payment in the books and the effect will be given based on the response received from KIADB. Pending clarity around the status of payment of the amounts demanded by KIADB, the Corporate Debtor has disclosed the same as a contingent liability in its books. The Corporate Debtor continues to disclose the said property in the financial statement as free hold land.
- vii. The matter pertaining to the registration of the said land with BRFL was discussed in various CoC meetings. Eventually, the CoC requested DLH to include a clause in its Plan that any gain arising out of the KIADB land transfer to BRFL shall be passed on to the financial creditors of the Corporate Debtor. The Resolution Plan of DLH provides that any amounts realized pursuant to the sale of the KIADB land of the Corporate Debtor, until the 'Discharge Date' (as defined in the new Resolution Plan), shall be paid by DLH to the financial creditors. This shall be over and above the 'FC Discharge Amount' that is being offered to the financial creditors under the Resolution Plan of DLH.
- viii. The RP understands that, according to DLH, if proper representation is made to KIADB, the registration process of the said land can be expedited and DLH envisages that the registration formalities of the said land can be completed within a year, co-terminus with the implementation of its Resolution Plan.

P. It is submitted that during the CIRP-1, when the Applicant was in management and control of the Corporate Debtor, the Applicant itself agreed to complete the transfer of said land to BRFL. Surprisingly the Applicant is now questioning the same transaction in this Application, trying to blow hot and cold at the same time. It is submitted that DLH and BRFL are not related parties. At some point in the past they both were associated with the entity called BAPL. As per the latest financials of BAPL and DLH, BRFL is not a related party to either of them.

4. **The new Resolution Applicant (R4) contended as below:**

- A. The Application bearing IA No. 19 of 2021 for approval of the Resolution Plan is reserved for orders. Any delay in the approval of the Resolution Plan would cause severe prejudice to R4 and successful resolution of the Corporate Debtor.
- B. The Applicant does not have any *locus standi* to file this Application. Ingredients of Section 29A of the Code, as alleged in the Application, are not made out against R4. The Applicant failed to show how the approval of the Resolution Plan would prejudicially affect or even concerns the Applicant.
- C. The Resolution Plan submitted by R4 does not deal with the monies invested by the Applicant and there is no cause of action or interest which will entitle the Applicant to maintain the present Application. This Application is a *mala fide* attempt to delay the approval of the Resolution Plan submitted by R4.
- D. The Applicant alleged that R4 suffers a bar under Section 29A of the Code on the following basis-
 - i. Transfer of lease hold right entered between the Corporate Debtor and R21 in the year 2010 was undervalued.

- ii. R4 is related party to Respondent Nos. 21 & 22. Mr. Vijay Thakkar is the common Director of R4 & R22.
 - iii. Thus the impugned transfer would fall within the category of preferential as well as fraudulent transaction under Chapter III of the Code; and
 - iv. R4 being a promoter Company involved in fraudulent and preferential transaction would be barred under Section 29A of the Code.
- E. It is submitted that assuming but without admitting the contentions of the Applicant as correct, R4 would not suffer the bar under Section 29A of the Code as ingredients necessary to attract such bar are missing.
- F. Even if it is assumed that the allegations of the Applicant are taken on face value, the same do not stand the test of Section 29A(g) of the Code because of the following:
- i. Neither the Respondent No. 21 nor Respondent No. 22 had undergone CIRP;
 - ii. The impugned transfer has not been subject of proceedings under Chapter III of the Code;
 - iii. In any event and without prejudice, no order was passed by any adjudicating authority declaring the impugned transfer as preferential, undervalued, extortionate or fraudulent;
 - iv. Even otherwise, the Successful Resolution Applicant (DLH) is neither the promoter / in control or management of R21.
- G. It is submitted, an attempt to characterise the impugned transfer (as affecting eligibility of R4) does not pass legal muster and it is *prima facie* unsustainable even if one were to accept the entirety of the case pleaded by the Applicant. Further the impugned transfer is beyond the

look back period stipulated under Section 43(4) of the Code and hence cannot be impugned as such.

- H. In any event and without prejudice, Section 43(2) of the Code lays down twin considerations which need to be proved for a transaction to be considered as a preferential transaction. First, a transfer of a property or interest therein of the Corporate Debtor is made for the benefit of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the Corporate Debtor. Second, such transfer should have the effect of putting such creditor or a surety or a guarantor, in whose favour the transfer is made, in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with Section 53 of the Code. An exception to the second condition is where such a transfer is made in the ordinary course of business or financial affairs of the Corporate Debtor or the transferee. The Applicant has failed to satisfy these ingredients.
- I. The Applicant failed to produce any particulars or document which would substantiate that the impugned transfer could be undervalued. A bald allegation was made that the transfer is undervalued. The Applicant has merely made allegation of fraud without material particulars which would satisfy necessary ingredients of the fraud under Section 66 of the Code. Mere allegation of fraud is not sufficient and that the party alleging fraud must provide material particulars thereof.
- J. R22 was incorporated only in the year 2012 i.e. two years after the impugned transfer. Since the Applicant has sought to link R4 with R21 through R22, the entire basis of the Applicant's allegation against R4 collapses as R22 did not even exist when the impugned transfer took place.

