

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

I.A. 1552 OF 2020

Under Section 66 r/w Section 60(5)(c) of
Insolvency & Bankruptcy Code, 2016

CA Manish Sukhani

...Applicant

Vs.

Shri Amit Lodha & Others

...Respondent

In the matter of

C.P.(IB) No. 4697/MB/2018

M/s Associated Road Carriers Limited

.... Financial Creditor

Vs.

M/s Indsur Global Limited

...Corporate Debtor

Order delivered on: 21/11/2023

Coram:

Shri Prabhat Kumar
Hon'ble Member (Technical)

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

Appearances:

For the Applicant : Mr. Avinash R. Khanolkar
a/w Ms. Surekha Yadav,
Advocate

For the Respondent : Ms. Jyoti Muley, Advocate

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

I.A. 1552 OF 2020

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This Application IA 1552/2020 is filed in C.P.(IB) 4697/MB/2018 by Sh. Manish Sukhani, Reesolution Professional (“Applicant”) in the Corproate Insolvency Resolution process (“CIRP”) in the matter of M/s Indsur Global Limited (“Corporate Debtor”) in terms of section 66 read with Section 60(5)© of the Insolvency & Bankruptcy Code, 2016 (“Code”) to seek following relief –
 - a. an Order U/s. 66 (1) of the Code directing Sh. Amit Lodha (Respondent No. 1 or R-1) to remit the amount of 3,75,000 towards the rent for the using premise of the Corporate Debtor for his personal use;
 - b. an Order U/s. 66 (1) of the Code directing the Respondent No. 1 to remit to the Corporate Debtor's account an amount of 37,80,000/- towards the lease rental of the flat which is being used by the R-1 for his residential purpose only;
 - c. an Order U/s. 66 (1) of the Code directing M/s STE MET (India) Private Limited (Respondent No. 4 or R-4) to remit to the Corporate Debtor's account an amount of 2 7,50,000/- towards the rent for the using premise of the Corporate Debtor for its business use;
 - d. an Order U/s. 66 (1) of the Code directing M/s Indsur Gears Limited (Respondent No. 5 or R-5) to remit to the Corporate Debtor's account an amount of 27.50,000/- towards the rent for the using premise of the corporate debtor for its business use;
 - e. an Order U/s. 66 (1) of the Code directing the R-1, Smt. Indu Lodha (Respondent No. 2 or R-2) and Shri Suresh Mal Lodha (Respondent No. 3 or R-3) to remit the afore-mentioned amounts to the Corporate Debtor's account in case the R-1, R-4

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

I.A. 1552 OF 2020

and R-5 fails to adhere the directions as mentioned in clause (a) to (d) above.

2. The CIRP in the matter of the Corporate Debtor commenced w.e.f. 24.09.2019 vide an Order of this Tribunal. The said Order was communicated to the Applicant vide an E-mail by the Registrar on 12.10.2019. Thereafter, immediately on 14.10.2019 the Applicant took charge of the affairs of the Corporate Debtor and further cause public notice inviting claims by the Stakeholders of the Corporate Debtor on 15-10-2019.

2.1. The R-1 to R-3 are the Directors (with Suspended Powers) of the Corporate Debtor and were in charge of the affairs of the Corporate Debtor before commencement of CIRP. R-4 is a company under Companies Act, 1956 under the management of the R-1 & R-2, therefore is a related party in terms of Section 5(24) of the Code. R-5 is a company incorporated under the Companies Act, 1956 owned by the management of brother of R-1 along with R-2 & R-3 as shareholders, therefore, is a related party in terms of Section 5(24) of the Code.

2.2. Based on the received claims the Applicant constituted a Committee of Creditors ("CoC") of the Financial Creditors of the Corporate Debtor on 22.11.2019 and re-constituted it on 18-01-2020, and convened as many as 7 (seven) meetings of the CoC for the functioning of the CIRP. In the 3rd CoC meeting held on 22-01-2020, the CoC moved resolution to appoint M/s. Amit Ray and Co.. Chartered Accountants (hereinafter referred as the Auditor) to perform the "Forensic Audit of the Corporate Debtor and was approved in the e-voting concluded on 30-01-2020.

