

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

M.A. 136 OF 2019

Under Section 66 of Insolvency &
Bankruptcy Code, 2016

Sterling Biotech Limited

...Applicant

Vs.

Mr. Nitin Jayantilal Sandesara

& others

...Respondent

In the matter of

C.P.(IB) No. 490/MB/2018

Andhra Bank

Financial Creditor

Vs.

Sterling Biotech Limited

Corporate Debtor

Order delivered on: 05.03.2024

Coram:

Shri Prabhat Kumar

Hon'ble Member (Technical)

Justice Shri V.G. Bisht

Hon'ble Member (Judicial)

Appearances

For the Applicant : Mr. Devashish Godbole, Advocate

For the Respondent : None

ORDER`

Per: Prabhat Kumar, Member (Technical)

1. This Misc. Application No. 136/2019 is filed by M/s Sterling Biotech Limited through its Resolution Professional in Corporate Insolvency Resolution Process (“CIRP”) seeking direction against the erstwhile Directors i.e. Respondent Nos. 1 to 5 to pay in respect of benefits received by them from the Corporate Debtor due to fraudulent transactions alleged in the Application in terms of Section 66 & 67 of the Insolvency & Bankruptcy Code, 2016 (“Code”). The Applicant seeks following reliefs:

1.1.This Tribunal be pleased to declare the Fraudulent Transactions, as more particularly described in A, B and C above, entered into by the Corporate Debtor as "fraudulent transactions" under section 66 of the Code;

1.2.This Tribunal be pleased to set aside the Fraudulent Transactions, more particularly described under A, B and C above, undertaken by Respondent Nos. 1 to 5 on behalf of the Corporate Debtor;

1.3.This Tribunal be pleased to direct the directors/ of the Corporate Debtor (i.e. the Respondent Nos. 1 to 5) to pay such sums to the Corporate Debtor in respect of benefits received by them from the Corporate Debtor due to the Fraudulent Transactions.

2. Andhra Bank, a financial creditor of the Corporate Debtor, had filed an application against the Corporate Debtor to initiate the corporate insolvency resolution process under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("Code"), which was admitted vide order dated June 11, 2018, initiating insolvency application ("Admission Order"), and appointing the Applicant as the interim resolution professional of the Corporate Debtor. Thereafter, the Applicant was appointed as a resolution professional in the First meeting of CoC which was held on July 26, 2018.

2.1. The Applicant states that as per the provisions of Section 66 of the Code provides that :

(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

- i. 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*
- ii. such director or partner did not exercise due diligence in minimising the potential loss to the creditors of the corporate debtor. 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.*

2.2. The Applicant states that it appears that the Corporate Debtor under the management of Respondents had entered into a number of fraudulent transactions with the certain entities, which are categorized as below ("Fraudulent Transactions"):

A. PURCHASES AT EXORBITANT PRICE

2.3. The Applicant states that the Corporate Debtor entered into certain fraudulent transactions with their suppliers for the purchase of certain material (crushed bones). The entities from

which the material was purchased, are collectively referred to as "said Suppliers".

2.3.1. The Applicant states that on an examination of the purchase register and books of accounts provided by the Corporate Debtor, it was found that the price at which the material (crushed bones) was purchased from the said Suppliers was abnormally higher than that of other suppliers of the Corporate Debtor for the same material.

2.3.2. The Applicant states that from the comparison 1 of the rates charged by these suppliers with charged by other suppliers, it is abundantly clear that the Corporate Debtor has purchased material from the said Suppliers at a substantially higher price compared to those of the other suppliers.

2.3.3. Further, the Applicant states that on perusal of information, including financial statements of the said Suppliers obtained from the online portal of the Ministry of Corporate Affairs ("MCA Portal"), it was found that for the financial year 2015-2016, the Corporate Debtor was the only customer of Joy Organics, one of such suppliers. In addition to that, the Applicant states that the Corporate Debtor accounted for majority of the sales undertaken by Andaj Distributors and Ample Trading, amongst such suppliers.

2.3.4. The Applicant states that it is also pertinent to note that the said Suppliers have reported no turnover for the financial year 2014-2015. The Applicant states that the financial statements of the said Suppliers for the financial year 2016- 2017 are not available on the MCA Portal. The

financial statements of the said Suppliers for the year 2015-2016 as obtained from the MCA Portal have been annexed to the Application and marked as Exhibit "C Colly". Therefore, the Applicant states that there is reasonable ground for suspicion that the said Supplier entities have been incorporated and used as a vehicle to misappropriate funds of the Corporate Debtor.

