

**IN THE NATIONAL COMPANY LAW TRIBUNAL
SPECIAL BENCH, CHENNAI**

MA/987/2019

In

IBA/330/2019

Application filed under section 43 & 66 r/w section 60(5) of the IBC, 2016

In the matter of Perfect International Private Limited

Sripriya Kumar, RP

Representing Corporate Debtor

(Perfect International Private Limited)

---Applicant

Vs

Ingenium Advisory LLP

13 Akila Nagar, West Kodala Pattai,

Thiruvanai Kovil, Srirangam,

Tiruchy-620005

Deepak Parasuraman

Designated Partner of IA, LLP

No.2 LIC Colony, 2nd Cross Street,

Dr. Radhakrishnan Nagar,

Thiruvanmiyur, Chennai-600041

P. R Venkatesh

Promoter Managing Director

13 Akila Nagar, West Kodala Pattai,

Thiruvanai Kovil, Srirangam,

Tiruchy-620005

--- Respondents

Order delivered on: 01.02.2020

CORAM:

B. S.V. PRAKASH KUMAR, ACTING PRESIDENT
S. VIJAYARAGHAVAN, MEMBER (TECHNICAL)

For the Applicant : *Shri. N. P Vijay Kumar, Advocate*
Shri. R. Pradeep, Advocate
For Ms. Sripriya Kumar, RP
For Respondent-1 & 2 : *Shri. Sriram, Advocate*
For M/s. Mamta Binani & Associates
For Respondent-3 : *Shri. A.G. Sathyanarayana, Advocate*

ORDER

Per: B. S.V. PRAKASH KUMAR, ACTING PRESIDENT

Order Pronounced on: 01.02.2020

It is an MA filed by the Resolution Professional u/s 43, 66 r/w 60(5) of the Insolvency & Bankruptcy Code, 2016 ("the Code") against the Respondents namely, Ingenium Advisory LLP (R1), Mr. Deepak Parasuraman (R2), Designated Partner of Ingenium Advisory (LLP) and Mr. P.R. Venkatesh (R3), Promoter-Managing Director of the Corporate Debtor stating that this Resolution Professional, on review of the financial books of the Corporate Debtor, noticed that a sum of ₹65lacs is showing as transferred to R1 from the Corporate Debtor Account on three dates i.e. ₹25lac on 19.12.2016, ₹30lacs on 26.06.2017 and ₹10lac on 31.03.2018. Over and above the amount mentioned

above, another amount of ₹25lac is shown as transferred to R1 on 15.12.2016, but whereas this entry of ₹25lac is reflected in tally as reversed but not evidenced in the Bank Statements of the Corporate Debtor. The Applicant further submits that out of aforementioned ₹65lac shown as paid to R1, ₹40lac was shown as transferred on 26.6.2017 & 31.3.2018, which is within two years before commencement date of CIRP i.e. 02.05.2019. When the Applicant has not found any supportings to these transfers, on R3 being asked about these transfers, R3 has verbally stated that these amounts were in the nature of professional fee paid to R1 to organise a loan of ₹20Crore for the business needs of the Corporate Debtor, but whereas, the Applicant says that he has not found any material from the books of the Debtor Company reflecting that a contract was executed in between R1 and the Corporate Debtor for providing such service to the Corporate Debtor by R1 and also not found any material reflecting that ₹20Crore aforementioned fund for carrying business of the Corporate Debtor has come into the Corporate Debtor.

2. When there is no material to assume that this payment was made to R1 towards the services assumed to have been provided by R1, and there being no material to assume that the Corporate Debtor made this payment to R1 as commission to the services purported to have been provided by R1, the RP made an enquiry about it and the RP sought clarification as to whether the said amount was refunded to the Corporate Debtor. The RP says no reply has come from R1 stating that this money was given to R1 for the services rendered by R1. In the meanwhile, as the RP made an enquiry about R1, she has learnt that this R1 was incorporated on 12.01.2015 as LLP. The original name of R1 was Ingenium Consulting LLP which was later said to have been changed to present name i.e. Ingenium Advisory LLP (Ingenium) to provide global management consulting and advisory services on overall business strategy.

3. On looking at the Board of Directors of the Corporate Debtor, R3 and one Ventakesh Jaichitra continuing as directors of the Corporate Debtor until before they were suspended, as to R1 is concerned, R2 and one Chitra Athwani continuing as designated partners of R1, in

between these two companies, there is another company called Udveka Engineering Services Private Limited (Udveka), it appears that the suspended directors of the Corporate Debtor have been continuing as directors of Udveka. Interesting part is the designated partner of R1 was the past director of Udveka, therefore, there is a commonality of interest, the Applicant says, between R1 to R3. Not only that, the Applicant says that R3's residence is presently used as the Corporate Office of Udveka as well as R1. By joining all these facts, it is evident that there is commonality of interest between the parties to prove that the impugned transactions are not genuine. No supporting, no invoices from R1 claiming payment, and no TDS has been shown as deducted while the Corporate Debtor paid this amount to R1.

