IN THE NATIONAL COMPANY LAW TRIBUNAL

KOCHI BENCH

KOCHI

IA(IBC)/204/KOB/2022
IN
CP(IB)/25/KOB/2021
(Under Section 66(1) of IBC, 2016)

In the Matter of M/s. Tenny Jose Limited:

MEMO OF PARTIES:

PRATHAP PILLAI,
IBBI/IPA-003/ICAI-N-00371-2021-22/13822
Resolution Professional of M/s. Tenny Jose Limited,
BLRA 15, Bridge Lane, Medical College P.O.,
Trivandrum – 695 001.

...Applicant

-Versus-

1. **TENNY JOSE,** Villa No:29, Noel fragranz, Shihab Thangal Road, Vidya Nagar Colony, Thrikkakara, Edapally, Ernakulam, Pin – 682 021.

2. **ELSA TENNY,** Villa No:29, Noel fragranz, Shihab Thangal Road, Vidya Nagar Colony, Thrikkakara, Edapally, Ernakulam, Pin – 682 021.

3. **ARUN C TENNY,** Villa No:29, Noel fragranz, Shihab Thangal Road, Vidya Nagar Colony, Thrikkakara, Edapally, Ernakulam, Pin – 682 021.

4. **GOPINATH SRIKUMAR,** #7, Indian Express Layout, Kodigehalli, Vidyaranyapura, Bangalore, Karnataka – 560 097.

5. **KIRAN C TENNY,** Villa No:29, Noel fragranz, Shihab Thangal Road, Vidya Nagar Colony, Thrikkakara, Edapally, Ernakulam, Pin – 682 021.

... Respondents

-In-

In the Matter of:

Korea Trade Insurance Corporation,

...Operational Creditor

-Versus-

Tenny Jose Limited,

...Corporate Debtor

Coram:

Shri P. Mohan Raj	:	Member (Judicial
Shri Satya Ranjan Prasad	:	Member (Technical)

Appearances (through video conferencing)

For Applicants	:	Mr. Hari Kumar G Nair, Adv Mr. Akhil Suresh, Adv
For Respondents 1 to 3 and 5	:	Mr. Pradeep Joy, Adv Mr. Rohan Kumar, Adv

Order reserved on: 11.11.2022

Order pronounced on:25.01.2023

O R D E R

1. This application has been filed under section 66 of IBC 2016 for fraudulent transactions and return of amount.

Brief facts of Petition: -

2. The Applicant /resolution professional filed this application. The CIRP order was passed against the corporate debtor Tenny Jose Limited, in the petition filed under section 9 of IBC 2016 by Korea Trade Insurance Corporation on 21.12.2021. Mr.Krishna Raj was appointed as interim resolution professional then, the applicant was appointed as resolution professional on 14.03.2022. After his appointment he started to function then with the approval of 4th committee of

creditors meeting dated 21.06.2022 the applicant appointed M/s. Jackson Abraham Thekkekara, Chartered Accountant as forensic Auditor on 02.04.2022 the forensic Auditor submitted his report on 04.06.2022, the copy of the report was served on the erstwhile directors of the corporate debtor for their objections if any. From the said Audit report the applicant came to know that the respondents/suspended Board of Directors of the Corporate Debtor had deliberately and *mala fidely* acted and made transactions with the sole intention to defraud the creditors of the Corporate Debtor.

The respondents indulged in fraudulent transactions. In the application the applicant set out certain transactions carried out by the respondents are fraudulent transactions they are Falsely increased the sales and purchase of the company, diversion of funds of LC for other than intended purposes of supporting purchases, payment of interest made to the extent of Rs.99,00,000/ on public deposit and excess remuneration of Rs.3,08,00,000/- paid as salary to the directors etc., but only in respect of last two transactions prayers are made. Further on the applicant side during the time of an arguments pressed only two transactions such as relating to prayer (ii) & (v) of the application.