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

I.A. 1552 OF 2020

3. It is stated by the Applicant that the Auditor has evaluated the transactions carried out by the Corporate Debtor within the period starting from 24.09.2017 to 24.09.2019 for classifying the transactions as Preferential or Undervalued or Transaction defrauding creditors or fraudulent transaction, as the case may be, and submitted its final report to the Applicant on 12.06.2020 with the observations over the reviewed transactions.

3.1. Thereafter, the Applicant on perusal of the Report requested the Auditor to revisit and comment on some specific points. 16. The Auditor submitted its Supplementary Report to the Transaction Audit Report on 18-08-2020. The Auditor has observed in its report that the Corporate Debtor has performed a Preferential Transaction as per the provisions of the S. 43 of the Code with its related parties i.e. the Respondents.

3.2. It is stated that the address of the Registered office of the Corporate Debtor and the address of the Registered office of the R-4 is one and same. The same premise was being lease hold premise taken by the Corporate Debtor from July 2018 for a monthly lease amount rental amount of Rs. 5,00,000/-. Further, the same premise was being used by the RI for his personal office use and also by the R5 for its business purpose

3.2.1. It is stated and submitted that the 25% of the said premise is being used by the entities other than the Corporate Debtor i.e. R-1, R-4 and R-5. However, from these parties no rentals have been booked by the Corporate Debtor for use of the said premise and the Corporate Debtor alone had borne all the rentals. As per the seating ratio of the officials of the entities other than the Corporate Debtor, as confirmed

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

I.A. 1552 OF 2020

by the R-1 himself, the proportionate lease rental for the usage by the R-1 comes to an amount of Rs. 25,000/- per month, and that for R-4 and R-5 comes to an amount of 50,000/-, each, per month.

3.2.2. Accordingly, for the period from Jul. 2018 to Sep. 2019 the R1 was supposed to pay an amount of 3.75,000/- and R4 and R5 were supposed to pay an amount of 7.50.000/- each for the use of the Corporate Debtor's premise. However, not a single penny has been paid by these parties.

3.2.3. In respectful submission of the Applicant since, the R1, R4 and R5 are the related parties of the Corporate Debtor; the Corporate Debtor, fraudulently, has not booked the amount of the rentals from the said Respondents. This act of the Corporate Debtor is clearly in violation of the provisions of the S. 66 (1) of the Code.

3.3. A lease agreement pertaining to one flat situated at Tower A, Omkar 1973, Pandurang Budhkar Marg, Worli, Mumbai has been entered by the Corporate Debtor, and R-1 signed the said lease agreement on behalf of the Corporate Debtor and this flat is being used solely by the R-1 for his residential purpose along with his family. The lease amount of the said flat is Rs. 2,70,000/- per month which is being paid from the account of the Corporate Debtor since Aug. 2018 till Sep. 2019. So. in total till the commencement of the CIRP, the Corporate Debtor has paid an amount of 237,80,000/- towards the lease rental of the said flat. This transaction had been entered by the Corporate Debtor is only for the benefit of the R-1 and family of the R-1 and for the said fraudulent purpose the Financial Asset of the Corporate Debtor has been used.

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

I.A. 1552 OF 2020

3.3.1. Therefore, in respectful submission of the Applicant the amount which has been spent by the Corporate Debtor, fraudulently, for the afore-mentioned purposes has to be contributed back to the account of the Corporate Debtor from the Respondents.

3.4. The afore-mentioned acts of the Corporate Debtor are clearly fraudulent in nature and performed only to give benefit to the related parties of the Corporate Debtor and therefore the Respondents are liable to make their contributions as per the provisions of the sec 66 of the code to the account of the Corporate debtor.

