

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

**IA-1927/2021 IN**

**CP/IB/4469/(MB)/2019**

Under Section 7 of the IBC, 2016

*In the matter of*

**Jayesh Sanghrajka**

...Applicant

V/s.

**Ornate Devlopers and Ors.**

Respondent(s) No.1

*In the matter of*

**Idbi Trusteeship Services Limited**

...Financial Creditor

Versus

**Ornate Spaces Private Limited**

...Corporate Debtor

Order delivered on: **02.05.2023**

*Coram:*

Mr. Prabhat Kumar

Hon'ble Member (Technical)

Mr. Kishore Vemulapalli

Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Applicant in IA-1927/2021:

Mr. Nausher Kohli a/w Mr. Devesh Juvekar, Mr. Ashish Parwani, Mr. Dikshat Mehra, Mr. Chintan Gandhi and Ms. Anjali Dhoot i.b Rajani Associates for the applicant.

Mr. Maulik Chokshi i/b Mr. Amar  
Khanna and Ms. Kriya Jain, Adv.

For the Respondent(s):

Mr. Amit Singh a/w Ms. Shivani  
Deshmukh i/b Abhay Nevagi and  
Associates, Ld. Counsel for the  
Respondent No. 6 in IA-1927/2021  
present.

### **ORDER**

***Per: Prabhat Kumar, Member (Technical)***

1. This is an application filed on 16.07.2021 by the Resolution Professional seeking order u/s 43, 47 and 66 of the Insolvency & Bankruptcy Code, 2016 {"Code"} in relation to following transactions –
  - a. Spending of Administrative and Licensing charges in cash amounting to Rs. 8.09 crores falling u/s 66 of the Code;
  - b. Loans advanced to related parties amounting to Rs. 116.26 crores falling u/s 43 of the Code;
  - c. Foreclosure of existing loans by transferring it from unrelated parties to related parties amounting to Rs. 16.24 crores falling u/s 43 of the Code;
  - d. Routing of sum received as interest on fixed deposits amounting to Rs. 2.10 crores falling u/s 43 of the Code;
  - e. Amount squared off by the Society by invoking bank guarantee amounting to Rs. 27 crores falling u/s 43 of the Code;
  - f. Cash transactions with Ornate Developers amounting to Rs. 5.75 crores falling u/s 66 of the Code;

- g. Shifting of unsecured loans to booking advance in respect of “Grove Towers’ amounting to Rs. 44.27 crores falling u/s 66 of the Code; and
- h. Investment in Aryan Spaces by mis-utilising the funds of the Financial Creditors amounting to Rs. 1.20 crores falling u/s 49 of the Code.
2. The applicant submitted that the Corporate Insolvency Resolution Process was initiated against the Corporate Debtor on 29.06.2020; the Applicant was appointed as IRP in order to carry out the Corporate Insolvency Resolution Process of the Corporate Debtor; after perusing the financials of the Corporate Debtor, the applicant was of the prima facie opinion that, there are certain transactions which were carried in the Corporate Debtor, fall under PUFEE transaction; in order to further investigate the books of accounts of the Corporate Debtor, he had appointed M/s. Jain Jagawat and Kamdar & Co. on 16.09.2020, to carry out the transactional audit report; based on his findings after perusing the books of accounts of the Corporate Debtor and also keeping the Transaction audit report as a supporting evidence, he filed present application to seek order in relation to transactions stated above.
3. We heard the Ld. Counsel for the RP. No reply filed by the respondents.
4. Section 66 of the Code provides that –
- (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.*

*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.*

4.1 Section 66 of the Code provides two circumstances i.e. (a) carrying of business with intent to defraud creditors; or (b) carrying of business for any fraudulent purpose, and makes the persons who were knowingly parties to the carrying on of the

business in such manner liable to contribute to the assets of the Corporate Debtor. In sub-section (2), it makes director liable if he knew that CIRP in case of the corporate debtor cannot be avoided, and does not exercise due diligence in minimising the potential loss to the creditors of the corporate debtor.

5. The Applicant has pointed out that a sum of Rs. 8,09,00,000/- was paid in cash during the year 2018-19 & 2019-20 and the amount so spent was booked as Expense under “Administrative and Licensing charges” and this fact is borne out from the report of by the Transaction Auditor also. The narration in the accounting software does not record any details, except a statement “**as per sir instruction**”. The said expenditure is not supported by any documents authorising such transaction or any invoice/voucher. It was noticed from the pleadings that such transaction is alleged to tantamount to siphoning of the funds, hence, is claimed to fall u/s 66 of the Code. During the hearing, this Bench asked the Ld. Counsel who shall be liable to contribute this amount in the absence of any pleading to this effect. The Ld. Counsel clarified that Respondent No. 5 i.e. Yash Machindar was Executive Director of the Corporate Debtor at that time and he is ‘Sir’ referred to in the narration.

