

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH
COURT-I
KOLKATA**

**I.A. (IB) No. 207/KB/2021
in
C.P. (IB) No. 683/KB/2018**

An application under sections 66 and 67 of the Insolvency and Bankruptcy Code,
2016 read with the Insolvency and Bankruptcy Board of India (Insolvency
Resolution Process for Corporate Persons) Regulations, 2016.

In the matter of:
Bank of India

... *Financial Creditor*

Versus

Aeon Manufacturing Private Limited

... *Corporate Debtor*

And

In the matter of:

**Raj Singhania, Resolution Professional of Aeon Manufacturing Private
Limited**

... *Applicant*

Versus

- 1. Om Prakash Pandey**
- 2. Anil Kumar Mishra**
- 3. Murlidhar Pandey**

... *Respondents*

Order pronounced on: 10 January 2023

Coram:

Shri Rohit Kapoor

: Member (Judicial)

Shri Balraj Joshi

: Member (Technical)

Appearances (through hybrid mode)

**For the erstwhile Resolution
Professional**

- :** 1. Mr. Avishek Guha, Advocate
2. Mr. Chitresh Saraogi, Advocate
3. Mr. Raj Singhania, erstwhile RP

For Respondent No. 1

- :** 1. Mr. Jayati Chowdhury, Advocate
2. Ms. Urmila Chakraborty, Advocate
3. Ms. Ranjana Seal, Advocate
4. Ms. Sucheta Mitra, Advocate

ORDER

Per Balraj Joshi, Member (Technical)

1. This Court convened through hybrid mode.

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2. The present I.A. has been filed by the erstwhile Resolution Professional of Aeon Manufacturing Private Limited under sections 66 and 67 of the Insolvency and Bankruptcy Code (“Code”) seeking directions upon the Respondents who are the former directors of the Corporate Debtor, to make payments on account of several high value cash transactions entered with the Respondents on several dated in the year 2019 and also on account of the credit sales made to the Respondents between the months January and March 2015.
3. This Adjudicating Authority *vide* order dated 30 October 2019 admitted Aeon Manufacturing Private Limited (“Corporate Debtor”) under Corporate Insolvency Resolution Process (“CIRP”) on a Petition filed under section 7 of the Code by Bank of India, registered as C.P. (IB) No. 683/KB/2018. The Resolution Plan was approved by this Adjudicating Authority on 11 May 2021.
4. ***Submissions of the learned Counsel appearing on behalf of the Applicant***
 - 4.1. The learned Counsel submitted that even after the approval of the Resolution Plan, the instant application is maintainable and as such distinguishable from the judgment passed in the matter of Venus Recruiters Pvt. Ltd. Versus Union of India & Ors. dated 26 November 2020 passed by the Hon’ble Delhi High Court wherein the Hon’ble Delhi High Court has held that the Resolution Professional cannot continue after approval of the Resolution Plan by the Adjudicating Authority. It has further been held in the said matter that the NCLT has no jurisdiction to entertain and decide avoidance applications which is under the new management unless a provision is made in the final Resolution Plan.
 - 4.2. Mr. Guha submitted that the above judgment of the Hon’ble Delhi High Court is distinguishable from the facts of the instant case. In the matter decided by the Hon’ble Delhi High Court, it is to be noted that that an avoidance application had been filed by the Resolution

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Professional therein much after the application for approval of the Resolution Plan was filed. In fact, in the said matter, the avoidance application was filed only two days prior to the date when this Adjudicating Authority reserved the application for approval of resolution plan for orders. However, in the instant case, not only had the instant application under Section 66 of the Code been filed long before the application for approval of the resolution plan, the matter had even been heard several times at the time when the application for approval of resolution plan was pending and thereafter approved by this Adjudicating Authority.

4.3. With regard to the purpose of funding the instant proceeding is concerned, it has been decided that the fees of the advocates relating to the instant case will be paid by Bank of India, the erstwhile sole member of the Committee of Creditors (“CoC”) who has been agreed upon to be the ultimate beneficiary of the payments that may be directed by the Tribunal to be made by the respondents in the instant application. The SRA, further, has nothing to do with the instant proceedings. Discussion on the said issue had also taken place in the 1st Monitoring Committee meeting on 28 May 2021, a copy of the same has been submitted with written notes.

4.4. The transactions comprise of certain high value cash transactions and credit sale transactions undertaken by the CD prior to the commencement of CIRP which are clearly wrongful/ fraudulent in nature coming under the purview of Section 66 of the Code and which merit passing of directions as prayed for in the application.

