

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 765 of 2020

[Arising out of order dated 01.02.2020 in MA/987/2019 in IBA/330/2019 passed by the Adjudicating Authority (National Company Law Tribunal), Special Bench, Chennai]

IN THE MATTER OF:

P R Venkatesh (Promoter)

13 Akila Nagar, West Kodala Pattai,
Thiruvananthi Kovi, Srirangam,
Tiruchy-620005.

....Appellant.

Versus

1. Sripriya Kumar,

Resolution Professional

Perfect International Fabricators Private Limited
B6/A8 Gems Court,
14, Khader Nawaz Khan Road,
Srirampuram, Thousand Lights West,
Nungambakkam, Chennai,
Tamil Nadu – 600006.

2. Ingenium Advisory LLP

13 Akila Nagar
West Kodala Pattai
Thiruvananthi Kovi, Srirangam,
Tiruchy – 620005.

3. Deepak Parasuraman

Designated Partner of Ingenium Advisory LLP
No. 2, LIC Colony, 2nd Cross Street

Dr. Radhakrishnan Nagar,
Thiruvanmiyur
Chennai – 600041.

.... Respondents.

Present:

For Appellant: Mr. Gaurav Mitra, Sr. Advocate along with Mr. Goutham Shivshankar, Advocate.

**For Respondents: Mr. Vijay Kumar, Advocate for IRP/R-1.
Mr. Mohit D. Ram, Advocate for R-1.**

J U D G M E N T

(21st September, 2021)

Justice Anant Bijay Singh;

This instant Appeal i.e. Company Appeal (AT) (Insolvency) No. 765 of 2020 was heard together with Company Appeal (AT) (Insolvency) No. 349 of 2020.

2. This instant Appeal has been preferred by the Appellant against the order dated 01.02.2020 passed by the Ld. Adjudicating Authority (National Company Law Tribunal), Special Bench, Chennai in MA/987/2019 in IBA/330/2019 whereby and where under the Ld. Adjudicating Authority passed the following order:

“ 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 Rs. 65 Lac to the Corporate Debtor within fifteen days from hereof.

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

3. The facts giving rise to the instant Appeal is as under:

i) That the Appellant is the erstwhile promoter and Managing Director of Perfect International Fabricators Private Limited. The Perfect is a private limited company incorporated on 30.11.2005. The Corporate Debtor was admitted to Corporate Insolvency Resolution Process proceedings pursuant to an application under Section 9 filed by an Operational Creditor – Ms. Jotun India Pvt. Ltd. which was admitted by the NCLT vide order dated 29.04.2019 passed in IBA/330/2019 wherein Respondent No. 1 was appointed as the Resolution Professional.

ii) The Respondent No. 2 (herein) - Ingenium Advisory LLP is a Limited Liability Partnership Firm registered under the LLP Act, 2008 and is carrying on the business of providing Business Consultancy & Global Management Consulting and Advisory Services, Corporate Restructuring and Arrangement of Funds for meeting working capital requirements for their corporate clients etc.

iii) The LLP is incorporated on 12.01.2015 and the present designated partners are Deepak and his sister in law, Mrs. Chitra Athwani. Mr. Deepak

and Venkatesh share good professional relations and are also co-directors in a company named M/s. Udveka Engineering Private Limited.

iv) It is further case is that the Respondent No. 2 (herein) - Ingenium Advisory LLP was operating out of its registered office 44/38, Veerbadran Street, Near Valluavar Kottam, Nungambakkam, Chennai 600034. However, the same was a rented premise. In 2016, Ingenium started operating out of a 5 Star Hotel from Chennai and currently operates from the same Hotel.

v) It is further case is that the professional relations with Deepak, Permitted Ingenium to designate Venakatesh's residence as Ingenium's registered address for purely compliance purposes.

