

THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH-I

I.A. 1420 OF 2020

Under Section 44, 45, 46 & 66 r/w Section 60(5)
of Insolvency & Bankruptcy Code, 2016

Mr. Anil Mehta

The Resolution Professional

...Applicant

Vs.

Mr. Ajit B. Kulkarni & others

...Respondents

In the matter of

C.P.(IB) No. 3558/MB/2018

Bank of Baroda

Financial Creditor

Vs.

Pratibha Industries Limited

Corporate Debtor

Order delivered on: 08.10.2024

Coram:

Shri Prabhat Kumar

Hon'ble Member (Technical)

Justice Shri V.G. Bisht

Hon'ble Member (Judicial)

Appearances

For the Applicant in 1420 : Mr. Dhruvad Vaghani a/w Mr. Gaurav Jain,
Advocate

For the Respondents in 1420 : Mr. Amir Arsiwala a/w Mr. Aniruth
Purushottam a/w Mr. Tanmay Kelkar,
Advocate

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This Application I.A. 1420/2020 is filed by Mr. Anil Mehta, the Resolution Professional (Applicant) on 17.02.2020 against Mr. Ajit Bhagwan Kulkarni & others (“Respondents”) in CP (IB) 3558 of 2018 in the Corporate Insolvency Resolution Process (“CIRP”) of Pratibha Industries Limited (Corporate Debtor) under Section 44, 45, 46 and 66 r/w Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (“Code”) seeking following reliefs:
 - a. *Pass and order directing Respondent No. 1, Respondent No. 2 and Respondent No. 3 (being the directors of the Corporate Debtor, in the control and management of the Corporate Debtor during the relevant period) to pay an amount of INR 533.77 crores on account of payments made by the Corporate Debtor to its related parties;*
 - b. *Pass and order directing Respondent No. 1, Respondent No. 2 and Respondent No. 3 (being the directors of the Corporate Debtor, in the control and management of the Corporate Debtor during the relevant period) to pay an amount of INR 11.77 crores for selling the assets of the Corporate Debtor on a lower value;*

- c. *Pass and order directing Respondent No. 1, Respondent No. 2 and Respondent No. 3 (being the directors of the Corporate Debtor, in the control and management of the Corporate Debtor during the relevant period) to pay an amount of INR 1411.59 crores on account of significant reduction in the inventory of the Corporate Debtor,*
- d. *Pass and order directing Respondent No. 1, Respondent No. 2 and Respondent No. 3 (being the directors of the Corporate Debtor, in the control and management of the Corporate Debtor during the relevant period) to pay an amount of INR 1253.40 crores on accounts loans extended by the Corporate Debtor which were converted into investments of the Corporate Debtor;*
- e. *Pass and order directing Respondent No. 1, Respondent No. 2 and Respondent No. 3 (being the directors of the Corporate Debtor, in the control and management of the Corporate Debtor during the relevant period) to pay an amount of INR 36.55 crores on account of payments made by the Corporate Debtor on behalf of its joint venture as letters of credits issued by the joint venture were invoked;*
- f. *Pass and order directing Respondent No. 1, Respondent No. 2 and Respondent No. 3 (being the directors of the Corporate Debtor, in the control and management of the Corporate Debtor during the relevant period) to pay an amount of INR 371.49 crores on account of fraudulent addition of fixed assets/ over statement of assets/ transfer of assets which were not recorded in the books of the Corporate Debtor,*
- g. *Pass and order directing Respondent No. 1, Respondent No. 2 and Respondent No. 3 (being the directors of the Corporate Debtor, in the control and management of the Corporate Debtor during the relevant period) to pay an amount of INR 60.22 crores in account of assignment of advances and receivables of the Corporate Debtor,*
- h. *Pass and order directing Respondent No. 1, Respondent No. 2 and Respondent No. 3 (being the directors of the Corporate Debtor, in the control and management of the Corporate Debtor during the relevant*

- period) to pay an amount of INR 147.93 crores on account of sale and lease back of the assets of the Corporate Debtor;*
- i. Pass and order directing Respondent No. 1, Respondent No. 2 and Respondent No. 3 (being the directors of the Corporate Debtor, in the control and management of the Corporate Debtor during the relevant period) to pay an amount of INR 183.40 crores on account of writing off of the receivables of the Corporate Debtor;*
- j. Pass and order directing Respondent No. 1, Respondent No. 2 and Respondent No. 3 (being the directors of the Corporate Debtor, in the control and management of the Corporate Debtor during the relevant period) to pay an amount of INR 500.62 crores on account of misstatement of encashed bank guarantees as receivables in the books of the Corporate Debtor;*
- k. Pass and order directing Respondent No. 1, Respondent No. 2 and Respondent No. 3 (being the directors of the Corporate Debtor, in the control and management of the Corporate Debtor during the relevant period) to pay an amount of INR 12.50 crores on account of fraudulent encashment of bank guarantees of the Corporate Debtor, and*
- l. Pass any other order as this Adjudicating Authority may deem fit.*
2. Vide order dated 01 February 2019, Pratibha Industries Limited ("Corporate Debtor"/ "PIL") was admitted into Corporate Insolvency Resolution Process ("CIRP") under the provisions of the Insolvency and Bankruptcy Code, 2016 ("Code"). Mr. Sunil Kumar Chaudhary, was initially appointed as the Interim. Resolution Professional ("IRP") of the Corporate Debtor. Mr. Anil Mehta was subsequently appointed as the Resolution Professional ("RP") of the Corporate Debtor in the 1st CoC meeting and further vide order dated 14 March 2019 confirmed as the RP of the Corporate Debtor.
3. As on the insolvency commencement dated i.e. 01 February 2019, the authorized capital of the Corporate Debtor is INR 70,00,00,000/- (Rupees Seventy Crores only) and the paid up capital is INR 47,71,94,696/- (Rupees Forty Seven Crores Seventy One Lakhs Ninety Four Thousand Six Hundred

and Ninety Six only) and as on the insolvency commencement date, the Corporate Debtor has the 3 (three) directors (currently in suspension) namely: Ajit Bhagwan Kulkarni; Vilas Bhgwant Parulekar; and Sunanda Datta Kulkarni (collectively referred to as "Directors"), who are Respondents in this application.

4. Pursuant to the provisions of Section 25(2)(d), read in conjunction with Section 43, 45 and 66, KPMG was appointed as "Transaction Auditor" on 26 April 2019 read with addendum dated 24 September 2019 to assist the Resolution Professional in conducting a transaction review of Corporate Debtor under relevant Sections 43, 45 and 66 of the Code of potential avoidance transactions. The Transaction Auditor reviewed the books of accounts and documents of the Corporate Debtor for the period from 01 February 2017 to 01 February 2019 ("Review Period") and on 13 March 2020, the Transaction Auditor submitted its Audit Report highlighting its findings. It may be noted that for the transactions 3, 4, 6, 7, 8 and 9, the Review Period has been extended from 01 April 2014 to 01 February 2019 instead from 01 February 2017 to 01 February 2019.

4.1. The Resolution Professional sought certain clarifications from Respondent No. 1, Respondent No. 2, Respondent No. 3, the Chief Financial Officer and the Auditors of the Corporate Debtor. The Respondent No. 1 vide its letter dated 11 February 2020 has replied and has asked for a period of 3 weeks to provide the information. However, no information has been provided till date. Further, the Respondent No. 2 has also responded vide letter dated 31st January 2020, but no adequate information has been provided. The auditors of the Corporate Debtor vide email dated 14 February 2020, has only provided some information on fourth observation i.e. the loans and advances extended by the Corporate Debtor to Pratibha FEMC JV which were converted into investments.

4.2. Basis review of the Transaction Audit report, the underlying documents relied by the Transaction Auditor, discussions with the Transaction Auditor from time-to-time, discussion with certain management

personnel of the Corporate Debtor, discussions with the financial creditors and review of the financial statements, the Resolution Professional is of the opinion and have determined that certain transactions undertaken by the Corporate Debtor fall within the scope of preferential transactions under Section 43 of the Code, undervalued transactions under Section 45 of the Code and fraudulent trading and wrongful trading transactions under Section 66 of the Code.

4.3. The Transaction Auditor has examined, the transactions undertaken with the related parties of the Corporate Debtor, which are broadly categorized into 3 (three) heads namely:

- (i) Payments to Joint Ventures (JVs);
- (ii) Payments to subsidiaries of the Corporate Debtor;
- (iii) Payments to Directors of the Corporate Debtor.

