THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I

I.A. 110 OF 2023

Under Section 66 of the Insolvency & Bankruptcy Code, 2016

Vinodkumar Pukhraj Ambavat
… Applicant

Vs.

Shantilal Javerchand Jain and Ors.
… Respondents

IN THE MATTER OF

C.P.(IB) No. 3863/MB/2019

Mr. Rajendra Shah

… Petitioner

Vs.

Varsha Corporation Limited

… Corporate Debtor

Order delivered on: 12.03.2025

***Coram**:*

Shri Prabhat Kumar
Hon'ble Member (Technical)

Justice V.G. Bisht (Retd.)
Hon'ble Member (Judicial)

Appearances:

For the Applicant	:	Adv. Nausher Kohli
For Respondents Nos. 1, 2, 3 & 6	:	Adv. Haridas Dave

ORDER

Per: Coram

1. The present Interlocutory Application has been filed by the Applicant seeking following reliefs:

   i. Pass an appropriate order under section 66 (1) of the Code with respect to Transaction No. 1 and direct, the Directors (viz. Respondent Nos. 1 to 3) and Respondent No. 4 shall jointly and severally contribute a sum of Rupees 16.49 Crores (Rupees Sixteen Crores, Forty Nine Lakhs) to the assets of the Corporate Debtor.

   ii. Pass an appropriate order under section 66 (1) of the Code with respect to Transaction No. 2 and direct, the Directors (viz. Respondent Nos. 1 to 3) and Respondent No. 5 shall jointly and severally contribute a sum of Rs. 29.65 Lakhs (Rupees Twenty-Nine Lakhs, Sixty-Five Thousand) to the assets of the Corporate Debtor.

   iii. Pass an appropriate order under section 66, subsection one of the code with respect to transaction number 2 for carrying out the business of the Corporate Debtor with intent to defraud the creditors of the corporate data.

   iv. Pass an appropriate order under section 44 of the Code reversing the effect of the preferential transaction and direct Respondent No. 2 to payback Rs. 12 Lakhs to the Applicant / CIRP, that she may have made as a result of such preference.

   v. Pass an appropriate order under section 44 of the Code reversing the effect of the preferential transaction and to direct Respondent Nos. 1 to 3 and Respondent No. 6 to payback Rs.1.33 Crores to the Applicant / CIRP, that he has made as a result of such preference.

vi. *Pass such other orders as this Hon'ble Tribunal may think fit and proper, in the facts and circumstances of the present case, and in the interest of justice, equity and good conscience.*

2. The present Interlocutory Application is filed on behalf of the Resolution Professional, Mr. Vinodkumar Pukhraj Ambavat of Varsha Corporation Limited under Sections 25(2)(j) read with Sections 43, 45 and 66 of the Insolvency and Bankruptcy Code, 2016 for seeking appropriate directions, orders and declarations against the Respondent (s) with respect to certain transactions identified as either preferential or fraudulent transactions.

3. The facts leading to the case in hand are as follows:

   i. The Corporate Debtor was admitted to the Corporate Insolvency Resolution Process (CIRP) vide an Order dated 10.06.2022 passed by this Tribunal. The Applicant was appointed as the 'Resolution Professional' of the Corporate Debtor by the Committee of Creditors ("COC") in their second meeting held on 08.08.2022.

   ii. The Applicant has identified, assessed and determined four (4) transactions, entered / executed by the Corporate Debtor which are stated to fall within the mischief of the above provisions under Chapter Ill and VI of the Code, 2016 causing a potential loss of Rs. 18,24,00,000 to the Creditors of the Corporate Debtor from 15/11/2019 to 10/06/2022. For this purpose, the Applicant is stated to have examined and relied upon the Transaction Review / Audit Report as prepared by the Transactional Auditors after approval of the CoC.

   iii. The Corporate Debtor was involved in the business of trading in plastic raw materials, chemicals etc. and trading in bullion.

