

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 196 of 2023

IN THE MATTER OF:

Vivek Prakash **...Appellant**

Versus

Dinesh Kumar Gupta **...Respondent**

Present:

For Appellant : **Mr. Vivek Sinha, Mr. Vivek Malik and Mr. Shubham Bharara, Advocates.**

For Respondent : **Mr. Govind Bhardwaj, Advocate for Liquidator.**

WITH

Company Appeal (AT) (Insolvency) No. 828 of 2023

IN THE MATTER OF:

Vivek Prakash **...Appellant**

Versus

Dinesh Kumar Gupta **...Respondent**

Present:

For Appellant : **Mr. Vivek Sinha, Mr. Vivek Malik and Mr. Shubham Bharara, Advocates.**

For Respondent : **Mr. Govind Bhardwaj, Advocate for Liquidator.**

O R D E R
(Hybrid Mode)

28.08.2024: **Comp. App. (AT) (Ins.) No. 828 of 2023**

1. This Appeal has been filed by the Appellant, the Ex Director of the Corporate Debtor challenging the Order dated 17.04.2023, passed by the Learned Adjudicating Authority, (National Company Law Tribunal, Court – V, New Delhi Bench) in I.A.119/2022 in IB No. 2354 / ND / 2019. I.A.119/2022 was filed under Section 66 read with sub-Clause 5 by the Liquidator of the Corporate Debtor. In the Application in Paragraph 9 and Paragraph 10,

certain transactions were referred to which were sought to be declared as a fraudulent transaction.

2. Adjudicating Authority in Paragraphs 4 & 5 of the Order has extracted the Paras 9 & 10 of the Application. In the Applications, the Appellant could not file any Reply and the Adjudicating Authority proceeded to decide the Application by the Impugned Order. Only two Paragraphs of the Orders i.e., Paragraphs 12 & 13 which can be said to be consideration of the Application by the Adjudicating Authority which Paragraphs 12 & 13 are as follows:

“12. We are of the view that the abovementioned observations are made by the rightly appointed Transaction Auditors and hence, have been taken on record. Further, it is relevant to mention that despite sending of multiple notices by the Applicant, the Respondents made no appearance. The Applicant has further enclosed affidavit of service, which justifies that there has been no default on the part of the Applicant and hence, the said Respondents has been proceeded Ex-parte with, by this Adjudicating Authority. In addition to that, we opine that the abovementioned Transaction Auditors are expert in the concerned field and that there has been no reply on the part of the Respondents, we see no impediment in allowing the present application.

13. Hence, we allow the Liquidator on behalf of the Jarvis Infratech Private Limited to restore the position of the Financial Transactions identified by the Applicant under Section 66, as it existed before such financial transactions had been entered into by the Corporate Debtor. Further, we direct the respondents to contribute to the assets of the Corporate Debtor, as detailed in Paragraphs 9 and 10 of the instant application based on the expert opinion of the Transaction Auditor leading to formation of opinion/belief on the part of the liquidator.”

3. When the allegations were made by the Liquidator that transactions are transaction which are transaction covered under Section 66, there has to be Application on mind by the Adjudicating Authority to the ingredients which are required to be fulfilled for declaring the transaction to be a fraudulent
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transaction. Paragraphs 9 & 10 of the Application as extracted by the Adjudicating Authority are ledger balances which are subsequent to 31.03.2019.

4. Learned Counsel for the Appellant submits that last Balance Sheet filed by the Corporate Debtor was as on 31.03.2019 and thereafter no Balance Sheet was filed. There is no finding by the Adjudicating Authority in the Impugned Order that ingredients of Section 66 are fulfilled. The mere fact that proceedings were Ex-Parte against the Appellant cannot be a reason to hold the ingredients of Section 66 are fulfilled without adverting to the relevant ingredients. Counsel for the Appellant has also given an explanation for not being able to appear before the Adjudicating Authority since personal Insolvency Proceedings were already going on against the Appellant and all documents were with the Resolution Professional ('RP') who was appointed by the Adjudicating Authority

5. Learned Counsel for the Liquidator submits that the Balance Sheet was filed after 31.03.2019 up to date before the commencement of the CIRP proceedings. Adjudicating Authority, however, has not referred to any Balance Sheet in the Impugned Order.

6. In the facts of the present case and especially the reasons as given above that Adjudicating Authority has not given any consideration or findings in the Impugned Order for holding the transaction are covered under Section 66. Ends of justice be served in setting aside the Order passed by the Adjudicating Authority dated 17.04.2023 and reviving the Application I.A.119/2022 for fresh consideration.

7. In view of the facts that Application is being revived, Appellant is also at opportunity to file the Affidavit in Reply to the Application within a period of three weeks from today along with the relevant materials which is required to be filed. The Adjudicating Authority after considering the Reply of the Appellant may proceed to pass fresh Order in accordance with law.