4. The Respondents R1 to R5 have filed a joint reply stating that the states transactions are not covered u/s 43 of the Code. It is further stated that

5. 6. The Applicant states in point no. 18 that the registered address of Corporate Debtor and R4 - STE MET (1) Pvt. Ltd is the same. Also the same premise was lease held by the Corporate Debtor since July 2018. In point 19 it is stated that R1 - Amit Lodha used the premises for his personal purpose. Also in point no. 20, the Applicant states that the same premise was used by R5- Indsur Gears Ltd.

5.1. It is interesting to note here that the email explanation to the above sitting arrangement exhibited and annexed as Annexure II in the Application is provided by R-1 - Amit Lodha. And R1 has stated that R4 used to occupy only TWO seats for which the rent is claimed to be Rs. 7,50, 000/-. The basis of such calculations is on the percentage usage of the seats. It is not acceptable and not

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

I.A. 1552 OF 2020

logical as well. The Applicant has considered only one statement out of said Annexure II that "approximately 25% seats were used by Non IGL (i.e.. non Corporate Debtor persons) entities. Hence the said claim is baseless.

5.2. It is further explained in Annexure II that Indsur Gears Ltd had provided one expert accountant during the forensic audit by one of the Financial Creditors prior to CIRP. It is on record in the report of that forensic audit. It was the understanding that as the accountant was on record of R-5- Indsur Gears Ltd. and nothing was not paid separately by the Corporate Debtor for his services to R5; RS-Indsur Gears Ltd will be allowed to use two seats in the office. This understanding is in the commercial prudence and hence should/need not be ignored.

5.3. The allegations that R1 Mr. Amit Lodha used this office for personal use. When R1 is an NRI by status and also the Director (Currently Suspended) of the Corporate Debtor, his presence in the said office becomes unquestionable. It is bound that he will use the office for all/any purpose. The claim of the Rent from him is lack of knowledge of mundane commercial transactions which are obvious.

5.4. Further, the Applicant states that the flat addressed at Tower A, Omkar 1973, Pandurang Budhkar Marg, Worli, Mumbai was used by R1- Amit Lodha and his family as residence the rent of which was paid by the Corporate Debtor. R-1 states and submits that it was part of the Remuneration as Director of the Corporate Debtor. This again is part of commercial practices approved by Companies Act 2013. As stated in the Auditor's report exhibited as Annexure I, this has been considered as due because the same

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

I.A. 1552 OF 2020

is not mentioned in the Director's Report or other Annual filings. It must be noted that the Corporate Debtor is compliant till 2018 as per records with ROC on the MCA website. (Master data exhibited as Ex. A) It is important to note that the rent claimed in amounting to Rs. 37,80,000/- is for the period of August 2018 to September 2019. The Annual filing would have taken place by August/September 2019 and August / September 2020 in which the said details would have been updated. But the initiation of CIRP led to suspension of R1. Hence this is not a non-compliance at all by R1 - Amit Lodha for which he is been made answerable in the said Application. Moreover, Being an NRI, he needs a residential accommodation here in India and the end recipient of the rent for the said flat was paid to an unrelated third party owner of the said flat. Hence, this transaction does not even fall within the category of "Related Party Transaction".

6. We have heard the Counsel and perused the material on record.
 - 6.1. At the outset, we find that the Respondents have filed their reply basis section 43, however, the applicant has sought prayers in terms of section 66 of the Code, which 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”*.
 - 6.2. Section 66 of the Code stipulates that the business of the Corporate Debtor is carried out with intent to defraud creditors or for any fraudulent purpose. Accordingly, there has to be an element of fraudulent intent to bring the transactions within four

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

I.A. 1552 OF 2020

corners the Section 66 of the Code. Sharing of common infrastructure, for which the costs has been borne by the Corporate Debtor, certainly results into undue benefit having been given to the related parties at the cost of the Corporate Debtor, and such benefit certainly has an element of fraudulent intent. Accordingly, we find that the transactions fall under the ambit of section 66 of the Code, and an appropriate relief ought to be granted.

