

IN THE NATIONAL COMPANY LAW TRIBUNAL

KOLKATA BENCH

KOLKATA

I.A. (IB) No. 1200/KB/2019

in

CP(IB) No. 1342KB/2018

An Application under section 43 and 44 of Insolvency and Bankruptcy Code, 2016

In the matter of:

Jai Balaji Industries Limited

...Operational Creditor

Versus

SPS Steels Limited

...Corporate Debtor

And

In the matter of:

Nitesh Kumar More, Resolution Professional of SPS Steels Limited

...Applicant

Versus

1. SPS Steels Limited
2. Bipin Kumar Vohra
3. Sanjukta Vohra
4. Arun Kumar Santhalia
5. Aftak Traders Private Limited, having registered office at Elegant Towers, 224A, AJC Bose Road, Kolkata – 700017.

Date of Hearing - 28.02.2022

Date of pronouncement the order - 28.03.2022

Coram:

Shri Rohit Kapoor

: Member (Judicial)

Shri Harish Chander Suri

: Member (Technical)

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Appearances (through video conferencing)

For Liquidator : Mr. Sourav Jain, Advocate

For R-2, R-3 & R-4 : Ms. Urmila Chakraborty, Advocate
Ms. Shivangi Thard, Advocate

For R-5 : Mr. Vikas Tewary, Advocate

ORDER

Per Harish Chander Suri, Member (Technical)

1. This court convened via video conferencing.
2. This is an application filed by Nitesh Kumar More (*'Applicant'*), the Liquidator of SPS Steels Limited (*'Corporate Debtor'*), alleging preferential transaction under the Insolvency and Bankruptcy Code, 2016 (*the Code'*).

Facts

3. The Corporate Debtor was admitted into Corporate Insolvency Resolution Process (*'CIRP'*) on 29 March, 2019 and Mr. Nitesh Kumar More was appointed as the Interim Resolution Professional (*'IRP'*) of the Corporate Debtor. *Vide* order dated 14 May, 2019 this Adjudicating Authority confirmed the Applicant as the Resolution Professional (*'RP'*) of the Corporate Debtor.
4. As per the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Debtor) Regulation, 2016 ("CIRP Regulations"), the Applicant appointed Rajesh Jalan & Associates, Chartered Accountants to conduct the forensic Audit of the Corporate Debtor to identify the transactions under section 43 of the Code.

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5. Rajesh Jalan & Associates, Chartered Accountants submitted its report dated 15 July 2019 (**Transaction Report**) to the Applicant on 17 July 2019. The Transaction Report is annexed to the application and has been marked with **Annexure B¹**.

Submissions of learned Counsel appearing on behalf of the Liquidator

6. On the basis of the Transaction Report, the Auditor focuses on certain shortcomings in the transactions entered during the two years preceding the initiation of the CIRP. The Transaction Report also extends to the period of 2018-2019 as some of the payments were also made from the bank accounts of the Corporate Debtor to related party.
7. From the Transaction Report, it transpires that during the period of last two years preceding the commencement of the CIRP, the Corporate Debtor has made some preferential payment to some of the Creditors of the Corporate Debtor. It is also established from the Transaction Report that the payment due to Aftek Traders Private Limited was Rs.5.96 Cr payable as per balance sheet, 2017.
8. The aforesaid transactions made by the Corporate Debtor puts Aftek Traders Private Limited in beneficial position as compared to the other creditors. It also reflects the mala fide intention of the Corporate Debtor.
9. Some of the transactions made by the Corporate Debtor are not in ordinary course of business as mentioned in section 43(3)(a). The summary of the transactions are as follows:

Name of Beneficiary	Date/year of transaction	Amount (In Rs)
Aftek Traders Private Limited	2017-2018	50,00,000/-
Aftek Traders Private Limited	2018-2019	15,00,000/-
TOTAL		65,00,000/-

¹Pages 22-32 of the I.A.

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10. The Corporate Debtor was in financial distress at the time these impugned payments were selectively made to the particular creditor, i.e., Aftek Traders Private Limited. Despite the Corporate Debtor being in default of repaying dues owed to various Financial as well as Operational Creditors, the Corporate Debtor made the impugned payments by way of reference to Aftek Traders Private Limited and ignored the outstanding dues of other creditors.
11. The management of the Respondent 5 i.e., Aftek Traders Private Limited, is same as of the Corporate Debtor and thus the payments made by the Corporate Debtor and its directors i.e., Respondents 2 to 4, put Respondent 5 i.e., Aftek Traders Private Limited in a beneficial situation than it would have been made in accordance with section 53 of the Code.

Submissions of learned Counsel on behalf of the Respondent Nos. 2 to 4 .

12. The Applicant has failed to prove that the payment/transaction made by the Corporate Debtor to the Respondent 5 i.e., Aftek Traders Private Limited are preferential in nature. Neither there is any proof to show that such transactions have put the Respondent 5 i.e., Aftek Traders Private Limited in a beneficial position.
13. Further, the transactions between the Corporate Debtor and the Respondent 5 i.e., Aftek Traders Private Limited have taken place during the ordinary course of business and financial affairs of the Corporate Debtor. The Applicant has wrongfully and illegally arrayed the respondents 2-5 as a party.
14. This application is on the basis of the purported forensic audit report dated July 15, 2019. The said Forensic Reports contains false and frivolous allegations and are not based on any fact. The Applicant has failed to apply his mind.