8. Application I.A.119/2022, having been filed in 2022, we request the Adjudicating Authority to expeditiously dispose of the Application.

Comp. App. (AT) (Ins.) No. 196 of 2023

1. This Appeal has been filed by the Ex Director of the Corporate Debtor, challenging the Order dated 22.12.2022 passed by the Learned Adjudicating Authority (National Company Law Tribunal, New Delhi Bench Court – V) in I.A. 111/2022 in (IB)/2354/ND/2019. I.A.111/2022 was filed by the Resolution Professional (‘RP’) under Section 43 read with Section 60(5) of the Insolvency and Bankruptcy Code, 2016, (for short ‘The Code or The IBC’) before the Adjudicating Authority. Liquidator has filed the transaction on the basis of Transaction Audit Report dated 19.08.2020.

2. Learned Counsel for the Appellant submits that the Order of the Adjudicating Authority by which transactions have been declared to be preferential transaction and direction has been issued to make contribution are not in accordance with the provisions of Sections 43 & 44 of the IBC. It is submitted that the transactions which have been declared to be preferential transactions were transactions under which it was claimed that there were certain receivables which were written off.

3. We have heard Counsel for the Liquidator also.

4. The Transaction Audit Report, which is the basis of Order is relevant transactions have been captured in Paragraph 9 of the Report, which is as follows:

“9. The company (PIL) has written off a huge amount of Rs.86, 69.550.46 during the financial year 2019-20 and booked the same under the head “Miscellaneous Expenses” in the Provisional Balance Sheet and Profit & Loss Account as at 10/02/2020. The amount primarily includes accounts receivables/amount recoverable & sales and is apparently an attempt divert/misappropriate the funds belonging to JIPL by forging the books of accounts, The written off amount consists of the following:

<i>SL. No.</i>	<i>Head of Account</i>	<i>Amount written off (Rs.)</i>	<i>Nature of amount written off</i>
<i>1.</i>	<i>Sales</i>	<i>58,03,943.00</i>	<i>Sales</i>
<i>2.</i>	<i>M/s. Coramandal Electronics</i>	<i>19,51,7689.00</i>	<i>Account receivable</i>
<i>3.</i>	<i>GST</i>	<i>7,38,018.00</i>	<i>GST Recoverable</i>
<i>4.</i>	<i>Directorate of Prosecution</i>	<i>1,19,284.00</i>	<i>Account Receivable</i>
<i>5.</i>	<i>TDS-2016-2017</i>	<i>56,537.00</i>	<i>TDS Receivable</i>
<i>6.</i>	<i>Cash</i>	<i>(-)0.05</i>	
	<i>Total</i>	<i>86.69.550.46</i>	

10. The company OTPL) seems to have Intentionally and wrongfully manipulated its current assets in form of Stocks, Trade Receivables, Loans, Advances and deposits recoverable to bring them down in 2019-20 by wrongfully, deliberately, and arbitrarily transferring most of the accounts receivable and loans & advances to its favourite parties and by writing off the assets belonging to the company. This is apparently an attempt to pass the undue benefits to the favourite parties and to cheat on the other creditors and the company itself.

11. The expenditure on account of Professional Charges have increased from Rs.10,73,500/- in 2018-19 to Rs.21,15,100/-In 2019-20 whereas there has been no business In the company during the year 2019-20 in terms of purchase or sales. These charges

include Rs.10 lacs paid to M/s GRPT Marketing Pvt. Lid. And Rs. 11 lacs paid to M/s. S. Chaudhary & Co. the documents related whereto could not be examined for want of access to the same. The expenditure does not appear to be genuine and seem to have been manipulated/inflated.

The Resolution Professional of the case was apprised of the aforementioned observations and the documents/information/explanations/clarifications etc. required in respect thereof as aforementioned. The Resolution Professional informed us to have sought the required documents/information/explanations/clarifications from the management of JIPL but the management of JIPL not only failed to provide the same but also showed its reluctance to offer us the opportunity to visit the office of JIPL for our verification/examination of necessary documents/information or to seek explanation/clarification on our observations within the reasonable time and opportunity offered by the Resolution Professional to the management of JIPL. This shows sheer non-cooperative attitude of the management of PL in the matter.

In view of the aforementioned circumstances, we are left with no other option but to submit our provisional transaction audit report on the basis of documents/information made available to us.