4.4. **Transaction 1 – Payment to the Related Parties** -The Corporate Debtor advanced an amount of INR 537.77 crores to its related parties, the details of which are given below –

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(Amounts in INR crores)

Sl. No.	Name of the party/entity	Relation with the Corporate Debtor	Bank transactions		Journal adjustment	
			Amount paid	Amount received	Debit	Credit
i.	FEMC Pratibha JV	Joint Venture	444.67	49.18	23.95	48.27
ii.	PIL Mosinzhtroi JV	Joint Venture	38.63	19.81	20.28	2.13
iii.	PIL Yogiraj JV	Joint Venture	22.25	53.25	0.71	-
iv.	PIL Al Ambia JV	Joint Venture	7.06	7.20	-	-
v.	Patel Pratibha JV	Joint Venture	-	2.36	-	-
vi.	PIL Membrane PHED Bihar	Joint Venture	-	0.37	-	-
vii.	Pratibha GECPL JV	Joint Venture	-	-	0.12	-
viii.	PIL Aparna JV	Joint Venture	-	-	-	0.15
ix.	Prime Infra Park Private Limited	Subsidiary of the Corporate Debtor	24.04	6.56	0.17	7.71
x.	BhopalSanchiHighwaysPrivate Limited	Subsidiary of the Corporate Debtor	0.32	-	0.00	-
xi.	Ajit Kulkarni	Director of the Corporate Debtor	0.72	4.43	0.96	1.05
xii.	Ravi Kulkarni	Director of the Corporate Debtor	0.08	0.05	-	0.69
	Total		537.77	143.21	46.19	60.00

4.4.1. The nature wise details of these payments (including debits net of receipts and credits) to JVs is as under -

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Nature of Transactions	FEMC Pratibha JV	PIL Mosinzhtroi JV	PIL Yogiraj JV	PIL Ambiya JV
Payment for BG	305.96	5.70	0.00	0.00
Interest	47.49	38.7	0.00	0.00
LC Payment	0.92		21.97	0.00
3 rd Party Payments	29.76	6.94	(-52.7)	0.40
Salary	5.43	(-0.39)	0.00	0.00
On Account	(-31.38)	(-15.54)	0.17	(-0.83)
BG Commission	3.29		0.27	0.00
Expenses	(-0.36)	1.56	0.00	0.29
Shares of PIL given to Banks of JV	10.07		0.00	0.00
TOTAL	371.18	36.97	(-30.29)	(-0.14)

4.4.2. The nature wise details of these payments (including debits net of receipts and credits) to subsidiary companies is as under -

Nature of Transactions	Prime Infrapark Pvt. Ltd.	Bhopal Sanchi Highways Pvt. Ltd.
Payment to 3 rd Party	(-0.61)	
Payment for Bank Guarantee/BG Commission	12.82	0.05
Loan	0.36	
On account	(-6.53)	
Interest	2.59	
Salary & other expenses	0.04	0.27
TDS Payment	1.27	
Total	9.94	0.32

4.4.3. The nature wise details of these payments (including debits net of receipts and credits) to suspended directors is as under -

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Nature of Transactions	Ajit Kulkarni	Ravi Kulkarni
Adjustment of Loan with related parties	0.73	(-) 0.59
Rent paid	0.72	
Proceeds from sale of shares	(-)4.43	
Rent credited	(-)0.82	
Amounts paid net of on account received		0.03
Credits for expenses		(-)0.1
Total	(-)3.80	(-)0.66

4.4.4. As on the insolvency commencement date i.e. 01 February 2019, the total financial debt of the Corporate Debtor is INR 7,152.73 crores. The Corporate Debtor (which was managed by Respondent No. 1, Respondent No. 2 and Respondent No. 3), instead of making payments to these financial creditors, made payments to its related parties and also failed to recover substantial amounts from these related parties.

4.4.5. That in the opinion of the Applicants, the Directors of the Corporate Debtor did not provide sufficient and reliable documentation/explanation as to why the abovementioned transactions were undertaken by them, especially when the Corporate Debtor was itself facing financial stress. Upon enquiry, the Corporate Debtor has neither provided any documents nor any cogent reasons, as to why no actions has been taken for recovery of these amounts. Hence, these above mentioned transactions appear to be preferential and/or fraudulent u/s 43 and 44 r/w Section 66 of the Code. In light of the same, the Respondent No.1 and 2 and Respondent No. 3 (being the persons in control of the Corporate

Debtor) are liable to contribute Rs.533.77 Crores u/s 43 r/w Section 66 of the Code.

4.5. **Transaction 2 – Sale of Assets at lower value** : During the Review Period the Corporate Debtor has sold assets worth INR 12.61 crores (approx.) for an amount of INR 0.84 crores and has incurred a loss of INR 11.77 crores. The details are as under –

Table at Para 26

Sl. No.	Date of entry	Asset Description	Book Value	Sale Value	Loss	Buyer
1	25.01.2019	Locomotive Diesel- 3	3.16	0.07	(-)3.09	SS Enterprises
2.	30.01.2019	Diesel Generator-5	0.87	0.05	(-)0.82	Devta Gensets Private Limited
3.	1.10.2019	Concrete Pump	0.12	0.00	(-)0.12	Kamlesh Electricals
4.	30.01.2019	Locomotive Diesel-6	6.41	0.51	(-)5.91	Saffron Codes
5.	01.10.2018	Mahindra Bolero-2	0.09	0.05	(-)0.04	Sharma Constructions
6.	01.10.2019	Tower Crane-2 Mobile Tower Crane and Concrete Pump	1.44	0.14	(-)1.29	Sarvjeet Singh
7.	30.01.2019	Batching Plant, Weight Bridge, Tractor and	0.52	0.02	0.50	SK Power

		Loader, Mobile Mast, Diesel Generator- 4, RO Plant and Transit Mixer				
8.	Total		12.61	0.84	(-)11.77	

4.5.1. The Respondents along with the management failed to provide any documented procedure undertaken by the Corporate Debtor for disposal of these assets. The management of the Corporate Debtor informed the transaction auditors that *quotations given by the aforementioned companies to which these assets were sold, were not traceable and no valuations of these assets were undertaken by a registered valuer, to ascertain the market value/fair value of these assets.* Further, no basis was provided by the management of the Corporate Debtor, for arriving at the consideration for the abovementioned sale of assets of the Corporate Debtor.

4.5.2. In the opinion of the Applicant, the said assets were sold for a consideration which is significantly less than the book value. Further, the corporate debtor has received a negligible consideration for selling these assets, which would not have taken place in the ordinary course of business of the Corporate Debtor and such transactions have been taken within one year preceding the insolvency commencement date.

4.6. **Transaction 3 – Significant reduction in the Inventory :** It has been observed that the inventory mentioned in the books of the Corporate Debtor during the Review Period had significantly decreased.

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(Amount in INR crores)

Particulars	As on 31 March 2017	As on 31 March 2018	As on 01 February 2019	Movement from 31 March 2017 to 01 February 2019
Raw Material	48.97	28.79	28.02	(20.95)
Work in Progress	1,641.65	311.60	251.01	(1,390.64)
Total	1,690.62	340.39	279.03	(1,411.59)

A detailed breakup of reduction in the work in progress inventory is as follows :

(Amount in INR crores)

Particulars	As on 31 March 2017	As on 31 March 2018	As on 01 February 2019	Movement from 31 March 2017 to 01 February 2019
Work in Progress	1,044.79	3.20	2.80	(1,041.99)
Claimed	533.12	258.51	245.39	(287.73)
Unmeasured Bil	44.00	47.23	2.82	(41.17)
Part Rate	11.12	2.58	-	(11.12)
Unmeasured Escalation	8.62	0.09	-	(8.62)
Total	1,641.65	311.60	25.01	(1,390.64)

4.6.1. The management of Corporate Debtor stated that “*the WIP included segment of unmeasured bill, unmeasured escalation, part rate claimed and other items like variations due to change in scope or difference in the substrata. After due verification a holistic approach was exercised and items previously included in WIP was moved to claim section. The company has captured against Rs. 2,800 Crores of claims partly in arbitration, partly submitted claim*”

and balance under submission. Wherever the contract did not have the arbitration clause, we need to move the same after paying the court fees which is in process. The company has engaged specialized agency to pursue this claim. From the accounting perspective 50% of the identified claims has been considered in the books". It was further stated by the management that *the macro details are not available since the work in progress was calculated on a guess estimated basis.* Thus, the authenticity of the inventory written off amounting to Rs. 1390.64 crores during the Review period could not be verified by the Transaction Auditor.

4.6.2. It was also stated by the management that *the reduction of the inventory containing raw materials was on account of the materials consumed but not accounted for in the books of accounts of the Corporate Debtor, material theft, material damaged or materials in control of the sub-contractors of the Corporate Debtor.*

4.6.3. Pertinently, as per the independent auditors in the financial statements of the Corporate Debtor for the financial year 2016-17 it was stated that *"management has not provided us the detailed working of Construction Work in Progress (WIP) totalling to INR 1641.65 Crore, Cost to Completion and consequent profitability/ and or losses on projects which are pending for execution. **In absence of these details, it is not possible for us to ascertain whether the WIP has been valued and stated correctly or not.** The consequential impact, if any, on the standalone financial statements is therefore not ascertainable".* It was further stated in the Report that *"The Company did not have an appropriate internal control system for reviewing computation of Work in Progress (WIP), Cost to Completion and estimated profitability of all projects. This could potentially result in inaccurate disclosure of WIP and consequent profitability".* Similarly, for the financial year 2017-18, the auditors have again stated that it was not possible for them to ascertain

whether the work in progress had been valued and stated correctly or not.