Further, it is an admitted position that since Financial Year 2018- 19, the revenues of Corporate Debtor have been exclusively from bullion trading.

iv. The Applicant respectfully submits that, the Respondent Nos. 1 to 3 are the promoters / directors of the Corporate Debtor as per the records available of the MCA website, and Respondent Nos. 1 to 3 are partners of Respondent No. 6. Respondent No. 4 and 5 are the parties with whom the Directors of the Corporate Debtor have fraudulently / wrongfully traded with an intent to conceal the monies and defraud the Creditors. Respondent Nos. 3 and 6 are the parties with whom the Directors have entered into preferential transactions.

4. **Transaction 1 : Sale of gold bullion to Swastik Diamonds, Respondent No. 4:**

i. Out of the total sales revenue of the Corporate Debtor amounting to Rs. 16.48 Crores in Financial Year 2020-21, 98% of the said sales amounting i.e. an amount upto Rs. 16.10 crores were made to single party M/s Swastik Diamonds (Respondent No. 4), more particularly in 5 transactions within a span of 7 days i.e. from 11.08.2020 to 17.08.2020.

ii. While perusing the Ledger Account of Respondent No. 4, it is observed that, the Corporate Debtor made sales of a total of 29.885 kilograms of 995 gold aggregating to aforesaid sales of Rs. 16.10 crores as per the narration in the ledger entries. On further examination, it is perceived that, of the total sales of Rs. 16.10 crores, the Corporate Debtor has only received

Rs. 24 lakhs in the Financial Year 2020-21 and another amount of Rs. 42.10 Lakhs in the Financial Year 2021-22. Accordingly, only Rs. 66.10 lakhs has been received from Respondent No. 4 and therefore, a total outstanding receivable from Respondent No. 4 amounts to Rs. 15.44 crores at end of Financial Year 2021-22. The Applicant further states and submits that, from examination of the bank statement of Cosmos Bank provided for the period 23.06.2020 to 10.06.2022, it is confirmed that only Rs. 66.10 lakhs have been received into the said bank account.

iii. The Applicant submits that, the Ledger Account of the Corporate Debtor also reveals that, the Corporate Debtor entered into another sale transaction with the Respondent No. 4 on 06.06.2022, where gold worth Rs. 1.0567 crores were sold to Respondent No. 4, i.e. only 4 days prior to the Insolvency Commencement Date. In view of these transactions, the total outstanding receivables from Respondent No. 4 reaches to Rs. 16.49 Crores as on 10.06.2022, thereby causing potential loss to the Creditors of the Corporate Debtor. The Applicant states and submits that, from the available information and tally back up provided by the Corporate Debtor, it appears that the transaction of sale of gold to Respondent No. 4 had taken place for first-time. It is further submitted that it is strenuous to accept that the Respondent Nos. 1 to 3 must have chosen to sale 31.885 kg of gold of Rs. 17.15 crores on credit to Respondent No. 4 in the ordinary course of business. As on the commencement of the CIRP, receivables from Respondent No. 4 are still outstanding, it may be concluded that the sales were made with *malafide* intention by Respondent Nos. 1 to 3 to keep the inventory of gold out of reach of the Creditors, thereby causing substantial losses to the Creditors of the Corporate Debtor.

iv. Upon inquiry with the Respondent Nos. 1 to 3, it is observed that the Respondent Nos. 1 to 3 have failed to submit any reasons or justification to the sale of 30 kilos amounting to amount of Rs. 16.10 Crores to Respondent No. 4 within one week when the Corporate Debtor was continuously incurring losses in the past years and further 2 kilos were sold, when earlier sales was not realized for over 2 years. It is noteworthy that, the amount received from Respondent No. 4 i.e. Rs. 66.10 lakhs is merely 4% of the total sales thereby resulting in wrongful trading with intent to deceive the Creditors of the Corporate Debtor.