2.3.5. The Applicant states that on perusal of information in relation to the Directors of the said Supplier entities on the MCA Portal, it was found that certain Directors of the said Supplier entities are also employees of the Corporate Debtor. The company master data of the said Suppliers as obtained from the MCA Portal has been annexed to the Application and marked as Exhibit "D Colly".

2.3.6. The Applicant states that as per the employee records of the Corporate Debtor, Mr. Rajendra Kalekar who is a Director of Ample Trading, is an employee of the Corporate Debtor and has been working as a peon since January 1, 1992. Further, Mr. Jitendra Pilke, who is a Director of Andaj Distributors, has claimed to be an employee of the Corporate Debtor on his Facebook social networking profile.

2.3.7. It was further observed that upon analysis of material inward registers of the Corporate Debtor that it appears that the name of supplier is overwritten to substitute original name with that of the said Suppliers. In view of what is stated above, the Applicant states that these companies were controlled and managed by the erstwhile promoters Corporate Debtor through the abovenamed Directors.

B. AMOUNTS PAID TO NISHANT CONSULTANCY PRIVATE LIMITED TOWARDS SECURITY EXPENSES

2.4. The Applicant states that the Corporate Debtor through its erstwhile promoters entered into certain fraudulent transactions with Nishant Consultancy Private Limited ("Nishant Consultancy"), which is purportedly a security service provider. These payments made to Nishant Consultancy were on account of security expenses.

2.4.1. The Applicant states that the agreement entered into between the Corporate Debtor and Nishant Consultancy was for the period of April 1, 2015 to March 31, 2016. Further, it was observed that no contract amount was provided for, in the said agreements. The Applicant states that payments were made to Nishant Consultancy even after expiry of the said agreement on basis of invoices raised by Nishant Consultancy. A copy of the said agreement is annexed to the Application and marked as Exhibit "H".

2.4.2. The Applicant states that on a review of monthly payments made to Nishant Consultancy, it was observed that the amounts paid from the month of July 2017 up till December 2017 were significantly higher than those made in the preceding months.

2.4.3. The Applicant states that from the above table it is clear that amounts paid to Nishant Consultancy increased from INR 0.06 crores between January 2017 and June 2017 to INR 0.1 crores from July 2017, which amounts to an increase of approximately 67%. The Applicant states that

an amount to the extent of INR 0.28 crores has been paid in excess to Nishant Consultancy.

2.4.4. The Applicant states on an inspection of invoices raised by Nishant Consultancy, it was found that there were no supporting documents in the nature of manpower supply details or attendance register etc. to substantiate services provided with the said invoices.

2.4.5. The Applicant states that when corporate details for Nishant Consultancy for obtained from the MCA Portal, it was found that the entity has two directors namely; Mr. Ashok Sakharam Pilke and Mr. Yogendra Janandhan Bangera. Further, it is pertinent to note that the abovenamed individuals are also directors in two other companies, both of which have entered into suspicious transactions with the Corporate Debtor. These two companies are Cachet Engineering Pvt. Ltd. And Sarovar Trading Pvt. Ltd.

C. Payment to Suppliers

2.5. The Applicant states that the Corporate Debtor had made payments to certain suppliers between July 1, 2015 and May 31, 2018 being amounts purportedly paid as advance to suppliers. On perusal of the books of accounts of the Corporate Debtor's head office for the above mentioned period, it was found that the said account has an outstanding debit balance of INR 322.93 crores as on March 31, 2018.

2.6. Further, the Applicant states that on review of unit-wise accounts of the Corporate Debtor for period between June 11, 2013 and June 30, 2015, it was found that certain payments

were made from the various units of the Corporate Debtor and the closing balances of the said accounts were transferred to the head office of the Corporate Debtor. The Applicant states that there are a total of 49 supplier companies to whom such payments have been made. The list of the said 49 supplier companies is annexed to the Application and marked as Exhibit "L".

2.7. The Applicant states that the documents in relation to said 49 supplier companies were obtained from the MCA Portal and it was found that a number of employees of the Corporate Debtor are directors in few of the said 49 supplier companies. A table listing out the names of such employees of the Corporate Debtor and their designations along with the companies among the said 49 supplier companies of which they are Directors is annexed to the Application and marked as Exhibit "M".

2.8. The Applicant states that the fact that a number of employees of the Corporate Debtor are Directors of many of the said 49 supplier companies goes to show that these companies were incorporated in order to siphon the funds of the Corporate Debtor and were in effect controlled by the erstwhile promoters of the Corporate Debtor.