4.6.4. There was an increase in the inventory of the Corporate Debtor from INR 961.50 crores in the financial year 2014-2015 to INR 1729.25 crores (almost double) in the financial year 2015-2016 and the same was eventually written off by the Corporate Debtor and brought down to INR 340.40 crores in financial year 2017-2018 and then to INR 279.04 crores as on 1 February 2019. Hence, there was a dramatic accumulation of the inventory followed by dramatic reduction, both within a short period of time.

4.6.5. That in the opinion of the Applicant, the Corporate Debtor has either intentionally misrepresented the actual position of the inventory in its balance sheet with a *malafide* intent to defraud its creditors or, if the amount of inventory stated in the financial statements of the Corporate Debtor is correct, then the Respondent No. 1, Respondent No. 2 and Respondent No. 3 (being the persons in management of Corporate Debtor) have fraudulently siphoned-off the said inventory for their personal benefit, thereby defrauding the creditors of the Corporate Debtor.

4.7. **Transaction 4 – Loans converted into Investments** : During the Review Period the Transaction Auditor observed that significant losses amounting to INR 645.09 crores, were incurred by 20 (twenty) joint ventures (JVs) of the Corporate Debtor. This amount of loss was accounted in the books of accounts of the Corporate Debtor as reduction in investment (in the JVs). Further, it was noted by the Transaction Auditor that certain debtor receivables and interest free loans and advances given to FEMC Pratibha JV (a joint venture of the Corporate Debtor amounting to INR 1253.40 crores were transferred to investment account of the Corporate Debtor, the details of which are given below :

Sr. No.	Date of Entry	Observations	Amount (in Crores)
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1	31 March 2017	Transfer of debtors account of FEMC Pratibha JV to Investment account	228.45
2	31 March 2017	Losses incurred by JVs recorded under Investments	(156.47)
3	30 September 2017	Transfer from Loans and advances to FEMC Pratibha to Investment account	645.21
4	31 December 2017	Write Off recorded in FEMC Pratibha JVs Investment account	(108.69)
5	31 March 2018	Transfer from Loans and advances to FEMC Pratibha to Investment account	271.05
6	31 March 2018	Losses incurred by JVs recorded under Investments	(488.62)
7	31 March 2018	Transfer from Loans and advances to FEMC Pratibha to Investment account	108.69

4.7.1. The management of the Corporate Debtor has stated that “*in December – 2017 management has decided to write off some of debtor and creditors & Loans & Advances. In that list in advertently investment of FEMC Pratibha JV was written off instead of Loans & Advances of FEMC Pratibha JV. Hence the same has been rectified in March 2018. In March 2018 financials the net worth of the company had eroded, management took up the call to transfer loans and advances to investment in consultation with the External Auditors*”.

4.7.2. The Transaction Auditor enquired from the management of the Corporate Debtor for the loans and advances, monetary limit of advancing funds, third party payments on behalf of FEMC Pratibha JV and recovery of the advances given to FEMC Pratibha JV, the management responded as follows:

- a. For Loans and advances : The management of the Corporate Debtor has stated that the advances were basically in the nature of partner capital given to the joint ventures as per the

requirement of the project. Being a partner with 100% stake, contributions were made by the Corporate Debtor. It may be noted that the Corporate Debtor has also received back a substantial amount of money from the FEMC Pratibha JV in the same period. Therefore, the net amount is much smaller than INR 2100 Crores.

b. For monetary limit of advancing funds: The management of the Corporate Debtor has stated that there is no such limit as the joint venture is association of person (“AOP”) where the stake of the Corporate Debtor is 100% and any funding requirement of the AOP is to be fulfilled by the joint venture partner i.e. the Corporate Debtor.

c. For third party payments on behalf of FEMC Pratibha JV:

The management of the Corporate Debtor has stated that due to financial crisis in the joint venture as it was incurring huge losses, the Corporate Debtor was responsible for paying off the liability of the joint venture as it is the partner in AOP. Therefore, in extreme urgent situations, Corporate Debtor made payments to various vendor and banks of the Corporate Debtor on its behalf.

d. For recovery of advances: The management of the Corporate Debtor has stated that these funds were given as a capital contribution of the partner of the joint venture. However, while accounting the amount was entered as loan. The Corporate Debtor has already received back certain amounts from the joint venture, as and when there was surplus in the joint venture. Further, the joint venture should not be viewed as a separate entity but should be viewed as a part of the Corporate Debtor.

4.7.3. Further, no justification/explanation has been provided by the management of the Corporate Debtor qua the booking of losses of joint ventures as a reduction in the investments of the Corporate

Debtor and the transfer of debtors, loans and advances extended to FEMC Pratibha JV as investment in the JV.

4.7.4. The Applicant is of the opinion that the said acts of the management, comprising of (A) giving of loans/advances to its JVs using the facilities taken from its financial creditors; (B) transfer of receivables on account of these loans/advances into the investment has led to siphoning off the funds of the Corporate Debtor. Further, in the opinion of the Applicant, the categorization of the receivables as investments of the Corporate Debtor amounts to fraudulent and/or wrongful trading under Section 66 of the Code.

4.8. **Transaction 5 – Payments made on invocation of Letter of Credit issued by FEMC Pratibha JV** : On review of the intercompany books of accounts for the Review Period, it was noted by the Transaction Auditor that the Corporate Debtor made payments on behalf of FEMC Pratibha JV which arose out of invocation of letters of credits, and were invoked by the vendors of FEMC Pratibha JV. The vendor wise details are as follows –

Date of LC invocation	Vendor Name	LC Amount (Rs. In crores)
19 th March 2016	Eagle Traders	14.40
18 th March 2016	Premium Sales corporation	13.20
1 st November 2015	Vanya Trade Exim Pvt Ltd	5.00
8 January 2016	Isotopic Metallics Pvt Ltd	2.67
8 January 2016	Goverdhan Overseas	1.28
	Total	36.55

4.8.1. The Transaction Auditor reviewed the documents which were provided along with the letters of credit documents by the management of the Corporate Debtor for the abovementioned vendors and the following issues were noted by the Transaction Auditor :

- a. Eagle Traders: Upon checking vehicle registration number mentioned on the invoices provided by the Corporate Debtor for Eagle Traders, it was noted by the Transaction Auditor that either the registration number of the vehicle did not exist or in some cases it belonged to two wheelers. It may be noted that as per the invoice, 85 metric ton of steel bars (Thermo Mechanically Treated bars were delivered by these two wheelers, which is practically impossible and the buyer as per the invoice stated the delivery address as Pratibha Industries Limited C/o Durga Trading Company.
- b. Premium Sales Corporation : In this case, it was noted that the TIN number mentioned in the invoice provided by the Corporate Debtor does not belong to any dealer and was showing as an invalid TIN number.
- c. Vanya Trade Exim Pvt. Ltd.: In this case, it was noted that the TIN number mentioned in the invoice provided by the Corporate Debtor does not belong to any dealer and was showing as an invalid TIN Number.
- d. Goverdhan Overseas: Upon checking vehicle registration number mentioned on the invoices provided by the Corporate Debtor for Goverdhan Overseas, it was noted by the Transaction Auditor that the registration number belonged to two wheelers. It may be noted that as per the invoice, 27 and 29 metric ton of steel bars (Thermo Mechanically Treated Bars) were delivered by these two wheelers, which is practically impossible.

4.8.2. A table reflecting these deliveries is as follows :

Entity	Invoice Number	Delivery vehicle registration number	Description	Quantity	Vehicle category as per public domain
Goverdhan Overseas	GO/475/15-16	DL4S 8268	Bar TMT	27 MT	Bajaj Auto Ltd - M-Cycle/Scooter
	GO/475/15-16	DL98 5321	Bar TMT	28 MT	Reg. No. does not exist
	GO/475/15-16	DL92S 8471	Bar TMT	28 MT	Reg. No. does not exist
	GO/475/15-16	DL6S 5842	Bar TMT	29 MT	Bajaj Auto Ltd - M-Cycle/Scooter
Eagle Traders	TI/2015-16/806	DL16 5992	Bar TMT	85 MT	Reg. No. does not exist
	TI/2015-16/810	DL14S 8472	Bar TMT	110 MT	Reg. No. does not exist
	TI/2015-16/810	DL98 4644	Bar TMT	65 MT	Reg. No. does not exist
	TI/2015-16/812	DL32S 8476	Bar TMT	105 MT	Reg. No. does not exist
	TI/2015-16/812	DL65 5862	Bar TMT	65 MT	Reg. No. does not exist
	TI/2015-16/813	DL12S 7269	Bar TMT	85 MT	Honda Motorcyle - M-Cycle/Scooter and Activa
	TI/2015-16/813	DL98 5564	Bar TMT	88 MT	Reg. No. does not exist
	TI/2015-16/816	DL92S 8463	Bar TMT	92 MT	Reg. No. does not exist

4.8.3. The management of Corporate Debtor has not provided the Transaction Auditor with any justification as to why these payments were made by the Corporate Debtor on behalf of its joint venture. No concrete action has been taken by the Corporate Debtor for recovery of the said amount from the joint venture.

