

**IN THE NATIONAL COMPANY LAW TRIBUNAL**  
**AHMEDABAD**  
**COURT - 2**

ITEM No.302

**IA/154(AHM)2022**  
**in CP(IB) 554 of 2018**

**Order under Section 60(5) 43, 45 & 49 IBC**

**IN THE MATTER OF:**

Shalabh Kumar Daga Liquidator of Silver Proteins Pvt Ltd

.....Applicant

V/s

Himanshu J Domadia

.....Respondent

**Order delivered on: 11/03/2024**

**Coram:**

**Mrs. Chitra Hankare, Hon'ble Member(J)**

**Dr. Velamur G Venkata Chalapathy, Hon'ble Member(T)**

**ORDER**

The case is fixed for pronouncement of the order. The order is pronounced in the open court, vide separate sheet

Sd/-

**DR. V. G. VENKATA CHALAPATHY**  
**MEMBER (TECHNICAL)**

Sd/-

**CHITRA HANKARE**  
**MEMBER (JUDICIAL)**

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
AHMEDABAD  
DIVISION BENCH  
COURT -II**

**IA 154/NCLT/AHM/2022**  
in  
CP (IB)/554(AHM) 2018

[Application under Sections 60(5), 43, 45 and 49 of the IBC, 2016]

**In the matter of:**

Mr. Shalabh Kumar Daga  
RP of M/s Silver Proteins Private  
Limited

....Applicant

Versus

Mr. Himanshu J Domadia and Ors.

...Respondents

**MEMO OF PARTIES**

Mr. Shalabh Kumar Daga  
(Liquidator)  
M/s. Silver Proteins Pvt. Ltd.  
Having address at:  
405, Atlantis Enclave,  
Above Dinner Bell Restaurant,  
Subhash Chowk, Gurukul,  
Memnagar, Ahmedabad-380052

....Applicant

Versus

- 1) Mr. Himanshu Jamanbhai  
Domadia  
(Suspended Management)  
M/s. Silver Proteins Pvt. Ltd.  
Palash 22, Ketan Society,  
Park Colony, Behind Motor  
House, Jamnagar-361008

- 2) Mr.Jamandas Veljibhai Domadia  
(Suspended Management)  
M/s. Silver Proteins Pvt.Ltd.  
Palash 22,Ketan Society,  
Park Colony, Behind Motor  
House, Jamnagar-361008
- 3) Silver Proteins Proprietorship  
Firm through its Proprietor  
Mr. Himanshu J. Domadia  
Palash 22,Ketan Society,  
Park Colony, Behind Motor  
House, Jamnagar-361008
- 4) M/s. Mahendra Oil Cake  
Industries Pvt. Ltd.  
Opp. Wind Mill Godown  
Bedi Bandar Road  
Bedeshwar Road  
Jamnagar-361 002

...Respondents

**Order pronounced on: 11.03.2024**

**Coram:**

**Mrs. Chitra Hankare, Member (Judicial)**

**Dr. Velamur G Venkata Chalapathy, Member (Technical)**

**Appearance:**

- For the Applicant : Ms.Nitu Chaturvedi, Advocate a.w.  
Mr.Aditya Raval, Advocate
- For the Respondent : Ms.Prachi Bohra, Advocate for  
Mr.Mohit Gupta, Advocate

**JUDGMENT**

1. This application is filed under Sections 60(5), 43, 45 and 49 of the IBC, 2016. The applicant is the liquidator of M/s. Silver Proteins Pvt. Ltd. situated in Gujarat. The Corporate Insolvency

Resolution Process (CIRP) was initiated against M/s. Silver Proteins Pvt. Ltd. on an application filed by the financial creditor i.e. Central Bank of India, from 29.06.2020 in CP (IB) 554 of 2018. Liquidation order was passed on 27.01.2021.

2. The brief facts of the case are that on verification of books of account (Tally Data) and other documents, it was observed by the auditor that the company had made payment of Rs.89.77 lakhs in the name of repayment of unsecured loans to directors/related parties two years prior to CIRP. It was also found that unsecured loans outstanding from 2014-15 were repaid during 2018-19. So there are probable chances that these are preferential transactions as per Section 43 of IBC. The applicant also stated other preferential transactions with associate company M/s.Mahendra Oil Cake Industries Limited. By passing general entries in the name of rent, the corporate debtor credited Rs.56.70 lakhs and outflow fund of Rs.24.42 lakhs. The applicant also stated that there is related party transaction of corporate debtor with proprietorship firm of director Mr. Himanshu J Domadia i.e. Silver Proteins Pvt. Ltd, it was total debit of Rs.303.75 lakhs and total credit was Rs.236.44 lakhs. Some discrepancies were also found in the record. The company has also made payment to directors in the name of remuneration amounting to Rs.54.91 lakhs during F.Y.2013-14 to 2018-19 though the corporate debtor was suffering losses.
3. The applicant also stated that some undervalued transactions covered under Section 45 of the Code. According to applicant, there was huge decline of Rs.2463.66 lakhs in the closing inventory during F.Y. 2014-15. The ratio of stock to sales was