5. **Transaction 2 : Sale of Bullion to Maa Kali Jewellers, Respondent No. 5 :**

i. Sale of 560 Grams of Gold amounting to Rs. 30.09 lakhs was made to M/s Maa Kali Jewellers (Respondent No. 5), in March 2022 and only a sum of Rs. 0.44 Lakhs was received against it thus leaving balance recoverable amounting to Rs. 29.65 Lakhs.

ii. Accordingly, it may be concluded that the sales were made with *malafide* intention by Respondent Nos. 1 to 3 to keep the inventory of gold out of reach of the Creditors, thereby causing substantial losses to the Creditors of the Corporate

Debtor, and the said sales of Rs. 30.09 Lakhs attracts the provisions of Section 66 of the Code.

6. **Transaction 3 : Payment to Indra S Jain / Director of the Corporate Debtor, Respondent No. 2 :**

i. Ms. Indra S Jain, Respondent No. 2 above-named is a director in the Corporate Debtor and therefore is a related party of the Corporate Debtor. Further that, the look back period for the purposes of section 43 of the Code will be considered from 10.06.2020 to 09.06.2022.

ii. While determining the transactions, it has been observed that, a sum of Rs. 12 Lakhs (Rupees Twelve Lakhs) has been transferred from the Bank Account of the Corporate Debtor on 23.03.2021 as against an antecedent debt on 23.11.2020 by way of a journal entry. It is noteworthy that, on perusal of the Ledger Account as available with the Applicant, the narration as shown in the Ledger Account is 'Amount Paid on A/c' which clearly indicates that, the liability created is not in ordinary course of business of the Corporate Debtor and has the effect of putting the creditor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with section 53.

iii. The Applicant submits that, Section 43 of the Code is explicitly clear that a Corporate Debtor shall be deemed to have given a preference, 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 and 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.

iv. Therefore, in facts of the present case it is clear that, the payment of Rs. 12 lakhs attract provisions of section 43 being preferential payment of antecedent debt not in ordinary course of business. The Applicant further states and submits that, upon inquiry with the Directors of the Corporate Debtor, the Directors have failed to justify whether the said transfer was made in the ordinary course of business or financial affairs of the Corporate Debtor.

v. In view of the facts as stated above, the Applicant prays before this Tribunal to pass appropriate orders reversing the effect of the preferential transaction and direct the Respondent No. 2 to payback Rs. 12 Lakhs to the Applicant / CIRP, that she may have made as a result of such preference.

7. **Transaction 4 : Payment to Sharad Construction Company, Respondent No. 6 :**

i. Sharad Construction Company (Respondent No. 6) is a related party of the Corporate Debtor, as Respondent No. 1 viz. Mr Shantilal Jain is a partner in Respondent No. 6 company.

ii. Upon investigating the books of accounts of the Corporate Debtor, it is observed that at the commencement of the look back period i.e. from 10.06.2020 to 09.06.2022, the Respondent No. 6 was a creditor for Rs. 29.54 lakhs (Rs. 0.2954 Crores), however during the look back period, Respondent No. 6 further paid Rs. 1.58 Crores to the Corporate Debtor. On further investigation, it is revealed that as against a total of Rs. 1.875 Crores, the Corporate Debtor paid a total of Rs. 1.33 Crores, resulting in outstanding credit payable of Rs. 54.28 lakhs (Rs. 0.5428 Crores) as on the commencement of CIRP.

iii. On further studying the audited financials of the Corporate Debtor for Financial Year 2018-19 to Financial Year 2020-2021, the total amount payable to Respondent No. 6 is shown under 'unsecured loan' from related party. Since the payment of Rs. 1.33 crores is made to Respondent No. 6 on account of antecedent financial debt (debt being received by Corporate Debtor during the look back period as well) the said payment would attract the provisions of section 43 of the Code, coming under the purview of 'preferential transaction.'

