

NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH

COURT-III

I.A. NO. 256 OF 2019

IN

C.P./IB/1487/MB/2017

Filed by

Om Prakash Kanoongo

(under sections 43,44 and 66 r/w section 60(5)(c)
of the Insolvency and Bankruptcy Code, 2016)

... Applicant/ Liquidator

Vs.

One Ocean Shipping Private Limited.

...Respondent No. 1

Oscar Infra Private Limited.

...Respondent No. 2

Rishi Agarwal, Muthuswamy Santhanam,
Ashwani Kumar, Ravi Newatia.

...Respondent No. 3, 4,5 & 6

(hereinafter collectively referred as “**Respondent(s)**”)

In the matter of

ICICI Bank Ltd.

...Petitioner/Financial Creditor

Versus

Western India Shipyard Ltd.

...Corporate Debtor

Reserved for order on: **10.02.2023**

Order Pronounced on: **21.03.2023**

Coram:

Hon'ble Shri H.V. Subba Rao, Member (Judicial)

Hon'ble Smt Madhu Sinha, Member (Technical)

Appearance:

For the Applicant: Mr. Amir Arsiwala and Mr. Bhargav Kosuru a/w Mr. Darpan Bhatia i/b IndusLaw for the Liquidator.

For the Respondent: None Appeared for the Respondent.

Per: *Shri. H. V. Subba Rao, Member (Judicial)*

ORDER

1. This Interlocutory Application is filed by Mr. Om Prakash Kanoongo, Applicant/Liquidator of Western India Shipyard Limited. (hereinafter referred to as 'Corporate Debtor'), against One ocean Shipping Pvt. Ltd (Respondent No. 1), Oscar Infra Private Limited (Respondent No. 2), Rishi Agarwal & Ors (Respondent No. 3 to 6).

Praying the following reliefs:

- i) Declare the following transactions of the Corporate Debtor to be fraudulent and contrary to the provisions of the IBC:*

(1) A transfer of ₹ 5 crores by the CD from its account bearing number 500800301000299 with Vijaya Bank (Gamdevi

Branch) to the Respondent No. 1 by way of cheque dated the 13.04.2017, bearing the number 36633443;

(2) A transfer of ₹ 15,12,50,000/- (Rupees fifteen crores twelve lakhs and fifty thousand only) to the Respondent No. 2 on the 15.04.2017, via electronic transfer;

- ii) Direct the Respondent No. 1 to pay an amount of ₹ 5 crores, or such other amount as may be directed, to the Applicant to be deposited into the liquidator's account along with interest @ 18% per annum from the 13th of April, 2017 till the date of receipt of payment;*
- iii) Direct the Respondent No. 2 to pay an amount of ₹ 15,12,50,000, or such other amount as may be directed, to the Applicant to be deposited into the liquidator's account along with interest @ 18% per annum from the 15th of April, 2017 till the date of receipt of payment;*
- iv) Direct the Respondent Nos. 3-6 to be jointly and severally liable to pay to the Applicant the amounts stated in prayer (ii) and (iii) above in case the Respondent Nos. 1 and/or 2 make any default in complying with the orders, if any, passed against them;*
- v) Costs of this miscellaneous application;*
- vi) Any other order that this Hon'ble Tribunal may deem fit in the facts and circumstances of this case.*

2. Brief submissions of the Applicant are as follows:

1. The Applicant/Liquidator states that, ICICI Bank Limited, filed an application under section 7 of the IBC seeking initiation of CIRP against the Corporate Debtor. On 12.12.2017, Company Petition no. 1487 of 2017 was ordered under CIRP and the Applicant was appointed as the IRP of the Corporate Debtor.
2. Further since no Resolution Plan was submitted by the Resolution Applicant, on 26.07.2018 the order of liquidation was passed by this Bench and the Applicant was further appointed as the Liquidator of the Corporate Debtor.
3. The Applicant further states that the present application is filed in relation to two fraudulent transactions entered into between the Corporate Debtor and the Respondent no. 1 & 2 totalling to **₹ 20,12,50,000/-** (Rupees Twenty crores twelve lakhs and fifty thousand only). More specifically, this application is being filed in relation to:
 - i) a transfer of ₹ 5 crores by the CD from its account bearing number 500800301000299 with Vijaya Bank (Gamdevi Branch) to the Respondent No.1 by way of cheque dated 13.04.2017 bearing number 36633443;
 - ii) a transfer of ₹15,12,50,000/-(Rupees fifteen crores twelve lakhs and fifty thousand only) to the Respondent No. 2 on the 15.04.2017, via electronic transfer;