4.8.4. The Applicant is of the opinion that the Respondent No. 1, Respondent No. 2 and Respondent No. 3 (being the persons in control and management of the Corporate Debtor) have undertaken these transactions with an intent to defraud its creditors and siphon-off the money through such route. It may further be noted that the actions of the Corporate Debtor do not fall within prudent business

practices. Pertinently, at a time when Corporate Debtor was itself facing financial troubles, it undertook these transactions and failed to taken any steps (as would be taken by any prudent manager) for recovery of these amounts to minimize the loss to the creditors of the Corporate Debtor.

4.9. *Transaction 6 – Additions in Fixed Assets / Overstatement of Assets/Transfer of assets not recorded in the books* : Upon review of the documents, it is found that 12 (twelve) vehicles were capitalized by the Corporate Debtor in its books during the financial year 2017-2018.

(Amount in INR crores)

S. No.	Particulars	Number of Vehicles sold/purchased by the Corporate Debtor	Consideration received by the Corporate Debtor
1.	Jaguar	1	1.12
2.	Land Rover Free Lander	1	0.50
3.	Mahindra Bolero	9	0.55
4.	Mercedes Benz (Purchased by the Corporate Debtor)	1	1.01

4.9.1. That the Transaction Auditor has observed the following similarities in the capitalization of all these assets, which are as follows:

- a. Assets were capitalized in the wrong period;
- b. Sale of these assets (except for the Mercedes Benz) were not recorded in the books of accounts;
- c. The assets are not in possession of the Corporate Debtor; and
- d. The Corporate Debtor purchased a luxury vehicle (being Mercedes Benz) during financial crisis.

4.9.2. It was observed by the Transaction Auditor that as on the insolvency commencement date i.e. 01 February 2019, out of the total gross block of the fixed assets of INR 654.40 crores, assets worth INR 336.70 crores were already sold by the financial

creditors of the Corporate Debtor, seized by its vendors/sub-contractors against the dues owed by the Corporate Debtor to them. Further, the Corporate Debtor has also failed to record the sale/transfer of certain assets named a TBMs (EPB – CAP 6600 MM – CC23, Model-S-937) charged to Yes Bank Ltd. worth INR 31.61 crores, as the assets sold/transferred and which are currently being shown as fixed assets of the Corporate Debtor.

4.9.3. It is clear from the above that the Corporate Debtor has overstated its assets in its books of accounts without making any provisions for these assets which were already realized by the financial creditors, vendors/ sub-contractors of the Corporate Debtor. This is a clear violation of the prudence concept of accounting, which is in turn leading into defrauding its creditors for the purposes of drawing more amount from them by showing inflated gross block of assets in its books of accounts.

4.9.4. The purchase and sale of luxury cars by the Corporate Debtor and the manner of its sale (without recording the sale in the books of the Corporate Debtor and without receiving corresponding amounts) during the period of stress for the Corporate Debtor was not only unjustified but also falls within the category of fraudulent and/or wrongful trading.

4.10. ***Transaction 7 – Assignment of Advances and Receivables outstanding from parties*** : On review of the books of accounts of the Corporate Debtor, it was observed by the Transaction Auditor that there were adjustments of receivables with payable of certain entities, i.e. receivables from its customers were adjusted against payables to certain vendors. A table showing the adjustments made by the Corporate Debtor during the Review Period is as follows :

Date of Entry	Customer Entity	Adjusted Amount (in INR Cr.)	Vendor Entity
31 March 2017	Transmatic Metallic Trading Private Limited	24.51	SPGMultitrade Private Limited
		4.68	SPG Macrocosm Limited
31 March 2017	PEL Industries Limited	6.92	Ace Metals Private Limited
		6.89	European Metals Private Limited
		2.12	Volition Trading Private Limited
31 March 2017	H R Trade Link Private Limited	6.39	SPG Macrocosm Limited
31 March 2017	Pankaj Metals	5.04	Connect Residuary Private Limited
31 March 2017	Platonic Sales & Marketing Private Limited	1.85	Esszee Manufacturing Private Limited
		1.32	SPG Macrocosm Limited
		0.16	IsotopicMetallicsPrivateLimitedand AttenuateMetallicsPrivateLimited
9 June 2017	IreoSkyon	0.23	Md. Bulbul Ahmed
31 March 2017	Rahul Sales Limited	0.11	Diamond Scaffolding Co (P) Limited
	Total	60.22	

4.10.1. As on 31 March 2017, the Corporate Debtor's liability towards Connect Residuary Pvt. Ltd. ("CRPL") amounting to INR 20.98 crores was transferred to other vendor's accounts which was in-turn adjusted with customer accounts of the Corporate Debtor i.e. PEL Industries and Pankaj Metals.

4.10.2. The management has stated that “*wherever the debtors and creditor had the link, it was prudent to write off the balances to arrive at the net effect. This were purely on the trading activities engaged by the company. Debtors and Creditors agreed and accordingly entries passed*”. The management further stated that “*due to financial crisis, the company could not make payment to Connect. As per arrangement made with many parties, payments were made by them to Connect on behalf of Pratibha. On receipt of Debit not from these parties, balances were transferred to respective parties*”.

4.10.3. It is further observed that –

- a. Directors of Platonic Sales & Marketing Pvt. Ltd. and Transmatic Metalik Trading Pvt. Ltd. are common and the status of both companies is strike off;
- b. The registered office and the directors (except for Pankaj Metal) of PEL Industries Limited, European Metals Pvt. Ltd., Ace Metals Pvt. Ltd. and Volition Trading Pvt. Ltd. are common;
- c. The directors of SPG Macrocasm Limited and SPG Multitrade Pvt Ltd. and the registered email address of these companies are common;
- d. The directors of Isotpic Metallics Pvt. Ltd. and Attenuate Metallics Pvt. Ltd. are common and the status of both companies is strike off.

4.10.4. The documents provided by the management of the Corporate Debtor either did not contain the delivery vehicle numbers or the vehicle registered on the said number was a two-wheeler or such registered number was not found in e-vahan. However, huge quantities of the HR plates and Steel rods are claimed to have been shipped through these vehicles. The Transaction Auditor also questioned the management of the Corporate Debtor with respect to these transactions and the management stated that the Corporate Debtor had purchased material in bulk and distributed the same to

nearby sites, as they purchased the material at a competitive rate therefore the delivery details were not present in the said documents.

4.10.5. The Directors of the Corporate Debtor as well as the management of the Corporate Debtor did not provide sufficient and reliable documentation which supports these transaction. Hence, these transactions do not appear to be genuine and are covered under Section 66 of the Code.

4.11. **Transaction 8 – Sale and Lease-back of the Assets** : On review of the books of accounts of the Corporate Debtor for the period of 01 March 2014 to 30 April 2015, it was observed that the Corporate Debtor sold its assets to the following five parties:

- a. Connect Residuary Pvt. Ltd. ("CRPL")
- b. European Metals Pvt. Ltd. ("EMPL");
- c. Ace Metals Pvt. Ltd. ("AMPL");
- d. Pankaj Metals;
- e. Volition Trading Pvt. Ltd. ("VTPL").

4.11.1. The assets worth INR 93.26 crores were sold to these parties and the Corporate Debtor received only an amount of INR 55.80 crores from these parties. Pertinently the balance amount was adjusted as loan repayments of the Corporate Debtor or loans repayments from the joint ventures of the Corporate Debtor (it was shown as intercompany receivable to Corporate Debtor from PIL CRFG JV) or vendor repayments.