iv. The Applicant further submits that, after inquiring the same with the Corporate Debtor, the reply of the Corporate Debtor corroborates that there was an antecedent debt of Rs. 0.29 Crores and that the Corporate Debtor further received Rs.1.58 Crores (Rs.1.29 Crores bank receipt and Rs. 0.29 Crores expenses paid on Corporate Debtor's behalf) and repaid Rs.1.33 crores towards the loan. Therefore, it is an admitted position, that the Corporate Debtor has repaid the loan on account of antecedent debt thereby attracting provisions of Section 43 of the Code.

v. In this background, the Applicant submits that a direction be issued against Respondent Nos. 1 to 3 and Respondent No. 6 to payback Rs.1.33 Crores to the Applicant / CIRP, that he has made as a result of such preference.

8. The Respondent No. 1, 2, 3 & 6 have filed combined reply dated 15.12.2023 stating that

a. the Resolution Professional has failed to make determination of the avoidance transactions within the model timelines as per Regulation 35A of CIRP Regulations.
b. There have been no adverse audit remarks or observations from State Bank of India regarding conduct of the business or transactions carried out by the Corporate Debtor prior to declaration of loan account as NPA on 15.12.2013 or subsequent thereto.
c. As regards sale of bullion to Respondent No. 4 & 5, The respondents, as director of the Corporate Debtor has purchased and sold gold in the regular course of business for profit to different entities, who have failed to repay the respective amounts due to their financial problem subsequently. The Corporate Debtor had payments outstanding from one of its clients M/s Penta Bullion LLP to the tune of Rs. 10,92,24,988/-, accordingly to realise the money from them, Corporate Debtor purchased Gold worth Rs. 12,50,47,150/- from 3.7.2020 to 14.7.2020. Similarly, the Corporate Debtor sold some gold to M/s Maa Kali Jewellers, in which it earned a gross profit of Rs. 78,290/-, and also sold 2 Kgs. Gold to Swastik Diamonds making a gross profit of Rs. 8,36,300/- on its assurance to clear old balance also, out of gold inventory of 2.26 kgs held by it in year 2021. As regards payment made to Respondent No. 2, such payment was reimbursement of money paid by it to discharge the debt

due to Lila Polymers Pvt. Ltd. in execution proceedings and this fact is evidenced from a Memorandum of Understanding dated 11.12.2020 entered with Lila Polymers Pvt Ltd. in this regard. Further as regards payment to Respondent no. 6, the funds were taken from Respondent No. 6, a partnership firm comprising Respondent No. 1 to 3 as its partners, to meet requirement of funds and the same were returned as and when the Corporate Debtor had sufficient income on a current account basis. The total amount claimed from the Respondents are nothing but transactions carried out during the course of business which does not put any creditor or person in preferential position. There is no loss incurred to other creditors by the Corporate Debtor as the intention of the respondents was to seek avenues to raise money, continue the business, increase profits, and repay the creditors.

9. Heard Ld. Counsel for Parties and perused the material available on record.

10. The timelines under Regulation 35A of CIRP Regulations have been held directory in nature, hence the contention that the application is in contravention of Regulation 35A has no merit. It is trite law that non-adherence to the timelines in relation to determination of avoidance transactions does not disentitle the Insolvency Professional to file an application for seeking avoidance, if such transactions are otherwise merits declaration of avoidance in the interest of Corporate Debtor.

11. The Applicant has sought orders in terms of Section 66 in relation to Transaction No. 1 & 2, and in terms of Section 43 in relation to Transaction No. 3 & 4.

Transaction No. 1 & 2

12. The transaction no. 1 & 2 pertains to sale of bullion and the basis of allegation primarily rests on non-realisation of sale proceeds. The Respondent had defended such transaction on the ground that Corporate Debtor gross profit on such sale transaction and these are duly reported in GST returns, hence cannot be doubted. The Respondent has also stated that the applicant can seek legal recourse to realise these outstandings.