(Hereinafter referred to as the “**said Fraudulent Transactions**”)

4. The Applicant states that he took over as the Resolution Professional of the Corporate Debtor and complied with the provisions of section 17 of the IBC and took over the management and affairs of the Corporate Debtor and subsumed all powers of its board of directors. Accordingly, the Applicant began to investigate into the books of accounts of the Corporate Debtor to ensure that no suspicious and/or fraudulent transactions were undertaken by it.
5. The Applicant further submits that during the course of his investigations into the books of accounts of the Corporate Debtor, the Applicant came across the said Fraudulent Transactions and immediately flagged them as suspicious as he could not locate any documents or agreements or even correspondence justifying the same in the records of the Corporate Debtor. It is pertinent to note that, from a perusal of the documents available to the Applicant taken from the records of the Corporate Debtor, the Respondent No. 1 and 2 are related parties of the Corporate Debtor.
6. Applicant Further on Realising that the said Fraudulent Transactions require scrutiny, the Applicant through his letter on

09.02.2018 to the Respondent Nos. 1 and 2 seeking further information and justification behind the transactions

7. The Applicant further stated that upon further scrutiny of the books of accounts of the Corporate Debtor, as well as the statements of its bank accounts, it was noticed that an entity by the name of "**Bermaco Energy Systems Limited**" (hereinafter referred to as "**BEL**") had made two transfers to the bank account of the Corporate Debtor on the 13 and 15th of April, 2017, totalling 20.12,50,000/- (Rupees twenty crores twelve lakhs and fifty thousand only). These deposits were made in account number 500800301000420 held at Vijaya Bank, which account is registered in the name of "Western India Shipyard Ltd-Share Application Account". The bank statements of the Corporate Debtor show that this entire amount was immediately transferred to another account maintained by the Corporate Debtor with Vijaya Bank bearing the account number 500800301000299.
8. Further that the Respondent No. 3 to 6 are persons related to the said Fraudulent Transactions who were exercising over the Corporate Debtor at the relevant time, the Applicant on 08.03.2018 sent letters, seeking clarifications for the Fraudulent Transactions.
9. The Applicant thereafter received a letter dated 12.03.2018, from the Respondent No. 2 stating the following:

- i) The Respondent No. 2 specifically stated that the Respondent No. 1, which had been transferred an amount of ₹ 5 crores from the Corporate Debtor, had in turn transferred that amount to it on the 13.04.2017.
 - ii) These amounts were accepted by the Respondent No. 2 acting as an escrow agent in favour of the aforementioned BEL.
 - iii) It was alleged that this amount of 20,12,50,000/- (Rupees twenty crores twelve lakhs and fifty thousand only) which was paid by the aforementioned BEL to the Corporate Debtor towards share application money, was transferred to the Respondent No. 2 in an escrow account with the understanding that the same would be transferred to BEL upon request.
 - iv) It was further alleged that the Respondent No. 2 received a letter on the 21.09.2017, from the Corporate Debtor and BEL requesting it to transfer the entire amount back to BEL they have mutually agreed to call off the transaction.
10. The Applicant further stated that the erstwhile management of the Corporate Debtor also replied to the Applicant under cover of a letter dated 13.03.2018, purporting to set out certain facts in relation to the said Fraudulent Transactions. In this letter, the erstwhile management purported to paint a picture whereby the

aforementioned BEL agreed to invest in the Corporate Debtor through the subscription of shares. It was stated in this letter that BEL agreed to subscribe to the shares of the Corporate Debtor, however it was alleged that this was conditional upon the Corporate Debtor complying with various outstanding issues such as filing of quarterly results, annual returns, etc. It is further stated in this letter that since the Corporate Debtor was not able to complete its part of the transaction, BEL cancelled the transaction and was therefore entitled to refund of the amount of ₹20,12,50,000/- (Rupees twenty crores twelve lakhs and fifty thousand only).