- 5.1 Section 66 of the Code encompasses carrying on a business for any fraudulent purpose. The term “Fraudulent” or “Fraud” is not defined in the Code, however, the term “Fraud” is defined in clause (i) of Explanation to Section 447 of the Companies Act, 2013 to mean “*in relation to affairs of a company or any body corporate, includes any act, omission, concealment of any fact or abuse*”

*of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss”.*

- 5.2 In the present cases, the payment of cash, which is not supported by any authorisation, details for which the said payment was made and how was it related to the business of the corporate debtor, falls within the ambit of fraud, as it is an act of abuse of position committed by ‘Sir’ to gain undue advantage from the company. Even if its nature is ascertained from the nomenclature of the account head, under which it is found debited, it would suggest that expenditure of licensing are not required to be spent in cash under any law, and even if it is to be deposited with any authority in cash, such payment is to be evidenced by a receipt. Accordingly, this payment is an act of concealment of fact pertaining to this transaction found recorded in the books of Corporate Debtor. As, the narration clearly indicates that this payment was made on instruction of ‘Sir’ and as confirmed by Ld. Counsel for Resolution Professional that Mr. Yash Machindar was Executive Director during the relevant time, this Bench is of considered view that he is liable to contribute this sum to the corporate debtor, in the absence of any contrary fact on the record.
- 5.3 In view of foregoing, this Bench directs the Respondent No. 5 to contribute a sum of Rs. 8,09,00,000/- to the Corporate

Debtor along with interest @ 9% p.a. within 30 days of communication of this order.

- 6 Section 43 of the Code provides that a repayment of loan to a related party within two years towards antecedent debt in preference to other similarly placed lender(s) is a preferential transaction if such repayment has the effect of putting such related party in an advantageous position than what it would have received in terms of provisions of section 53 of the Code. In the present case, there are other creditors of the Corporate Debtor, including SASF, who are unsecured and similarly placed as the related parties of the Corporate Debtor, to whom the alleged payments have been made in preference to other creditors; such payments are towards antecedent debt and has the effect of putting related party in an advantageous position than the other similarly placed creditors; and such related party have received an amount more than what they would have received in accordance with the provisions of section 53 of the Code; and such repayment of loan to related party is not a transaction in its ordinary course of business
- 7 The Applicant has pointed out that a sum of Rs.116,26,15,785.19 is outstanding as on 31.03.2020 as Loans to Related Parties. The applicant claims this transaction to be it in nature of Preferential transaction u/s 43 of the Code. This fact is borne out from the report of by the Transaction Auditor also. The Corporate Debtor had extended these loans to following parties –

Sl. No.	Name of Related Party	Amount (Rs.) Receivable	Relationship
1	Ornate Developers	1,45,59,38,111.19	Director of CD is proprietor

2	Ornate Housing Pvt. Ltd.	16,10,174.00	Directors of CD are also directors therein
3	Ornate Realtors & Developers Pvt Ltd	4,07,500.00	Directors of CD are also directors therein
4	Ornate Wellness Pvt Ltd	1,41,40,000.00	One of Director of CD is also directors therein
5	Yash Machindar	5,20,000.00	Director of CD

7.1. It is the case of applicant that the Corporate Debtor is not engaged in lending of money under Memorandum of Association; the said loan transactions are not supported by resolutions as required under Companies Act; interest free loans are not permissible under the Companies Act; and NOC from lenders is not on record in this regard. It is further stated that the account of M/s Ornate Developers was found debited by a sum of Rs. 5,49,50,000/- with a narration 'Being entry passed as per instruction of Sir' with a corresponding credit to the account of "Joint Venture – Silver Oak Solution Private Limited'.

7.2 This Bench perused the material before it and heard the Ld. Counsel. At the outset, this Bench is of considered view that a sum of Rs. 5,49,50,000/- having been found debited to the account of 'Ornate Developers' resulted into increase in the amount receivable from such firm and it can not be said to have resulted into any preferential transaction, unless it has the effect of transferring receivable from of any unrelated party to this firm, which is not the case. Further, this Bench finds that a transaction is a preferential transaction u/s 43 of the Code where 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. In the present case, the related party didn't owe any sum from the corporate debtor, hence there was no antecedent debt in relation to which a preference can be said to have been given to the such parties over other creditors.