13. It is relevant to note here that the loan account of the Corporate Debtor was classified as NPA on 15.12.2013. The bullion trade is commonly take place on cash payment basis, and the credit therein is an exception. On perusal of the ledger account of Respondent No. 4, it is noted that first payment of Rs. 6,00,000/- was received from the Respondent No. 4 on 15.9.2020, while sale amounting to Rs. 16,09,74,720/- had taken place upto 17.8.2020. In total, a sum of Rs. 24,00,000/- was received upto November, 2020, and thereafter an aggregate sum of Rs. 46,10,000/- was received over the year 2021-22. Even though, there was outstanding of Rs. 15,43,64720/- as on 6.6.2020 for more than 20 months, the Corporate Debtor again made a sale of Rs. 1,05,67,800/- on that day without receiving any further money even thereafter.

14. Similarly, in case of Respondent No. 5, the two sale transaction of gold bullion are the only transactions taken place with them, and as against total sale consideration of Rs. 30,09,290/-, a sum of Rs. 43,826/- was received by Corporate Debtor.

15. It is also pertinent to note that a company petition seeking initiation of CIRP process was already pending since 2019. These facts clearly show that the transaction of sale of bullion to Respondent No. 4 & 5 was undertaken to keep the Gold bullion inventory, which is readily realisable cash asset, out

of reach of its Creditors by converting it into Book Debts in name of a firm, with whom there was no dealing prior to first sale on 11.8.2020 and after last sale on 6.6.2020. This is undoubtedly an act carried out with intent to defraud creditors of the Corporate Debtor.

16. Section **66.** (1) of the Code provides that "*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.*" These facts clearly establishes that the transactions with Respondent No. 4 & 5 are not bona-fide and can not held to be carried out in ordinary course of business. Accordingly, we hold that the Respondent No. 1 to 3 are jointly or severally liable to contribute to the Corporate Debtor a sum of Rs. 16,49,32,520/- and Rs. 29,65,464/-, being the amounts outstanding from Respondent No. 4 & 5 in the books of Corporate Debtor, within 30 days from the communication of this Order. The said amounts or unpaid part thereof shall carry interest @ 12% p.a. from the date of this Order till the date of its payment, after expiry of 30 days of communication of this Order. It is clarified that the Applicant shall also have legal recourse available against Respondent No. 4 & 5 independently to recover the outstanding, however, the total amount realised from these Respondents in this relation shall not exceed the amounts payable by Respondent No. 4 and 5.

Transaction with Respondent No. 2

17. The Corporate Debtor had paid a sum of Rs. 12,00,000/- to Respondent No. 2 on 23.03.2021 and this payment is claimed to have settled the amount recovered by Lily Polymers Pvt. Ltd., the creditor of corporate debtor, from the sale consideration payable by such creditor under a Memorandum of Understanding dated 11.12.2020 entered into between the Respondent No. 2 & 3 and Lily Polymers Pvt. Ltd for sale of one flat owned by respondent No. 2 & 3 in their favour. The said adjustment is stated to have taken place in discharge of consent decree dated 11.12.2020 between such creditor and Corporate Debtor settling the amount of Rs. 66.00 lakhs payable by Corporate Debtor for a sum of Rs. 12.00 lakhs. It is recorded at clause 3 of said consent terms dated 11.12.2020 that "*…….As Varsha Corporation Limited failed to effect payment of the instalments agreed upon under the MOU, Mrs. Indra Shantilal Jain and Mr. Shirish Shantilal Jain, directors of Varsha Corporation Limited agreed to settle the outstanding dues of Varsha Corporation Limited by transferring their right, title and interest in Residential Flat No. 1801 situated on the 18th Habitable Floor, admeasuring 74.80 sq. mts. (carpet area) (exclusive of balconies), along with exclusive use of 1 Car Parking……………., to LPPL for a consideration after adjusting the outstanding Decreed liability payable by Varsha Corporation Limited to LPPL*". This clearly shows that the antecedent debt due from Corporate Debtor to Respondent No. 2 arose in discharge of obligation of Corporate Debtor in the execution of consent decree, accordingly the payment of Rs. 12.00 lakhs on 23.03.2021 was in nature of reimbursement of money paid by the Respondent No. 2 to the creditor of the Corporate Debtor. Hence, it can not be said that such payment to Respondent No. 2 has resulted into any preferential treatment. The bona-fide of Respondent No. 2 is apparent from the fact that they agreed to transfer their property to satisfy the debt of

