

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I**

I.A. 1094 OF 2020

Under Section 45, 50 & 66 of the
Insolvency & Bankruptcy Code, 2016.

Amit Poddar,
Insolvency Professional of Unijules Life
Sciences Limited.

...Applicant

V/s

Mr. Faiz Zakir Vali & Others

... Respondents

In the matter of

C.P. (IB)No.3080/MB/2018

Punjab National Bank

...Financial Creditor

V/s.

Unijules Life Sciences Ltd.

... Corporate Debtor

Order delivered on: 05/12/2023

Coram:

Shri Prabhat Kumar
Hon'ble Member (Technical)

Justice Shri V.G. Bisht
Hon'ble Member (Judicial)

Appearances:

For the Applicant : Mr. Arjun Sathees, Advocate

For the Respondent : Ms. Namrata, Advocate

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This IA 1094/2020 is filed by SH. Amit C Poddar, the Resolution Professional (“Applicant”) of M/s Unijules Life Sciences Limited (“Corporate Debtor”) in the Corporate Insolvency Resolution Process (“CIRP”) under the Insolvency & Bankruptcy Code, 2016 (“Code”). The Applicant has sought order in terms of section 45, 50 and 66 of the Code against Respondents.
2. That the Corporate Debtor was incorporated in the year 2006. The Respondent No. 1 to 4 being the Directors and Respondent No 5 being CFO were responsible for the day to day affairs of Corporate Debtor during the relevant period. The Corporate Debtor was engaged in the business of manufacturing and sale of Pharmaceuticals & Cosmetic Products. The Corporate Debtor was classified as a NPA on 30.09.2014 after enjoying credit facilities with numerous banks.
3. The Corporate Debtor was admitted into CIRP 08.03.2019 pursuant to an Application filed u/s 7 of the Code namely CP (IB) 3080 of 2018 on 9.10.2018. The credit facility account was classified as NPA on 30.09.2014
4. That the Committee of Creditors in the meeting held on 15/05/2019 passed resolution to appointing A.B.B. & Associates, Chartered Accountants to undertake a Transaction audit of the Corporate Debtor for the period commencing from 09.03.2017 to 08:03 2019 (Audit Period) to ascertain movement of funds along with detailed scrutiny of the accounts in line with provisions of Code.
5. M/s A.B.B. & Associates, Chartered Accountants provided its Report (Transaction Report) on 02/12/2019 and based on the findings and

observation in the said Report, the Applicant identified certain transactions which the Corporate Debtor has executed with the Respondents which would fall within the purview of Section 45 (Undervalued transactions), Section 50 (Extortionate Credit transactions) and Section 66 (Fraudulent trading or wrongful trading).

6. We have heard the Counsel and perused the material on record.
- 6.1. The Applicant has prayed for relief in terms of section 45, 50 and 66 of the Code, and stated the specific section of Code under which relief is sought in relation to each kind of transactions stated in the Applicant. The prayer seeks directions to the Respondent to pay such sum in respect of benefits received by them from the Corporate Debtor. We will take up each transaction under distinct head for the adjudication purpose.
- 6.2. Before proceedings further, it would be appropriate to refer to Section 45, 50 and 66 of the Code, which reads as under –
- 6.3. **Section 45: Avoidance of undervalued transactions.**

45. (1) If the liquidator or the resolution professional, as the case may be, on an examination of the transactions of the corporate debtor referred to in sub-section (2) determines that certain transactions were made during the relevant period under section 46, which were undervalued, he shall make an application to the Adjudicating Authority to declare such transactions as void and reverse the effect of such transaction in accordance with this Chapter.

(2) A transaction shall be considered undervalued where the corporate debtor—

(a) makes a gift to a person; or

(b) enters into a transaction with a person which involves the transfer of one or more assets by the corporate debtor for a consideration the value of which is significantly less than the value of the consideration provided by the corporate debtor,

and such transaction has not taken place in the ordinary course of business of the corporate debtor.

Section 50: Extortionate credit transactions

50. (1) *Where the corporate debtor has been a party to an extortionate credit transaction involving the receipt of financial or operational debt during the period within two years preceding the insolvency commencement date, the liquidator or the resolution professional as the case may be, may make an application for avoidance of such transaction to the Adjudicating Authority if the terms of such transaction required exorbitant payments to be made by the corporate debtor.*

(2) *The Board may specify the circumstances in which a transactions which shall be covered under sub-section (1).*

Explanation.—For the purpose of this section, it is clarified that any debt extended by any person providing financial services which is in compliance with any law for the time being in force in relation to such debt shall in no event be considered as an extortionate credit transaction.

Section 66: Fraudulent trading or wrongful trading.