5. On appraisal of the materials on record, rival pleadings and the submissions from either side the following are the observations of this Bench:

- a. The Corporate Debtor entered into a lease cum sale agreement with KIADB on 23.06.2008 for a consideration of ₹. 2.01 Crores. The MoU to sell the land was entered into between the Corporate Debtor and R21 for ₹. 2.25 Crores and the possession of the land was handed over to R21 pending execution of the sale deed. Thus it is clear that the land was proposed to be sold for a higher value than the purchase price. It is noted that on 14.05.2019, the KIADB claimed a sum of ₹.69.93 Lakhs towards additional cost of land. The Applicant has not placed any material in support of the contention that the property was worth about ₹. 25 Crores in 2010 which would show that it was proposed to be sold at a far lesser value (₹. 2.25 Cr.).
- b. We have also noticed that Clause 17 of the lease cum sale agreement dt. 23.06.2008 provides as below:

“The lessor may at his discretion consider the request of the lessee for the transfer of lease hold rights of scheduled property in favour of a new entrepreneur as identified by the lessee during the currency of lease, imposing such terms and conditions as decided by the lessor from time to time in this regard, provided that such transfer shall be permissible if the lessee has substantially implemented the project”.

- c. On 14.05.2019 KIADB agreed to execute the sale deed in favour of Corporate Debtor and demanded ₹. 76.63 Lakhs towards additional land cost and other charges. The Corporate Debtor *vide* letter dated 23.05.2019 addressed to KIADB stating therein that it is agreeable to the sale of the land to BRFL/R21. From the above it is clear that KIADB has no objection for sale of the land by the Corporate Debtor to BRFL/R21.
- d. With the above facts let us examine the applicability of various provisions of the Code as alleged by the Applicant.

e. Section 47 of the Code provides as below:-

“47. Application by creditor in cases of undervalued transactions. –

(1) Where an undervalued transaction has taken place and the liquidator or the resolution professional as the case may be, has not reported it to the Adjudicating Authority, a creditor, member or a partner of a corporate debtor, as the case may be, may make an application to the Adjudicating Authority to declare such transactions void and reverse their effect in accordance with this Chapter.

(2) Where, the Adjudicating Authority, after examination of the application made under sub-section (1), is satisfied that –

(a) undervalued transactions had occurred; and

(b) liquidator or the resolution professional, as the case may be, after having sufficient information or opportunity to avail information of such transactions did not report such transaction to the Adjudicating Authority,

it shall pass an order-

(a) restoring the position as it existed before such transactions and reversing the effects thereof in the manner as laid down in section 45 and section 48;

(b) requiring the Board to initiate disciplinary proceedings against the liquidator or the resolution professional as the case may be.” (emphasis supplied)

f. The mandate is very clear that only a ‘Creditor, Member or a Partner’ of the Corporate Debtor can make an Application to the Adjudicating Authority to declare such transactions as void and reverse their effect. The Applicant not being a Creditor or Partner of the Corporate Debtor is not competent to raise the issue nor can seek a direction to R3 concerning the matter. As per R3 a forensic auditor was appointed to look into the transactions of the Corporate Debtor and certain transactions of the Corporate Debtor were found to be questionable and the same are pending consideration before this Tribunal.

- g. The CoC is aware of the proposed sale of the land for ₹. 2.25 Crores in the year 2010. No member of the CoC has questioned the propriety of the consideration. In the absence of any material the allegation of undervaluation cannot be accepted, for the limited purpose of this Application.
- h. Whether the impugned transaction is covered under other provisions of the Code may now be examined.
- i. Section 43 of the Code deals with preferential transactions and relevant time. The same is extracted below:

“43. Preferential transactions and relevant time. –

*(1) Where the liquidator or the resolution professional, as the case may be, is of the opinion that the corporate debtor has **at a relevant time given a preference** in such transactions and in such manner as laid down in sub-section (2) to any persons as referred to in sub-section (4), he shall apply to the Adjudicating Authority for avoidance of preferential transactions and for, one or more of the orders referred to in section 44.*

(2) A corporate debtor shall be deemed to have given a preference, if–

*(a) there is a transfer of property or an interest thereof of the corporate debtor for the benefit of a creditor or a surety or a guarantor for or **on account of an antecedent financial debt or operational debt** or other liabilities owed by the corporate debtor; and*