2.9. Further, the Applicant state that on accessing the financial statements of the said 49 supplier companies it was found that a number of the said companies have not reported any revenue.

These companies are:

- a. Rever Trading Pvt. Ltd.
- b. Facet Trading Pvt. Ltd.
- c. Savor Trading Pvt. Ltd.
- d. Overt Trading Pvt. Ltd.

- e. Renish Trading Pvt. Ltd.
- f. Gatsby Trading Pvt. Ltd.
- g. Kudos Trading Pvt. Ltd.

2.10. The Applicant states that this further evidences that these companies are in fact shell companies and were incorporated for the sole purpose of misappropriating the funds of the Corporate Debtor.

2.11. The Applicant states that based on what is stated above, it is clear the funds of the Corporate Debtor to the extent of INR 322.93 crores have been misappropriated through these companies.

3. The Applicants states that the Applicant was not provided with all the information sought by the Applicant from the management. It appears certain information pertaining to the pre-CIRP tenure has been intentionally withheld, misrepresented or destroyed with view to avoid detection. The Applicant submits that the Corporate Debtor is already being investigated by the Central Bureau of Investigation, Directorate of Enforcement and other investigatory bodies. The Applicant craves leave to rely on the orders / findings or the said bodies. The Applicant further states that allowing such Fraudulent Transactions will cause irreparable loss to the creditors and will create an impact on the distribution of the assets of the Corporate Debtor to the legal creditors.
4. The Respondents have not filed the reply despite numerous opportunities having been provided to them. They have also not entered in appearance before this Tribunal.
5. Heard learned Counsel and perused the material on record.

- 5.1. Section 66 provides that if any business of the corporate debtor has been carried on with intent to defraud creditors of the corporate debtor or for any fraudulent purpose, this Tribunal may make an order directing the Directors to contribute to the Corporate Debtor.
- 5.2. The facts placed on record by the Resolution Professional in relation to Transaction at “A” i.e. purchase at exorbitant prices clearly demonstrates that purchases from the said suppliers were at rates considerably higher than the rates charged by other suppliers. Further, the credentials of some of the suppliers lead to a conclusion that such suppliers were either intermediaries to retain difference in such supplier companies or were bogus suppliers where no material came to be received.
- 5.3. The facts placed on record by the Resolution Professional demonstrate that the transaction at ‘B’ and ‘C’ have been carried out with the entities owned/controlled by the employees of the Corporate Debtor and their credentials are suspicious. The Respondents have neither filed any reply nor came forward to explain the genuineness of these transactions.
- 5.4. The Code does not define the term “Fraud”, however the section 3(37) of the Code provides that words and expressions used but not defined under the code shall have the meaning as assigned to such term under the Companies Act, 2013. The term ‘Fraud’ is defined in Explanation to Section 447 in following manner :

“fraud” in relation to affairs of a company or any body corporate, includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person

with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss.

- 5.5. The said definition is inclusive and includes the abuse of position committed by any person to gain undue advance or to injure the interest of the Company. We appreciate the fact that the applicant has limited information to make out the case and it is the duty of the Respondents to come forward to explain these transactions, failing which an adverse inference can be drawn. The Applicant has specifically averred that the management has failed to provide complete information and details in relation to affairs of the Corporate Debtor. Accordingly, we have no hesitation to hold that the Respondents have failed to explain their position in relation to allegations against them, hence they must be directed to contribute the sums relating to transactions at 'A', 'B' and 'C' to the corporate debtor within 30 days along with interest @ 15% p.a. from the date of payment.
6. In view of aforesaid discussion, this MA 136/2019 is allowed and disposed of accordingly.

Sd/-

Prabhat Kumar
Member (Technical)

Sd/-

Justice V.G. Bisht
Member (Judicial)

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

M.A. 675 OF 2019

Under Section 43 of Insolvency &
Bankruptcy Code, 2016

Sterling Biotech Limited

...Applicant

Vs.

**Mr. Nitin Jayantilal Sandesara
& others**

...Respondent

In the matter of

C.P.(IB) No. 490/MB/2018

Andhra Bank

Financial Creditor

Vs.