66. (1) *If during the corporate insolvency resolution process or a liquidation process, it is found that any business of the corporate debtor has been carried on with intent to defraud creditors of the corporate debtor or for any fraudulent purpose, the Adjudicating Authority may on the application of the resolution professional pass an order that any persons who were knowingly parties to the carrying on of the business in such manner shall be liable to make such contributions to the assets of the corporate debtor as it may deem fit.*

(2) *On an application made by a resolution professional during the corporate insolvency resolution process, the Adjudicating Authority may by an order direct that a director or partner of the corporate debtor, as the case may be, shall be liable to make such contribution to the assets of the corporate debtor as it may deem fit, if—*

(a) before the insolvency commencement date, such director or partner knew or ought to have known that there was no reasonable prospect of avoiding the commencement of a corporate insolvency resolution process in respect of such corporate debtor; and

(b) such director or partner did not exercise due diligence in minimising the potential loss to the creditors of the corporate debtor.

(3) Notwithstanding anything contained in this section, no application shall be filed by a resolution professional under sub-section (2), in respect of such default against which initiation of corporate insolvency resolution process is suspended as per [section 10A](#).]

Explanation.—For the purposes of this section a director or partner of the corporate debtor, as the case may be, shall be deemed to have exercised due diligence if such diligence was reasonably expected of a person carrying out the same functions as are carried out by such director or partner, as the case may be, in relation to the corporate debtor.

Transaction with Mr. Faiz Zakir Vali (Respondent No. 1)

7. Mr. Faiz Zakir Vali (Respondent No. 1) was working as a Managing Director in the Corporate Debtor, and had drawn salary of Rs. 18,00,000/- pa for the Financial Year 2016-2017 & Financial Year 2017-2018. However, it was observed by the Transaction Auditor that in the Financial Year 2018- 2019, that the salary drawn by the Corporate Debtor was increased exorbitantly from Rs. 18,00,000/- to Rs 48.00,000 per annum. It is the case of the applicant that no approvals from the remuneration committee supporting this increase of Rs. 30,00,000 has been made available, and no valid Board Resolution was passed under the provisions of Companies Act, 2013 approving this unreasonable increase in salary has been made available. This increase has caused prejudice to the interest of the creditors and has further affected the ability of the Corporate Debtor to service its debt. Instead of paying liabilities to the Creditors' the erstwhile Director was withdrawing unreasonable salary from the Corporate Debtor Therefore, it is submitted that the said transaction amounting to Rs. 30,00,000/-c (Rs. 48,00,000

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Rs. 18,00,000) can undoubtedly be termed as Fraudulent Fund diversion under Section 66 of the Insolvency and Bankruptcy Code, 2015.

7.1. Respondent No. 1 filed the Reply stating that in order to make the corrections in the salary of Managing Director in comparison to the other Companies, a decision was taken to increase salary to Rs. 48 Lakhs Per Annum, and full salary has not been withdrawn. It is also submitted that in the meeting held on 02.05.2009, the Board of Directors decided to increase the remuneration from Rs. 2 Lakhs per month to Rs. 4 Lakhs per month w.e.f. 01.06.2010, and such increase was approved by the shareholders in the EoGM held on 30.05.2009. Further, in the year 2014 due to heavy losses, R1, reduced salary to Rs. 12 Lakhs per Annum from F.Y. 2014 to 2015-2016. It is further stated that and as can be verified in the ledger account from the books of the Corporate Debtor, this Salary was not regularly paid and the Respondent as a net credit balance of Rs. 147,56,363.49, receivables from the Corporate Debtor as on 31.03.2020. However, on perusal of the Personal Ledger Account in the books of account of the Corporate Debtor submitted by the Respondent No. 1, demonstrate that a sum of Rs. 252,61,436.02 was receivable from the Corporate Debtor as on 01.04.2016. This means that to Rs. 10,505,072.53 was paid to the Respondent No. 1 besides payment of Remuneration which was credited to the said personal account; hence, we do not find any merit in the argument of R1 that these salaries were not paid to him. Nonetheless, we find that the payment of remuneration was duly approved by the Board of Directors and members in the EoGM, and the Applicant has not pleaded that no services were rendered by the Respondent No. 1, also we could not find anything on record to suggest that the increase in remuneration was considered excessive under the Income Tax Act in terms of Section 40A (2). Accordingly, we are of the considered opinion that these payments cannot be said to fall under Section 66 of the Code; because, the element of 'intent' or 'fraud' has not been made out in the Application. Since, the Applicant has not made out any case u/s 44, we are of the considered view that no

order can be passed in terms of Section 44 in relation to our observation in this Para.

Transaction with Mr. D. K. Bellani (Respondent No. 3)

8. Mr. Dharampal Keshawdas Bellani (Respondent No.3), was working as a Technical Head in Corporate Debtor. As per the Transaction Audit Report, the Corporate Debtor had carried out fixed Asset transactions during the audit period. The Corporate Debtor had booked the Vehicle Maruti "Ertiga" vide Journal Voucher dated 30.06.2016 for Rs 9,84,372/- . However, the Invoice dated 29.04.2016 of Automative Manufacturers Pvt. Ltd. provides that the vehicle was purchased in name of Respondent No.3.