11. The Applicant, after going through the records of the Corporate Debtor, realised that this entire story being concocted by the respondents is false, fabricated, and fraudulent. The Applicant came across several documents clearly showing that the amount of ₹ 20,12,50,000/- (Rupees twenty crores twelve lakhs and fifty thousand only) transferred into the Corporate Debtor by BEL was utilised for the issuance of shares to it. Some of the documents that make it clear that BEL was issued shares against its share application money of 20,12,50,000/- (Rupees twenty crores twelve lakhs and fifty thousand only) are:

- i) A letter dated 13.04.2017, sent by the Corporate Debtor to the Bombay Stock Exchange Ltd, informing the exchange

that the Share Allotment Committee of the Board of Directors of the Corporate Debtor was to be held on the 14.04.2017, for the purpose of considering the allotment of up to 9,25,00,000 equity shares and 3,75,00,000 warrants of the Corporate Debtor of the face value of 2/- each fully paid-up at par aggregating to ₹ 25 crores to BEL pursuant to the principle approval letter No. DCS/PREF/AC/PRE/1794/2016-17.

- ii) A letter dated 14.04.2017, sent by the Corporate Debtor to the Bombay Stock Exchange Ltd, informing it that the Share Allotment Committee of the Corporate Debtor approved the allotment of equity shares and warrants to the aforementioned BEL. This letter also records that the allotment of shares and warrants has been made by the Corporate Debtor to the aforementioned BEL pursuant to approval by the board of directors as well as the in-principle approval letter of the Bombay Stock Exchange Ltd.
- iii) A letter dated 10.07.2017, sent by the Corporate Debtor to its sole financial creditor describing the amount received by the Corporate Debtor from BEL as consideration for the allotment of shares and share warrants.
- iv) A letter dated the 11.07.2017, sent by the Corporate Debtor to its sole financial creditor in which the Corporate

Debtor gives details about the utilisation of the amounts received by it from BEL.

- v) A letter dated the 18.07.2017, sent by BEL to the sole financial creditor of the Corporate Debtor categorically admitting that it is an investor in the Corporate Debtor and has subscribe to equity shares and warrants therein.
- vi) A letter dated 18.07.2017, sent by the Corporate Debtor to its sole financial creditor giving details of the utilisation of the amount of 20,12,50,000 (Rupees twenty crores twelve lakhs and fifty thousand only) received from BEL on account of share application money.

12. The Applicant further after perusal of the above captioned documents submits that the share application money of 20,12,50,000/- (Rupees twenty crores twelve lakhs and fifty thousand only) received by the Corporate Debtor from BEL was appropriated towards the share capital by the issuance of equity shares and share warrants to BEL. It is only after the commencement of the insolvency resolution process, that the erstwhile management of the Corporate Debtor has made up a story about the Respondent Nos. 1 and 2 having accepted the amount of ₹ 20,12,50,000/- (Rupees twenty crores twelve lakhs

and fifty thousand only) from the Corporate Debtor on behalf of BEL acting as its escrow agent.

13. The Applicant further stated that the Respondent No. 3 responded to the letter dated the 08.03.2018, sent by the Applicant to him, by simply stating that he is not concerned with the affairs of the Corporate Debtor and is therefore unable to give any clarity. The Applicant replied to this letter on 04.04.2018, pointing out that the Respondent No. 3 is the chairman of ABG Shipyard Ltd which is the holding company of the Corporate Debtor and therefore would be considered as a person connected to the Corporate Debtor. As such, the Applicant stated that it is inconceivable that the Respondent No. 3 would not be aware about the said Fraudulent Transactions.