- 6.3. The R-1 has pleaded that he was non-resident Indian, and in such case, he could not have used the office premises of the Corporate Debtor for his personal purpose and has also relied upon the disclosures made in the annual filings with the MCA wherein no personal expenditure has been attributed to the Respondents. We also find that the R-1, on the one hand, has pleaded that he was non-resident, and at the same time, has pleaded that residential house at the cost of the Corporate Debtor provided to him and his family was part of the Remuneration as Director of the Corporate Debtor.
- 6.4. We find from the Forensic Auditor's report that the there is clear finding of usage of 25% of the office of the Corporate Debtor by persons other than the Corporate Debtor, which has been demonstrated that the said office premises was having 20 seats out of which 5 seats were occupied by the persons other than the Corporate Debtor for their own purpose, not connected or related to the purpose of business of the Corporate Debtor. The Auditor has also brought on the record that Respondent no. 4 was having common registered office address. Further, it is not denied by the Respondent that Respondent no. 5's staff was occupying the office of the Corporate Debtor for the purpose of business, however, the same has been defended on the basis that Respondent No. 5 was bearing the cost of one accountant, who

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

I.A. 1552 OF 2020

was rendering the services to the Corporate in return. However, there is nothing on record to indicate that these intra-group transactions were accounted for in the books and were at arm's length as mandated u/s 188 of the Companies Act, 2013. The fact of common usage of office is apparent from the records, in so far as Respondent no. 4 & 5 are concerned.

6.5. As regards usage of the office and Residence by the Respondent no. 1 for personal purpose, we find that the Respondent No. 1 has defended this stating that he was a non-resident and could not have carried on any business from the premises of the Corporate Director and the residence was provided as part of his Director's remuneration., however no evidence has been filed to substantiate that the Respondent No. 1 was subjected to Income Tax on provision of rent free accommodation as part of the remuneration or such provision of rent free accommodation at cost of Corporate Debtor was approved by the Corporate Debtor in accordance with the Companies Act, 2013.

6.6. We find from the email of Respondent No. 1, forming part of this Application, that the Respondent no. 1 has admitted usage of 25% of office space by persons other than Corporate Debtor, however, he also stated in the same e-mail that Respondent No. 5 had provided availability of qualified accountant for 6 months and did not charge any fees, which is stated to be in accordance with the understanding to compensate the corporate debtor for usage of their office. It is further stated in the said email that Respondent No. 5 had no staff in office premises at Lower Parel office, which was occupied from September, 2017 to July, 2018, thereafter all companies, including Corporate Debtor, were shifted to Pinnacle BKC office from August, 2018 to September, 2018.

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

I.A. 1552 OF 2020

6.7. Since, the Applicant has estimated the quantum of personal benefit to the persons other than corporate debtor, at the cost of corporate debtor, on the basis of submissions of the Respondent no. 1, we do not find any infirmity therein. In the absence of any other evidence refuting the findings of the Auditor's except that the Lower Parel office had 18 seats, and not 20 seats, we are of the considered view that an order in terms of Section 66(1) can be passed directing the Respondent No. 1, Respondent No. 4 & Respondent No. 5 to contribute in terms of prayer (a), (b), & (c) within 30 days of communication of this Order. It is further directed that Respondent no. 1 to Respondent no. 3 shall be liable to contribute, severally or jointly, to the Corporate Debtor, to the extent any money due from the Respondent No. 1, Respondent No. 4 & Respondent No. 5 in terms of prayer (a), (b), & (c) is not recovered within 30 days of communication of this Order, as the Respondent no. 1 to Respondent no. 3, being responsible for management of Corporate Debtor, were knowingly parties to these transactions. It is clarified that the sums due under this Order shall be a charge, in terms of section 67 of the Code, on any debt or obligation due from the corporate debtor to him, or on any mortgage or charge or any interest in a mortgage or charge on assets of the corporate debtor held by or vested in him, or any person on his behalf, or any person claiming as assignee from or through the person liable or any person acting on his behalf.

7. With aforesaid directions, this IA 1552/2020 is disposed of as allowed.

Sd/-

Prabhat Kumar
Member (Technical)

Sd/-

Justice V.G. Bisht
Member (Judicial)