4.5. The Resolution Professional received few documents only on or about February, 2020 and several documents were not provided to by the suspended Board of Management of the Corporate Debtor. The Resolution Professional formed his preliminary opinion regarding the existence of certain objectionable transactions on 14 March 2020.

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4.6. Thereafter, due to the Covid-19 pandemic and the lockdown that followed there was no progress in the CIRP of the Corporate Debtor.

4.7. The Transaction Auditor submitted its report the Resolution Professional on 31 December 2020. The Resolution Professional concurred with the findings of the Transaction Auditor that there were certain section 66 transactions that had been entered into by the suspended Board of Management of the Corporate Debtor and on the same day the Resolution Professional drew up an independent determination regarding the existence of undervalued transactions, which is evident from the minutes of the 13th CoC meeting held on 04 January 2021. This I.A. was filed on 04 February 2021.

4.8. Moving on to the transactions, the learned Counsel submitted that the transactions can be divided into two parts i.e. being high value cash value transactions and credit sale transactions undertaken by the Corporate Debtor under the directorships of the respondents has been identified by the Resolution Professional as coming within the purview of section 66 of the Code.

4.9. The details of the transactions along with the reasons for the classification of the transactions as coming under Section 66 of the Code are mentioned herein below:

HIGH VALUE CASH TRANSACTIONS

Transaction to the tune of Rs. 72, 42,200 (Rupees Seventy Two Lakh Forty Two Thousand Two Hundred Only) entered in cash

(Amount in Lakhs)

Name	Payment Amount(Rs.)	Relationship	Date of Payment
Sri Balaji Logs Products Pvt. Ltd	25,93,200	Related Party	From 10/4/2019 to 7/10/2019

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Maa Anadamayee Timber	25,00,000	No information available	28/2/2019
Rahul Plywood Centre	16,00,000	No information available	28/2/2019
Aditya Enterprises	5,49,000	Creditor	30/4/2019
	Total- 72,42,200		

4.10. On 31 March 2015 and 31 March 2016, the Corporate Debtor had made unaccounted cash payments of Rs. 1,15,00,000 (Rupees One Crore Fifteen Lakh only) to one of its creditor Swastik Trade Agency without any disclosure made in the audited financial statements of the Corporate Debtor which is against the norms of Indian Accounting Standard.

4.11. Each of the above transactions have been entered into in cash and not disclosed in the financial reports of the CD.

CREDIT SALES TRANSACTIONS

4.12. Credit sales done to the tune of Rs. 38,16,73,000 (Rupees Thirty Eight Crores Sixteen Lakhs and Seventy Three Thousand Only) against which nothing has been realized or no steps have been taken to recover the dues. The credit sales entered into the books are considered to be fictitious and are shown in the books with an intent to defraud its creditors.

(Amount in Lakhs)

Party Name	Jan '15	Feb '15	Mar'15	Total
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Creative Commosales Pvt. Ltd.	306.68	538.96	405.68	1251.32
M/s. Shitala Enterprises	313.86	598.38	392.58	1304.79
Vaibhavshali Engineering Pvt. Ltd.	298.71	526.00	435.91	1260.62
Total	919.25	1663.34	1234.17	3816.73

- 4.13. Credit sales of more than Rs. 38 Crores was made in a span of just three months between January 2015 and March 2015.
- 4.14. Vaibhavshali Engineering Private Limited has been struck off from the Registrar of Companies as on date of filing the application and Creative Commosales Private Limited has not filed its financials with Registrar of Companies since 2018, which strengthens the stand that these sales were made to obscure and shell companies for the purpose of siphoning of funds in order to defeat the rights of the creditors.
- 4.15. Credit sales of as much as Rs 12,60,62,000 (Rupees Twelve Crore Sixty Lakh and Sixty Two Thousand Only) was made to Vaibhavshali Engineering Pvt. Ltd in the aforesaid period when the paid up equity share capital of Vaibhavshali Engineering Pvt. Ltd. was only Rs. 1,00,000 (Rupees One Lakh Only), evident from the MCA master data.
- 4.16. Further, the audited financial statements of the Corporate Debtor indicate that there has been sale of material timber but as per the Ministry of Corporate Affairs (MCA) data available for the two companies, the companies are shown to have purchased iron and steel (evident from Pg 71-74, 76,85 of the application being part of the transaction audit report). This results in material difference and raise reasonable suspicion regarding the nature of the transaction.