8.1. Despite Respondent No.3 being the owner of the vehicle, the Corporate Debtor has capitalized the asset and has shown liability in favor of Respondent. No.3. Moreover, the Corporate Debtor has not submitted any Board or Management approvals or legal documents reflecting the transfer of asset from Respondent No.3 to Corporate Debtor. Furthermore, the Corporate Debtor has paid sums amounting to Rs. 2,77,750/- in Financial Year 2016-2017 and Rs. 3, 20,326/-in Financial Year 2017-2018 and Rs. 2,90,754/- in Financial Year 2018 2019 for the vehicle. The Corporate Debtor has neither provided Form 16 of the Director, nor has included any perquisite value for TDS purposes. Therefore, Respondent No. 1 to 5 in connivance with each other have committed a fraud of Rs.8.88,830/-during the audit period for a vehicle cost of Rs.9,84,872 and falls within the ambit of section 66 of the Insolvency and Bankruptcy Code.

8.2. The Respondent No. 1 has submitted that vehicle is in the possession of the Applicant itself and is being used by the employees of the Corporate Debtor for its official purposes as was being used earlier also. As the

account of the Corporate Debtor was under NPA, it could not have secured credit facility for purchase of vehicle, it was decided to purchase the car in his name for official purpose of the Corporate Debtor. The said vehicle accounted in the books of account of the corporate Debtor and depreciation thereon under the Income Tax Act has been claimed by the Corporate Debtor.

- 8.3. In view of these facts, we find that the vehicle is duly accounted in the books of the Corporate Debtor and in the normal course of the business, the Companies give their vehicles to the Employees for the official use. No perquisite is taxable under the Income Tax Law in case the vehicle is given for official purposes. Simply because, the vehicle was registered in the name of R3, it cannot be said that the transaction of purchase of vehicle is for fraudulent or malicious purposes. Accordingly, we are of the considered opinion that this transaction cannot be said to fall under Section 66 of the Code; because, the element of 'intent' or 'fraud' has not been made out in the Application.

Transactions with Herbatone Specialities Pvt. Ltd. (Respondent No. 6)

a) Sale of Old Machinery

9. Herbatone Specialities Pvt. Ltd. ("Respondent No. 6") is a company in which shareholders and directors are the relatives & employees of the Corporate Debtor. Further, Mr. Ali Akbar Raja and Girish Anand Thadani, the Directors of Respondent No. 6 are employees of Corporate Debtor. Hence it is apparent that Respondent No. 6 is indirectly managed by Respondent No. 1. The Transaction Audit Report reflects that the Corporate Debtor has carried out major transactions with Herbatone Specialities Pvt. Ltd. which are outside the normal course of the business. The Transaction Report observes that the Corporate Debtor had sold off old machinery amounting to Rs.80,13,728/ on 03.06.2016, even though these machineries were fixed assets given as collateral to consortium banks against term loans and cash credit facilities availed by the

Corporate Debtor. It is further submitted that it's essential to attain permissions from the Consortium Banks for disposal of such collateral assets. The Respondent No. 1 to 5 have neglected to obtain any such approvals and have sold off machinery to the detriment of the creditors and have acted in interests prejudicial to the interest of the Corporate Debtor Respondent No. 6 is being created for diverting which is prejudicial to the interest of the creditors of the Corporate Debtor. Therefore, the aforesaid transactions fall squarely within the ambit of Section 66 of the Insolvency Bankruptcy Code, 2016.

- 9.1. The Respondent has submitted that the depreciation value of the said machine in the books was Rs 33,61,596.82 in the books of the Corporate Debtor and the scrap value was much lower than that. Further, the machine was outdated, being a manual machine, and not in use for long period of time. The allegation that the said machine was mortgaged as collateral security is false and incorrect.
- 9.2. We find that the Applicant has made out a case u/s 66 in relation to this transaction, but has not placed on record any evidence to suggest that the sale value as recorded in the books of account of the Corporate Debtor was less than its fair market value and at the time of sale. Further, no evidence has been placed to prove that the said machine was mortgaged to the Creditors. Even if that be so, the sale proceeds of the machines came into the books of Corporate Debtor and no allegation from the prejudiced the Financial Creditor pertaining to sale of mortgage property is on record. Accordingly, we are of the considered opinion that this transaction cannot be said to fall under Section 66 of the Code; because, the element of 'intent' or 'fraud' has not been made out in the Application.

b) Write off Rs. 155,03,414/-

10. It is observed by the Transaction Auditor that an amount of Rs. 1,55,03,414 crores has been shown as written off in the Tally Account of Respondent No. 6. It is submitted that the Respondent No. 1 insisted that when there was a shift from the old Accounting Software namely CALL

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ACPAC to Tally, there to which certain double entries were generated. It is submitted that the Respondent No. I further maintains that the double entries created had been rectified in the year 2016-2017. It is submitted that the Auditor further sought the year of migration into the Tally software and sought for Reconciled Ledger Balances for reviewing the same, however they were not made available to the Applicant. It is submitted that certain bogus transactions had been undertaken before 01.04.2016 and the same were later adjusted during the Audit period. Thus, the aforesaid transactions of sum of Rs.155,03,414) falls within the purview of Section of the Insolvency and Bankruptcy Code 2016.