fluctuating every year. The reason given for decline is cancellation of contract by one China Company. The stock was sold at very low rate i.e. Rs.100 to Rs.128 per ton, instead of Rs.10,000 per ton. There is no documentary evidence to show the valuation. Therefore, auditor is forced to believe that the sale of stocks is done for consideration less than market value. The company has not implemented any standard pricing policy and the rates have been changed from customer to customer. According to applicant, all these are undervalued transactions covered under Section 45 of the Code. It is also alleged that the company had realized from debtors an amount of Rs.5600.27 lakhs. No documents in this regard were provided. Therefore, applicant and auditor are forced to believe that hiding of information is done with ulterior motive to defraud the creditors and are comes under scanner of Section 49 of the IBC. The corporate debtor had also written off balance of the debt amounting to Rs.10.82 lakhs without any reason. On the observation of report, clarification was sought from suspended management but it was not given. Hence, prayed for directing respondents to appropriate all these sums in the account of the corporate debtor maintained by the applicant.

4. The respondents, by filing reply, denied all the allegations leveled against them. The respondents contended that as per Regulation 35A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the Resolution Professional/Liquidator has to form an opinion whether transactions are covered under Section 43, 45 and 49 of the IBC, 2016 of the Code, then to take a decision to file application. No such opinion was formulated by the liquidator nor any determination has been made. Only the Stakeholders

Consultation Committee resolved to move an application against them. The forensic auditor report is ex facie, vague, speculative and indefinite. The applicant has filed combined application for avoidance transactions which is not permissible. They have also failed to produce documents to substantiate the allegations leveled against respondents. The respondents have given detailed explanation on all the transactions alleged by the applicant.

5. As far as payment of unsecured loan to director, the respondents have submitted that the same was within the knowledge of the Financial Creditor as audited annual accounts of the Corporate Debtor were submitted to the Financial Creditor. It is also stated that no objections has been raised by the Financial Creditor till date and hence, no preference has been given to Respondent No. 1. It is further submitted that Respondent No. 1 had granted loan to the Corporate Debtor and the Corporate Debtor would repay the loan to the Respondent No. 1 periodically. Therefore, the repayments were made in ordinary course of financial affairs of the Corporate Debtor. According to respondents, the Mahendra Oil Cake Industries Ltd. had leased factory premises along with machinery on land to the Corporate Debtor. The lease agreement was executed for a period of 5 years i.e., from 25.06.2009 to 30.06.2014. After expiry of the said lease deed, a 2nd lease agreement dated 26.06.2014 was executed for a period of 5 years i.e., from 01.07.2014 to 30.06.2019. As per the terms of the lease deed, the Corporate Debtor was required to pay an amount of Rs. 18,00,000/- per annum as rent to Mahendra Oil Cake Industries Ltd. Due to the Corporate Debtor was running into losses or unable to generate enough profit, the annual rent was

reduced to Rs. 9,00,000/- per annum in 2nd lease deed. The Corporate Debtor had paid an amount of Rs. 24.42 lakhs to Mahendra Oil Cake Industries Ltd, towards rent which is less than the due amount.

6. According to respondent, since the account of the Corporate Debtor had turned NPA, the suppliers & customers were not inclined to carry out their business with the Corporate Debtor. Therefore, the proprietorship firm Silver Proteins - Jamnagar used to purchase unfiltered oil from suppliers and same was supplied to the Corporate Debtor at market rate and the purchase-sale transactions with Silver protein proprietorship firm were at arm's length and within the knowledge of the Financial Creditor. It is submitted that the present transaction is beyond the scope of section 43 not only because the transaction has taken place in ordinary course of business but also because no transfer of property has taken place from Corporate Debtor to a creditor or guarantor giving preference to it. Respondent, further submitted that remuneration and salary were paid by the corporate debtor to the suspended management towards the services rendered by them. It is further submitted that the Respondent Nos. 1 & 2 would draw less amount towards salary in the financial years in which the Corporate Debtor suffered heavy losses. The audited annual accounts for the F.Y 2017-2018 that the figures shown in forensic audit report towards remuneration to Suspended Management is incorrect and baseless. So, any payment made to the Respondent Nos. 1 & 2 would fall within the ambit of payment made in ordinary financial affairs of the Corporate Debtor. The salaries paid to the directors or employees of the

Corporate Debtor will not fall within the ambit of preferential transaction.