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15. The Corporate Debtor had purchased various trading goods like billet, angle, MS plate, TMT bar etc. from the Respondent 5 i.e., Aftek Traders Private Limited. In respect to such purchase the total dues payable to the Respondent 5 i.e., Aftek Traders Private Limited as on March 31, 2015 was Rs.5,96,36,035/-. Same is reflected in the ledger account of the Respondent 5 i.e., Aftek Traders Private Limited.²
16. The Corporate Debtor was under going through tremendous financial stringencies due to recession in the steel industry and due to which the Corporate Debtor was unable to pay the outstanding dues to the Respondent 5 i.e., Aftek Traders Private Limited.
17. However, on several demands by the Respondent 5 i.e., Aftek Traders Private Limited³, the Corporate Debtor paid a sum of Rs.50,00,000/- and Rs.15,00,000/- on March 26, 2018 and May 22, 2018, respectively.
18. Hence, the payment made by the Corporate Debtor was made in the usual course of business and in good faith and it cannot be termed as preferential transaction.
19. Further, the CIRP commenced on 29 March 2019, the Applicant was the Resolution Professional during CIRP but he did not comply with regulation 35 of the CIRP Regulations. The Resolution Professional failed to form an opinion within 75 days or make a determination within 155 days from the commencement of CIRP. The present application has been filed on 20 September 2019 i.e. after 175 days from the date of commencement of CIRP and not within 135 days from the date of commencement of CIRP.
20. The said application is barred by laws of limitation. Further, the Applicant has filed this adversarial application against himself by making the Corporate Debtor as Respondent No.1, which can only be represented by the Applicant himself.

² Annexure - A of the Reply by Respondent Nos. 2-4.

³ Pages 25-27 of the Reply by Respondent Nos. 2-4.

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Submissions of learned Counsel on behalf of the Respondent No.5.

21. The Transactions made between the Respondent 5 i.e., Aftek Traders Private Limited and the Corporate Debtor were out of usual course of business.
22. The Corporate Debtor was not making any payment in respect of the said transactions to the Respondent 5 i.e., Aftek Traders Private Limited even after on repeated demands made by the Respondent 5 i.e., Aftek Traders Private Limited.⁴
23. After receiving letter from the Respondent 5 i.e., Aftek Traders Private Limited the Corporate Debtor admitted its liability and assured that the outstanding dues will be cleared once the business of the Corporate Debtor sees profit.⁵
24. Since, the business of the Respondent 5 i.e., Aftek Traders Private Limited was in the brink of closure, when the Respondent 5 i.e., Aftek Traders Private Limited had issued legal notice to the Corporate Debtor for the payment of the dues.
25. Upon such pressure, the Corporate Debtor paid a sum of Rs.50,00,000/- and Rs.15,00,000/- on March 26, 2018 and March 22, 2018, respectively, from a total sum of Rs.5,96,36,035/-. Further, the Respondent 5 i.e., Aftek Traders Private Limited had also lodged its proof of claim of Rs.5,31,36,035/- with the Applicant.⁶
26. The Application filed by the Applicant does not shows any valid cause. Further, it is well settled law that the Corporate Debtor on and from the CIRP commencement date is represented by the IRP/RP. Whereas, this application is adversarial in nature the Applicant has made the Corporate Debtor as Respondent No.1.
27. The Respondent No.5 also relied on various judgments, as follows;

⁴ Annexure – C of the Reply by Respondent No.5.

⁵ Annexure – D of the Reply by Respondent No.5

⁶ Annexure – E of the Reply by Respondent No.5

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Allahabad Bank v. SPS Steels Rolling Mills Limited, NCLT, Kolkata Bench
Order dated **February 26, 2020**;

“Paragraph 11 - We further consider it pertinent to observe that the assistance of expert agencies can be taken for determination of preferential, invalid or fraudulent transactions, but, in spite of that, independent opinion of Resolution Professional / Liquidator remains a must, meaning thereby, irrespective of the exercise done by the expert agency, the Resolution Professional should independently form a belief / opinion that such transactions, in fact, existed which require appropriate order from this Authority.

Paragraph 14 - Now, coming to the facts of the case, it is noted that no material of whatsoever nature has been brought on record which can establish the fact of formation of opinion by the Resolution Professional as regards the Corporate Debtor being subjected to such transactions. Thus, provisions of Section 43 of the IBC, 2016 read with Regulation 35A of IBBI (CIRP) Regulations, 2016 stand non-complied and violated. Further, even in the application, this aspect has not been covered and in our considered view, reliefs sought by way of prayers do not amount to formation of opinion. Thus, merely on this basis, the application filed by the Resolution Professional is liable to be rejected”

Official Liquidator, High Court, Calcutta v. Padam Kumar Khaitan and Others⁷

“Paragraph 24 - The auditors' report on the basis whereof the application was filed is the only document in the judge's brief of documents filed by him in the proceedings. The report does not contain any information or materials other than those stated in the points of claim.....