4.11.2. The Corporate Debtor sold its assets to certain entities (for which full amounts were not received) and then leased the same back from CRPL at an extremely high price without undertaking a proper valuation of the assets and merely stated that the value of the assets as per the books were considered as the transactions, therefore no other valuation report was required by the Corporate Debtor and CRPL. The party wise details of such lease transactions is as below

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(Amount in INR crores)

Party name (customer account)	Book value of assets sold	Bank receipts	Amount adjusted as loan repayments	Amount adjusted as JV's loan repayment	Amount adjusted with vendor payment
CRPL	18.13	(15.35)	-	(6.65)	-
	17.83	(4.01)	(7.90)	(2.50)	-
AMPL	18.21	(18.21)	-	-	-
AMPL	16.33	(16.33)	-	-	-
Pankaj Metals	11.90	(1.90)	-	-	(10.00)
VTPL	10.86	-	-	-	(10.86)
Total	93.26	(55.80)	(7.90)	(9.15)	(20.86)

The year wise break up of lease obligations and its accounting in the books is as follows :

(Amount in INR crores)

Particulars	FY 2014-15	FY 2015-16	FY 2016-17		FY 2017-18	Total
			Up to 30 June 2016 (before BG invoked)	After 30 June 2016		
Hire charges recorded as per books of accounts of Corporate Debtor	9.47	14.07	22.17	82.96	-	128.66
Hire charges to be recorded as per lease schedules	9.47	25.75	11.15	33.45	48.84	128.66
Bank payments to CRPL (A)	9.33	25.10	9.79	-	-	43.22
BG invoked by CRPL (B)	-	-	-	83.73	-	83.73
Adjusted with vendors/ customer accounts (C)	-	-	-	20.98	-	20.98
Total payments to CRPL (A+B+C)						147.93

4.11.3. The Corporate Debtor also provided bank guarantees worth INR 83.73 crores to CRPL, as security payments towards payment of hire charges. That CRPL invoked all the bank guarantees amounting to INR 83.73 crores on 20 July 2016 and 01 October 2016. Despite the timely payments made by the Corporate Debtor, the invocation of bank guarantee issued by the Corporate Debtor to CRPL was done. The hire charges for the period of 01 July 2016 to 31 March 2017 amounted to INR 33.45 crores. However, the Corporate Debtor recorded the hire charges as INR 82.96 crores. No justification has been provided by the management of the Corporate Debtor to the Transaction Auditor as to why such high amount was recorded in the books of accounts of the Corporate Debtor.

4.11.4. Further, on enquiring about the whereabouts of the assets which were leased by the Corporate Debtor from CRPL, the Transaction Auditor was informed that *the Corporate Debtor was not in possession of the abovementioned assets even though the bank guarantees have been invoked by CRPL*. This clearly indicates that the Corporate Debtor undertook this transaction to siphon off the money with an intent to defraud its creditors and the same clearly falls in the ambit of Section 66 of the Code.

4.12. **Transaction 9 – Write off of the receivable** : The Transaction Auditor, reviewed the books of accounts of the Corporate Debtor and it was observed that certain receivable balances were written off by the Corporate Debtor during Review Period. The party wise details of write off is as follows :

Sl. No.	Name of Party	Classified as	Amount (INR Crores)
1.	Pratibha China State JV	Trade Receivables	40.19
2.	Durga Trading Company	Trade Receivables	13.01
3.	Creative Distributors	Trade Receivables	12.61

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4.	MinaquaInternational Private Limited	Trade Receivables	6.98
5.	N M M C	Trade Receivables	3.44
6.	Trishala Impex	Trade Receivables	3.38
7.	D R Overseas	Trade Receivables	2.63
8.	PandheInfrocons Private Limited	Trade Receivables	2.27
9.	Odeon impex	Trade Receivables	2.17
10.	Tirupati Iron India Private Limited	Trade Receivables	1.54
11.	Spiegel Enterprises Private Limited	Trade Receivables	1.52
12.	Akola Municipal Corporation Akola	Trade Receivables	1.33
13.	Piramal Sunteck Realty Private Limited	Trade Receivables	1.32
14.	Platonic Sales & Marketing Private Limited	Trade Receivables	1.20
15.	Pan India Infra Private Limited	Trade Receivables	1.17
1.1716.	Raymond Ltd J K House	Trade Receivables	1.17
17.1.17	Sterling & Wilson Limited	Trade Receivables	1.09
18.	Lodha Dwellers Private Limited	Trade Receivables	1.02
19.	Othervendors/JV's	Trade Receivables	8.28
20.	PHED Jodhpur Barmer 1138	Retention & Security Deposits	16.00
21.	PHED Jodhpur Bhilwara 1143	Retention & Security Deposits	7.18
22.	PHED BaheraHurda 1142	Retention & Security Deposits	6.78
23.	Bhartiya Ciry Dev Pvt Ltd	Retention & Security Deposits	4.61
24.	PHED Bahera Hurda 1142	Retention & Security Deposits	3.97
25.	R J Rishikiran Projects Pvt Ltd	Retention & Security Deposits	3.36
26.	Runwal Homes Pvt Ltd Green	Retention & Security Deposits	3.34
27.	PHED Chambal Bhilwara 1143	Retention & Security Deposits	2.98
28.	PHED Nagaur WSS pipeline project	Retention & Security Deposits	1.93
29.	NMMC Navi Mumbai. Bhokarpada	Retention & Security Deposits	1.70
30.	Deposit – Liquidated Damage	Retention & Security Deposits	1.66
31.	Deposit -TLD	Retention & Security Deposits	1.65
32.	Bhartiya City Dev Pvt Ltd	Retention & Security Deposits	1.51
33.	Rustomjee Realty Pvt Ltd P – I	Retention & Security Deposits	1.50
34.	Sunshine Housing & Infrastructure	Retention & Security Deposits	1.40
35.	D J B Ashok Vihar P – IV	Retention & Security Deposits	1.37
36.	Rustomjee Realty Pvt Ltd P – I	Retention & Security Deposits	1.20
37.	Other Vendors/Parties (with amounts less than INR 1 crores	Retention & Security Deposits	07.69
38.	Sundry Parties	Other Write Off	7.25
	Total		183.40

4.12.1. The management has stated that *they have been pursuing for the recovery of these receivables which were due from a long time. However, the management took the opinion of external auditors and accordingly these trade receivables were written off after verifying the veracity of the same.*

4.12.2. The management of the Corporate Debtor failed to provide any document supporting the above write off. In order to ascertain genuineness of the balances that were written off by the Corporate Debtor, 39 (thirty nine) entities were selected by the Transaction Auditor for testing of transaction evidencing revenue recorded during the period of 01 April 2014 to 01 February 2017. Out of 39 (thirty nine) entities, details of 07 (seven) entities were not provided by the Corporate Debtor by stating that no revenue transactions were undertaken by the Corporate Debtor during the said period.

4.12.3. The write off undertaken by the Corporate Debtor does not appear to be genuine and therefore the Applicant is of the opinion that the Respondent No. 1, Respondent No. 2 and Respondent No. 3 (being the persons in control and management of the Corporate Debtor) have undertaken the writing off the receivables with an intent to defraud the creditors of the Corporate Debtor and to siphon-off money through such route. It may further be noted that the actions of the Corporate Debtor do not fall within prudent business practices. Particularly, at a time when Corporate Debtor was itself facing financial troubles, it undertook these transactions and failed to take any steps (as would be taken by any prudent manager) for recovery of these amounts to minimize the loss to the creditors of the Corporate Debtor.

4.13. **Transaction 10 – Misstatements of Encashed Bank Guarantees as Receivable:** The Corporate Debtor issued numerous bank guarantees to its vendors/ clients. Out of the said bank guarantees, bank guarantees worth Rs. 500.62 crores were encashed by the vendors/clients of the Corporate Debtor, the details of which are stated below :

<u>Sr. No.</u>	<u>Receivable From</u>	<u>Encashed By</u>	<u>Amount of BG (Rs. In crores)</u>
1	Clients of PIL	Clients of PIL	102.77

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2	FEMC Pratibha JV	Clients of FEMC Pratibha JV(DMRC)	305.96
3	Prime Infra Park Pvt Ltd	Clients of Prime Infra Park Pvt Ltd(DMRC)	12.82
4	PIL Mosinzhtroi JV	Clients of PIL Mosinzhtroi JV(EIL-DJB)	26.50
5	PIL NBCC JV	Clients of PIL NBCC JV(NBCC)	52.58
	Total		500.62

4.13.1. As per the Transaction Audit Report, the bank guarantees were encashed by the clients of the Corporate Debtor against the claims made by the Corporate Debtor on these clients for termination of the project agreements. The management has stated that *these encashments are under litigation, hence the same have been categorized as receivables from the clients of the Corporate Debtor*. No provision has been made for these payments by the Corporate Debtor, which is violative of the concepts of the accounting standards followed in India. Therefore, the applicant is of the opinion that the Corporate Debtor has overstated its assets for an amount of Rs. 102.77 crores by recognizing receivables from clients.

4.13.2. The Transaction Auditor also reviewed the books of accounts of these joint venture and subsidiaries of the Corporate Debtor and observed that an amount of INR 194.79 crores was adjusted from the advances from clients and an amount of INR 137.69 crores were written off from the books of accounts of these joint ventures and subsidiaries. However, the said amount has been accounted as a receivable in the books of accounts of the Corporate Debtor from these joint ventures and subsidiaries of the Corporate Debtor.

4.13.3. In the the opinion of the Applicant, the Corporate Debtor overstated its assets amounting to INR 397.86 crores by recognizing receivables from the joint ventures and subsidiaries of the Corporate Debtor based on the contingent recoveries from the

clients of these joint ventures and subsidiaries of the Corporate Debtor.