7. The forensic audit report prepared by the concerned auditor is baseless and prepared without application of any mind. It is stated that as per the contract, the Corporate Debtor had to supply 200 metric tons of Indian Groundnut Edible Oil to M/s. China SDIC International Trade Co. Ltd. and same was supplied to it. The Corporate Debtor had raised invoice dated 01.08.2012, bearing No. P14G of USD 4,58,430.48/- on M/s. China SDIC International Trade Co. Ltd. against the said invoice, M/s. China SDIC International Trade Co. Ltd. had only paid an amount of USD 3,35,763/- on the pretext that goods supplied to it were of inferior quality. Respondents further submitted that realization from debtors worth Rs.5600.27 lakhs in an account other than account maintained with Central Bank of India will only amount to breach of terms and conditions of the sanction letter. Respondents submitted that there is no siphoning of funds or diversion of funds into the personal accounts of the Suspended Management or related parties. It is submitted that Section 45 applies only when either of the requisite is fulfilled-

- a. The Corporate Debtor makes a gift to a person; or
- b. When the Corporate Debtor transfers an asset to a person at a value which is significantly less than the market value.

So, no assets have been transferred from corporate debtor to any person.

8. The respondent further submitted that there is no evidence on record to substantiate the allegations. Different amounts are

mentioned in the forensic report and in the application. The respondents have provided all details of the corporate debtor to the applicant. Hence, the allegations of non-cooperation are baseless. None of the transaction is covered under Sections 43, 45 and 49 of the IBC, 2016. Hence, prayed for dismissal of the application.

9. The applicant/liquidator has filed its rejoinder affidavit in response to the reply filed by the respondents. The respondents and applicants have filed the written arguments. The respondent has relied upon the judgment of Hon'ble **NCLAT in the matter of Mr. Saptarshi Nath & Anr. Vs. Kapil Dev Taneja** [Company Appeal (AT) (Insolvency) No. 1356 of 2022]
10. Heard Ld. Counsel for the applicant and Ld. Counsel for the respondents also gone through the written submissions filed by the parties and citations.
11. With respect to the first given transaction i.e. repayment of unsecured loans amounting to Rs.89.72 lakhs and Rs.1.33 lakhs, the respondent submitted that it was within the knowledge of financial creditor as audited annual accounts were submitted to the financial creditor at that time financial creditor has not raised any objection. Respondent No. 1 granted loan to corporate debtor and it was repaying the same periodically. Thus, payments were made in the ordinary course of financial affairs of the corporate debtor. Such affairs i.e. the transfer made in the ordinary course of business are excluded from the preferential transactions. With respect to payment of rent to Mahendra Oil Cake Industries, the respondent relied upon lease agreement from 25.06.2009 to 30.06.2014 and second lease

agreement from 01.07.2014 to 30.06.2019. The yearly rent was Rs.18,00,000/-. According to respondent as the corporate debtor was running into losses, annual rent was reduced to Rs.9,00,000 per annum. The amount paid is less than the due amount. The respondent also annexed copies of both the lease agreements. This transaction was also done in the ordinary course of business. So it will not fall within the purview of preferential transaction.

12. The applicant also alleged that the corporate debtor entered into purchase-sale transaction with proprietorship firm of the Director Mr. Himanshu J. Domadia namely Silver Proteins, Jamnagar, with an intent to defraud the creditors of the corporate debtor. According to respondents, no preference is given to proprietorship firm/Silver Proteins. It is further stated that as the account of the corporate debtor turn NPA, the suppliers and customers were not inclined to carry out business with it. Therefore, Silver Proteins, Jamnagar firm used to purchase unfiltered oil from suppliers and same was supplied to corporate debtor at market rate. The corporate debtor also sells whose products to proprietorship of Silver Proteins to sell further. These transactions were within the knowledge of financial creditor. The respondent also produced purchase and sale invoices with the firm. The respondent submitted that a separate IA bearing No. 154 of 2022 is also filed by the applicant alleging this transaction as preferential transactions. Thus, the applicant himself is not clear whether the transaction is preferential in nature or fraudulent. He cannot seek same reliefs in two applications. Nowhere applicant clearly opined that this transaction is having intention to defraud the creditors of the corporate debtor or the transactions were done for any

fraudulent purpose. Only because the auditor suspected these transactions, the applicant filed this application. The argument of respondent is that the applicant himself is not sure whether the transaction is preferential or fraudulent holds water.