10.1. The Respondent has denied that any amount was written off while migration old accounting software to new accounting software. We are of the considered view that the Applicant has failed to explain the other accounting head where the such write off has made impact. A simplicitor write off entails debit to the profit and loss account or debit to any other account, however, there is no pleading to this effect the Applicant himself admitted that certain double entries were created in the migration which came to be rectified, and the inference has been drawn on the basis of non provision of these entries for verification. However, we are of the considered view that these entries could have been identified after looking at the other lag of journal entry. Accordingly, we do not find force in the argument of the Applicant and of the considered view that no case is made out u/s 66 of the Code.

c) Transfer of Rs. 289,08,595/-

11. It is also observed in the Audit Report that an amount of Rs.2,89,08,595/- which is debit balance (receivables) in various suppliers' account which had been grouped under "Sundry Creditors Finished Goods" was transferred to Respondent No. 6 in Financial Year 2017-2018. It is submitted that due to the aforesaid transfers, the Opening Credit balance was reduced. It is submitted that this adjustment amounting to sum of Rs.2,89,08,595/-cannot

be verified. The Corporate Debtor has failed to provide any Balance confirmation Letters, or Agreements or other correspondences with these third parties whose balances have been written off. The aforesaid transaction of fund diversion of receivables falls under the scope of Section 66 of the Insolvency and Bankruptcy code 2016.

11.1. The Respondent has pleaded that these Sundry balances were receivable from ethical business customers and were under disputes for various claims of expiry of goods of discounts and the customers were not paying the same. Since, the Respondent No. 6 in business of the ethical marketing of the product of the Corporate Debtor, these balances were agreed to be recoverable from Respondent No. 6 and were accordingly, debited to their Account by transfer of these Sundry balances.

11.2. We find these transaction were duly accounted in the books of Accounts of the Corporate Debtor, and a claim of unrecoverable balances from the marketing associate is a normal business practice. Further, these claims are stated to be irrecoverable. Accordingly, we are of the considered opinion that this transaction cannot be said to fall under Section 66 of the Code; because, the element of 'intent' or 'fraud' has not been made out in the Application.

Transactions with Kaalki Multitrading Pvt. Ltd. (Respondent No.7)

12. The Transaction Report provides that Kaalki Multitrading Pvt. Ltd. (**Respondent No. 7**) is company in which Respondent No. 1 is the Director. As on 01.04.2016, there was an opening debit balance of Rs. 1,89,57,905/- in the books of the Corporate Debtor. It is submitted that sufficient appropriate evidence for the debit balance in the books of the Corporate Debtor has not been made available. It is submitted that out of the opening debit balance amount of Rs. 1,42,82,111/- is credited to the Respondent No. 7 by debiting Respondent No. 6. It is submitted that instead of receiving the amount the Corporate Debtor adjusted the

balance with Respondent No. 6, which is detrimental to the interest of the corporate debtor and thus, is diversion of funds.

12.1. The Respondent has submitted that the advance payment was made to R7 against purchase of certain packaging goods to fulfil the supply of products to the customers. Prior to strike off its name by RoC, Respondent No. 7, Transferred these sums to R6 to procure the goods on behalf of the Corporate Debtor and this money was finally returned back by R6 to Corporate Debtor. The Respondent has placed on record bank statement of R6 evidencing transfer of these funds by R7 to R6; however, the said statement does not reflect the amount refunded back to the Corporate Debtor. Accordingly, we direct the Applicant to verify the refund of said amount of Rs. 142,82,111/- to the Corporate Debtor, and the R1 shall provide necessary evidence to verify such refunds. In case of failure of R1, this amount shall be recoverable from R1 to R4 singly or jointly in terms of Section 67 of the Code.

Transactions with Om Exports (Respondent No. 8)

13. It is submitted that Om Exports "**Respondent No.8**" is a Merchant Exporter. It is submitted that the Corporate Debtor was undertaking manufacturing for Respondent No. 9 on loan/license basis. The raw materials required for production and manufacturing were purchased either from Respondent No. 9 or from third party vendor. It is observed from the Transaction report that purchases from vendor are booked based on invoices. It is submitted that instead of paying the vendors directly the credit balances are adjusted against receivables through journal voucher from Respondent No. 9 and thus the vendor is squared off. It is submitted that for interparty adjustment, the confirmation and consent from the vendor who are being settled is necessary. However, the Respondent No. 1 to 5 has failed to provide the same and therefore such transaction amounting to Rs.77, 94,176/- falls within the ambit of section 66 of the IBC.