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The suspicion gets further catalysed when it was observed that, no Central Sales Tax (CST) has been paid in respect of the above sales made by the Corporate Debtor.

- 4.17. Further, the transaction auditors have not been able to obtain any further information nor any contact details been furnished by the respondents to cross verify such credit sales despite approving the transactions and making corresponding entries in the financial statements.
- 4.18. Not a single rupee has been recovered from the aforesaid transactions. The fact that not a single rupee has been recovered from any of the three entities coupled with the fact that the credit sales were made around the same time in the year 2015 under the directorships of Respondent Nos. 1, 2 and 3 is clear indication of the intention of the directors to defraud the creditors of the corporate debtor and as such they should be held liable to make such contributions to the assets of the corporate debtor.
- 4.19. It is stated that due to the reasons mentioned hereinabove, determination regarding the existence of the transactions being fraudulent in nature was made by the Resolution Professional which led to the Resolution professional to file the instant application.
- 4.20. The two sets of transactions mentioned hereinabove are unexplained and not disclosed in the annual report which is explanatory and evident from the ledgers and books of accounts annexed to the transaction audit report forming part of the application.
- 4.21. The transactions as undertaken, satisfy all requirements of section 66 of the Code and as such remedial measures to undo the fraud played upon the creditors and other stakeholders of the Corporate Debtor by the erstwhile directors is needed to be taken to compensate for the loss suffered by the creditors, resolution

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applicants and other stakeholders in accordance with the provisions of the Code.

4.22. In so far as timelines go, it is an admitted fact that the RP has acted beyond the timelines provided under the Code read with the relevant Regulations. Although the RP tried his best to ensure compliance with timelines under the Code, the exigencies of the case on account of non-cooperation by the suspended board coupled with the Covid-19 pandemic morefully described hereinabove led to the RP exceeding the timelines provided under Regulation 35. It is submitted that the Hon'ble Tribunal may condone non-compliance with the timelines prescribed depending upon the facts and circumstances of the case. Reliance in this regard is placed upon the judgment passed by the Hon'ble Supreme court passed in *Kailash v. Nanhku & Ors* ((2005) 4 SCC 480) wherein the Supreme Court went on hold that "Extension of time may be allowed if it is needed to be given for circumstances which are exceptional, occasioned by reasons beyond the control of the defendant and grave injustice would be occasioned if the time was not extended".

4.23. While on this, it must be stated that it has been held time and again by the Apex Court that timelines in a statute fall within the domain of procedural law. The timelines have further been considered to be handmaid of justice which cannot overpower substantive rights. Reliance in this regard is placed on the well-known judgment passed by the Hon'ble Apex Court in *Smt. Rani Kusum v. Smt. Kanchan Dev* ((2005) 6 SCC 705). The Hon'ble NCLAT in *Aditya Kumar Tibrewal vs Om Prakash Pandey & Ors* (2022 SCC OnLine NCLAT 142) dated 6th April has further held that timelines provided under Regulation 35A for the RP are only directory and not mandatory.

4.24. The learned Counsel thus that the respondents under whose directorships and control these transactions described hereinabove

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have been undertaken be brought to book so as to ensure that that the perpetrators of fraud are not allowed to get away scot-free by unjustly enriching themselves at the cost of the creditors and other stakeholders

5. Submissions of the learned Counsel appearing on behalf of the Respondents

5.1. The learned Counsel submitted that the I.A. is time barred under regulation 35A of the CIRP Regulations.

Sl. No.	Event	Timeline	Expected Date	Actual Date
1.	Initiation of CIRP	--	--	30.10.2019
2.	Appointment of RP	--	--	29.11.2019 in CoC and confirmation by order dated 30.12.2019
3.	Resolution passed for appointment of transaction auditor	30.10.2019 + 75 days	--	--
4.	Transaction Auditor appointed	--	--	14.07.2020
5.	Report submitted	--	--	31.12.2020

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Sl. No.	Event	Timeline	Expected Date	Actual Date
6.	Application under section 66 and 67 filed on	30.10.2019 + 135 days	13.03.2020	03.02.2021
7.	Approval of Resolution Plan	--	--	11.05.2021