vi) The Corporate Debtor – Perfect International Fabricators Private Limited represented by P R Venkatesh – Appellant herein and Ingenium Advisory LLP entered into contract whereby Ingenium Advisory LLP was required to arrange long term and working capital loan on behalf of the Perfect International Fabricators Private Limited for their business requirements. The copy of the Agreement dated 12.10.2015 marked as Annexure A-2 at page 40 to 43 of the Appeal Paper Book.

vii) As per the clause 3.1 and 3.2 of Contract No. 1, the Ingenium Advisory LLP was to charge 3% of the total debt arranged as it success fee.

viii) As per clause No. 3.3, Perfect was required to pay Rs. 5,00,000/- as advance to the Ingenium Advisory LLP and the balance was to be paid after the consummation of the transaction.

ix) Further case is that the advance amount of Rs. 5,00,000/- was paid by Perfect to Ingenium Advisory LLP on 19.12.2016 by way of RTGS.

x) On 16.08.2016, Perfect and Ingenium Advisory LLP entered into another agreement wherein Ingenium Advisory LLP was required to facilitate the procurement of purchase order / supply contract from windmill manufacturing companies for supply of tubular steel towers from Perfect (Annexure A-3 at page 44 to 47 of the Appeal Paper Book).

xi) Further case is that as per Clause 3.2 of Contract No. 2 dated 16.08.2016, Ingenium Advisory LLP was entered to receive 5.5% commission on the amount of the purchase orders and Rs. 5 lacs towards expenses. The Ingenium Advisory LLP fulfilled Contract No. 1 dated 12.10.2015 by securing a Rs. 3 Crore loan to Perfect International Fabricators Pvt. Ltd. from M/s. SREI Equipment Finance Limited on 19.06.2017 and thereafter, Perfect International Fabricators Pvt. Ltd. was liable to pay Rs. 9 Lacs in accordance to Clauses 3.1 and 3.2 of Contract No. 1. As stated above, Rs. 5 lacs were already paid in advance by Perfect International Fabricators Pvt. Ltd. to Ingenium Advisory LLP and the remaining Rs. 4 lacs were paid by Perfect International Fabricators Pvt. Ltd. to Ingenium Advisory LLP on 20.06.2017.

xii) Further case is that the pursuant to Contract No. 2 dated 16.08.2016 (Annexure A/3 at page 44 to 47 of the Appeal Paper Book), Ingenium Advisory LLP facilitated a meeting between a potential buyer and Perfect International Fabricators Pvt. Ltd. Subsequent to the facilitation of the meeting by Ingenium Advisory LLP, the meeting of Perfect International Fabricators Pvt. Ltd. with a potential buyer – M/s Regen Powertech Pvt. Ltd. was finalised in the 1st week of December, 2016 and a purchase order worth Rs. 9.5 crores were finalised in favour of Perfect International Fabricators Pvt. Ltd. on 07.11.2016 upon which Perfect was entitled to get commission of Rs. 52.5 lacs + rs. 5 lacs

(expenses) totalling to Rs. 57.25 lacs, in accordance to clause 3.2 of the Contract No. 2.

xiii) The total amounting of Rs. 65 lacs were transferred by Perfect International Fabricators Pvt. Ltd. to Ingenium Advisory LLP in three tranches on 19.12.2016, 20.06.2017 and 31.03.2018 in accordance to Contract No. 1 and Contract No. 2.

xiv) The Perfect International Fabricators Pvt. Ltd. was admitted to CIRP proceedings pursuant to an application under section 9 filed by an Operational Creditor – M/s Jotun India Pvt. Ltd. which was admitted by the Ld. NCLT vide order dated 29.04.2019 passed in IBA/330/2019 wherein Respondent No. 1 was appointed as the Resolution Professional.

xv) The Resolution Professional filed MA/987/2019 before the Ld. NCLT alleging that Perfect International Fabricators Pvt. Ltd. and Ingenium Advisory LLP are related parties and the transfer of payments by Perfect International Fabricators Pvt. Ltd. to Ingenium Advisory LLP within the look-back period (2 years before the date of admission of CIRP Proceedings) were preferential and fraudulent, notwithstanding the fact that there exist clear agreements under which the said amounts were indeed payable by Perfect International Fabricators Pvt. Ltd. to Ingenium Advisory LLP. Thereafter, the Ld. Adjudicating Authority, vide order dated 01.02.2019 allowed the MA/987/2019 in IBA/330/2019. Hence this Appeal.