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- 13.1. Respondent No. 8 has filed the Reply stating that it has developed customer based in Nigeria in pharmaceuticals companies who outsource their requirements of pharmaceuticals products from India through R8.
- 13.2. Order for manufacturing pharmaceutical formulation and for purchase of the same on manufacture, is sent by R8 to the manufacturer (Corporate Debtor in this case) as and by way of Contract manufacturing/ job-work. The order for purchase of raw materials and packaging materials from respective suppliers is issued by R8 on behalf of Corporate Debtor for delivery directly at the address of the Corporate Debtor for manufacture of the pharmaceutical formulation. The payment in respect of the Raw Materials and packaging materials to the suppliers is made by R8 through the Corporate Debtor (i.e. R8 pays to Corporate Debtor and in turn Corporate Debtor pays to the suppliers). In the entire transaction so mentioned Corporate Debtor is entitled to receive only the payment in respect of contract manufacturing/ job work charges only. But in case the Corporate Debtor is not able to does not make payment to the supplier or when the payment is overdue to supplier or the supplier does not make the delivery of materials unless full advance payment is made to them or continuous supply of materials is interrupted due to non-payment to the supplier-then R8 pays directly to the suppliers for uninterrupted supply of materials.
- 13.3. We find that the nature of transaction as explained by the Respondent is a transaction which takes place as a normal business practice in case of contract manufacturing. The Applicant has failed to controvert the fact of contract manufacturing pleaded by the R8 and confirmed by the R1 in the Reply. Accordingly, the payments made to the Raw Material suppliers by R8 on behalf of the Corporate Debtor and recorded in the books of the corporate debtor by way of journal entry cannot be said to be either fraudulent or malicious to the detriment of the interest of the creditors. Accordingly, we are of the considered opinion that this transaction cannot be said to fall under Section 66 of

the Code; because, the element of 'intent' or 'fraud' has not been made out in the Application.

Transactions with M/s. Ali Hatim Hussain & Co (Respondent No. 9)

14. It is submitted that M/s. Ali Hatim Hussain & Co, Chartered Accountants, the Respondent No. 9 herein, are statutory Audit Firm. It is submitted that an amount of Rs. 10,00,000/- was invested in the Corporate Debtor at the interest rate of 30% per annum on 19.08.2016 by CA Ali Hatim Hussain. It is submitted that out of this Rs.6,00,000/- was advanced by Company "Sigma". It is pertinent to mention that Sigma is owned by CA Ali Hatim Hussain and has been struck off as per MCA website. It is submitted that the Transaction Audit Report provides that during the Audit Period, an aggregating substantial sum of Rs.67,66,298/- was paid to Respondent No. 9, under the realm of professional fees, liaising, interest on loan, and loan repayments. However, it is submitted that there is no reason or document substantiating a payment of such a large sum. It is further submitted that an amount of Rs.41,00,000/- was credited Respondent No. 9, towards professional fees and audit fees on various dates. As per Schedule III of the Companies Act, 2013 any payments to statutory auditor need to be disclosed. However, the Respondents No. 1 to 5 have not disclosed the payments and therefore it appears that the same is a clear case of fraud as per requirements of section 66 of the IBC.

14.1. Respondent No. 9 has filed Reply stating that its partner i.e. Ali Hatim Hussain acted as a consultant for various proceedings u/s 153 of the Income Tax Act for the assessment Years 2008-09 to 2013-14 and various other years for sales Tax, Value Added Tax and goods and service tax from financial year 2017-18 till 08.03.2019. Further, the provision of Tax fees for 2016-17 for Rs. 9, 05,000/- and accordingly it raised invoices for 14,75,000/- including the expenses incurred by them. The fact of these services is verifiable from the records of the corporate debtor and all professional assignments were executed with the approval

of the then management. As regards, financial assistance provided by the partner, it is incorrect to say that Rate of Interest was 30% p.a. the Corporate Debtor has paid only Rs. 1 Lakhs towards interest and the loan was refunded back in the instalments starting from January 2017 to June 2017. Also, the respondent is not related to SIGMA Pharmachem Pvt. Ltd. and allegations in relation there to are imaginary. Respondent has also placed on record the details of payments received from the corporate debtor to that professional assignments and contents that Sum of Rs. 14,95,000/- is still receivables from the corporate debtor as against a sum of Rs. 2495,198/-, shown as payable in the books of the corporate debtor. It is further stated that the sum of Rs. 41 Lakhs is already included in sum of 67,66,298/- and these two amounts are not independent.

14.2. We find that the Respondent has explained the composition of receivables of Rs. 61,39,543/- and has further explained reason for discrepancies by demonstrating that the books of the corporate debtor reflects excessive payable to the Respondent.

14.3. We find that this transaction has been sufficiently explained and cannot be said to be fraudulent and malicious. Mere non-disclosure of the remuneration from other assignments by the Respondents Partners cannot lead to the inference of fraud or malice. Accordingly, we are of the considered opinion that this transaction cannot be said to fall under Section 66 of the Code; because, the element of 'intent' or 'fraud' has not been made out in the Application.