14. On 06.04.2018, the Applicant also responded to the letter dated 12.03.2018, received from the Respondent No. 2. By way of this letter, the Applicant sought further details about allegations made by the Respondent No. 2 in its aforementioned letter dated 12.03.2018.

15. The Respondent No. 2 replied to this letter on 10.04.2018, and stated that there was no agreement between it, the Corporate Debtor, and the aforementioned BEL specifically appointing the Respondent No. 2 as an escrow agent. It is pertinent to note that

the Respondent No. 2 has admitted the there was no written agreement between it, the Corporate Debtor, and BEL by which it was appointed as an escrow agent. This further go to show that this ruse of the Respondent No. 2 acting as an escrow agent is concocted, fictitious, and has been made up solely for purpose of covering up the said Fraudulent Transactions.

16. The Respondent No. 2 also enclosed with this letter dated 10.04.2018, a purported letter of the Corporate Debtor dated 21.09.2017. It is the Applicant's specific case that this purported letter of the Corporate Debtor dated 21.09.2017, is for which and fabricated, as the Applicant has not been able to locate any such letter in the records of the Corporate Debtor. In fact, the Applicant had not come across any such letter from the Corporate Debtor prior to receiving the letter from the Respondent No. 2 dated 10.04.2018. If this letter was genuine, the Applicant would have been able to find the same in the records of the Corporate Debtor. Therefore, it is clear that the letter dated 21.09.2017, purportedly sent by the Corporate Debtor is forged, fabricated, and does not actually exist.

17. Further that along with its letter dated 10.04.2017, the Respondent No. 2 also forwarded a letter dated 22.09.2017, purportedly sent by BEL to the Corporate Debtor, and another letter dated 13.04.2017, purportedly sent by the Corporate Debtor to the Respondent No. 2. It is the specific case of the Applicant that both of these letters are clearly forged and fabricated as the Applicant has only come across them for the first time after receiving the letter from the Respondent No. 2. Another letter dated the 21.09.2017, purportedly sent by the Corporate

Debtor to the Respondent No. 2 was also enclosed with the aforementioned letter dated the 10.04.2017, sent by the Respondent No. 2. This letter also appears to have been forged and fabricated, as the Applicant was not able to find any such letter in the records of the Corporate Debtor.

18. The Applicant further states that as it is abundantly clear that the justification sought to be given by the respondents with respect to the said Fraudulent Transactions cannot be sustained. The respondents are attempting to paint a picture that the said Fraudulent Transactions were merely part of the elaborate arrangement by which the Respondent No. 2 was to not as an escrow agent for the purported transaction between the Corporate Debtor and BEL. However, apart from the fact that neither party was able to produce any documentation demonstrating any such arrangement of appointment of the Respondent No. 2 is an escrow agent, the documents on record clearly go to show that BEL was allotted equity shares and share warrants against the share application money received from it. The shares and share warrants having been allotted to BEL, it is clear that the story being made by the respondents that the said Fraudulent Transactions were only escrow transactions is false, fabricated, and fraudulent story being cooked up by them.

19. Thus, the Applicant submits that the respondents have not been able to show any legal or even realistic justification for the said Fraudulent Transactions. Therefore, it is clear that the respondents have absolutely no reason or justification behind an amount of 20,12,05,000/- (Rupees twenty crores twelve lakhs and fifty thousand only) having been transferred to the

Respondent No. 1 and 2. As such, the said Fraudulent Transactions are clearly in violation of the provisions of the IBC. In such a scenario, the Applicant is entitled for an order from this Hon'ble Tribunal directing the respondents to return this amount of 20,12,05,000/- (Rupees twenty crores twelve lakhs and five thousand only) to him by depositing the same in the liquidators account.

20. Another interesting aspect to note is that the Respondents have, along with their letters, produced communications from "Bermaco Energy Limited", while the amount of 20,12,50,000/- (Rupees twenty crores twelve lakhs and fifty thousand only) was paid into the Share Application Money Account of the Corporate Debtor by "Bermaco Energy Systems Limited" which is a separate legal entity, This is one more suspicious factor that leaves no doubt that the said Fraudulent Transactions are fraudulent in nature.