Brief facts of the reply of Respondents Nos.1 to 3 and 5: -

3. The application is not maintainable; all the contentions of the application are based on the forensic audit report and there is no independent determination of any fraudulent transactions by the RP. The application is filed in belated stage on 15.07.2022 after expiry of 208 days from the date of CIRP. As per the time line of

CIRP the RP is required to form an opinion within 75 days of the commencement of CIRP and based on that opinion to be formed he has to make determination on or before the 115th day of CIRP. But in the instant case the RP has not compiled the said time limit set out in Regulation 35 (A) of Insolvency and Bankruptcy regulations 2016. There is no mala fide intention of the respondent, while making transactions nor was any transaction done to defraud the creditors. Transactions were carried out in regular course of the business during the good health of the corporate debtor. The director's remuneration was fixed during the good financial condition of the corporate debtor and the same salary was followed from the financial year 2017-2018 to 2019 to 2020. When the financial statement of the year 2019 to 2020 came out with poor manner the directors internally decided to reduce their salary by 40% for the financial year 2020 to 2021 and resolution was passed by the board in the month of July 2020. The allegations are frivolous and baseless, and prayed for dismissal of application.

The Points for determination are: -

1) Whether the application is barred by limitation?
2) Whether the applicant/ RP has not filed the application on his own determination?
3) Whether, the Respondents indulged in fraudulent Transactions? if yes whether the applicant is entitled for refund of amount?

Point No. 1 & 2: -

4. The corporate debtor was ordered to CIRP on 21.12.2021. This application was filed on 15.07.2022. On the respondent side taken a plea that since this application is not filed within the time limit prescribed under Regulation 35-A of the Insolvency and Bankruptcy Board of India and (Insolvency Resolution Process for Corporate Persons) Regulation 2016, is not maintainable. It is true that as per Regulation 35-A of the Insolvency and Bankruptcy Board of India and (Insolvency Resolution Process for Corporate Persons) Regulation 2016, Resolution Professional has to form an opinion within 75 days from the date of CIRP, and made determination within 115 days and has to file an application within 135 days, from the date of commencement of CIRP. From the available materials it appears that after the initiation of CIRP on 21.12.2021, the Resolution Professional appointed Forensic Auditor on 02.04.2022. Forensic Auditor submitted his report on 23.09.2020, there after the Resolution Professional determined that the Respondents deliberately and malafidely acted with sole intention to defraud the creditors of the corporate debtor, then he filed this application, after expiry of 135 days from the date of initiation of CIRP.

5. On the application side argued that this application is maintainable even though it is filed after 135 days from the date of CIRP. The time line mentioned in Regulation 35-A of Insolvency Bankruptcy and (Insolvency Resolution Process for Corporate Persons) Regulation 2016 is directory in nature because no consequential effect is mentioned therein for non-compliance of time limit. This

view is expressed and fortified in Madras High Court Judgment Shahji Purushutom -vs- Union of India, there it is observed that when there is no consequential result is prescribed it will consider as only a directory. In this regard on the applicant side relies upon the NCLAT-Delhi order passed in company Appeal (AT) Insolvency No.583 of 2021 order dated 06.04.2022, **Aditya Kumar Tibrewal Vs Om Prakash Pandey and Orsin** here the NCLAT clearly held that the application filed by the resolution Professional relating Sections 43 and 45 read with Sections 66 and 60(5) of the Code is not to be rejected filed beyond the period of 135th days of Insolvency Commencement date only on the ground of non-compliance of Regulation 35A of CIRP Regulations, 2016, further held that the expression "shall" in regulations 35A(1),35A(2) and 35A(3) is not mandatory and requirement of "forming an opinion" under section 35A(1)" make a determination" under Section 35A(2) and "shall apply to the adjudication authority for appropriate relief on or before 135th day of the Insolvency Commencement date" are only directory. It is well settled proposition of law that one should not be allowed to take advantage of his own wrong. Thus, the applicant has vividly described the reason for maintenance of application. As per Section 5 of the Limitation Act, if the applicant satisfies the court that he had sufficient cause for not making the application within time, the delay to be condoned. The Apex Court held in Sesh Nath Singh and another -vs- Baidyabati Sheora phuli co-operative Bank Ltd. and another in Civil Appeal No. 9198 of 2019 order dated 22.03.2021 that delay can be condoned irrespective of whether there is any formal application or not if there are sufficient material on record disclosing sufficient cause for the delay. In this case also even though on the applicant side not filed any formal condone delay application but in the petition the delay is properly and satisfactorily explained.

