IN THE NATIONAL COMPANY LAW TRIBUNAL

COURT III, MUMBAI BENCH

M.A. 384 of 2020
In
C.P.(I.B.) 1237 of 2019

Under Section 19, Section 43, Section 44 and Section 66 of the Insolvency and Bankruptcy Code, 2016 an all the other provisions of the Insolvency and Bankruptcy Code, 2016

Filed By

Mrs. Vaishali Arun Patrikar,

Resolution Professional,

M/s. Panama Systems Private Limited,

having its registered office at A-2, Shantidoot Society,

Parvati Darshan, Pune 411009

.....Applicant/ Liquidator

V/s

Mr. Hemant Khinvasara,

Director (Suspended) of M/s Panama Systems Private Limited

having its registered office at R/at B-Octeva-110,

One North Society, Beside Magarpatta City, OPP. YOO,

Pune 411028 **....Respondent**

Order Reserved On: 24.01.2023

Order Pronounced On: 06.03.2023

Coram:

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

Smt Madhu Sinha, Hon'ble Member (Technical)

Appearance:

For the Applicant: Adv. Ms. Prachi Wazalwar a/w Adv Princi Jaiswal

For the Respondent: Adv. Mr. Amir Arsiwala a/w PCS Prashant Thakre.

***Per:* Smt Madhu Sinha, Member (Technical)**

ORDER

1. This Miscellaneous Application 384 of 2020 is filed by Mrs. Vaishali Arun Patrikar (hereinafter referred as the "**Applicant/Liquidator"**) of M/s. Panama Systems Private Limited (hereinafter referred as "**Corporate Debtor**") under **Section 19, Section 43, Section 44, Section 66** of the Insolvency and Bankruptcy Code, 2016 and all the other applicable provisions of the Insolvency and Bankruptcy Code, 2016 praying for following reliefs:

(a) This Hon'ble Tribunal be pleased to pass an Order u/s 44 of the Code directing the Respondent to remit the amounts of Rs. 2,28,813/- and 76,500/- in the bank account of the Corporate Debtor which is paid by the Respondent.

(b) This Hon'ble Tribunal be pleased to pass an Order U/s. 66 of the Code directing the Respondent to restore the assets of the CD and handover the possession to the RP

or remit the amount of Rs. 80,81,460/- in the bank account of the Corporate Debtor to compensate the loss suffered by the creditors of the CD.

(c) This Hon'ble Tribunal be pleased to pass an Order u/s. 19 of the Code to direct Respondent to comply with the instructions of the resolution professional and to cooperate with him in collection of information and management of the corporate debtor.

(d) This Hon'ble Tribunal may pass the punishment order u/s 68, 69, 70, 71 imposing a fine or imprisonment or both as may deem fit by this Hon'ble Bench.

(e) This Hon'ble Tribunal be pleased to pass any other Order in the interest of Equity, Justice and good conscience.

2. The Applicant subsequently filed an Additional Affidavit dated 29.06.2022 along with Audited Balance Sheet as on 31st March 2018, group summaries of fixed assets and details as per tally back-up of the Corporate Debtor, Ledger printout of mobiles from the tally backup of the Corporate Debtor in the year 2018-2019, wherein the amount of the missing assets under prayer clause (b) above was revised to Rs. 50,95,000/-.

3. <u>Submission on Behalf of the Applicant:</u>

i. The Applicant states that this Tribunal, vide an Admission Order dated 10.07.2019, initiated the Corporate Insolvency Resolution Process (hereinafter referred as "**CIRP"**) under Section 9 of the Code, against the Corporate Debtor. Subsequently, Mrs. Neelima Anil Bhate was appointed as Interim Resolution Professional (**IRP**). However, in the 1st COC meeting, held on 14.08.2019, Mrs. Neelima Anil Bhate was replaced by Mrs. Vaishali Arum Patrikar (**the Applicant**). Thereafter, the Applicant was confirmed as Resolution Professional by the Committee of Creditors (hereinafter referred as "**COC**").