- 5.2. However, in the supplementary affidavit filed by the Applicant, the Applicant has sought for condonation of delay to file the application under regulation 35A of the CIRP Regulations.
- 5.3. The learned Counsel submitted that the Resolution Professional failed to form an independent opinion or make a determination which are required under the provision of section 66 and 67 of the Code.
- 5.4. The I.A. was affirmed on 03.02.2021 and was filed when the Corporate Debtor was in CIRP, after approval of the Resolution Plan by this Adjudicating Authority, the Corporate Debtor is no longer a Corporate Debtor and is under a new management, hence the I.A cannot survive beyond the conclusion of the CIRP.
- 5.5. The Applicant has contended that high value cash payments has been made in respect of transactions with Sri Balaji Logs Products Private Limited, Maa Anadamayee Timber, Rahul Plywood Centre and Aditya Enterprises, however, the said entities were not made parties to the said I.A.
- 5.6. The learned Counsel has denied that the Corporate Debtor made any unaccounted cash payment of Rs.1,15,00,000/- or any other sum to its creditors, Plastic Trade Agency or that no disclosure has been made in the audited financial statements of the Corporate Debtor.
- 5.7. It is denied that the transactions are in excess of the amount described under section 40A (3) of the Income Tax Act, 1961.

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5.8. Further, the transactions executed or entered into with Creative Commosale Private Limited, Shitala Enterprises and Vaibhavshali Engineering Private Limited between the period from 15.01.2015 and March 2015, the said transactions are now time barred. The Companies became inactive or struck off from the register of the Registrar of Companies recently, Creative Commosale Private Limited is still an active as is evident from the master data. The learned Counsel submitted that the Resolution Professional should have taken steps for recovery from Creative Commosale Private Limited.

5.9. With respect to the credit sales, all the credit sales were made in for only three months in 2015 and the Corporate Debtor stopped all further transactions with the said entities after no payment was received. The entities have not been added as Respondents in the I.A..

5.10. The learned Counsel denied all the allegations raised by the Applicant and that all the transactions were all executed in good faith and in the usual course of business and there was no malafide or ulterior motive to execute such transactions.

Analysis and Findings

6. Heard the learned Counsel appearing on behalf of the Applicant and the Respondent No. 1 and perused the record.
7. The Corporate Debtor was admitted into CIRP on 30 October 2019. The Respondent has raised several defenses, but before going into the defenses, let us consider whether this petition is maintainable after the approval of the Resolution Plan.
8. The learned Counsel appearing on behalf of the Applicant has submitted that in the first meeting of the steering committee of the Corporate Debtor which was held on 28 May 2021 it was resolved that the present I.A. would be carried on by the Resolution Professional till the disposal

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of the said I.A. and that the expenses shall be borne by the Secured Financial Creditor. The Successful Resolution Applicant would have nothing to do with the present I.A. The steering committee have resolved to continue the I.A. and have assigned the duty to the former Resolution Professional to represent the Secured Financial Creditor, therefore this I.A. is maintainable as the Applicant is acting as the representative of the secured Financial Creditor and not in its capacity of Resolution Professional.

9. Having dealt with the maintainability of the I.A. let us move on to the merits of the I.A. The Hon'ble Supreme Court laid down the detailed approach that the Resolution Professional is expected to take in the matter of avoidance transactions in paragraph 28.1 in **Anuj Jain vs. Axis Bank Limited and Ors. MANU/SC/0228/2020**,

“28.1. Looking to the legal fictions created by Section 43 and looking to the duties and responsibilities per Section 25, in our view, for the purpose of application of Section 43 of the Code in any insolvency resolution process, what a resolution professional is ordinarily required to do could be illustrated as follows:

1. In the first place, the resolution professional shall have to take two major but distinct steps. One shall be of sifting through the entire cargo of transactions relating to the property or an interest thereof of the corporate debtor backwards from the date of commencement of insolvency and up to the preceding two years. The other distinct step shall be of identifying the persons involved in such transactions and of putting them in two categories; one being of the persons who fall within the definition of 'related party' in terms of Section 5(24) of the Code and another of the remaining persons.

2. In the next step, the resolution professional ought to identify as to in which of the said transactions of preceding two years, the beneficiary is a related party of the corporate debtor and in which the beneficiary is not a related party. It would lead to bifurcation of the identified

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transactions into two sub-sets: One concerning related party/parties and other concerning unrelated party/parties with each sub-set requiring different analysis. The sub-set concerning unrelated party/parties shall further be trimmed to include only the transactions of preceding one year from the date of commencement of insolvency.

3. Having thus obtained two sub-sets of transactions to scan, the steps thereafter would be to examine every transaction in each of these sub-sets to find: (i) as to whether the transaction is of transfer of property or an interest thereof of the corporate debtor; and (ii) as to whether the beneficiary involved in the transaction stands in the capacity of creditor or surety or guarantor qua the corporate debtor. These steps shall lead to shortlisting of such transactions which carry the potential of being preferential.