4.13.4. The Independent Auditors have qualified their report for non-provision of INR 353.67 Crores towards encashment of Bank Guarantees by clients of Corporate Debtor.

4.13.5. The Applicant is of the opinion that the said acts have been undertaken by the Corporate Debtor to siphon off the funds of the Corporate Debtor through its subsidiaries. Further, the Corporate Debtor has not taken any steps to recover the said amounts which indicates that the Directors have not exercised due diligence in minimizing the loss to the creditors as per Section 66(2) of the Code.

4.14. **Transaction 11 – Fraudulent encashment of Bank Guarantee by Vendor** : The Transaction Auditor noted that a bank guarantee was encashed by a vendor of the Corporate Debtor namely Shital Enterprise. The said bank guarantee was worth INR 12.50 crores and was encashed in the financial year 2016-2017. The Transaction Auditor enquired about the above encashment from the management of the Corporate Debtor and the management stated that the Corporate Debtor received an amount of INR 5 crores from the vendor as a mobilization advance for development/construction of land at Bhiwandi, a copy of work order in this relation was provided by the management .

4.14.1. On 30 April 2016, the Corporate Debtor made purchases of INR 7.65 Crores from the said vendor for certain materials. The material is stated to be transported through Hindustan Roadways, however, this transporter has been named a fake transport company in a FIR filed by Union Bank of India.

4.14.2. The management of the Corporate Debtor has admitted that due to non-performance of the contract entered into between the Corporate Debtor and the vendor, the vendor encashed the bank guarantee of INR 12.50 crores.

4.14.3. A Table reflecting the transaction is as follows :

(Amounts in INR crores)

Date of transaction	Nature of transactions	Amount	
5 April 2016	Amount received by PIL from Shital Enterprises		(5.00)
30 April 2016	Purchases made by PIL from Shital Enterprises		(7.65)
20 June 2016 to 26 December 2016	Interest recorded by PIL		(1.30)
21 June 2016 to 15 March 2017	Interest payments made to Shital Enterprises		1.55
1 January 2017	Interest recorded earlier, reversed by PIL		1.30
2 August 2016	BG encashed by Shital Enterprises	5.00	12.50
17 March 2017		7.50	
31 March 2017	Non performance charges recorded by PIL		(1.48)
	Closing balance as on 1 February 2019		(0.08)

4.14.4. The Corporate Debtor has recorded an amount of INR 1.48 crores as non-performance charges. However, no such term/clause was mentioned in the work order provided to the Transaction Auditor by the Corporate Debtor.

4.14.5. The Applicant is of the view that the Directors have colluded with the vendor and encashed the bank guarantee to siphon off the money of the Corporate Debtor. This makes its apparent that the purported transaction was undertaken by the Corporate Debtor to defraud its creditors and siphon off the money for its own benefit through such routes.

4.15. To sum up, the following table reflects the relief sought by the Applicant in the present application –

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Section	Nature of Transaction	Details of the Transaction	Reliefs Sought
43 and 66	Preferential Transaction and Fraudulent / Wrongful Trading	Payments made by the Corporate Debtor to its related parties	533.77
45 and 66	Undervalued Transaction and Fraudulent / Wrongful Trading	Sale of assets of the Corporate Debtor on lower value	11.77
	Trading		
66	Fraudulent / Wrongful Trading	Significant reduction in inventory of the Corporate Debtor	1411.59
66	Fraudulent / Wrongful Trading	Loans extended by the Corporate Debtor converted into investments	1253.40 .
66	Fraudulent / Wrongful Trading	Payments made by Corporate Debtor on behalf of its joint venture as LC issued by the joint venture were invoked	36.55
66	Fraudulent / Wrongful Trading	Fraudulent addition of fixed assets/ overstatement of assets/ transfer of assets not recorded in the books of the Corporate Debtor	371.49
66	Fraudulent / Wrongful Trading	Assignment of advances and receivables of the Corporate Debtor	60.22
66	Fraudulent / Wrongful Trading	Sale and lease back of the assets of the Corporate Debtor	147.93
66	Fraudulent / Wrongful Trading	Writing off of the receivables of the Corporate Debtor	183.40
66	Fraudulent / Wrongful Trading	Mis-statement of encashed bank guarantees as receivables in the books of the Corporate Debtor	500.62
66	Fraudulent / Wrongful Trading	Fraudulent encashment of Bank Guarantees	12.50

5. The respondent No.1 filed affidavit in reply dated 23.09.2023 providing transaction wise explanation in the following manner –

5.1. Transaction 1 - – *Payment to the Related Parties*

Transactions with JVs

5.1.1. **FEMC Pratibha JV : In relation to** issuance of Bank Guarantees & commission paid on the same, the Auditors have made factually incorrect observation. Those BG's were issued by the Corporate Debtor well prior to that during the FY 2012-13 to 2013-15 at the time of commencement of the works awarded to JV & as per the contractual requirements. The Corporate Debtor had issued the various BG's to the Client (DMRC) on behalf of FEMC Pratibha JV during the period from **FY 2012-13 to 2013-15** for the purpose of Performance of the Contracts, security towards Mobilization Advance, Secured Advance, Machinery Advance, etc. & also extended those BG's time to time. Those BG's were provided for the CC 18 & CC23 Projects. During the course of execution, the Client (DMRC) encashed those BG's amounting to INR 305.96 Cr. during the review period from 01.02.2017 to 01.02.2019 because the JV was unable to repay the various advances inter alia Mobilization Advance, Secured Advance, Machinery Advance etc. DMRC also encashed Performance BG's. However, DMRC used those funds for making direct payments to JV's vendors for completing the projects. The Client (DMRC) utilized those funds for adjusting their recoveries & for completion of the projects in terms of the provisions of the Contract between DMRC & FEMC Pratibha JV.

5.1.1.1. In case of DMRC CC 18 Project, the banks had sanctioned the Credit Facilities to FEMC Pratibha JV & Pratibha Industries Limited is a Corporate Guarantor to these facilities. In case of DMRC CC 23 Project, the banks had sanctioned the Credit Facilities Pratibha Industries Limited to execute DMRC CC-23 Project. Therefore, in both the cases, it

was Pratibha's obligation to adhere to terms of the sanction letters.

5.1.1.2. Contractual Obligations of Pratibha Industries Limited with reference to FEMC Pratibha JV (CC 23 Project)

- a. Under clause 2 of JOINT VENTURE AGREEMENT (JVA) dated 14.03.2012, "All the parties shall be jointly and severally liable to the Employer for the performance of whole contract in the event that the contract is awarded to the JV".**
- b. As per Clause No.3, under Roles of Parties of SUPPLEMENTARY AGREEMENT (SPA) dated 15.03.2012. As per: PRATIBHA INDUSTRIES LIMITED's role during the Bidding Stage is "To carry out all the Bid / Contractual compliance required inclusive of submission of Earnest Money Deposit / Performance Security etc.,"**
- c. PRATIBHA INDUSTRIES LIMITED role During Execution Stage (in the event of award of Contract) is "PRATIBHA shall be responsible for execution of entire scope of the Contract including contractual compliances."**
- d. As per Clause No.4 Management Fees, under Responsibility & Sharing (On Page 6 of 10). "if FEMC wishes to act only as Technical Service Partner, then participation of the Parties in the fully integrated Joint Venture shall be re-arranged as given here below and PRATIBHA shall execute the entire defined scope of works given in the tender documents accordingly". FEMC: 0% (Zero Per cent). PRATIBHA: 100% (Hundred Per cent).**
- e. As per Clause No.7 - Bank Accounts, (Page 7 of 10). "In the event of award of Contract, if PRATIBHA approaches**

any bank for working capital facility to be availed for, then FEMC (as a JV partner) shall not have any objection for raising such working capital facility for the said Contract. However, FEMC will not owe any liability, responsibility, or otherwise for raising such loan by PRATIBHA”.

f. As per Clause No.10 – Bonds and Guaranties.

“PRATIBHA hereby agree and undertake to arrange to provide all debt, bonds and / or guarantees, and statutory clearances / permits that may be required in connection to the submission of the bid and if the bid is successful and the contract is awarded to the Joint Venture, for the execution of the Project and / or as required in connection with the Contract and / or such indemnities (Whether joint and Several or otherwise) as the guarantors or bonds shall reasonably require from the Parties in connection therewith.

g. As per APPENDIX–1 (FEMC as a Technical Partner) Under Sr.No.13–FINANCING (Page No. 10 of 10).