Submissions on behalf of the Appellant

4. The Learned Sr. Counsel for the Appellant during the course of argument and memo of Appeal has also Written Submissions submitted that

the Ld. Adjudicating Authority while passing the impugned order has failed to appreciate that the total amounts of Rs. 65 lacs which was received by Respondent Nos. 2 and 3 herein was in multiple instalments between December 2016 to March 2018 much prior to CIRP Proceedings, Rs. 40 lacs were paid within 2 years prior to the commencement of the CIRP and the remaining 25 lacs were paid outside of that period.

5. It is further submitted that these transactions were all bona fide payments made for services rendered by Ingenium Advisory LLP for and on behalf of the Corporate Debtor pursuant to two Agreements dated 12.10.2015 (Annexure A-2 at page 40 to 43 of the Appeal Paper Book) and 16.08.2016 (Annexure A-3 at page 44 to 47 of the Appeal Paper Book).

6. It is further submitted that the Resolution Professional in this case has moved an application under Sections 43 and 66 of the Insolvency and Bankruptcy Code, 2016 making vague, unclear allegations about the transactions being both “preferential” and “fraudulent”. Section 43 deals with preferential transactions. Section 66 deals with fraudulent transactions. The elements of both the Sections are completely distinct.

7. It is further submitted that the Ld. Adjudicating Authority, in paragraph 8 of the impugned order wrongly finds that there was no material to say that the payments made were transferred as payment for consultancy services. It further holds that there were no supporting entries in the books of account of the Corporate Debtor to demonstrate that these payments were made for business purpose.

8. It is further submitted that the Ld. Adjudicating Authority has adopted a completely inverted and erroneous approach regarding proof of fraudulent

transactions under Section 66 of the IBC. The Ld. Adjudicating Authority has placed a negative burden of proving that the transactions are not fraudulent on the Appellant against whom the allegation of fraud is made. This is completely contrary to well settled principles of law that fraud has to be proved by the person alleging it by leading cogent evidence. Further, it is submitted that the fraud must be pleaded and proved. It cannot be presumed.

9. It is further submitted that on the basis of these submissions the impugned order cannot be sustained in the eye of law, therefore, the Appeal is allowed.

Submissions on behalf of the Respondent No. 1

10. The Respondent No. 1 was the Resolution Professional of Corporate Debtor viz. Perfect International Fabricators Private Limited and is presently the Liquidator of the Corporate Debtor.

11. The Learned Counsel for the Respondent No. 1 during the course of argument and his Affidavit in compliance of the order dated 27.07.2021 submitted that the purchase order dated 16.08.2016 filed by the Appellant was not a complete document and that there were terms and conditions attached to such purchase order which have not been filed before the Hon'ble Tribunal. Accordingly, this Tribunal by order dated 27.07.2021 was pleased to permit the Respondent No. 1 to file the entire purchase order dated 16.08.2016 which is as Annexure RP-1 in Company Appeal (AT) (Insolvency) No. 349 of 2020.

12. It is further submitted that the Respondent No. 1 –Liquidator that a sum of Rs. 65 lacs have been paid to Ingenium Consulting LLP by the Corporate

Debtor and that the said payment is not supported by any commercial transaction and it is purely an afterthought basis which the Appellant in the present Appeal.