- 7.3 Nonetheless, this Bench is of considered view that the amounts advanced to the related parties is a case of diversion of funds of the Corporate Debtor for the benefit of such related party and it is only an act in abuse of position as director of the Corporate Debtor with intent to gain undue advantage and injure the interests of the company or its creditors. Accordingly, this transaction falls under section 66 of the Code, as it is an act of carrying the business of Corporate Debtor in fraudulent manner. Since, the applicant prays for declaration of the transaction listed in the present application in alternate in other sections of the Code, this Bench is of the considered view that this transaction squarely falls u/s 66 of the Code, accordingly, the entry of Rs. 5,49,50,000/- with a narration 'Being entry passed as per instruction of Sir' with a corresponding credit to the account of "Joint Venture – Silver Oak Solution Private Limited' shall be reversed in the books of the Corporate Debtor and the parties named in the above table as well as Silver Oak Solution Private Limited, ought to be directed to contribute an equal sum to the

Corporate Debtor along with interest @ 9% p.a. within 30 days of communication of this order.

8. The Applicant has pointed out that an aggregate of sum of Rs.16,24,53,348.00 is found to be debited on various dates to the account of M/s Ornate Developers. The applicant claims this transaction to be it in nature of Preferential transaction u/s 66 of the Code. This fact is borne out from the report of by the Transaction Auditor also. It is stated that this has resulted into the foreclosure of existing loans owed by different parties by transferring it from unrelated parties to related parties. This Bench finds that the effect of such transfer of debts owed by unrelated parties to M/s Ornate Developers is increase in the balance receivable from M/s Ornate Developers, which is separately claimed in this application and dealt with in this order at para 7. Accordingly, this Bench is of the considered view that this transaction stands subsumed in the amount ordered to be contributed by Ornate Developer in terms of para 7.3 of this order. Hence, no separate adjudication is required. However, it is clarified that the Corporate Debtor shall be entitled to enforce recovery from such un-related parties also, in case it fails to recover such sums from M/s Ornate Developers.
9. The Applicant has pointed out that an aggregate of sum of Rs. 2,10,00,000.00 is found to be transferred to the account of M/s Ornate Developers and M/s Ornate Wellness Private Limited out of proceeds of interest on fixed deposits held by the Corporate Debtor with ICICI Bank, The applicant claims this transaction to be it in nature of Preferential transaction u/s 43 of the Code. This fact is borne out

from the report of by the Transaction Auditor also. It is stated that this has resulted into the advancing of loans to such related parties without following the due procedure. This Bench finds that the effect of such transfer of proceeds of interest received from ICICI Bank is increase in the balance receivable from M/s Ornate Developers, which is separately claimed in this application and dealt with in this order at para 7. Accordingly, this Bench is of the considered view that this transaction stands subsumed in the amount ordered to be contributed by Ornate Developer in terms of para 7.3 of this order. Hence, no separate adjudication is required.

10. The Applicant has pointed out that a bank guarantee for a sum of Rs.27,00,00,000.00 was encashed by M/s UTI Employee Sai-Samruddhi Co-Operative Credit Society (“Society”), who is not a party to the present application, and such invocation resulted into appropriation of entire fixed deposit of Rs. 27,00,00,000/- towards it by the Bank. It is further pleaded that the amount so received by the Society has been allowed to be set off against the money collected from its members towards the construction of flats under the Development agreement. The applicant claims this transaction to be it in nature of preferential transaction u/s 43 of the Code. This fact is borne out from the report of by the Transaction Auditor also.
- 10.1 This Bench finds that the invocation of bank guarantee on 5.10.2019, provided by the Corporate Debtor to the Society under Development Agreement, was on account of default of the Corporate Debtor. This Bench further finds that the Corporate Debtor was admitted into CIRP to resolve its defaults thereafter i.e. on 29.06.2020 and the money

received by the Society under this Bank Guarantee was to be utilised by the Society towards construction of flats, which the corporate debtor had failed at that time. However, since the admission of the Corporate Debtor into CIRP, the claims of the members of the Society have been admitted in the Resolution Professional; and the amount of Rs. 27,00,00,000.00 realised by the Society is dealt with in the Resolution Plan pending for approval before this Bench. Accordingly, this Bench is of considered view that this transaction does not require any adjudication at this stage. It is clarified that our findings, in relation to this transaction, contained in this order shall not be binding on any party in any subsequent proceeding, except proceedings emanating from this order.