6. The Division Bench of Delhi High court in **TATA STEEL BSL LIMITED Vs VENUS RECRUITERPRIVATE LIMITED & ORS, LPA 37/2021** dated 13.01.2023 at para 74 held as follows:

> *74. The first prong on which the Impugned Judgment holds that avoidance applications, in facts of the present case, are infructuous is because they have not been filed as per the prescribed timelines. However, it is our understanding that the timelines under Regulation 35A are directory and not mandatory in nature. This is because Regulation 35A pertains merely to the RP discharging his statutory burden of filing an avoidance application within an outer limit of 135 days from the commencement of the CIRP. This timeline takes date of commencement of CIRP as the reference point. However, the CIRP process itself is not strictly or mandatorily bound by its own timelines. The same has been held by the Hon''ble Apex Court in Essar Steel India Ltd. Committee of Creditors v. Satish Kumar Gupta, Neutral Citation Number: 2023/DHC/000257 LPA 37/2021 etc. Page 63 of 73 (2020) 8 SCC 531.*

Thus, the catena of supra citations made clear that the Regulation 35A is only directory.

7. This application is filed alleging that the respondents committed an act of fraudulent Transactions. As per Section 17 of the Limitation Act 1963 for the application based upon the fraud of respondent, the period of limitation shall not begin to run, until the applicant discovered the fraud. Here, the applicant came to know the fraudulent trading of respondents only on 04.06.2022 the day on which audit report was submitted to him. From the date of knowledge of fraud on 04.06.2022 this petition has been filed on 15.07.2022 within 42 days, hence there is no delay in filing this application, even if there is any delay in filing this application beyond 135 days fixed under Regulation 35-A in view of supra mentioned Apex court Judgment in the absence of any formal application the said delay is here by condoned.

8. On the respondent side it is alleged that the Resolution Professional not acted independently, he had delegated his duty of forming an opinion determination of fraudulent transaction to the forensic auditor and such delegation of duty is in contravention to the provisions of IBC. The mere acceptance of auditor's report does not amount to delegation of power of Resolution Professional. It is the exclusive domain of Resolution Professional either to accept the report of forensic auditor report or not. It does not mean that when Resolution Professional accepted the report of auditor, he delegated his duty to auditor. Here the Resolution Professional accepted the Forensic Auditor's report and determined on his own and filed this application. Thus, the contention of the respondents is unsustainable.

In this scenario it is answered that the petition is not barred by limitation and Resolution Professional has filed this application on his own, determination.

Point No 3: -

9. In respect of fraudulent transactions, the applicant stated that the deposits received from the various persons to the tune of Rs.12.64 crores were disguised as loans from the directors or advance from the customers, in violation of section 76 of Companies Act 2013 and the interest paid is shown in different heads as operational expenses. Further it is stated that the respondents drawn excess remuneration of Rs. 3,08,00,000/-in an unusual manner, without any authorization.

10. The petitioner alleged that the respondent had indulged in certain fraudulent trade transactions with intents to defraud the creditors of corporate debtor. As per Section 66 of the Insolvency and Bankruptcy Code, 2016 if any persons carried on the business of Corporate Debtor with intent to defraud its creditors, then the said person shall liable to make such contributions to the assets of the Corporate Debtor. One of the allegations made against the respondents is that they have received the loans to the company from the outsiders/public, but disguised those loans as if loan from directors, advances, against sale etc., in this regard in the application it is mentioned that a sum of Rs.99 lakhs has been paid towards interest. In annexure V it is mentioned that loans received from public, were disguised as loan from directors and given certain transactions and observed that this was done to avoid section 76 of the Companies Act 2013. In the annexure

V it is stated that deposits from K. Gopal, Rohit enterprises Shanthi Corporation, Sree Seetharama Paper Agency and Mittal Trading company were received but disguised the said deposit as loan received from Tenny Jose, C Tenny Jose and interest paid to the depositors were debited in the different head. Either in the application nor in annexure V no details have been furnished who were benefited by this Act and how the amount Rs.99,00,000/- was arrived. In annexure it is concluded that this practice might have been performed by company to avoid compliances of public deposits as provided under section 76 of Companies Act, 2013 and to mislead other financial creditors, in that event it may come under mismanagement of company affairs in violation of statutory provision but it will not amount to fraud.