ii. The Applicant being the Resolution Professional, detected an amount of Rs.50,000/- and Rs. 26,500/- being transferred by Respondent on 26.07.2019 and 19.08.2019, towards the payment of Advocate Mily Ghoshal. When the Applicant inquired about the approval of such payments from the earlier IRP (i.e. Mrs. Neelima Anil Bhate. She was informed that such payments were not approved by IRP. Subsequently, the Applicant sent a recall notice calling upon the Respondent to refund the aforesaid payment amounting to a total of Rs. 76,500/-. Further, the Respondent vide an email dated

07.12.2019, affirmed to make the payments soon, however he failed to do so.

iii. The Applicant states that, the Respondent vide an e-mail dated 11.12.2019, informed the Applicant that that various payments amounting to Rs. 2,28,813/- were made by him to some of the creditors and employees on the basis of medical and personal urgencies. However, the Applicant submits that these payments were made to some selected employees/vendors in preference to the other creditors/ employees of the Corporate Debtor from his personal bank account on *ad-hoc* basis. The Applicant states that these transactions were without her approval performed in a fraudulent manner to defraud the other creditors of the Corporate Debtor.

iv. Further, the Applicant had sent an email dated 30.09.2019, to the Respondent, in order to obtain information pertaining to the Fixed Asset Register and all the other relevant details. However, this information was partially received in bits and pieces and justifications were given as regards to the completeness of the information. Therefore, the Applicant requested the information again vide an email dated 09.12.2019, however, the Respondent failed to co-operate.

v. The Applicant submits that the Respondent did not corporate in handing over keys, giving control of the websites, passwords or giving any biometric access. Pursuant to the non-cooperation from the Respondent the Applicant decided to shift the business operations to a new place in order to reduce the cost of the Corporate Debtor substantially and to keep the Corporate Debtor in going concern. The Applicant for a smooth shifting, asked Respondent about the Login Id and password. However, the Applicant states that the Respondent gave a wrong pass word.

vi. The Applicant further states that she observed a mismatch of assets as per the list of assets mentioned in books of accounts provided by the Respondent. A number of assets with an approximate value of Rs. 81 lacs were not traceable either in the offices situated at Pune or Kolhapur of the Corporate Debtor. The amount is arrived as per the information available in the Books of Accounts of the Corporate Debtor.

Particulars	No. of the assets as per books	No. of assets physically found	Difference	Approx cost of Rs.
Apple I Mac Computers	2	NIL	2	2,39,480
Laptops	25	3	22	6,35,800
Lenovo Desktops	147	31	116	40,94,800

Vehicles	3	NIL	3	29,86,380
Mobiles Redmi Note 6 pro	15	NIL	15	1,25,000
			Total	80,81,460

However, this claim was revised by the Applicant to Rs. 50,95,000/- in the Additional Affidavit dated 29.06.2022.

vii. The Applicant states that with respect to the aforementioned assets, the Respondent informed that these assets were either sold or scrapped, during the year 2018-2019. However, this justification was not corroborated with the records of the Corporate Debtor and the Applicant submits that these assets are misappropriated by the Respondent. Regardless of multiple requests, the Respondent did not co-operate in providing the data, information etc. in preparation and finalisation of the accounts for the period 01.04.2018 to 31.03.2019 and thereafter.

viii. Further the Applicant submits that this act and omissions of the Respondent squarely falls under Section 68 of the IBC Code, 2016 which is partly reproduced below:

Section 68. Punishment for concealment of property:

(1) Where any officer of the Corporate Debtor has,

i. Within the twelve months immediately preceding the insolvency commencement date,

(a) Willfully concealed any property or part of such property of the Corporate Debtor or concealed any debt due to, or from, the corporate debtor, of the value of ten thousand rupees or more; or

(b) Fraudulently removed aby part of the property of the Corporate Debtor of the value of Ten Thousand Rupees or more;

ix. The Applicant further states and submits that the nature of the transaction performed by the Respondent during the stated period is a fraudulent one and performed by the Respondent to defraud the Creditors of the Corporate Debtor u/s 68 of the IBC. Hence, this Application.