21. In these facts, the Applicant is seeking an order from this Hon'ble Court under section 44 and/or section 67 of the IBC, directing the Respondents to pay to him an amount of 20,12,50,000/- (Rupees twenty crores twelve lakhs and fifty thousand only), which shall be deposited in the liquidator's account for disbursal in accordance with the provisions of the IBC. The Applicant humbly submits that this would be in the best interests of all the stakeholders and would ensure that the object of the IBC has been met.

FINDINGS

Heard Mr. Bhargav Kosuru a/w Mr. Darpan Bhatia, Counsel appearing for the Applicant/Liquidator of Western India Shipyard Limited (Listed Company). It is noteworthy to mention here that none appeared for the Respondent neither they choose to file reply from 12.02.2020 till 10.02.2023. This Application is filed under section 43,44 and 66 r/w section 60(5) of the IBC seeking remittance of amount obtained from two fraudulent transactions entered into between the Corporate Debtor/Western India Shipyard Ltd (WISL) and the One Ocean Shipping Private Limited (Respondent No. 1) and Oscar Infra Private Limited (Respondent No. 2) amounting to Rs. 20,12,50,000/- (Rupees twenty crores twelve lakhs and fifty thousand only.

Upon perusal of the document and available records with this Bench, it reveals in the statement of account that for the period from 01.01.2017 to 21.11.2017 in the Bank Account bearing no. 500800301000299 (Vijaya Bank) of the Corporate Debtor, reflecting the transaction amount as withdrawn by the Respondent(s) from the below mentioned Bank A/c of the Corporate Debtor, The Detailed transactions are as below:

This table sets out the Transactions as below:

Date of Transaction	Cheque Bearing no.	Account No. (In Vijaya Bank)	Amount (Withdrawn)	Respondent(s)
13.04.2017	36633443	500800301000299	5 Crore	R1
15.04.2017	36633454	500800301000299	5 Crore	R2
15.04.2017	36633453	500800301000299	5 Crore	R2
15.04.2017	36633455	500800301000299	5 Crore	R2
15.04.2017	36633457	500800301000299	12,50,000	R2
		Total	20,12,50,000	

Further from the Statement of Account dated 01.04.2016 to 15.05.2018 as provided by the Applicant, Wherein Another Account number addressed as Share Application Account bearing A/c no. 500800301000420 of the Corporate Debtor, Wherein “Bermaco Energy Systems Ltd” on 13.04.2017 through NEFT and 15.04.2017 through RTGS deposited total amount of Rs. 20,12,50,000 were Credited into the Share Application Account maintained by the Corporate Debtor.

The following are the detailed Transactions receipt of the share Application receipt of the Corporate Debtor are as given below :

Date	Account No. (In Vijaya Bank)	Amount (credited) by Bermaco Energy Systems Ltd.
13.04.2017	500800301000420	40,000,000
13.04.2017	500800301000420	10,000,000
15.04.2017	500800301000420	40,000,000
15.04.2017	500800301000420	40,000,000
15.04.2017	500800301000420	20,000,000
15.04.2017	500800301000420	40,000,000
15.04.2017	500800301000420	11,250,000
	Total	20,12,50,000

It is Pertinent to note that the transactions appearing in the bank statements of both the accounts bearing no. 500800301000299 and 500800301000420, which is reflected in the name of the Corporate Debtor/ Western India Shipyard Ltd (WISL). Further it is significant to mention herein that since CIRP of the Corporate Debtor commenced from 12.12.2017, Thereafter RP repeatedly through his emails raised issues with regards to an amount of Rs 5 crore to One Ocean Shipping Private Limited (Respondent No. 1) and 15.125 crores to Oscar Infra Limited, for providing with the details and explanation for the transactions made between the Respondent(s) and Corporate Debtor. The Respondent No.2 in his email dated 12.03.2018 replied to the Resolution Professional by referring & responding to his mail dated 09.02.2018, replying and