Sterling Biotech Limited

Corporate Debtor

Order delivered on: 05.03.2024

Coram:

Shri Prabhat Kumar

Hon'ble Member (Technical)

Justice Shri V.G. Bisht

Hon'ble Member (Judicial)

Appearances

For the Applicant : Mr. Devashish Godbole, Advocate

For the Respondent : None

ORDER`

Per: V.G. Bisht, Member (Judicial)

1. This Misc. Application No. 675/2019 is filed by M/s Sterling Biotech Limited through its Resolution Professional in Corporate Insolvency Resolution Process (“CIRP”) seeking declaration of the transactions to related parties undertaken by the erstwhile Directors i.e. Respondent Nos. 1 to 5 as preferential transactions u/s 43 of the Insolvency & Bankruptcy Code, 2016 (“Code”) and to set aside those transactions and directions to the respondents to pay in respect of benefits received by them from the Corporate Debtor due to related parties transactions alleged in the Application. The Applicant seeks following reliefs :

1.1.This Tribunal be pleased to declare the Related Party Transactions entered into by the Corporate Debtor with its Related Parties as "preferential transactions";

1.2.This Tribunal be pleased to set aside the preferential transactions undertaken by the Respondent Nos. 1 to 5 on behalf of the Corporate Debtor with the Related Parties;

1.3.This Tribunal be pleased to direct the directors of the Corporate Debtor (i.e. the Respondent Nos. 1 to 5) pay such sums to the Applicant in respect of benefits received by him from the Corporate Debtor due to the Related Party Transactions;

2. Andhra Bank, a financial creditor of the Corporate Debtor, had filed an application against the Corporate Debtor to initiate the corporate insolvency resolution process under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("Code"), which was admitted vide order dated June 11, 2018, initiating insolvency application ("Admission Order"), and appointing the Applicant as the interim resolution professional of the Corporate Debtor. Thereafter, the Applicant was appointed as a resolution professional in the First meeting of CoC which was held on July 26, 2018.

3. The Applicant states that the following entities are related parties of the Corporate Debtor and fall under the definition of 'related party' as defined under Section 2(24) of the Code:
 - a. Sterling Oil Resources Limited;
 - b. Sterling Port Limited.Collectively referred to as "Related Parties"

3.1. The Applicant states that Section 43 of the Code reads as under
:

Preferential transactions and relevant time.

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

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

(2) A corporate debtor shall be deemed to have given a preference, if- (a) there is a transfer of property or an interest thereof of the corporate debtor for the benefit of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor; and (b) the transfer under clause (a) has the effect of putting such creditor or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with section 53.

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

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

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

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

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

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

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

- 4) A preference shall be deemed to be given at a relevant time, if
- (a) It is given to a related party (other than by reason only of being an employee), during the period of two years preceding the insolvency commencement date;
 - or
 - (b) a preference is given to a person other than a related party during the period of one year preceding the insolvency commencement date.

4. The Applicant states the Corporate Debtor under the management of Respondents had entered into preferential transactions with the Related Parties, the summary which is set out below ("RP Transactions");

Sr. No.	Name of the Party	Nature of Transaction	Number of Transaction	Payment (INR) in Crores
1.	Sterling Oil Resources Limited	Financing Transaction	20	12.17
2.	Sterling Port Limited	Financing Transaction	04	3.68

		and Advance Payment		
Total			26	16.03

4.1. The Applicant states that the RP Transactions mentioned hereinabove fulfills all the conditions laid down in Section 43 of the Code, for it to be qualified as a 'preferential transaction' as as out hereinbelow:

4.2. On review of the payment register for the period of June 11, 2016 to June 10, 2018 (i.e. two years prior to the Insolvency Commencement Date), the Applicant states that the Corporate Debtor has undertaken the RP Transactions within the said period.

4.3. The Applicant states that on review of the constitutional documents of the Related Parties, the main objects of the business of the Related Parties is as follows:

Sr. No.	Name of the Entity	Nature of Business as stipulated in the MOA
1.	Sterling Oil Resources Limited	Oil Exploration and Production Activities
2.	Sterling Port Limited	Operates and Develops Marine Ports.

4.4. However, the transactions undertaken by the Related Parties of the Corporate Debtor are not in the nature of their ordinary course of business of the Corporate Debtor. The business of the Corporate Debtor is manufacturing of gelatin and active pharmaceutical ingredients.

4.5. Further, advancing of temporary loan to the Related Parties of the Corporate Debtor is not in nature of ordinary course of business or financial affairs of either parties but in the nature of financial debt. Therefore, repayment of temporary loans owed to these entities is not covered under exceptions under section 43(2) of the Code.