11. The Applicant has pointed out that a sum of Rs.5,75,00,000.00 was received from Ornate Developers in cash during the financial year 2018-19 & 2019-20. The applicant claims this transaction to be it in nature of Preferential transaction u/s 66 of the Code. This fact is borne out from the report of by the Transaction Auditor also. This Bench finds that the fact of receipt of cash from M/s Ornate Developers is not disputed either in the application or in the Transaction audit report. Further, this Bench finds that it is a case of receipt of cash and not transfer of any money and fact that this money received from Ornate Developers was found recorded in the cash book of the Corporate debtor is not disputed. Merely, the receipt of a sum in cash can not be held to be fraudulent, unless the findings of the applicant suggest that this receipt was merely represented by a book entry. Further, the recovery of receivable from Ornate Developers is separately claimed in

this application and dealt with in this order at para 7. When these facts were pointed to the Ld. Counsel, he agreed not to press this transaction for further adjudication. Accordingly, this Bench feels that no adjudication is called for in relation to this transaction.

12. The Applicant has pointed out that a sum of Rs.42,99,38,428.00 crores was transferred from the account head 'Unsecured Loans' to 'Booking Advance in respect of "Grove Towers' in the name of 37 persons during the financial year 2018-19 & 2019-20. The applicant claims this transaction to be it in nature of Preferential transaction u/s 66 of the Code. This fact is borne out from the report of by the Transaction Auditor also. During the course of hearing, the Ld. Counsel for the Resolution Professional clarified that these persons are considered as Home-buyers and included in the class of Home-buyers. It was also submitted by Ld. Counsel that their names are also found in the MIS of flat allottees shared with it. This Bench is of the considered view that effect of conversion of unsecured loans into Home-buyers does not alter their status, as in both cases, these persons remains financial creditors of the Corporate Debtor. Further, it is not disputed that the money was received from these persons and no flats has been handed over to these persons till commencement of CIRP. Merely, booking in their name does not result into any additional advantage having been given to such persons. Further, the Resolution Professional has not brought on record any fact that such conversion took place other than in ordinary course of business. Accordingly, this Bench is of the considered view that this transaction does not fall u/s 66 of the Code, finds that this transaction cannot be held to be a preferential transaction a

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13. The Applicant has pointed out that a sum of Rs.1,20,00,000.00 is outstanding as on 31.03.2020 as “Investment in Aryan Space”, owned by Mr. Aarif Ahsan Khan. The applicant claims this transaction to be it in nature of Preferential transaction u/s 49 of the Code. This fact is borne out from the report of by the Transaction Auditor also. Investment in Aryan Spaces by mis-utilising the funds of the Financial Creditors amounting to Rs. 1.20 crores falling u/s 49 of the Code. It is stated that the corporate debtor had entered into an un-registered MOU for purchase of land for a sum of Rs. 2,25,00,000/- with the said party; and the corporate debtor has diverted this money for buying the land, the title of which is disputed. The said amount is stated to have been paid from 7.8.2018 to 17.9.2018 in the transaction audit report. From the perusal of the transaction audit report, it is noticed that Annexure 1 contains one name Aarif Khan/Mohammed Khan, who had advanced a sum of Rs. 2,23,00,000/- from 28.05.2018 to 27.08.2018 to the Corporate Debtor and such loan was transferred to Flat Booking on 1.4.2019, thereby entitling him to one flat in the proposed residential project of the Corporate Debtor. The dates on which transaction of advance against land to Aryan Spaces and date on which loan was taken from Aarif Khan raises a doubt as to whether both are same persons? There is nothing on record to suggest that these are same persons. However, in the interest of Corporate Debtor, the Bench is of the considered view that the Resolution Professional be directed to look into whether Mr. Aarif Ahsan Khan of Aryan Spaces and Mr. Aarif Khan is same person; and if both are same persons, the transaction of advance to Aryan Spaces, without any substance, is an act of

concealing the facts with the connivance of such persons so as to benefit him by a sum of Rs. 1,20,00,000/-, which results into the injury to interests of the company or its creditors. In such case, Aryan Spaces shall be liable to contribute a sum of Rs. 1,20,00,000/- to the Corporate Debtor or the Corporate Debtor shall be entitled to set-off this amount from the amount of its proprietor's admitted claim.

14. In view of this, the present application **IA-1927/2021** is **partly allowed**. IA-1927/2021 **disposed** of accordingly.

**Sd/-**  
**Prabhat Kumar**  
**Member (Technical)**

**Sd/-**  
**Kishore Vemulapalli**  
**Member (Judicial)**

SVR/02.05.2023