3. <u>Reply on Behalf of the Respondent:</u>

i. The Respondent filed a detailed reply dated 01.11.2021, opposing all the averments dealt in the present Miscellaneous Application.

ii. The Respondent states that the claim of the original Operational Creditor who filed the Company Petition i.e Mrs. Lata Ajit Shah, is Rs. 1,54,55,744/- whereas the admitted claim by the Liquidator is Rs. 2. 87 Cr. Being a sole COC member, she is mis-using the process of CIRP for her own undue benefits and had jeopardised the interest of all the creditors and stakeholders

including the employees of the company and unsecured creditors in the company.

iii. Further, the Respondent states that the alleged payment of Rs. 76,500/-to Advocate Mily Ghoshal was paid on the basis of the legal consultancy services availed in relation to the Insolvency Petition against the company, while these invoices were actually raised by the Advocate prior to the CIRP initiation, based on an oral approval of the IRP. However, this amount has been remitted back to the company on 16.03.2020.

iv. With reference to the other payment of Rs. 2,28,813/-, the Respondent states that all the payments were made from the personal account of the Respondent and not from the Company's account and therefore, the said transaction cannot be treated as a preferential transaction. Further, the Respondent states that these payments were made from his own pockets owing to personal and medical emergencies of the creditors as these amounts were not paid by the Resolution Professional and hence the employees /vendors approached the Respondent for help. The Respondent also submits that the Forensic Audit Report of the Corporate Debtor had not recorded any transaction as avoidable transaction.

v. The Respondent with respect to non-co-operation states that that all the information and assets were available in the office premises, and the possession was duly given to the to the Applicant.

vi. Furthermore, the Respondent states that all the information and documents were under complete control of Applicant. The Respondent was surprised by Applicant's claim as she was very well able to sell the assets under Liquidation and Monies were given to CoC sole member to settle her undue exorbitant and fraudulent claim , RP fees, fees to process advisor Mr. Harshad Deshpande. etc.

vii. The Respondent submits that the Applicant had visited Kolhapur Office and took over all the assets which were lying there including his personal assets as well. These personal assets were not returned to the Respondent. Further the Applicant had taken the control over the office and has disposed off all the assets of the company and also stated that all the amount had been distributed/ paid to the sole COC member and used for her own fees and process advisor fees. The Respondent states that in case the Applicant had shifted the office, the Applicant must explain the claim admitted for rental of the new office.

viii. The Respondent further submits that all the passwords and ids were submitted duly to the Applicant. Further, it is pertinent to note that the Applicant earlier had filed reply to IA 1635 of 2021 stating that the statutory filings have been completed. If the Id and password were not available, then how did she complete the filing as claimed by her. The Respondent states that the statements made by the Applicant are totally contradictory in I.A 1635 of 2021 and in MA 384 of 2020. The Respondent seeks appropriate actions against the Applicant to be taken by the NCLT and IBBI in view of the fraudulent working of the Applicant.

ix. The Respondent states that the Applicant had accepted in her reply to I.A. 1653 of 2021 that some of the assets are sold and the monies have been in received in the Bank Account of the Company. The Respondent further states that the company being an IT company, the relevant assets in the nature of laptops, phone, etc needs to be upgraded or replaced or scraped owing to the depreciation , therefore, the Respondent had sold the assets.

x. Further, the Respondent states that the Applicant had taken charge of Respondent's personal assets and therefore must return the same. The Respondent is seeking directions against the Applicant to bring and all the monies that have been paid out

of liquidation of the assets and the distribution must happen as per the waterfall mechanism of the IBC code.

xi. In view of the stated facts as above, the Respondent states that the Section 19, Section 43, Section 44, Section 66 and Section 68 or any other provision regarding any avoidable transaction are not at all attracted. Appropriate directions against the Applicant and COC must be issued and redistribution of liquidation estate must be ordered.