4. In the next step, the said shortlisted transactions would be scrutinised to find if the transfer in question is made for or on account of an antecedent financial debt or operational debt or other liability owed by the corporate debtor. The transactions which are so found would be answering to Clause (a) of Sub-section (2) of Section 43.

5. In yet further step, such of the scanned and scrutinised transactions that are found covered by Clause (a) of Sub-section (2) of Section 43 shall have to be examined on another touchstone as to whether the transfer in question has the effect of putting such creditor or surety or guarantor in a beneficial position than it would have been in the event of distribution of assets per Section 53 of the Code. If answer to this question is in the affirmative, the transaction under examination shall be deemed to be of preference within a relevant time, provided it does not fall within the exclusion provided by Sub-section (3) of Section 43.

6. In the next and equally necessary step, the transaction which otherwise is to be of deemed preference, will have to pass through another filtration to find if it does not answer to either of the Clauses (a) and (b) of Sub-section (3) of Section 43.

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7. After the resolution professional has carried out the aforesaid volumetric as also gravimetric analysis of the transactions on the defined coordinates, he shall be required to apply to the Adjudicating Authority for necessary order/s in relation to the transaction/s that had passed through all the positive tests of Sub-section (4) and Sub-section (2) as also negative test of Sub-section (3).

28.2. On a motion made by the resolution professional after and in terms of the exercise aforesaid, the Adjudicating Authority, in its turn, shall have to examine if the referred transaction answers to all the descriptions noted above and shall then decide as to what order is required to be passed, for avoidance of the impugned transaction or otherwise.

10. Although the above steps are given for preferential transactions, the same method is to be applied to all avoidable transactions as well. The Applicant in its supplementary affidavit has submitted that only the tally data was provided to the Applicant by the suspended Board of Directors and after scrutinizing the said data, he formed an opinion and thereafter appointed the transaction auditor for examination of avoidable transactions. The Applicant has submitted that he has taken assistance from the transaction audit report to determine the nature of transactions.
11. On perusal of the minutes of the 13th CoC meeting held of 04 January 2021, in Item No. 04 at point D, on bare reading it is seen that the Resolution Professional has only relied on the Transactions Auditor's report and has not compared the report with the documents of the Corporate Debtor. The note is extracted herein "*RP informed that as per the report there are certain transactions prior to the period of 2 years from the date of commencement of Insolvency Resolution Process which seems to be carried out with an intention to defraud the creditors*"
12. Let us first take into account the transactions the Applicant has classified as High value transactions which have been entered in the year 2019

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with Sri Balaji Logs Products Pvt Ltd., Maa Anadamayee Timber, Rahul Plywood Centre and Aditya Enterprises. In the minutes of the 13th CoC meeting as well as the letter to the IBBI, the Resolution Professional has mentioned that the transactions have been entered prior to two years from the date of commencement of CIRP, the question that arises is “why did the Resolution Professional not determine and analyse these transactions beforehand?”.

13. Further for the transactions with respect to the credit sales, although the documents of the other parties have been annexed to the I.A., the documents, such as bank statements, financial statements etc. of the Corporate Debtor, which would have enabled us to determine whether such transactions have been actually entered into, have unfortunately not been filed by the Resolution Professional.
14. The Resolution Professional has time and again reiterated that he has made determination about the transactions but he has failed to file any document other than the transaction report to evidence that he had made such determination.
15. Further, the assertion of the Resolution Professional that the few of the credit sales have been undergone with companies having lesser equity share capital and has stated that such gap in the credit sale and the paid up equity share capital raises reasonable “*suspicion*” cannot be a proper ground for determining that the said transactions were fraudulent.
16. The Hon’ble Supreme Court has provided so many steps and filtration processes so that the avoidable transactions would be bonafide. Mere assumptions and suspicions cannot be considered to determine avoidable transactions.
17. Under the aforesaid circumstances, we are not inclined towards granting prayers in I.A. (IB) 207/KB/2021 and the said I.A. is hereby rejected. The main Company Petition numbered C.P. (IB) No. 683/KB/2018 shall stand disposed of in view of the fact that there are no pending I.A.s.

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18. The Registry is directed to send email copies of the order forthwith to all the parties and their learned 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.

Balraj Joshi
Member (Technical)

Rohit Kapoor
Member(Judicial)

Order signed on the 10th day of January 2023

GGRB_LRA