4.6. The Applicant states that it is abundantly clear from the details mentioned hereinabove that the debt due and payable to the Related Parties is of the nature of financial debt or operational debt and is antecedent in nature. The Applicant states that there are ledger extracts of the Related Parties which specifies that there is amount which is paid by the Related Parties to Corporate Debtor and the same has been annexed and marked hereto as Exhibit "E" Colly. Further, there are bank statements of the Related Parties which evidence that certain amounts were paid to the Corporate Debtor. The excerpts of the bank statements of the Related Parties have been annexed and marked hereto as Exhibit "F" Colly.

4.7. Section 53 of the Code sets out a waterfall mechanism for the the distribution of proceeds from the sale of the assets of the Corporate Debtor. Further, Section 53 sets out that the distribution of proceeds shall take place as per the priority list of creditors of the Corporate Debtor. Therefore, during the distribution of the assets of the Corporate Debtor, the Related Parties will be treated as creditors of the Corporate Debtor and will receive proceeds as per the priority list of creditors set out in Section 53 of the Code.

4.8. The Applicant states the Respondents undertaking the RP Transactions of the Corporate Debtor have given preference to the Related Parties. Further, the Applicant states that the debts owed by the Corporate Debtor to the Related Parties fall under clause (f) of Section 53(1) of the Code. The transactions such as these is precisely what has been envisaged in the Section 43 of the Code.

4.9. The Applicant further states that the Applicant was not provided with all the information sought by the Applicant from the management. It appears certain information pertaining to the pre- CIRP tenure has been intentionally withheld, misrepresented or destroyed with view to avoid detection. The Applicant submits that the Corporate Debtor is already being investigated by the Central Bureau of Investigation, Directorate of Enforcement and other investigatory bodies. The Applicant craves leave to rely on the orders/findings or the said bodies.

5. The Respondents have not filed the reply despite numerous opportunities having been provided to them. They have also not entered in appearance before this Tribunal.
6. Heard Counsel and perused the material on record.
 - 6.1. Section 43 of the Code creates a legal fiction whereby a payment made to a creditor towards repayment of antecedent debt is deemed as preferential transactions provided such transaction was taken within the specified period and was not in ordinary course of business.
 - 6.2. In the present case, the stated transaction clearly falls within the specified look back period of two years and the payee creditors are related parties of the Corporate Debtor. We appreciate the fact that the applicant has limited information to make out the case and it is the duty of the Respondents to come forward to explain that these transactions falls within the exception provided in section 43 of the Code, failing which an adverse inference can be drawn. The Applicant has specifically averred that the management has failed to provide complete information and details in relation to affairs of the Corporate Debtor. Accordingly, we have no hesitation to hold that the Respondents have failed to explain their position in relation to allegations against them, and the Applicant has proved that these transactions are preferential transactions. Accordingly, we set aside these transactions and hold that the parties who were paid by the Corporate Debtor shall refund these sums within 30 days of the communication of this Order.

THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-I

M.A. 675 OF 2019
In
C.P.(IB) No. 490/MB/2018

7. In view of aforesaid discussion, this MA 675/2019 is allowed and disposed of accordingly.

Sd/-

Prabhat Kumar
Member (Technical)

Sd/-

Justice V.G. Bisht
Member (Judicial)

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

M.A. 687 OF 2019

Under Section 45, 66 & 60 (5) of
Insolvency & Bankruptcy Code, 2016

Sterling Biotech Limited

...Applicant

Vs.

Mr. Nitin Jayantilal Sandesara

& others

...Respondent

In the matter of

C.P.(IB) No. 490/MB/2018

Andhra Bank

Financial Creditor

Vs.

Sterling Biotech Limited

Corporate Debtor

Order delivered on: 05.03.2024

Coram:

Shri Prabhat Kumar

Hon'ble Member (Technical)

Justice Shri V.G. Bisht

Hon'ble Member (Judicial)

Appearances

For the Applicant : Mr. Devashish Godbole, Advocate

For the Respondent : None

ORDER`

Per: V.G. Bisht, Member (Judicial)

1. This Misc. Application No. 687/2019 is filed by M/s Sterling Biotech Limited through its Resolution Professional in Corporate Insolvency Resolution Process (“CIRP”) seeking direction against the erstwhile Directors i.e. Respondent Nos. 1 to 5 to pay in respect of benefits received by them from the Corporate Debtor due to fraudulent transactions u/s 66 of Insolvency & Bankruptcy Code, 2016 (“Code”) described in A, B & C; and seeking declaration of the transactions described in D undertaken by the erstwhile Directors i.e. Respondent Nos. 1 to 5 as undervalued transactions u/s 45 of the Code and to set aside those transactions. The Applicant seeks following reliefs :