11. The next allegation is the directors were paid excess remuneration of Rs.3,08,00,000/- In annexure V facts are narrated in detail and figures are given in annexure 13, how the excess remuneration was drawn by the respondents 1 to 3 and 5 in violation section 197 & 198 of Companies Act 2013 and without any resolution or authority in this regard. For the financial year 2019-2020 the remuneration payable to the directors has been considered as Nil since the company did not have remarkable profit and the company did not prepare the appropriate notice in compliance of schedule V of the Companies Act 2013. The excess payment for the financial years 2017- 2018 to 2020- 2021 received by the managing director, whole time directors and other directors are given in table.

12. The 2nd respondent drawn the remuneration from the corporate debtor as a director, but as per annual statements she was non-executive and not in managerial cadre so she is not entitled to draw any remuneration hence remuneration payable to her is considered as Nil., and the entire amount paid towards remuneration of second respondent is liable to be recovered. It is also noticed that 5th respondent even though resigned on 19.10.2021 but drawn salary till 31st January 2022. The maximum permissible remuneration and actual remuneration paid to the directors for the four financial years 2017-2018 to 2020-2021 are given below: -

Particulars	2017-18	2018-19	2019-2020	2020-21
Remuneration Paid	1,16,60,000	1,26,60,000	1,26,22,580	76,00,700
Maximum permissible amount	69,84,882	25, 23, 006	-	42,15,540
Excess remuneration paid	46,75,118	1,01,36,994	1,26,22,580	33,85,160

13. On the respondents 1 to 3 and 5 side not denies the receipt of the amount mentioned in the supra table, their reply is the pay structure was fixed during the time the company was in flourish and the same was followed for the financial years 2-17-2018 to 2019-2020. When the financial statement of the year 2019-2020 came out then only the respondents restructured the payment schedule by reducing 40% for the following financial year and passed resolution in this regard in July 2020.

14. From the contents of the respondents, they have not denied the receipt of excess payment but justified that they have simply followed the pay schedule fixed earlier when the company was in good financial condition, if this contention is accepted it may relieve the respondents from criminal liability but will not exonerate them from the liability to return the amount what according to them received by ignorance or by mistake.

15. In the application or in annexure V there is no iota of reference about 4th respondent, it is informed that he was appointed as an independent director in non-executive cadre on 18.06.2018 and resigned as such from office on 12.07.2021.

16. In the circumstances it is concluded that applicant side in crystal clearly proved that the respondents 1 to 3 and 5 drawn excess remuneration, for which they were not entitled, in consequence they are liable to refund the said excess payments drawn by them individually/personally and severally to the applicant. The prayer V in application is granted against the respondents 1 to 3 and 5. Thus this point is answered.

17. In the result the respondents 1 to 3 and 5 are directed to pay jointly and severally a sum of Rs.3,08,00,000/- (Rupees Three crore and eight lakh only) to the applicant within a month from today, failing which the amount Rs.3,08,00,000/- will carry 12% simple interest per annum from the date of this order to till the date of realization of amount. Thus, the application is ordered against the respondents 1 to 3 and 5, in respect of respondent No.4 application is dismissed. No cost.

18. 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,

19. Certified Copy of this order may be issued, if applied for, upon compliance of all requisite formalities.

SATYARANJAN PRASAD Digitally signed by SATYARANJAN PRASAD Date: 2023.01.25 12:41:51 +05'30'

Satya Ranjan Prasad
Member (Technical)

PANDIAN MOHAN RAJ Digitally signed by PANDIAN MOHAN RAJ Date: 2023.01.25 13:41:35 +05'30'

P. Mohan Raj
Member (Judicial)

Signed on this 25th day of January, 2023.

Supriya-P. s