Responsibility of “FEMC” = 0%. Responsibility of “PRATIBHA” = 100%

5.1.1.3. Contractual Obligations of Pratibha Industries Limited with reference to FEMC Pratibha JV (CC 23 Project):

a. Under Clause No.2 of JOINT VENTURE AGREEMENT (JVA) dated 21.05.2012 –

Responsibility / Liability of the Joint Venture. “All the parties shall be jointly and severally liable to the Employer for the performance of whole contract in the event that the contract is awarded to the JV”

b. As per terms of SUPPLEMENTARY AGREEMENT (SPA) dated 12.06.2012. As per Clause No.2, under Roles of Parties: PRATIBHA INDUSTRIES LIMITED’s

role during the Bidding Stage is “To carry out all the Bid / Contractual compliance required inclusive of submission of Earnest Money Deposit / Performance Security etc.”

- c. **PRATIBHA INDUSTRIES LIMITED role During Execution Stage (in the event of award of Contract)** is “PRATIBHA shall be responsible for execution of entire scope of the Contract including contractual compliances.”
- d. **As per Clause No.3 Management Fees, under Responsibility & Sharing (On Page 5 of 9).** “if FEMC wishes to act only as Technical Service Partner, then participation of the Parties in the fully integrated Joint Venture shall be re-arranged as given here below and PRATIBHA shall execute the entire defined scope of works given in the tender documents accordingly”. FEMC: 0% (Zero Per cent) PRATIBHA: 100% (Hundred Per cent)
- e. **As per Clause No.6 - Bank Accounts, (Page 6 of 9)** “In the event of award of Contract, if PRATIBHA approaches any bank for working capital facility to be availed for, then FEMC (as a JV partner) shall not have any objection for raising such working capital facility for the said Contract. However, FEMC will not owe any liability, responsibility, or otherwise for raising such loan by PRATIBHA”.
- f. **As per Clause No.9 – Bonds and Guaranties.** “PRATIBHA hereby agree and undertake to arrange to provide all debt, bonds and / or guarantees, and statutory clearances / permits that may be required in connection to the submission of the bid and if the bid is successful and the contract is awarded to the Joint Venture, for the execution of the Project and / or as required in connection with the Contract and / or such indemnities (Whether joint and Several or otherwise) as the guarantors or bonds shall

reasonably require from the Parties in connection therewith.

- g. As per APPENDIX-1 (FEMC as a Technical Partner) Under Sr.No.13-FINANCING (Page No. 9 of 9) Responsibility of "FEMC" = 0% Responsibility of "PRATIBHA" = 100%**

5.1.1.4. In view of the above, the conclusion drawn by the Auditors that "The large portion of this amount has been paid by the Corporate Debtor for on account of issuance of Bank Guarantees" is incorrect. It is only that bank guarantees which have been furnished by Corporate Debtor in favor of the above mentioned joint ventures have been encashed by the Client i.e. DMRC (Delhi Metro Rail Corporation) as per the contract. Therefore there is no diversion of money to any related party or otherwise by any stretch of imagination. Therefore, The Corporate Debtor had debited the said amount of INR 305.96 Cr. FEMC Pratibha JV during the review period.

5.1.1.5. Those BG's were issued by the Corporate Debtor to the Client (DMRC) on behalf of FEMC Pratibha JV during the period FY 2012-13 to FY 2014-15 to fulfil its contractual obligations. Those BG's were issued by the Banks during the relevant period after due diligence & considering the relevant provisions of the various agreements between the Client (DMRC) & JV, & Pratibha & JV, & between Pratibha & FEMC & JV.

5.1.1.6. The Auditors have recorded that the Corporate Debtor have paid an amount of INR 50.92 Cr. to FEMC Pratibha JV (related party) towards interest & BG Commission. Factually, those amounts have been paid by the Corporate Debtor to the **Financial Creditors** of JV towards the payments of Interest & BG Commission. This amount has not been used by the

Corporate Debtor to clear the other dues of the JV's (Related Party) but used for to clear dues of the **Financial Creditors**.

5.1.1.7. Further, in case of DMRC CC 18 Project, the banks had sanctioned the Credit Facilities to FEMC Pratibha JV & Pratibha Industries Limited is a Corporate Guarantor to these facilities. In case of DMRC CC 23 Project, the banks had sanctioned the Credit Facilities to Pratibha Industries Limited to execute DMRC CC-23 Project. Therefore, in both the cases, it was Pratibha's obligation to adhere to terms of the sanction letters. Therefore, Pratibha had paid the interest of INR 47.63 Cr. & BG Commission of INR 03.29 Cr. to the Banks to fulfil their obligations mentioned in the Credit Facility Sanction Letters.

5.1.1.8. **As per the Supplementary agreements dated 15.03.2012 (CC 18) & dated 12.06.2012 (CC 23), 100% financial stakes for profit and losses are held solely by the Pratibha Industries Ltd and thus no other related party has been benefitted by the afore stated transaction as eventually if anyone has stood to gain, it is only the Corporate Debtor and thus these transactions are not fraudulent and hence not avoidable.**

5.1.1.9. The Auditors have recorded that the Corporate Debtor have paid an amount of INR 21.45 Cr. to FEMC Pratibha JV towards the Salary during the Review Period from 01.02.2017 to 01.02.2019. Factually, for the execution of both DMRC CC 18 & DMRC CC 23 projects, Pratibha Industries Limited is responsible for business expenses such as salaries, etc. and also entitled for 100% of profits and thus as per contractual obligations in ordinary course of business, payment of salaries has been duly made by the Corporate Debtor who holds 100% financial stakes in the JV further these salaries are debited to FEMC Pratibha JV account. This by no means results in any

undue benefit to the FEMC Pratibha JV at the cost of the Corporate Debtor and hence cannot be categorized as the fraudulent transaction.

5.1.1.10. The actual investment made by the Corporate Debtor in those JV entities during the review period was of INR 162.66 Cr. ($468.62 - 305.96 = 162.66$). Out of these, the Corporate Debtor had paid an amounts of INR 50.92 Cr. to the Financial Creditors towards the interest & BG Commission & INR 21.45 Cr. to the staff towards their Salary, during the review period. Therefore, the effective investment made by the Corporate Debtor in JV entity during the review period was of INR 90.29 Cr. [$162.66 - 50.92 - 21.45 = 90.29$] Further, as against of this investment of INR 90.29 Cr., the Corporate Debtor also has received the amounts of INR 97.45 Cr. [$49.18 + 48.27 = 97.45$] from FEMC Pratibha JV. Therefore, the Corporate Debtor has received more amount of INR 07.16 Cr. from the JV entity during the review period. Further, these transactions had happened based on the terms of the Agreements executed between JV entity & Clients, & between PIL & other JV entity for fulfilling Its obligations to complete those projects awarded to the aforesaid JV.

5.1.1.11. It is pertinent to note that immediately after commencement of CIRP process, about in May 2019, FEMC Pratibha JV received about INR 32.00 Cr. towards Tax Refund which was then transferred to the Corporate Debtor. Therefore, it is crystal clear that the Corporate Debtor has not been defrauded.

5.1.2. **PIL Mosinzhtroi JV: (Package 2 & Package 3) :**

5.1.2.1. The BG's were issued by the Corporate Debtor well prior to that during the FY 2011-12 to 2013-14 at the time of commencement of the works awarded to JV & as per the contractual requirements. The Corporate Debtor had issued the

various BG's to the Client (DJB / EIL) on behalf of PIL Mosinzhstroi JV during the period from FY 2011-12 to 2013-14 for the purpose of Performance of the Contracts, security towards Mobilization Advance, Secured Advance, Machinery Advance, etc. & also extended those BG's time to time. Those BG's were provided for the Package 2 (P2) & Package (3) Projects. During the course of execution, the Client (DJB / EIL) encashed out of them BG's amounting to INR 05.70 Cr. during the review period from 01.02.2017 to 01.02.2019 because the JV was unable to repay the Mobilization Advance timely.

5.1.2.2. The banks had sanctioned the Credit Facilities to Pratibha Industries Limited to execute DJB (Package 2) & (Package 3) Projects. Therefore, it was Pratibha's obligation to adhere to terms of the sanction letters.

5.1.2.3. Further, those BG's of INR 05.70 Cr. were issued by the Corporate Debtor to the Client (DJB / EIL) on behalf of PIL Mosinzhstroi JV & the Corporate Debtor made other expenses on behalf of PIL Mosinzhstroi JV for the fulfillment of their contractual obligations.

5.1.2.4. The clauses of agreements executed in relation to **Pratibha Mosinzhstroi Consortium (Project P2)** are as follows:

a. Under Clause No.2 of CONSORTIUM AGREEMENT dated 21.01.2011, – Responsibility / Liability of the Consortium. “All the parties shall be legally liable and jointly and severally responsible to the “Owner” for the execution of the Project and to discharge all obligations under the Contract.”

b. Under Clause No.4 – Responsibility & Sharing. The participation of the Parties in the fully integrated Consortium shall be as given here below and they shall execute the defined scope of works given in the tender

documents accordingly: PRATIBHA: 60% (Sixty Per cent) MOSINZHSTROI: 40% (Forty Per cent).