1.1.This Tribunal be pleased to declare the Fraudulent Transactions, as more particularly described in A, B, C and D above, entered into by the Corporate Debtor as "fraudulent transactions" under section 66 of the Code;

1.2.This Tribunal be pleased to set aside the Fraudulent Transactions, more particularly described under A, B, and C above, undertaken by Respondent Nos. 1 to 5 on behalf of the Corporate Debtor;

1.3.This Tribunal be pleased to set aside the Undervalued Transactions more particularly described under D above, undertaken by Respondent Nos 1 to 5 on behalf of the Corporate Debtor and set aside the same;

- 1.4. This Tribunal be pleased to direct the directors of the Corporate Debtor (i.e. the Respondent Nos. 1 to 5) pay such sums to the Applicant in respect of benefits received by them from the Corporate Debtor due to the Fraudulent Transactions;
 - 1.5. This Tribunal be pleased to direct the directors of the Corporate Debtor (i.e. the Respondent Nos. 1 to 5) make good the amounts lost by the Corporate Debtor due to the Undervalued Transactions;
 - 1.6. This Tribunal be pleased to direct the Respondents and the management of the Corporate Debtor to produce all relevant documents with respect to the books of accounts and other important matters of the Corporate Debtor and make other important disclosures required in relation to the CIRP of the Corporate Debtor.
2. Andhra Bank, a financial creditor of the Corporate Debtor, had filed an application against the Corporate Debtor to initiate the corporate insolvency resolution process under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("Code"), which was admitted vide order dated June 11, 2018, initiating insolvency application ("Admission Order"), and appointing the Applicant as the interim resolution professional of the Corporate Debtor. Thereafter, the Applicant was appointed as a resolution professional in the First meeting of CoC which was held on July 26, 2018.

FRAUDULENT TRANSACTIONS

3. The Applicant states that as per the provisions of Section 66 of the Code if any transaction is entered into by a Corporate Debtor with the intention to defraud creditors of the corporate debtor or for any

fraudulent purpose in a manner stipulated under Section 66 of the Code, the Adjudicating Authority may order the parties who knowingly undertook such transactions to make such contributions to the assets of the Corporate Debtor as it may deem fit. Section 66 of the Code has been replicated below for reference;

3.1. The Applicant states that as per the provisions of Section 66 of the Code provides that :

(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

i. 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

- ii. *such director or partner did not exercise due diligence in minimising the potential loss to the creditors of the corporate debtor. 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.*

3.2. The Applicant states that it appears that the Corporate Debtor under the management of Respondents had entered into a number of fraudulent transactions with the certain entities, which are categorized as below ("Fraudulent Transactions"):

A. PAYMENTS MADE TO RAJ BONES LIMITED

3.3. The Applicant states that certain payments made on account of the Corporate Debtor to Raj Bones Limited ("Raj Bones") have been accounted directly under the head of expenditure. The Applicant states that vouchers and the corresponding supporting documents in support of these transactions were asked for but not provided for verification and we were made to understand that there were no purchases, merely entries passed at Baroda site and that all the cheques were prepared at the Mumbai head office of the Corporate Debtor.

3.3.1. The Applicant states that a total payment of INR 2.66 crores have been made by the Corporate Debtor to Raj Bones without any vouchers or supporting documents as stated. Further, the Applicant states that he has reasonable reason to believe that Raj Bones is an entity which is in effect under the control and management of the erstwhile promoters of the Corporate Debtor. The Applicant states that on perusal of the corporate information pertaining to Raj Bones available on the online portal of the Ministry of Corporate Affairs ("MCA Portal"), it was found that one Mr. Indrajeet Baliram Tiwari is a Director of Raj Bones. The Applicant states that on review of the employees list of the Corporate Debtor, it was discovered that Mr. Indrajeet Baliram Tiwari has been working as Supervisor MV Pool in the Human Resources and Administration Department of the Corporate Debtor since April 1, 1998. Therefore, the Applicant believes that Corporate Debtor through the Respondent Nos. 1 to 5 was in effect under the control and management of Raj Bones. Further, owing to this nexus, the Applicant believes that an amount of INR 2.66 crores have been siphoned off using Raj Bones as a vehicle.

B. ADVANCES PAID TO RELATED PARTIES

3.4. The Applicant states that on a scrutiny of transaction carried out with certain related parties were fraudulent in nature and were carried out to defraud the creditors of the Corporate Debtor.