4. The money transfer from the Corporate Debtor to R1 is said to have occurred toward commission payable to R1, according to the Respondents, on two counts, one – commission based on business services provided by R1, two – commission towards arrangement of loan of ₹20Crore to the Corporate Debtor through R1.

5. When income from business operations of R1 is looked into, the RP says, R1's financial statement discloses nil income from the operations of R1, except income of ₹37.85lac from other income. The Applicant considering the transactions in between the Corporate Debtor and R1 as fraudulent transactions, she has moved this application for a direction against Respondents jointly and severally to repay ₹65lac to the Debtor Company as this money has evidently gone from the Corporate Debtor to R1.

6. As against these allegations, R1 & R2 and R3 separately filed their replies that R1 was incorporated on 12.01.2015 with designated partners of Mr. Deepak Parasuraman (R2) and Mrs. Chitra Athwani. According to them R1, on 12.10.2015, entered into a contract with the Corporate Debtor to facilitate securing long term and capital debt to the Corporate Debtor on an exclusive basis to undertake the transaction within a period of six months with a stipulation that R1 would ensure that the Corporate Debtor would get ₹20Crore long term debt and ₹40Crore towards working capital. For which the success fee payable to R1 would be @ 3% of the total debt, out of

which a sum of ₹5lac would be paid as advance so that it would be set off against expenses. In view of the same, the Corporate Debtor paid ₹5lac to R1 on 19.12.2016. The Respondents submit that 19.12.2016 R1 received ₹25lac including ₹5lac as advance towards the commission for getting the business orders for the Wind Mill (Regen Power Tech Private Limited) for supplying tubular steel for the Corporate Debtor. To justify this ₹25lac payment to R1 by the Corporate Debtor, these Respondents filed another agreement dated 16.08.2016 reflecting that R1 obtained orders for the Corporate Debtor for the manufacturer of tubular steel towers for their wind mills from Wind Mill manufacturers. For which, success fee to R1 would be at the rate of 5.5% of the total order value, in this case also, five lakh rupees would be paid by the Corporate Debtor as non-refundable advance in addition to the success fee towards expenses. These Respondents submit that R1 has fulfilled first Contract arrangement by securing ₹3Crore loan to the Corporate Debtor from M/s. SREI Equipment Finance Limited (SREI) on 19.06.2017, therefore, the Respondents submit that Corporate Debtor @ 3% liable to pay ₹9lac to R1. With

regard to this payment, as the Corporate debtor already paid ₹5lac an additional amount of ₹4lac was paid on 26.06.2017. These Respondents submit that R1 has fulfilled contract by getting the purchase order from M/s. Regen Power Tech Private Limited (Regen) for ₹9.50Crore on 27.12.2016 upon which R1 being entitled to get a commission of ₹52,25,000 plus ₹5lac (travelling and other legal expenses) totaling to ₹57,25,000 at the rate of 5.5% on the total value of the deal. Since R1 has entitled to receive the amount aforesaid, the Corporate Debtor made payment of ₹20lac to R1 on 19.12.2016 and remaining payments of ₹24lac on 26.06.2017 and remaining ₹10lac on 31.03.2018. According to these Respondents R1 is still entitled to get balance of ₹1,25,000 from the Corporate Debtor.

7. As to the allegation of commonality of interest between the directors of the Corporate Debtor and the partners of R1, Respondents submit, merely by having a common office or having office at the premises of Corporate Debtor or erstwhile Managing Director of the Corporate Debtor, commonality of interest cannot be attributed in between R2 and R3, unless the attributed relation falls within the

ambit of Section 5 (24) or (24A) of the Code. The Respondents submit that there were four Directors in the Corporate Debtor Board, R2 is not related to any of these Directors, therefore, it is not right to say that R3 has acted on the instructions of R2. They say it is true that R2 and R3 are Directors of Udveka but the Director of the Corporate Debtor and the partner of R1 remaining directors in some other company will not fall u/s.5(24A) (h) of the Code because R3 has never acted as per the directions of R2. For they are not being related to each other, the allegation that R3 acted as per the instructions of R2 will not lie. With these submissions, the Respondents counsel submits that these transactions have to be considered as the transactions occurred during the ordinary course of business as stated u/s.43(3)(a) of the Code.