Transactions with Unistraw Pvt. Ltd. (Respondent No. 10 & 11)

15. The Transaction report provides that the Corporate Debtor had entered into a Business Associate Agreement ("BAA") dated 01.04.2013 with SRS Pharmaceuticals Pvt. Ltd. and SRS Unistraw Pvt. Ltd (Respondent No 10 & 11 respectively) ("Business Associate") for setting up a manufacturing and packaging facility for the products on the Corporate Debtor premises

deploying its raw materials, machines, equipment and technology. It is submitted that as per the aforesaid Agreement, the Corporate Debtor has to associate with the Respondent No. 10 and Respondent No. 11 for providing support services by setting up of the facility and manufacturing and packaging of the products as per the standards and specification of Respondent No. 10 and Respondent No. 11. It is submitted that the Corporate Debtor was supposed to raise monthly invoices on Respondent No. 10 and Respondent No. 11 for products manufactured in the facility. It is submitted that Respondent No. 10 and Respondent No. 11 agreed to pay the Corporate Debtor Rs.0.35 per product manufactured in the facility using the beads supplied by Respondent No. 10 and Respondent No. 11 to the Corporate Debtor. During the period commencing from Financial Year 2016-2017, the Corporate Debtor had carried out support services up to 28.10.2016. It is submitted that the total beads manufactured 4,46,23,889 and raised an amount of Rs.1,31,61,500/- (at the rate of Rs. 0.35 per bead). As per the Agreement, the Respondent No. 10 and Respondent No. 11 agreed for minimum contracted capacity of 10,00,00,000 at the rate of Rs.0.35 per bead. It is submitted that the Corporate Debtor has been undervaluing its invoices to the extent of Rs.78,38,500/- i.e (60,000,000*0.35 - 1,31,61,500). It is submitted that the Respondent No. 1 to 5 have undervalued their invoicing to the extent of Rs.78,38,500/- and hence the same falls within the ambit of section 45 of the IBC.

15.1. We find from the Agreement dt. 01.04.2013 placed by the Respondent on record that that the Corporate Debtor was to set up the facility as per the requirement direction from the business associate for product manufacture using the bids supply for the business associate. Clause 16.1 provides for minimum contracted capacity of 10,00,00,000 and further provides that in the event that and for as long as ULSL will not have achieved the minimum contracted capacity in any given year, the business associate shall not be required to comply with its obligations under Clause 16.2 as regards the minimum off-take

guarantee. Clause 16.2 provides that the business associate shall off take 60% of the minimum contracted capacity p.a.

15.2. We noticed that the forensic auditor has opined on the basis that the minimum contracted capacity was a minimum commitment from the business associate; however, that off take commitment was based on raising the minimum contracted capacity to 10,00,00,000. The forensic auditor has quoted the reply of the management that *“the Company got into the BAA upon the assumption of UNISTRAW of the level of pre-existing business after it purchased the brand from Australia. However, the shifting of machinery from China to Nagpur and getting the regulatory approvals like SA9000 and BRC audit took more time and hence the market went down. Since there were miscalculations on both sides and foreseeing the potential of the business, funds invested on both sides, the minimum guarantee term was never enforced on either party. In hindsight and looking to the business and profitability levels today it was a good decision for the Company. Due to this the calculation of loss incurred cannot be said to hold relevance”*.

15.3. The Applicant has alleged this transaction as undervalued in nature contending that the Corporate Debtor ought to have recovered Rs. 78,38,500/- during the F.Y. 2016-17, being 60% of 10,00,00,000 at the Rs. 0.35 paise as reduced by the total amount charged 131,61,500/- upto 28.10.2016. We are of the considered view that the business associate could not be faulted for pre-mature termination in October, 2016 and the minimum contracted quantity was for the whole year. Further, both the Parties have agreed not to insist upon minimum guarantee term in view of the reasons explained above. Mere lack of business acumen or waiver of its right cannot lead to an inference that the business was carried on in fraudulent or malicious manner. Accordingly, we are of the considered opinion that this transaction cannot be said to fall under Section 66 of the Code; because, the element of ‘intent’ or ‘fraud’ has not been made out in the Application.

Transactions pertaining to Purchases

16. As per Transaction Report, raw materials and packing materials were purchased at rates that were higher than the average item price for the years 2016-2017, 2017-2018 and 2018-2019 totalling to Rs.79,32,149/- which is prejudicial to the interest of the Corporate Debtor. The Corporate Debtor has claimed that this was caused due to seasonal variations. However, the Respondent No. 1 to 5 have failed to provide sufficient reasoning for justifying the discrepancy and transactions as aforesaid which clearly falls under the provisions of extortionate credit transactions as prescribed under section 50 of the Insolvency and Bankruptcy Code, 2016.

16.1. We find that the Transaction Auditor has explained the approach for identification of extortionate transactions. It is stated that they selected purchased items (Raw Material, Packing material) rates for audit period from purchase register taken from Tally software, average rate was derived based on quantity and values on yearly basis. Individual purchase rates were compared with average rate for such selected items. In some of the cases they observed that purchase prices are higher than the average item price for the concerned years. The Auditor has also reported the management explanations as *“In pharma and herbal sourcing, seasonal variations can fluctuate rates and in some cases beyond the usual and again is within the industry standards. Also this company deals in 4 manufacturing verticals so some sort of rate variation is expected keeping in mind the large number of products manufactured. Also, % wise variations are only 0.61%, 0.71% & 0.35% of total value of purchases made during the Financial Years 2016-17, 2017-18 & 2018-19 respectively”*.