3.4.1. On perusal of details from the MCA Portal, it seems that there is no direct nexus of the businesses carried out by

PMT Machines Limited and Sterling Port Limited with that of the Corporate Debtor. The Applicant states that these entities are related entities of the Corporate Debtor, there is reasonable cause to believe that the above transactions were carried out by the Respondents to misappropriate the funds of the Corporate Debtor. Further, as stated above, as there is no direct relation between the businesses carried out by some of these entities and that carried out by the Corporate Debtor, these transactions do not seem to have been undertaken in the ordinary course of business.

C. ADVANCES PAID ON ACCOUNT OF CAPITAL WORK IN PROGRESS

3.5. The Applicant states that on a review of the books of accounts maintained by the Corporate Debtor for its Special Economic Zone Unit ("SEZ Unit"), it was found that as on January 1, 2013 the accounts showed a balance on account of advances paid to various suppliers. The said balance was recorded in the books of accounts under the head of capital work under progress. The said balance has since been transferred from the SEZ Unit to the Head Office of the Corporate Debtor in Mumbai as on December 31, 2014.

3.5.1. The Applicant states the Respondents are Directors of Blue Mercantile. Further, as per the records obtained from the MCA Portal, International Projects Ltd. has been struck off. Phoenix Global Ltd. is a company based in Australia providing legal services to various businesses. American Resources is involved in services related to the

oil and gas sector. Further, there is no information available on the MCA Portal or in the public domain regarding Arabian Projects Ltd, Globe Mercantile Company Ltd. and Prime Sources Agency Ltd. On perusal of information available in the public domain, it appears that there is no nexus between projects purported to be undertaken by the SEZ Unit of the Corporate Debtor and the regular business of the above mentioned companies.

3.5.2. In view of the aforesaid, there is reasonable cause to believe that the said advances paid on account of capital work in progress to these entities have been carried out to misappropriate the funds of the Corporate Debtor. More particularly, with reference to the financials of March 31, 2018, duly audited by the statutory auditors, it may be noted that on physical verification and upon perusal of the books, it is evident that the investment shown in the books versus the present value demonstrate practically no investment in the SEZ unit. This has been confirmed by the valuers of the Corporate Debtor.

UNDERVALUED TRANSACTION

4. The Applicant states that the Corporate Debtor under the management of the Corporate Debtor entered into an undervalued transaction with respect to certain lands owned by the Corporate Debtor. Section 45 of the Code provides:

(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.*

4.1. The undervalued transaction undertaken by the Corporate Debtor under the management of the Respondents is in relation to PUNE LAND LEASE.

4.1.1. The Corporate Debtor owns land in Pune bearing description Gat No. 396, Urse Village, Mawal, District Pune, Maharashtra ("Pune Land"). The Applicant states that the Corporate Debtor entered into a lease agreement dated March 3, 2008 in respect of the Pune Land with one Sterling Healthcare Private Limited. Sterling Healthcare Private Limited is a related entity of the Corporate Debtor.

4.1.2. The Applicant states that the annual rent charged by the Corporate Debtor in respect of lease of the Pune Land is substantially lower than the market rate for rent in the area where the Pune Land is situated. The Applicant states that in order to compare the market rate for rent in respect of

similar land in the area, market rate was estimated using information available in public domain as well as on different property dealing websites and that general rate for land in the area is approximately Rs. 6 to Rs. 8 per square foot per month of building area. A screenshot of lease rental market trends available on a real estate website, is annexed to the Application and marked as Exhibit I.

4.1.3. The Applicant states that in view of what is stated above, there is reason to believe that the said lease transaction ("Undervalued Transaction") is an undervalued transaction as contemplated under section 45 of the Code. The Applicant states that the Undervalued Transaction meets the requirements of an undervalued transaction as contemplated under section 45 of the Code.

OTHER OBSERVATIONS

5. The Applicant states that on a perusal of the financial statements of the Corporate Debtor, it has emerged that there is a sharp decline in revenue and profit of the Corporate Debtor from the year 2012 onwards. Further, the Applicant states that the Corporate Debtor under the management of the Respondents have invested in several projects, most of which have not been completed. The Applicant states that an amount of approximately INR 700 crores have been spent on a particular gelatin manufacturing plant in Bharuch SEZ, Gujarat. The Applicant states that the said plant was supposed to be in operation in the year 2012, but the said plant is not operational till date.