8. On hearing the submissions of either side and by looking at the documents filed by both the parties, it is evident that money was transferred from the Corporate Debtor to R1. From the records of the corporate debtor there is no material to say that these monies were transferred as commission towards the consultancy services rendered by R1. There are no supporting entries from the books of the

Corporate Debtor to prove that this money was paid to R1 towards business purpose. As to the monies shown as paid to R1 by the Corporate Debtor, if at all, monies were paid in relation to the services rendered by R1, the Corporate Debtor should have deducted TDS from those amounts but no information or details reflecting TDS was deducted from the monies paid by the Corporate Debtor to R1. Though the Resolution Professional sent emails on 18.07.2019, 06.08.2019 and 17.08.2019 to the Suspended-Directors and R2 of R1 asking explanation to the monies paid to R1 by the Corporate Debtor, no information came from any of these persons. RP says that, this story of providing consultancy services by R1 has come up at the time of filing reply in the application moved by the RP. What the documents R1&2 filed with the reply are, letters dated 12.10.2015 and 16.08.2016 alleged to have written by R1 to R3 as agreements between a person namely Mr. Karthik on behalf of Ingenium (R1) and R3. It is nowhere mentioned in this letter that both of them agreed for these arrangements. Normally when an agreement is entered into, both the

parties enter into agreements signed by them on behalf of themselves or on behalf of Companies or Partnerships, as the case may be.

9. The peculiarity in these two agreements are, that these letters appeared to have gone from R1 to R3. Since it being mere letters addressed to other side, at the most could be assumed that R3 should have signed on receipt of these letters. No further proof to show that these letters were indeed sent to R3. As to the loans to have been provided by SREI, it appears that it is a letter gone from SREI to the Corporate Debtor. But on perusal of this letter, it appears that it was written by R1 to SREI stating as follows:

"SEFL:OFFER/Loan-Domestic/2016-2017/ -

Dated 19.06.2017

M/s. Perfect International Fabricators Private Ltd.

MR Palayam, Sanamagalam Post,

Trichy - 621 104.

Kind Attn : Mr. Rajasekaran Venkatesh (Managing Director)

Dear Sir/Madam,

Sub : Your proposal for the loan transaction with us.

With reference to your application we (hereinafter referred to as "Srei") are pleased to offer you ("Borrower") under both transaction the equipment(s) described below to be used by you on the following broad terms and conditions :

.....

Perfect International Fabricators (P) Ltd

*P.R.Venkatesh
Managing Director*

10. On the bottom of every page of this letter, surprisingly it is shown as signed by R3 on behalf of the Corporate Debtor. But in the body portion, it has been stated that an application was given by the Corporate Debtor over which SREI was pleased to offer a loan of ₹3.60Crore. Had it been so, it should have been signed by SREI. But in this case, it was shown as signed by R3 on behalf of the Corporate Debtor. To our understanding it is nowhere shown as this offer letter was processed upon the facilitation provided by R1. Moreover, it is only an offer letter, no letter has been placed showing that this loan was granted. If the story set out by these Respondents is assumed as correct, why these Respondents have not reflected the same in the records of the Corporate Debtor and why these Respondents did not reply to the e-mails sent by the Resolution Professional.

11. As to the Purchase Order placed by Regen, had this money been paid by the Regen, those details should have been given. No such

details have been given reflecting goods were sold and money was received by the Corporate Debtor and out of which, if commission was released to R1, there should have been invoices and reduction of TDS from the commission. No such material is available on record.

12. By looking at the agreement by way of letter written by R1 and the offer given by SREI purportedly offering loan to the Corporate Debtor and also the purchase order, Regen purported to have been placed upon the Corporate Debtor could not be construed as transaction happened through R1 as consultancy and by virtue of it, commission was received from the Corporate Debtor. That apart, to prove that this transaction happened by virtue of brokering it by R1, burden is cast upon the Corporate Debtor to place all those transaction documents but no such documents were placed. These letters could be cooked up soon after filing this application because these documents will not be construed as documents supporting the payments made by the Corporate Debtor to R1, because as and when any payment made towards business transactions, tax payments will be there, and also tax

deductions will be there. But no such indications from any of these documents.

13. Burden is upon the Corporate Debtor to prove that these transactions are genuine transactions supported by material proof because the management of the Corporate Debtor is deemed to have custody of the material papers of the Corporate Debtor. When such documents are not placed before the Court of Law explaining the transactions, it is to be deemed that the Corporate Debtor failed to prove that those transactions are genuine transactions taken place for carrying out the business of the Corporate Debtor.