4. <u>Rejoinder filed by the Applicant :</u>

i. The Applicant had filed the Rejoinder dated 18.01.2022 opposing the Reply.

ii. With respect to discrepancy in the assets value and its availability, the Respondent has not provided the information as to whom the assets of the Corporate Debtor are transferred or sold, with no selling price details. The Applicant further states that the Respondent has vaguely replied to this issue by concealing the vital information.

iii. The Applicant has recently detected that the Respondent is carrying the business of the Corporate Debtor in a manner of a proprietorship firm as “Panama Systems” with the Proprietor being “Abhay Balkrushna Waghmode” who is an employee of the

Corporate Debtor, bearing id PSPL144. The Applicant further states that the Respondent along with the Proprietor carried out this business from 03.04.2019 from an office located at Pune. The copy of the Shop Act and the Udhog Aadhar Registration certificate registration dated 02.11.2019 is annexed to the Rejoinder.

iv. The Applicant further states that the CIRP by this Tribunal was initiated on 10.07.2019, it is pertinent to note that within 4 months, the Respondent through its employees started another firm by same name and diverted the business of the company. Therefore, it seems that the employees and the assets of the Corporate Debtor are being utilised for the said business for the personal benefit of the Respondent and Mr. Abhaykumar Waghmode. The Applicant further states that the Respondent diverted the business of the Corporate Debtor and carried out the business of Grampanchayats automation/ data entry of the Namuna 1-33, various certificates and reports. The business is same in nature as that was carried on by the Corporate Debtor i.e., Panama Systems Private Limited.

v. The Proprietary concern had a current account no. 0040011120000978 at Lokmangal Co-Op Bank at Pune and the said current transactions were made from November 2019 to

September 2021. The Applicant apprehends that by this route the assets, funds and business of the Corporate Debtor have also been directed to this propriety business, the said bank account copy is duly annexed to the Rejoinder. Further, the Applicant has observed from the bank Statements that the customers(Gram Panchayats) of the Corporate Debtor are the customers of Panama Systems (Proprietorship) and the same business is done with these customers by proprietorship concern. The list of the same customers is annexed along with the monthly summary receipts from the bank statements. These bank statement clearly shows that the amounts received from this business were regularly withdrawn by Mr. Abhay Kumar Waghmode. Further, the amounts received from the business were regularly transferred to the Bank Account of the Respondent at Development Credit Bank. From the above facts, the Applicant states that it is apparent that the competing business was run by the Respondent for his personal benefit.

vi. The Applicant states that the Respondent has sold the business of this Panama Systems (Proprietary) to M/s Kimaya Fintech Pivate Limited at a consideration of Rs. 31 Lakhs vide the Agreement /document dated 17.08.2020, the copy of the same is attached to the Rejoinder. This Agreement is duly signed and the Respondent is the Managing Director of M/s Kimaya Fintech

Private Limted. Further, the Applicant states that the consideration of Rs. 31 lakhs must have been taken by the Respondent for his personal benefit only.

vii. Thus, the Respondent even after the initiation of CIRP process had used the assets, information, employees of the Corporate Debtor for their personal benefit and carried on competing business even before the CIRP, and during the CIRP which is a clear case of defrauding the creditor of the Corporate Debtor.

viii. Further, the Applicant has recently found that there are various civil and criminal cases pending against the respondent at various under IPC, NI Act and CPC etc. for cheating, for dishonour of cheques and for recovery of advances taken by the Respondent from various persons.

ix. The Applicant further states that the claims have been admitted in accordance with the law and considering the clauses of the Leave and License agreement. The Applicant admits that the amount of Rs. 76,500 was received from the personal bank account of the Respondent on 16.03.2020, after the frequent reminders for the same. It may be noted that the Respondent ultimately accepted that it was a preferential payment and he returned it.

x. The Applicant states that the Respondent neglected to pay the dues to various vendors of the Corporate Debtor for almost 1.5 years but only made payments to certain selective employees of his choice in preference and not to other vendors. This clearly corroborates that the fact that competing business was carried on with select employees by the respondent in the name and style of Panama Systems with the assistance of employee of Corporate Debtor.

xi. The Applicant submits that utmost transparency was maintained by her which is evident by the information available with the Respondent. The Applicant states that the payments made during the year 2020 were related to CIRP and the payments during the 2021 were related to the Liquidation process.