5.1. Further, the Applicant states that on an analysis of capital work in progress recorded in the books of accounts of the Corporate

Debtor, it has emerged that the Corporate Debtor has disclosed INR 2503.20 crores under the accounting head of capital work in progress as on March 31, 2018. The Applicant states that during the period of review a net addition in capital work in progress of INR 951.39 crores has been recorded. However, on further investigation it came to the notice of the Applicant that the said additions are on account of exchange fluctuation losses on various loans, preoperative expenditure and derivative loss. The Applicant states that the same indicates that the projects under which these amounts were paid under capital work in progress were at a standstill since the year 2013. In view of the above, the Applicant states that it is imperative that he be provided with the necessary documents in order to be able to verify and evaluate the capital work in progress of the Corporate Debtor.

5.2. The Applicant states that there is substantial reason to believe that the Corporate Debtor has a Branch office in Sharjah, UAE which has not been disclosed. The Applicant states that the Corporate Debtor is in receipt of a notice from the Income Tax Department ("IT Department") bearing no. ITBA/AST/F/142(1)/2018- 19/1011589638(1) dated August 17, 2018 issued in respect of accounting year 2015-2016. The notice inter alia calls upon the Corporate Debtor to produce details regarding the branch office in Sharjah, UAE in relation to permission documents, ledger copies for the said branch and other details. The Applicant states that while perusing books of accounts and other documents of the Corporate Debtor, he has not come across any reference to the Corporate Debtor's branch office in Sharjah, UAE. Therefore, the Applicant states that in

view of the notice from the IT Department, there is a possibility that the Corporate Debtor has an office in Sharjah, UAE which has not been disclosed by the managements.

6. The Respondents have not filed the reply despite numerous opportunities having been provided to them. They have also not entered in appearance before this Tribunal.

7. Heard learned Counsel and perused the material on record.

8. Section 66 provides that if any business of the corporate debtor has been carried on with intent to defraud creditors of the corporate debtor or for any fraudulent purpose, this Tribunal may make an order directing the Directors to contribute to the Corporate Debtor.

8.1. The facts placed on record by the Resolution Professional demonstrate that the transaction at 'A', 'B' and 'C' have been carried out with the entities, owned/controlled by the employees of the Corporate Debtor and some unrelated entities having suspicious credentials. The Respondents have neither filed any reply nor came forward to explain the genuineness of these transactions.

8.2. The Code does not define the term "Fraud", however the section 3(37) of the Code provides that words and expressions used but not defined in this Code shall have the meaning as assigned to such term under the Companies Act, 2013. The term 'Fraud' is defined in Explanation to Section 447 in following manner :

"fraud" in relation to affairs of a company or any body corporate, includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to

gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss.

- 8.3. The said definition is inclusive and includes the abuse of position committed by any person to gain undue advance or to injure the interest of the Company. We appreciate the fact that the applicant has limited information to make out the case and it is the duty of the Respondents to come forward to explain these transactions, failing which an adverse inference can be drawn. The Applicant has specifically averred that the management has failed to provide complete information and details in relation to affairs of the Corporate Debtor. Accordingly, we have no hesitation to hold that the Respondents have failed to explain their position in relation to allegations against them, hence they must be directed to contribute the sums relating to transactions at 'A', 'B' and 'C' to the corporate debtor within 30 days alongwith interest @ 15% p.a. from the date of payment.
9. As regards undervalued transaction at 'D', the applicant has placed on record comparable rentals of the lease property, which clearly demonstrates that the Corporate Debtor's land has been leased to a third party, which is a related entity, at significantly lower consideration. Accordingly, this transaction falls within the scope of Undervalued transaction u/s 45 of the Code. Accordingly, we set aside the lease transaction and direct the Lessee to handover the peaceful and vacant possession of said land back to the Corporate Debtor within 30 days.
10. The Applicant has also sought direction to the Respondent Management to provide the details of Capital Work in Process and

Office at UAE. These assets belong to the Corporate Debtor and the suspended management ought to have shared complete information and details in relation to these properties without any direction from us. However, since these details are still pending, we direct the Respondent suspended management to provide all details in relation to Capital Work in Process and Office at UAE. Further, they shall co-operate and assist the applicant in reconciling the details of Capital work in process physically as well. In case, the details of Capital work in process are not satisfactorily explained, the Applicant shall be at liberty to file appropriate application before this Tribunal for appropriate directions.

11. In view of aforesaid discussion, this MA 687/2019 is allowed and disposed of accordingly.

Sd/-

Prabhat Kumar
Member (Technical)

Sd/-

Justice V.G. Bisht
Member (Judicial)