Paragraph 25 -application initiating proceedings under section 543 must contain particulars of specific allegation against each of the respondents who are

⁷ (2011) 161 Comp Cas 402 decided on July 28, 2008

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to be specifically identified and named to the extent of their respective acts of misfeasance or breach of trust....”

28. The Respondent No. 5 also relied on *Anuj Jain, IRP of Jaypee Infratech Limited v. Axis Bank Limited*⁸, *Bank of Maharashtra v. Visa Power Limited (In Liquidation) NCLT Kolkata Bench*⁹, *Santosh Choraria, RP of Suraj Fabrics Industries Limited v. Bipin Kumar Vohra & Ors, NCLT Kolkata Bench*¹⁰ and *Samir Agarwal, RP of Bhaskar Shrachhi Alloys Limited v. Bharat Goenka & Ors, NCLT Kolkata Bench*¹¹.

Rejoinder to the reply of the Respondents

29. During the hearing of the I.A., the learned Counsel appearing on behalf of the Applicant submitted that the Resolution Professional had formed an opinion on 11 June 2019 i.e. on the 74th days after the commencement of CIRP and had also made a determination as to the preferential transactions on 19 July 2019 and informed the IBBI in Form 6. The Applicant also filed an annexure “Letter A” along with the written notes to substantiate that the Resolution Professional had made a determination and had intimated the IBBI.

Orders

30. Heard the learned Counsel appearing for the Applicant and the learned Counsel appearing for the Respondents and perused the record.
31. Firstly, the Respondent No. 1 is the Corporate Debtor and once a Resolution Professional is appointed for the Corporate Debtor, the Corporate Debtor is to be represented by the Resolution Professional or Liquidator as and when necessary. We do not know why the Corporate Debtor has been arrayed as a Respondent in the present I.A. in an application filed by the Applicant who was the erstwhile

⁸ (2020) 8 SCC 401

⁹ CA (IB) 1168/KB/NCLT Kolkata Bench Order dated July 2019, Para 14-22

¹⁰ Order dated February 18, 2021, Para 20-21

¹¹ CP (IB) No. 701/KB/2019 order dated 14 January, 2022, para 17 - 20

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Resolution Professional, hence the Corporate Debtor is removed from the array of Respondents.

32. Before we look into the merits of the case, let us consider whether the Applicant complied with regulation 35A of the CIRP Regulations. In the course of hearing the Applicant submitted that he had formed an opinion and had made a determination as well. It was further submitted that the Applicant had also sent an intimation to IBBI that the Applicant had formed a decision. The Applicant filed a letter addressed to the IBBI, but there was nothing to prove whether the same was sent *via* email or post. If the Applicant had formed an opinion and had made a determination, the same should have been reflected in the application as well and not be given along with the written notes at the time of hearing.
33. On perusal of the I.A., the Applicant has not made any submission as to the opinion formed or the determination arrived at with respect to the preferential transactions. The Applicant in his application has time and again only relied on the Report filed by the Auditor.
34. Therefore, the Applicant has clearly not formed an opinion nor has he made a determination as to the transactions made.
35. Although the present I.A. is hit by regulation 35A of the CIRP Regulations and hence it is not maintainable, certain observations are also pertinent to be noted. On perusal of the report of the Auditor, internal page nos. 7 and 8 contain the list of debtors and creditors of the Corporate Debtor, wherein the amounts due, amounts received and payments made have been given. The Corporate Debtor received payments from its debtors and has also made payments to its creditors. The payment made to Aftek Traders Private Limited would have been deemed to be preferential if the Corporate Debtor did not make payments to the other creditors and only made payment to Aftek Traders Private Limited, the Corporate Debtor

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has made payment to Bholanath Ingots Private Limited and Sublabh Steels Private Limited along with Aftak Traders Private Limited.

36. We have taken a consistent stand that the RP is duty-bound to comply not only with the timelines under regulation 35A but also that the opinion and determination required to be made in terms of sub-regulations (1) and (2) therefore are important constituents before filing the applications in respect of avoidance transactions. As Adjudicating Authority, we are required to go by the RP's determination and not on the views of the transaction auditor appointed by the RP.

37. The facts and circumstances of the present application do not inspire our confidence that it is maintainable *ex facie*. The application is hit by regulation 35A of the CIRP Regulations for there is no independent opinion or determination of the Applicant towards the transactions in question.

38. Under the aforementioned circumstances, we are not inclined towards granting the prayers. Resultantly, we dismiss the **I.A. (IB) No. 1200/KB/2019**.

39. The Registry is directed to send e-mail copies of the order forthwith to all the parties and their Ld. Counsel for information and for taking necessary steps.

40. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Harish Chander Suri
Member (Technical)

Rohit Kapoor
Member (Judicial)

Order pronounced on the 28th day March, 2022

Safura/ GGRB [LRA]