OPINION:

In view of our examination/verification of the documents/information produced before us for the purpose of Transaction Audit of the company UIPL). We do hereby, submit our Provisional Transaction Audi Report of the company and are of the opinion that:

- a) the management of the company has wrongfully, deliberately and arbitrarily diverted its assets in form of “accounts receivable/recoverable” aggregating to Rs.1,31,65,883.57 in favour of the “related party” viz. PTPL and Rs.7,06,894.52 in favour of the another “related party” viz. STSFL on preferential basis with the mala-lide intention of wiping off the recoverable/receivable assets from the books of accounts and Balance Sheet of the company for the benefit of favourite parties on preferential basis thereby leaving the least for the other creditors, which apparently amounts to misappropriation/diversion of the assets and breach of trust of the other creditors of the company and the company itself;

- b) *the management of the company has deliberately made a payment of Rs.1,53,38,176/- out of the only major receipt of Rs.1,57,39,397/- during the year 2019-20 to the “related party” viz. STSPL on preferential. Basis apparently with the mala-fide intention of diverting the funds of the company and depriving the other creditors of the company of their rights.*
- c) *the management of the company has been found having indulged in misutilization/diversion of dis funds by way of advancing/diverting its funds to the directors and other parties without any consideration flowing in to the company;*
- d) *the management of the company has wrongfully, deliberately and arbitrarily written off its assets to the extent of R5.86,69,550.46 apparently with the mala-fide intention of wiping off the assets and presenting the unfair and untrue position of profit/loss and assets/liabilities of the company, which is apparently an attempt defraud the company and its creditors and to misappropriate/divert the assets of the company;*
- e) *the company appears to have booked unreasonably high expenditure to the Profit & Loss Account for the period ended on 10/02/2020 thereby inflating the loss during that period and possibly misappropriating the funds of the company by such actions.”*

5. The submission which has been pressed by the Counsel for the Appellant is that the transactions which are referred to were transactions where it is claimed that certain amount were written off as captured in Para 9 in the Table at Item Nos. 1 to 5.

6. We have considered the submissions of the Counsel for the Appellant and perused the record.

7. Section 43 of the IBC provides as follows:

“43. Preferential transactions and relevant time.-

(1) Where the liquidator or the resolution professional, as the case may be, is of the opinion that the corporate debtor has at a relevant time given a preference in such transactions and in such manner as laid down in sub-section (2) to any persons as referred to in sub-section (4), he shall apply to the Adjudicating Authority

for avoidance of preferential transactions and for, one or more of the orders referred to in section 44.

(2) A corporate debtor shall be deemed to have given a preference, if—

(a) there is a transfer of property or an interest thereof of the corporate debtor for the benefit of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor; and

(b) the transfer under clause (a) has the effect of putting such creditor or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with section 53.

(3) For the purposes of sub-section (2), a preference shall not include the following transfers—

(a) transfer made in the ordinary course of the business or financial affairs of the corporate debtor or the transferee;

(b) any transfer creating a security interest in property acquired by the corporate debtor to the extent that—

(i) such security interest secures new value and was given at the time of or after the signing of a security agreement that contains a description of such property as security interest and was used by corporate debtor to acquire such property; and

(ii) such transfer was registered with an information utility on or before thirty days after the corporate debtor receives possession of such property:

Provided that any transfer made in pursuance of the order of a court shall not, preclude such transfer to be deemed as giving of preference by the corporate debtor.

Explanation.—For the purpose of sub-section (3) of this section, "new value" means money or its worth in goods, services, or new credit, or release by the transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the liquidator or the resolution professional under this Code, including proceeds of such property, but does not include a financial debt or operational

debt substituted for existing financial debt or operational debt.

(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.”

8. For holding transaction to be a preferential transaction, conditions enumerated in Section 43 need to be established. The word “transaction” has been defined in Section 3(33), which is as follows:

“3. Definitions.- *In this Code, unless the context otherwise requires,-*

(33) “transaction” includes a agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor;”

9. Learned Counsel for the Appellant submitted that in the Master Data of the Company as reflected in the Ministry of Corporate Affairs, the last Balance Sheet which is noted is up to 31.03.2019 and no Balance Sheets were submitted by the Corporate Debtor thereafter. It has been submitted by the Appellant that there was no material brought on the record to indicate that any decision to write off the aforesaid amounts were taken by the Appellant nor there is any documents, Board Resolution or Letter to indicate that the said decision was taken by the Appellant.

10. Learned Counsel for the Liquidator has also not been able to support the Impugned Order to characterise the transaction as preferential transaction. The mere fact that certain amounts were written off cannot amount to preferential transaction within meaning of Section 43.

11. In view of the aforesaid, we are of the view that Adjudicating Authority in the Impugned Order has not returned the findings as to how the ingredients of Section 43 are proved in the facts of the present case. The Order Impugned is unsustainable.

In view of the aforesaid, we set aside the Impugned Order insofar as directions in Paragraph 8(c) are concerned qua Appellant.

Appeal is allowed to the above extent.

**[Justice Ashok Bhushan]
Chairperson**

**[Barun Mitra]
Member (Technical)**

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