answering about the amount of ₹15.125 crores received from the Corporate Debtor, The Oscar Infra Private Limited (Respondent no. 2) as certainly acknowledged the receipt of ₹ 5,00,00,000 from M/s One Ocean Shipping Pvt Ltd received on behalf of Corporate Debtor and 15,12,50,000/- directly from the Corporate Debtor on 13.04.2017 and 15.04.2017 respectively in an Escrow Account held in favour of M/s. Bermaco Energy limited (BEL), Further it was admittedly accepted by Respondent no. 2 that “the said amount, which was paid by BEL to WISL towards share Application Money, was transferred to Respondent(s) in the Escrow Account with an understanding that the same is to be transferred to M/s. Bermaco Energy limited (BEL), upon their request. Further Respondent while emphasizing upon the above facts stated that both the Corporate Debtor and M/s. Bermaco Energy limited (BEL), had mutually agreed upon to call off the transaction as the Corporate Debtor could not complete various compliance.

Further, the Respondent no. 2 on 21.09.2017 received letter from both the Corporate Debtor and M/s. Bermaco Energy limited (BEL) requesting and authorising to transfer the entire said amount to BEL. Acting upon such request the Respondent(s) transferred Rs. 20,12,50,000/- into the account of BEL thereby closing the escrow account. Therefore, the balance of Corporate Debtor in Oscar Infra Pvt Ltd (Respondent no. 2) and in their books of accounts stood nil.

Further, Respondent No. 3 through his email dated 13.03.2018 under the letter head of ABG Shipyard limited (Holding Company of Corporate Debtor) combinedly replied to the Letter dated 08.03.2018 of the Resolution Professional, and admitted that During December, 2016 BSE suspended trading of WISL equity share for non-compliance of filing quarterly results of March, 2016. June 2016 and September 2016,

Further that the Corporate Debtor received Share Application money from M/s Bermaco Energy Ltd in two tranches, i.e. on 13.04.2017 and 15.04.2017 respectively.

Therefore Pursuant to the 'In Principle' Approval Letter dated 31.03.2017, issued by BSE limited, an email dated 14.04.2017 was sent by ABG, holding company of the Corporate Debtor to BSE Limited with regards to the allotment of shares and warrants made to Bermaco Energy Limited, further with an email dated 10.07.2017 and 11.07.2017, addressed to ICICI bank Limited, wherein the ABG acknowledged that as per the discussions with the Investor (BEL), the necessary funds were assured to be remitted to the Corporate Debtor, further stating that the utilisation of the amounts so received by Corporate Debtor as consideration for the allotment of shares and share warrants to BEL (Investor). Further the Resolution Professional rightly pointed out towards the Amount which was paid into the share Application Money account of the CD by "Bermaco Energy Limited", whereas it is evident from the entries in the statement of Accounts that it was paid by "**Bermaco Energy Systems Limited**" and not "Bermaco Energy Limited" as both being separate legal entity.

Therefore, this Bench is of the considered view that both the prayers of the Applicant/ Liquidator as prayed is eligible to be admitted:

- i) *The Respondent No. 1 is directed to pay an amount of ₹ 5 crores, along with interest @ 18% per annum from the 13th of April, 2017 till the date of receipt of payment to the Applicant to into the Liquidator's Account.*
- ii) *Direct the Respondent No. 2 to pay an amount of ₹15,12,50,000, or such other amount as may be directed,*

to the Applicant to be deposited into the liquidator's account along with interest @ 18% per annum from the 15th of April, 2017 till the date of receipt of payment;

Furthermore, the Applicant/Liquidators claim in the present IA 256 of 2019 remains unchallenged by the Respondent(s), Therefore the amount of 20,12,50,000/- (Rupees twenty crores twelve lakhs and fifty thousand only) is to be refunded back by the beneficiary to the Liquidator of Western India Shipyard Ltd henceforth.

Thus, the above IA no. 256 of 2019 is Allowed and stands disposed off

Sd/-

MADHU SINHA
Member (Technical)
// Chaitanya B//

Sd/-

H. V. SUBBA RAO
Member (Judicial)