xii. The Applicant states that no GST password was provided and therefore, the liquidator herself contacted the GST department and followed up with them and filed the Application for revocation of cancellation of registration and finally on 22.05.2020, the order of revocation of cancellation was received by Liquidator. A new login-id was activated by the GST Department and made available to her for all the GST filings from No. 2018 onwards, the copy of the same is attached to the Rejoinder.

xiii. With reference to the mismatch of the assets the original amount price amounted to Rs. 50.95 lakhs and therefore the Respondent has wrongfully concealed the assets of the Corporate Debtor.

FINDINGS:

i. We have heard the Counsel appearing for the Applicant and the Counsel appearing for the Respondent at length. We have also taken due note of the submissions and documents placed on record. This Application is filed under Section 43, Section 44, Section 66, Section 19 and for Punishment Order under Sections 68, 69, 70, 71 of Insolvency and Bankruptcy Code, 2016 against the Respondent (Suspended Director of the Corporate Debtor) seeking various reliefs including to restore the assets /handover the possession of assets/ compensate the loss suffered by the creditors of the Corporate Debtor along with other reliefs as detailed in the Application. On perusal of the documents annexed to the present Application, it is evident that the issues for consideration before us are:

a. *Whether the Application under Section 43,44 and Section 66 would survive in absence of Transaction Audit Report/ Forensic Audit Report showing any preferential transaction /fraudulent transaction or wrongful trading and subsequently any action under section 68,69,70 and 71;*

b. *Whether Application under Section 19 to seek Order against Respondent for non-cooperation with Resolution Professional/ Liquidator is maintainable;*

ii. During the course of hearing before this Tribunal on 02.06.2022, the Counsel for the Applicant stated that she is not pressing for a part of prayer clause (a) i.e. Rs. 76,500/- paid to Advocate Mily Ghoshal as this amount was refunded by the Respondent. The Applicant further stated the same in her Rejoinder dated 10.01.2022. However, the Applicant advancing her contention stated, even if aforesaid amount is remitted back, it amounts to preferential transaction. Further, the Applicant contended that an amount of Rs. 2,28,813/- was paid to some vendors/employees and these payments was made in preference to the other creditors/ employees of the Corporate Debtor from his personal account on *ad-hoc* basis which squarely falls under the nature of preferential transaction. In order to better address the issue, it is necessary to examine the scope of the preferential transaction which is enumerated under the provisions of the Code, 2016. For the sake of clarity and brevity the provision of the said transaction is extracted below.

> ***Section 43:*** *(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.

In so far as the present case is concerned, the record reveals that the payment of Rs. 76,500 made to the Advocate Mily Ghoshal by the Respondent, despite of no written approval by the earlier IRP i.e Mrs. Neelima Bhate, which is evident by the email dated 27.07.2019. The Respondent contended that the IRP had given oral approval, without representing any evidence. Even if the amount of Rs. 76,500/- is remitted back by the Respondent, it is crystal clear from the impugned transaction has not happened during the ordinary course of business and that such transaction was deliberately entered into by such Respondent in order to adversely affect the interests of such a person in relation to the claim. In furtherance to this, the Bench notes that the Respondent made payment of Rs. 2,28,813/- to some vendors/employees on humanitarian grounds owing to the personal and medical urgencies of the creditors via his personal bank account. However, there is a lack of evidence to show that the amount of Rs. 2,28.813/- was an outcome of the Corporate Debtor's business since it is paid from the personal account of the Respondent and also there is

no Audit Report to evidence the same. Since the amount of Rs. 76,500/- is not pressed by the Applicant as it is reversed to the Corporate Debtor's account and the amount of Rs. 2,82,813/- is paid from personal account of the Respondent, therefore Bench is refraining to adjudicate on this contention due to lack of concrete proof.