13. The applicant alleged that Rs.7.62 lakhs was paid to the suspended management in the last two years towards remuneration. According to respondent, salary of Respondent No.1 was Rs.1,20,000/- whereas salary of Respondent No.2 was Rs.1,40,000/- in F.Y 2016-17 and F.Y 2017-18. He has relied upon the audited annual accounts for those financial years. As the salary was paid to the directors since the inception of corporate debtor, it was paid in the ordinary financial affairs of the corporate debtor. So, it will not fall within the purview of preferential transaction.
14. According to applicant, on verification of financial statements and other records by the auditor, it was seen that there was huge decline of Rs.2463.66 lakhs in the closing inventory during the F.Y. 2014-15 as compared to last year. According to respondent, the deterioration of funds was due to cancellation of an agreement by M/s. China SDIC International Trade Co. Ltd. through agent M/s. Singhal Trading Corporation. As per the contract, corporate debtor had supplied 200 metric tons of groundnut edible oil to the China company which was supplied and invoice was raised on 01.08.2012 but lessor amount was paid by the company, as the goods supplied were of not superior quality. Thus, the explanation for decline of stock was given by the respondent. The respondent also produced copy of contract,

invoice, settlement etc. Thus, it also does not smell of any fraudulent transaction.

15. The applicant alleged that the corporate debtor has realized debts worth Rs.5600.27 lakhs in accounts other than Cash Credit account maintained with Central Bank of India. Therefore, it is undervalued transaction with an intention to defraud the creditors. According to applicant, on analyzing books of account and record available to the auditor this transaction is realized, it is mentioned by the auditor. The auditor has also mentioned that no documents in this regard were provided to him. Therefore, applicant is forced to believe that hiding of information is done with ulterior motive to defraud the creditors. Though the clarification was sought from suspended management by emails no such clarification was given. However, according to respondent, no documentary proof to that effect is produced by the applicant and it can only amount to breach of terms and conditions of the sanctioned letter. The respondent further stated that there are no allegations of syphoning of funds into the personal account of the suspended management. The respondent further submitted that as per Section 49 of IBC, where the corporate debtor has entered into an undervalued transaction as referred to in Section 45(2) and when Adjudicating Authority is satisfied that such transaction was deliberately entered then only the offence is made out. Only the auditor's report stated that the funds were deposited in HDFC Bank account instead of Central Bank of India. Auditor has given a table showing the amount realized from debtors since 2013-14 to 2019-20. Auditor himself mentioned that the credit facilities were declared as NPA on 01.07.2015. Moreover, no bank statement, etc. were produced

on record. The auditor as well as applicant is not sure about alleged transactions.

16. Regulation 35A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, is provides as under:-

*“(1) On or before the seventy-fifth day of the insolvency commencement date, the resolution professional shall form an opinion whether the corporate debtor has been subjected to transaction covered under sections 43, 45, 50 or 66.*

*(2) Where the resolution professional is of the opinion that the corporate debtor has been subjected to any transactions covered under sections 43, 45, 50 or 66, he shall make a determination or before the one hundred and fifteenth day of the insolvency commencement date”.*

21. After receiving report from the forensic auditor, liquidator has placed observations made by the auditor in the meeting with the Stakeholders Consultation Committee (SCC). In the said meeting, following resolution was passed:-

*“RESOLVED THAT, Mr. Shalabh Kumar Daga, Liquidator is hereby authorized to take opinion on the matter and engage reputed lawyer for the purpose of filing application u/s. 43,45, 49, 50, 66 or any other sections or provision of Insolvency and Bankruptcy Code to the honourable NCLT, Ahmedabad and the fees will be paid by SCC”*

Thus, applicant appears to have not applied his mind to the facts of alleged transactions. The applicant has only relied upon the report of financial auditor. The applicant has apprehension that there are probable chances that these transactions were entered fraudulently.

22. It is only resolved in the meeting of SCC that the application is to be filed. Nowhere the applicant has mentioned that he has formed an opinion whether the corporate debtor has been subjected to transaction covered under Section 43, 45 and 49 of the IBC that too before 115<sup>th</sup> day from the commencement of

CIRP. The preferential, undervalued and defrauding transactions requires intention of the party. The applicant not even stated that there was any such intention of the corporate debtor to defraud their creditors. No proof regarding the transactions is filed by Applicant. Beneficiaries are not made parties. The applicant has not quantified the undue benefit received by the Corporate Debtor. Even on preponderance of probability, the applicant failed to produce any evidence to satisfy ingredients of alleged sections. In view of Regulation 35A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, it is mandatory for the liquidator to form an opinion regarding preferential, undervalued and defrauding transactions which is not at all done by the liquidator/applicant. Thus, it cannot be said that the transactions mentioned by the applicant are preferential, undervalued and defrauding transactions. As discussed above, the transactions alleged do not appear to be preferential, undervalued and defrauding. None of the ingredients of Section 43, 45 and 49 of the IBC are fulfilled so as to bring home the guilt of the Corporate Debtor. We, therefore, held that the transactions mentioned by the applicant have not been established as preferential, undervalued and defrauding transactions by the applicant.

23. Hence, we pass the following order:-

**ORDER**

Application is rejected.

Sd/-

**DR. V. G. VENKATA CHALAPATHY**  
**MEMBER (TECHNICAL)**

Sd/-

**CHITRA HANKARE**  
**MEMBER (JUDICIAL)**