14. A case falls within the ambit of Sec.43 of the Code when repayment was made to the Creditor within the look back period for putting such creditor in a beneficial position than it would have been in the event of distribution of assets made in accordance with Section 53 of the Code.

15. In this case, RP says that R1 has not provided any consultancy services to the Corporate Debtor, it was only payments made to R1 to cause unlawful gain to R1 based on sham transactions

causing loss to other Creditors. When material is absent to prove that the transaction is genuine, the Respondents shall prove that transaction is not fictitious and they must prove that R1 is entitled for commission and that entitlement was cleared by the Corporate Debtor. Suppose it is proved, then the point is whether it is within the look back period or not, if it is proved that transaction is within look back period and it has not taken place in ordinary course of business, then it is obvious that it will come within the purview of Section 43 of the Code. Then next point is to ascertain as to whether it is within one year look back period or beyond one year look back period and falling in the second year look back period, if it is falling within second year look back period, then it shall fall within Section 5 (24) or (24A) of the Code.

16. In this case, no material is there to prove that R1 acted as commission agent to facilitate the Corporate Debtor to secure loan from SREI and also to secure Purchase Order from Regen. As long as this aspect is not proved, it cannot be said that, the relation in between the Corporate Debtor and R1 is debtor and creditor relationship. If any

money has been shown as siphoned from the Corporate Debtor Accounts, as to those monies, if the Corporate Debtor failed to show it as payment to a Creditor, then such payment has to be considered as a fraudulent transaction falling within the ambit of Section 66 of the Code.

17. As to R1 Partnership Firm, it was hardly setup nine months before the Corporate Debtor entered into first Agreement with R1, in this background, it can never be construed that R1 has capacities to broker on behalf of somebody to secure loans to the Corporate Debtor. Moreover, by looking at R2 and R3 remaining as Directors in some other company incorporated by them, it cannot be called that the relationship in between R2 and R3 is purely business relation which has been said in this case.

18. As we said earlier, this related party concept comes into existence to look into, when transaction taken place in the period beyond one year look back period and before lapse of two year look back period. As to section 66, look back period and relative or related party concepts will not come into picture, this Bench need not

ascertain whether it is in compliance of Section 43 elements. In companies, management is answerable to every transaction, it has to explain and prove every transaction is based on business needs and part of business, mere oral saying will not make any transaction genuine unless supported by material proof, which normally happens in every transaction. In this case, it is shorn of such supporting material.

19. For there being no proof from R3's side reflecting that it is a genuine transaction, it has to be deemed that R3 siphoned the money from the Corporate Debtor by paying it out to R1 so as to cause loss to the Creditors of the Corporate Debtor. Here in this case, no documents has been placed by R3's side or even from R1 side reflecting that these payments were made to R1 as commission towards the services purported to have been rendered by R1. Those letters-cum-agreements are procurable, those documents will attain authenticity provided they are supported by other material such as tax payments, tax deductions and transit receipts and correspondence from third parties to R1 and

third parties reflecting R1 persuading them to secure services from the Corporate Debtor, here no such documents are in existence.

20. As to the liability against R3, since he is admittedly erstwhile Managing Director of the Corporate Director and not in a position to prove that it is a genuine transaction and not an action to defraud the Creditors of the Corporate Debtor, he is anyway liable.

21. As to the party not in the management of the Corporate Debtor, that is R2, though he is not part of the management of the Corporate Debtor, he knows that R1 has no claim against the Corporate Debtor, therefore he ought to have refunded it to the Corporate Debtor as soon as it came to the account of R1. Had it been genuine transaction, it must have reflected tax payments and tax deductions and R1 must have disclosed that it has been providing similar services to others, but no such material placed. In view of it, we hereby hold that R2 and R3 are the persons, who were knowingly parties to the carrying on of these fraudulent transactions so as to siphon the funds of the Corporate Debtor.

22. For the reasons aforementioned, for R3 having not stated that he is not the cause for release of the funds from the Corporate Debtor to R1 and R1 having not proved that this money has come to his partnership firm towards commission, we hereby hold the impugned transfer of the Corporate Debtor funds to R1 is for fraudulent purpose. Therefore we hereby direct R2 and R3 jointly and severally to contribute ₹65lac to the Corporate Debtor within fifteen days from hereof.

23. Accordingly, this MA/987/2019 is hereby allowed.

SD
(S.VIJAYARAGHAVAN)
Member (Technical)

SD
(B.S.V.PRAKASH KUMAR)
Acting President

SR/Arpan