16.2. We notice that Section 50 of the Code applies to credit transactions involving the receipt of financial or operational debt. The purchase of goods results into existence of operational debt, however, the section uses the word ‘extortionate’, which has not been defined in the code. The dictionary defines the word to mean “(of a price) much too

high; exorbitant". In view of explanation submitted by the management we find that the variation of less than 1% cannot be classified as exorbitant in nature, more so, when the basis for comparison is the average of the year. Accordingly, we do not find any merit in that contention that any case is made out in relation to these transactions to be classified under section 50 of the code.

Transactions pertaining to Sales

17. As per Transaction Report, in various cases it was observed that the sales price were lower than the average item price, which is prejudicial to the interest of the Corporate Debtor. It is submitted that the undervalued transaction for Financial Year 2016-2017, 2017-2018 and 2018-2019, in totality amounted to Rs.61,80,964. It is observed in the Audit Report that these sales items were undervalued to the total extent of Rs. 19,36,868/- in the Financial Year 2016-2017. In the financial year, these transactions were undervalued in totality to Rs. 20,92,618/- and in Financial Year 2018-2019 these transaction were lower than the average item price to the extent of Rs 21,51,478/-. Thus, these aforesaid transaction have been undervalued in total to the extent of Rs. 61,80,964 and further, Respondent No. 1 to 5 have failed to provide sufficient reasoning for justifying the discrepancy and hence can be classified as undervalued transactions as prescribed under section 45 of the Insolvency and Bankruptcy Code, 2016.

17.1. We find that the Transaction Auditor has explained the approach for identification of under valued transactions. It is stated that they selected sales items rates for audit period were checked from sales register taken from Tally software, average rate was derived based on quantity and values on yearly basis. Individual sales rates were compared with average rate for such selected items. In some of the cases they observed that sales prices are lower than the average item price for the concerned years. The Auditor has also reported the management explanations as "*Prices vary from customer to customer and between market segments. Also there are seasonal variations which play a major*

role in sourcing based upon the level of unhealthiest. This sort of variation is expected and market standard for a diversified company as our within the pharma domain. Also, % wise variations are only 0.29%, 0.30% & 0.34% of total value of purchases made during the Financial Years 2016-17, 2017-18 & 2018-19 respectively”.

17.2. We notice that Section 45 of the code provides for avoidance of under valued transaction, and uses the word ‘significantly’, which signify that a minor variations could not be brought into the ambit of section 45 of the code. In view of explanation submitted by the management we find that the variation of less than 1% cannot be classified as significant in nature, more so, when the basis for comparison is the average of the year. Accordingly, we do not find any merit in that contention that any case is made out in relation to these transactions to be classified under section 45 of the code.

Transactions pertaining to Electricity Expenses

18. As per Transaction Report it is observed that there is an abnormal variation between consumption of electricity and quantity of production. The Corporate debtor has explained that such variation is due to certain ancillary machineries functioning constantly regardless of their requirement. However, it is submitted that the energy meters of such machineries are not known to the corporate debtor. It is further pertinent to note that the Directors, their families and related company’s electricity bills amounting to **Rs. 17,95,330/-** for the period April 2016 to March 2019 have been debited in company under power & electricity account. It is submitted that the explanation provided by Corporate Debtor for carrying these activities was that there were sales offices established for sales and marketing activities and the electricity bills were for such spaces. However, it is submitted that no rent agreement or any other documents were provided to substantiate such claim. Therefore, the Respondent No. 1 to 5 are unable to justify the expenses made and such aforesaid fund diversion as described fall under section 66 of the Insolvency and Bankruptcy Code, 2016.

18.1. The Respondent replied that the Electricity meters were in the name of owner from whom the premises was taken on lease, and the electricity at the said premises was been used only for the commercial and official purpose of the Corporate Debtor. The transaction auditor has stated in the report *“We gone through the production records and Electricity consumption for all the three manufacturing locations D-82 (Injectable division) P-34 (Ointment division) & P-38 (Herbal & unistraw division). We mapped the Electricity consumption against production quantity, and observed abnormal variations between consumption of electricity and quantity of production. While discussing the reason for this variation UNIJULES management explained that certain ancillary machines like AHU (Air handling unit) Quality section, Stabilization section works 24x7 for 365 days irrespective of whether production machines are in operation or not. Hence it is not possible to establish any trend between electricity consumption and production quantity. We enquired about the energy meter for these ancillary machines, which company said they do not have confirmed knowledge about energy meters, hence not installed in any production locations. Keeping in view, the nature of industry of the company and absence of electricity meters for ancillary machines, we could not proceed further for trend analysis for electricity consumed in actual production.”*

18.2. We find from the statement of the transaction auditor that the allegation is based merely on the inference drawn on the basis of erratic consumption while mapped with the corresponding production. We find that Section 66 of the code contemplates only those transactions which are under taken with ‘an intent’ to default creditors or for any fraudulent purposes. It is not case of the applicant that any benefit out of such erratic consumption has enured to any third person at the cost of the Corporate Debtor. Accordingly, we are of the considered opinion that this transaction cannot be said to fall under Section 66 of the Code; because, the element of ‘intent’ or ‘fraud’ has not been made out in the Application.