13. It is further submitted that the Appellant created ante dated documents viz Contracts dated 12.10.2015 (Annexure A-2 at page 40 to 43 of the Appeal Paper Book) and 16.08.2016 (Annexure A-3 at page 44 to 47 of the Appeal Paper Book) to justify the payment of Rs. 65 lacs.

14. It is further submitted that the whole transaction is fraudulent and the Corporate Debtor has been defrauded of Rs. 65 lacs as there is no Invoice, no GST/Service Tax nor any deduction of TDS when the said payment of Rs. 65 lacs was made by the Corporate Debtor to Respondent No. 2 herein - Ingenium Consulting LLP.

15. The Learned Counsel for the Respondent No. 1 while placing reliance of the purchase order at relevant page 35 of the Affidavit dated 03.08.2021 and referred clause 27 deals with Anti-Bribery & Code of Conduct which is read as under:

“27. ANTI-BRIBERY & CODE OF CONDUCT

The Seller / Service Provider shall comply with all applicable laws, statutes, regulations and codes relating to anti-bribery and anti-corruption. Seller / Service Provider will not engage in any activity or practice which constitutes an offence under the relevant requirements including not offering, paying, considering or benefiting, either directly or indirectly an inducement or reward of any kind for any services, or possible services in relation to this Purchase

Order. Breach of this clause shall be deemed a material breach of this Purchase Order. The Supplier will not passively, nor directly or indirectly violate the basic human rights of employees and will not engage any child labour.”

16. It is further submitted that the email was also sent to the mail ID available of the Respondent No. 2 but no response was received from the Respondent No. 2.

17. It is further submitted that the books of accounts reflected this money as advance to the Appellants and there was no response to the queries raised by the Resolution Professional from the Appellant and Respondent No. 2 and 3 about the nature of such advance, the Respondent No. 1 started making further enquiry into the matter. During further enquiry, it become clear that:

a. The Office of the Respondent No. 2 is located at the residence of the Appellant;

b. The Appellant and the Respondent Nos. 2 and 3 have common interest in a company called as Udveka Engineering Private Limited where Appellant and his wife are directors since 22.08.2016 and 26.09.2018 respectively. The Respondent Nos. 1 and 2 hold 500 and 9500 equity shares respectively in Udveka Engineering Pvt. Ltd. with balance 250 shares held by the Appellant. Therefore, the Respondent No. 2 and 3 are shareholders and Appellant is Director acting on instructions of the Respondent No. 2 and 3;

c. No details were disclosed by the Respondent No. 2 and 3 or by the Appellant despite repeated requests about the payments and transactions to the Resolution Professional.

18. It is further submitted that based on these submissions the Id. Adjudicating Authority has rightly passed the impugned order and there is no merit in the Appeal, the Appeal is fit to be dismissed.

Submissions on behalf of the Respondent No. 2.

19. Learned Counsel for the Respondent No. 2 – Ingenium Advisory LLP during the course of arguments supported the arguments advanced by Learned Sr. Counsel for the Appellant and submitted that these transactions were *bona fide* payments made for services rendered by Respondent No. 2 for and on behalf of the Corporate Debtor pursuant to tow Agreements dated 12.10.2015 (Annexure A-2 at page 40 to 43 of the Appeal Paper Book) and 16.08.2016 (Annexure A-3 at page 44 to 47 of the Appeal Paper Book).

20. It is further submitted that the Ld. Adjudicating Authority, in paragraph 8 of the impugned order wrongly finds that there was no material to say that the payments made were transferred as payment for consultancy services. It further holds that there were no supporting entries in the books of account of the Corporate Debtor to demonstrate that these payments were made for business purpose.

21. It is further submitted that based on these submissions the impugned order cannot be sustained in the eye of law and fit to be set aside and the Appeal be allowed.

FINDINGS

22. After hearing the Learned Counsel for the parties and going through the pleadings as also Written Submissions, we are of the considered view that the following facts are admitted in the instant Appeal.