*(b) the transfer under clause (a) has the effect of putting **such creditor or a surety or a guarantor in a beneficial position** than it would have been in the event of a distribution of assets being made in accordance with section 53.*

(3) For the purposes of sub-section (2), a preference shall not include the following transfers–

(a) transfer made in the ordinary course of the business or financial affairs of the corporate debtor or the transferee;

(b) any transfer creating a security interest in property acquired by the corporate debtor to the extent that –

(i) such security interest secures new value and was given at the time of or after the signing of a security agreement that contains a description of such property as security interest, and was used by corporate debtor to acquire such property; and

(ii) such transfer was registered with an information utility on or before thirty days after the corporate debtor receives possession of such property:

Provided that any transfer made in pursuance of the order of a court shall not, preclude such transfer to be deemed as giving of preference by the corporate debtor.

Explanation. – For the purpose of sub-section (3) of this section, “new value” means money or its worth in goods, services, or new credit, or release by the transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the liquidator or the resolution professional under this Code, including proceeds of such property, but does not include a financial debt or operational debt substituted for existing financial debt or operational debt.

(4) A preference shall be deemed to be given at a relevant time, if –

(a) It is given to a related party (other than by reason only of being an employee), during the period of two years preceding the insolvency commencement date; or

(b) a preference is given to a person other than a related party during the period of one year preceding the insolvency commencement date.”

- ii. The land in question has not been transferred by the Corporate Debtor on account of any antecedent financial or operational debt and the transfer does not have the effect of putting such creditor or surety or guarantor in a beneficial position that would have been in the event of distribution of assets being made in accordance with Section 53 of the Code. Further this transaction

has taken place in the year 2010 much beyond the relevant period provided under sub-section (4).

iii. As already indicated the transaction has been found to be not an undervalued transaction and executed far beyond the relevant period. Hence sections 45 or 46 of the Code shall have no application thereto. In addition there is no material to indicate that the transaction has been deliberately entered into with a view to keep the property out of the reach of any person who could stake a claim against the Corporate Debtor or that the transaction had been entered into to defraud any of the Creditors. Thus sections 49 and 66 of the Code would not be attracted.

iv. Section 66 of the Code provides as below:

“66. Fraudulent trading or wrongful trading. –

(1) If during the corporate insolvency resolution process or a liquidation process, it is found that any business of the corporate debtor has been carried on with intent to defraud creditors of the corporate debtor or for any fraudulent purpose, the Adjudicating Authority may on the application of the resolution professional pass an order that any persons who were knowingly parties to the carrying on of the business in such manner shall be liable to make such contributions to the assets of the corporate debtor as it may deem fit.

(2) On an application made by a resolution professional during the corporate insolvency resolution process, the Adjudicating Authority may by an order direct that a director or partner of the corporate debtor, as the case may be, shall be liable to make such contribution to the assets of the corporate debtor as it may deem fit, if-

(a) before the insolvency commencement date, such director or partner knew or ought to have known that there was no reasonable prospect of avoiding the commencement of a corporate insolvency resolution process in respect of such corporate debtor; and

(b) such director or partner did not exercise due diligence in minimising the potential loss to the creditors of the corporate debtor.

[(3) Notwithstanding anything contained in this section, no application shall be filed by a resolution professional under sub-section (2), in respect of such default against which initiation of corporate insolvency resolution process is suspended as per section 10A.]

Explanation. – For the purposes of this section a director or partner of the corporate debtor, as the case may be, shall be deemed to have exercised due diligence if such diligence was reasonably expected of a person carrying out the same functions as are carried out by such director or partner, as the case may be, in relation to the corporate debtor.”

- v. At the cost of repetition it may be stated that the CoC itself discussed about the transaction and has found no fault with the transaction. The lease deed itself provided for the sale and transfer of the land (by the Corporate Debtor) and there is no opposition from KIADB thereto.
- vi. The Applicant who could not implement the Resolution Plan submitted by him has come up before us with this frivolous Application and making bald allegations by taking on his hand a single transaction of the year 2010 and trying to scuttle the approval of the fresh Resolution Plan, which is pending approval.
- vii. In view of the fact that the impugned transaction does not fall under any of the provisions of the Code as alleged by the Applicant, the Applicability of Section 29A against the new Resolution Applicant / DLH would not arise.

- i. In the light of the discussions supra we find this Application to be frivolous and without any merits. The same is accordingly dismissed on contest. Despite it being a deserving case for imposition of costs we however refrain from doing so.

Sd/-

V. Nallasenapathy
Member (Technical)

Sd/-

Janab Mohammed Ajmal
Member (Judicial)