Transactions pertaining to Excise Duty Evasion due to Rate Difference

19. The Transaction Audit Report observes that the Corporate Debtor had received Purchase Orders from two Merchant Exporters and correspondingly has raised Invoices with inflated prices to the extent of 60-70% of the Purchase Orders rates in years 2016-2017 & 2017-2018. Thereafter, it is observed that the Corporate Debtor had raised credit notes for the difference between the Purchase Order and the Invoice price. It is submitted that this has resulted in inflated sales on one hand and over booking expenses on the other. Further, it is submitted that the Corporate Debtor had submitted Form AREI (Application for Removal of Excisable Goods) as endorsed by respective merchant exporter to the Excise department for availing increased amount of rebates. Thus, it is submitted that the corporate debtor has used these inflated sales prices to claim excess 'excise rebate of **Rs.34,29,112/-** and hence it is a clear cut case of fraud committed by the Respondent No. 1 to 5 against government dues which falls within the ambit of section 66 of the IBC. Furthermore, the rate difference between the amount of sales which amounts to sum of Rs.5,99,28,710 also clearly falls under the purview of section 66 of the Insolvency and Bankruptcy Code, 2016.
- 19.1. We do not find these transactions following under Section 66 as the applicant has made out a case for potential misuse of excise rebate scheme by the Corporate Debtor along with merchant exporter, though no case has been made out by any of the Government Department. Even if it is admitted that the case is made out, such avail such excess duty shall become refundable to the Government Department and will not accrue to the Corporate Debtor. The case of transaction auditor that the company has used the inflated sales prices to claim excess excise rebate of Rs.3429112/-. We are of the considered view that this claim does not fall under Section 66 of the code though it may be violation of prohibition of Excise Law or Foreign Trade Development Regulation for misuse of Government schemes, even if there may be one.

Transaction carried out during Demonetization

20. The Transaction Report provides that during the demonetization period, the Corporate Debtor has laundered unaccounted cash balance into the cash book by suppressing real expenditures, inflating fictitious cash collections from advances, employees and customers and further accumulated unrealistic cash balances, which was shown as deposits during demonetization period. It is submitted that the Corporate Debtor does not maintain physical cash register and has no record other than tally accounting software to prove that cash balance existed during that period. It is submitted that such transactions amounting to Rs.1,34,81,500/- definitely cause prejudice to the interest of the creditors and affect the ability of the Corporate Debtor to service its debt. Hence the Respondent No. 1 to 5 have committed fraud which fall in the preview of section 66 of the Insolvency and Bankruptcy Code, 2016.

20.1. The transaction auditor has reported Cash and Bank transactions are maintained in Tally accounting software. An amount of Rs.1,34,81,500/- (FY 17-18 Rs.89500/-, FY 18-19 Rs.30,82,985/-) of cash was deposited during the period 11-11-2016 to 30-12-2016. The sources as accounted by the company in Tally was from cash withdrawn from Corporation Bank {020901601150018}, ING Vyasya Bank Ltd., (C/A 549011025406), Central Bank of India (3490898444) of Rs.1,25,97,800/- (FY 17-18 Rs.62,60,500/- FY 18-19 Rs.97,59,734/-). Further an amount of Rs.65,87,372/- (FY 17-18 Rs.13,78,981/-, FY 18-19 Rs.19,73,106/-) recoveries made from employees advance and customers. None of these vouchers are supported by the receipts with signature of the payer or company. Out of these withdrawals, an amount of only Rs.56,45,488/- (FY 17-18 Rs.72,07,011/-, FY 18-19 Rs. 83,12,267/-) was spent as expenditure during the 01-04-2016 to 24-12-2016 resulting in an accumulated maximum daily cash balance of s.1,21,13,309 (FY 17-18 Rs.9,72,654/-, FY 18-19 Rs.17,91,074/-).

20.2. We find that the withdrawals and deposit of cash during the monetization period is duly account in the cash book of the Corporate

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Debtor and the amount shown as cash balance as on the CIRP commencement date is recoverable from the management if not found with the company. However, it is not the case of the Applicant. The applicant as well as transaction auditor seems to have carried away with the notion of money laundering having taken place during demonetization period by introduction of cash by third party. It is the case of the Applicant that since the vouchers supporting the receipt of the cash are not available le this cannot be believed. However, it is a matter of record that such cash receipts are duly accounted in the account of corporate Debtor. Accordingly, we are of the considered view no case is made out under Section 66 of the code and the Applicant as well as transaction auditor ought not to have made out any case beyond the four corners of the code in this application.

21. Before we part away we consider it appropriate to state that transaction auditor has got some other transaction also which are not stated in the plaint application, however, the transaction auditor has also given a categorical finding in relation to those transaction. The Resolution Professional may peruse the report carefully and take appropriate action if required.
22. In view of the aforesaid findings and decisions, IA 1094/2020 is disposed of as partly allowed.

Sd/-

Prabhat Kumar
Member (Technical)

Sd/-

V.G. Bisht
Member (Judicial)