Corporate Debtor. Hence, we are of considered view that no order is called for in terms of Section 43 of the Code.

Transaction with Respondent No. 6

18. The ledger account of Respondent No. 6 in the books of Corporate Debtor shows a credit balance of Rs. 28,28,600/- as on 1.4.2020 and balance of Rs. 54,28,574/- as on 10.6.2022, which clearly indicates that the net due to Respondent No. 6 has increased during this period. It is case of the Applicant that during period from 10.06.2020 to 09.06.2022, the Corporate Debtor received Rs.1.58 Crores (Rs.1.29 Crores bank receipt and Rs. 0.29 Crores expenses paid on Corporate Debtor's behalf) and repaid Rs.1.33 crores towards the loan during the said period, and has sought a declaration of preferential payment for a sum of Rs. 1.33 crores in terms of Section 43 of the Code. On perusal of the ledger account, we find that Corporate Debtor owed a sum of Rs. 29,24,500/- to Respondent No. 6 as on 10.6.2020 and this increased to Rs. 54,28,574/- as on insolvency commencement date, which clearly reflects that there was no preference given to Respondent No. 6 on net basis. The Applicant has only considered the payment side while seeking declaration in terms of Section 43 of the Code, and has ignored the various credits in form of payment made by Respondent No. 6 to the Corporate Debtor or to third parties on its behalf, which in our considered view is not correct approach. The Applicant himself has noted that a sum of Rs. 1.29 crores was received from Respondent No. 6 through bank account during look back period as against which a sum of Rs. 1.33 crores was paid to it during said period, resulting into net excess payment of Rs. 4.00 lacs. However, when we peruse the ledger account of the Respondent No. 6, we note that Respondent No. 6 has paid a sum of Rs. 3,85,020/- on 18.9.2020 and Rs. 1,20,972/- on 20.5.2022 towards GST liability of Corporate Debtor,

which is more than the amount paid in excess through banking channel. Hence, it cannot be said that such payment to Respondent No. 6 has resulted into any preferential treatment, as the payment and receipts of money is in nature of current account transactions to enable the Corporate Debtor to tide over its short-term financial needs. Hence, we are of considered view that no order is called for in terms of Section 43 of the Code.

Decision

19. In view of the foregoing discussion, we hold that the Respondent No. 1 to 3 are jointly or severally liable to contribute to the Corporate Debtor a sum of Rs. 16,49,32,520/- and Rs. 29,65,464/-, being the amounts outstanding from Respondent No. 4 & 5 in the books of Corporate Debtor, within 30 days from the communication of this Order in terms of Section 66 of the Code. The said amounts or unpaid part thereof shall carry interest @ 12% p.a. from the date of this Order till the date of its payment, after expiry of 30 days of communication of this Order. It is clarified that the Applicant shall also have legal recourse available against Respondent No. 4 & 5 independently to recover the outstanding, however, the total amount realised from these Respondents in this relation shall not exceed the amounts payable by Respondent No. 4 and 5. However, no order is called in terms of Section 43 in relation to transaction No. 3 and transaction No. 4.

20. In view of the aforesaid discussion, **IA 110 of 2023** is **partly allowed** and **disposed of** accordingly.

Sd/-	**Sd/-**
Prabhat Kumar **Member (Technical)**	**Virendrasingh G. Bisht** **Member (Judicial)**

12.03.2025