- The Corporate Debtor –‘Perfect International Private Limited’ and the Respondent No. 2 entered into two Agreements viz. Agreement dated 12.10.2015 (Annexure A-2 at page 40 to 43 of the Appeal Paper Book) and 16.08.2016 (Annexure A-3 at page 44 to 47 of the Appeal Paper Book) respectively.
- The Corporate Debtor made the first tranche of payment on 19.12.2016 of Rs. 25,00,000/- including the advance of Rs. 5,00,000/- as a part payment of the initial contract of 2015 for facilitation of securing long term working capital loan for the Corporate Debtor.
- The Corporate Debtor released the second tranche of payment of Rs. 30,00,000/- to the Appellant No. 2 which included Rs. 4,00,000/- as balance commission amount for arranging the long term working capital loan from SREI Equipment Finance Limited and Rs. 26,00,000/- as part of commission for getting business order from M/s Regen Powertech Private Limited.
- The Corporate Debtor released the third tranche of payment on 31.03.2018 amounting to Rs. 10,00,000/- as balance commission amount for getting business order from M/s Regen Powertech Private Limited.

- All together 65 Lacs have been received by the Respondent No. 2 from the Corporate Debtor in three tranches.
- The Respondent No. 1 – Resolution Professional during the course of CIRP while reviewing the books of accounts of the Corporate Debtor came to notice across the aforesaid payments made by the Corporate Debtor to the Respondent Nos. 2 and 3.
- The details of payments were sought from the Appellant through email but there was no response or justification in support of such payments made to the Respondent No. 2 and 3. The books of accounts reflected this money as advance to the Respondent No. 2 and 3.
- It is also admitted fact that the Office of the Respondent No. 2 is located at the residence of the Appellant.
- It is also admitted fact that the Appellant have common interest in a company called as Udveka Engineering Private Limited where Appellant and his wife are directors since 22.08.2016 and 26.09.2018 respectively.
- It is also admitted fact that the Respondent Nos. 2 and 3 hold 9500 and 500 equity shares respectively in Udveka Engineering Pvt. Ltd. with balance 250 shares held by the Appellant. Therefore, the Respondent Nos. 2 and 3 are shareholders and Appellant is Director acting on instructions of the Respondent Nos. 2 and 3.
- It is also admitted fact that the Respondent No. 2 was incorporated on 12.01.2015 and the Respondent No. 3 and his wife are partners of the Respondent No. 2 are engaged in investment advisory and business consultancy services.

- It is also admitted that the payment was made pursuant to two letters of engagements dated 12.10.2015 and 16.08.2016.
- It is also admitted fact that the letter of engagement dated 12.10.2015 is letter of engagement between the Respondent No. 2 and Appellant, the Respondent and Corporate Debtor is not a party to the said engagement.
- It is also admitted fact that the no Invoice was raised by the Respondent No. 2 on the Corporate Debtor for such payment. There is no service tax charged for such Invoice and there is no TDS deducted by the Corporate debtor for such payment.
- Taking all these facts, the Agreements dated 12.10.2015 (Annexure A-2 at page 40 to 43 of the Appeal Paper Book) and 16.08.2016 (Annexure A-3 at page 44 to 47 of the Appeal Paper Book) are suspicious documents and cannot be relied upon.

ORDER

23. After hearing the parties and gone through the records, we are of the considered view that there is no illegality committed by the Ld. Adjudicating Authority while passing the impugned order. The impugned order dated 01.02.2020 passed by the Ld. Adjudicating Authority (National Company Law Tribunal), Special Bench, Chennai in MA/987/2019 in IBA/330/2019 is hereby affirmed. There is no merit in the instant Appeal. The instant Appeal is hereby dismissed. No order as to costs.

24. Registry to upload the Judgment on the website of this Appellate Tribunal and send the copy of this Judgment to the Ld. Adjudicating Authority (National Company Law Tribunal), Special Bench, Chennai, forthwith.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

New Delhi

21st September, 2021

R. Nath.