iii. Further, the Applicant has revised the value of the missing assets in the nature of mobile phones, laptops and desktops in the prayer clause (b) from Rs. 80,81,460/- to Rs. 50,95,000/- vide the Additional Affidavit dated 29.06.2022. The Applicant further stated that, she had received information from the Respondent that the vehicles from the missing assets were sold and the amount was received in the bank account of the Corporate Debtor, therefore an amount of Rs. 28,86,380/- was deducted from the original claim amount. On 02.06.2022, in the course of hearing before this Bench, the Counsel for Applicant stated about the missing assets which were scrapped or written off by the Respondent also the auditing of the books of account of the Corporate Debtor could not be carried out due to non-co-operation by the Respondent. Furthermore, the Respondent agreed across the bar to submit the relevant information to the Applicant within two weeks. Despite the above-mentioned statement, the Respondent in his Written Submissions dated 31.01.2023, vaguely replied that the claimed missing assets were sold and scrapped owing to the depreciated value in the year 2018-2019, wherein the proceeds were used for the daily office expenses. The

Applicant has raised the contention that selling of missing assets by the Respondent amounts to fraudulent and wrongful trading under section 66 of the Code. The Bench notes that the Respondent has clearly failed to disclose any whereabouts of the assets while candidly mentioning that the assets have been sold or scrapped, failing to disclose further vital information. The Bench further observes that some or all of these missing assets may have been sold during the period as claimed by the Applicant and as per the statement of Respondent in his reply, however there is no clarity or appropriate bifurcation placed on record about how the Applicant has evaluated the value of missing assets amounting to Rs. 50,95,000/- produced in the Additional Affidavit dated 29.06.2022. Also, there is no coherence whether this amount is calculated on the basis of depreciated value or the original amount is on the date of purchase of the missing assets is taken into consideration . Further it is pertinent to mention that there is no audited document placed to show the computation of value of the missing assets amounting of Rs. 50,95,000/- along with requisite details like date of purchase, the depreciated value, purchase bills, etc. The Applicant is clearly lacking evidence to support the value contended in the Additional Affidavit therefore, this Bench is not able to adjudicate the act of the Respondent under wrongful and fraudulent trading of the assets under Section 66 for lack of evidence on sale value of these assets.

iv. As far as the non- co-operation by the Respondent is concerned, we have examined the e-mails attached as annexures/exhibits to the Application which were exchanged between the Applicant and Respondent for seeking and providing the information pertaining to the Corporate Debtor Company. The defense taken by the Respondent states that all the information in his possession had already been communicated to the Applicant to which the Applicant has contended that the information was partly received. A mere running of the eye on the contents of Section 19 imposes an obligation on the personnel and promoters of the 'Corporate Debtor' to extend all assistance and co-operation which the Resolution Professional/Liquidator will require in running / managing the affairs of the Corporate Debtor. However, it is pertinent to note, the running/managing the affairs of the Company by the Applicant has come to an end as the Applicant has filed an Interlocutory Application 2739 of 2021 seeking dissolution of the Corporate Debtor Company. It is necessary to observe that at this advanced stage, the process of Liquidation has attained its finality wherein the running of business has come to an end. Further, the Applicant with the information available with her, distributed all the assets and balances to the respective stakeholders as per Section 53 of the Code and the Liquidation Account of the Corporate Debtor is already closed on 27.01.2023. Thus, while dealing with the contention of non-co-operation by the Respondent, the Applicant has taken her steps to complete the process with whatever information she had. Also, with regards to concealment of information pertaining to the missing assets (phone, laptops, desktops) the Applicant/Liquidator has not provided any

concrete proof with respect to the evaluation of the amount claimed for the concealed property/missing assets or conducted any audit to conclusively show the value of missing assets as claimed. Therefore, in view of the above facts and circumstances, the Bench is of the considered opinion that the Applicant has failed to furnish the requisite details or provide any concrete proof with regards to the contentions raised, hence the bench is refraining from taking any action on the conduct of the Respondent in absence of any clinching evidence.

With the above observations, the present Misc. Application no 384 of 2020 is dismissed and disposed of.

SD/-
MADHU SINHA
MEMBER (TECHNICAL)

SD/-
H.V. SUBBA RAO
MEMBER (JUDICIAL)

//Renuka//LRA//