- c. **As per SUPPLEMENTARY AGREEMENT (SPA) dt. 25.01.2011:** Under the heading **RECITALS at Page 2 of 8:** “As the parties have mutually decided that **“PRATIBHA” shall be undertaking execution of the entire portion of work, therefore, MOSINZHSTROI seeks to be responsible only to the extent of providing Technical Services (if required by the Consortium) for smooth and timely execution of project of the Consortium and not as per the participation ratio given in the Consortium Agreement.** The Consortium shall reimburse MOSINZHSTROI for any such technical or additional services provided. MOSINZHSTROI shall be indemnified from the responsibilities during bidding and execution of the Project, which are falling under the scope of PRATIBHA.
- d. **Under Clause No.9 – Bonds and Guaranties – Page No.5 of 8:** “PRATIBHA hereby agree and undertake to arrange to provide all debt, bonds and / or guarantees, and statutory clearances / permits that may be required in connection to the submission of the bid and if the bid is successful and the contract is awarded to the Consortium, for the execution of the Project and/or as required in connection with the Contract and/or such indemnities (Whether Joint and Several or otherwise) as the guarantors or bonds shall reasonably require from the Parties in connection therewith”. “PRATIBHA shall also procure formal agreements between such third parties so that liability for any claims or demands arising under such indemnities is borne solely by PRATIBHA”. “PRATIBHA” is 100% Responsible for Financing.

5.1.2.5. The clauses of agreements executed in relation to **Pratibha Mosinzhstroi Consortium (Project P3)** are as follows :

- a. **Under Clause No.2 of CONSORTIUM AGREEMENT dated 21.01.2011: – Responsibility / Liability of the Consortium.** “All the parties shall be legally liable and jointly and severally responsible to the “Owner” for the execution of the Project and to discharge all obligations under the Contract.”
- b. **Under Clause No.4 – Responsibility & Sharing.** The participation of the Parties in the fully integrated Consortium shall be as given here below and they shall execute the defined scope of works given in the tender documents accordingly: PRATIBHA: 60% (Sixty Per cent) MOSINZHSTROI: 40% (Forty Per cent).
- c. **As per SUPPLEMENTARY AGREEMENT (SPA) dated 25.01.2011:** Under the heading **RECITALS at Page 2 of 8:** “As the parties have mutually decided that “PRATIBHA” shall be undertaking execution of the entire portion of work, therefore, MOSINZHSTROI seeks to be responsible only to the extent of providing Technical Services (if required by the Consortium) for smooth and timely execution of project of the Consortium and not as per the participation ratio given in the Consortium Agreement. The Consortium shall reimburse MOSINZHSTROI for any such technical or additional services provided. MOSINZHSTROI shall be indemnified from the responsibilities during bidding and execution of the Project, which are falling under the scope of PRATIBHA.
- d. **Under Clause No.9 – Bonds and Guaranties – Page No.5 of 8:** “PRATIBHA hereby agree and undertake to arrange to provide all debt, bonds and / or guarantees, and

statuary clearances / permits that may be required in connection to the submission of the bid and if the bid is successful and the contract is awarded to the Consortium, for the execution of the Project and/or as required in connection with the Contract and/or such indemnities (Whether Joint and Several or otherwise) as the guarantors or bonds shall reasonably require from the Parties in connection therewith". "PRATIBHA shall also procure formal agreements between such third parties so that liability for any claims or demands arising under such indemnities is borne solely by PRATIBHA". "PRATIBHA" is 100% Responsible for Financing.

5.1.2.6. Factually, the various BG's of INR 05.70 Cr. which were issued by the Corporate Debtor to the Client (DJB / EIL) on behalf of PIL Mosinzhstroi JV during the period from FY 2011-12 to 2013-14 were encashed by the Client (DJB / EIL) during the review period from 01.02.2017 to 01.02.2019. Therefore, The Corporate Debtor had debited the said amount of INR 05.70 Cr. to PIL Mosinzhstroi JV during the review period.

5.1.2.7. Those BG's were issued by the Corporate Debtor to the Client (DJB / EIL) on behalf of PIL Mosinzhstroi JV during the period FY 2011-12 to FY 2013-14 to fulfil its contractual obligations. Those BG's were issued by the Banks during the relevant period after due diligence & considering the relevant provisions of the various agreements between the Client (DJB / EIL) & JV, & Pratibha & JV, & between Pratibha & Mosinzhstroi & JV.

5.1.2.8. The Auditors have recorded that the Corporate Debtor have paid an amount of INR 39.60 Cr. to their JV's (related parties) towards interest & BG Commission. Factually, those amounts have been paid by the Corporate Debtor to the

Financial Creditors of JV towards the payments of Interest. This amount has not been used by the Corporate Debtor to clear the other dues of the JV (Related Parties) but used for to clear dues of the **Financial Creditors**.

5.1.2.9. In terms of sanction terms of the Credit Facilities, it was Pratibha's obligation to adhere to terms of the sanction letters. Therefore, Pratibha had paid an interest of INR 39.60 Cr. to the Banks to fulfil its obligations mentioned in the Credit Facility Sanction Letters.

5.1.2.10. The actual investment made by the Corporate Debtor in PIL Mosinzhstroi JV during the review period was of INR 52.93 Cr. ($58.63 - 05.70 = 52.93$). Out of these, the Corporate Debtor had paid amounts of INR 39.60 Cr. to the Financial Creditors towards the interest during the review period. Therefore, the effective investment made by the Corporate Debtor in JV entity during the review period was of INR 13.33 Cr. [$52.93 - 39.60$]. Further, as against of this investment of INR 13.33 Cr., the Corporate Debtor also has received the amounts of INR 21.94 Cr. [$19.81 + 2.13$] from JV entity. Therefore, the Corporate Debtor has received more amount of INR 08.61 Cr. from the JV entity during the review period.

5.1.2.11. These transactions had happened based on the terms of the Agreements executed between JV entity & Clients, & between PIL & PIL Mosinzhstroi JV for fulfilling Its obligations to complete those projects awarded to the aforesaid JV entity.

5.1.3. PIL Yogiraj JV:

5.1.3.1. The Corporate Debtor has received more amount of INR 30.29 Cr. from the JV entity (Related Parties) during the review period. Further, these transactions had happened based on the terms of the Agreements executed between JV entity & Clients, & between PIL & PIL Yogiraj JV for fulfilling Its

obligations to complete those projects awarded to the aforesaid JV entity.

5.1.3.2. Pratibha Industries Limited of Mumbai by entering into the Agreement with Yogiraj Powertech of Mumbai formed a Joint Venture Company namely PIL Yogiraj JV to bid & to execute if awarded the work of “EPC Contract for Constriction of Pumping Station, Rising main & allied works (Link 2 & Link 4) for Narmada Water Resource & Kalpsar Department Gujarat. The banks had sanctioned the Credit Facilities to Pratibha Industries Limited to execute this Project (Link 2 & Link 4). Therefore, it was Pratibha’s obligation to adhere to terms of the sanction letters. Therefore, Pratibha had invested in this project to fulfil its obligations mentioned in the Credit Facility Sanction Letters. The relevant obligations are as mentioned below.

5.1.4. As per Supplementary Agreement dated 23.12.2013 in relation to Project Link 2, Under Responsibilities & Sharing – Clause No.2 on Page No. 4 of 11 - Since YOGIRAJ will be acting only as “Specialized Agency/Subcontractor for the Electrical works”, participation of the Parties in the Joint Venture shall be re-arranged and agreed as given herein below and PRATIBHA shall execute the entire defined scope of works given in the tender documents accordingly including taking all financial and poicy decisions thereto without any costs, liability or damages whatsoever on YOGIRAJ. YOGIRAJ: 0% (Zero Per cent). PRATIBHA: 100% (Hundred Per cent).

5.1.5. As per Supplementary Agreement dated 23.12.2013 in relation to Link 4 Project, Under Responsibilities & Sharing – Clause No.2 on Page No. 3 of 11 & 4 of 11 Since YOGIRAJ will be acting only as “Specialized Agency/Subcontractor for the Electrical works”, participation of the Parties in the Joint Venture shall be re-arranged and agreed as given herein below and

PRATIBHA shall execute the entire defined scope of works given in the tender documents accordingly including taking all financial and policy decisions thereto without any costs, liability or damages whatsoever on YOGIRAJ. YOGIRAJ: 0% (Zero Per cent)
PRATIBHA: 100% (Hundred Per cent)

5.1.6. PIL Al Ambia JV:

5.1.6.1. The Corporate Debtor has received more amount of INR 00.14 Cr. from the JV entity (Related Party) during the review period. Further, the aforesaid transactions had happened based on the terms of the Agreements executed between JV entity & Clients, & between PIL & PIL Al Ambia JV for fulfilling Its obligations to complete those projects awarded to the aforesaid JV entity.

5.1.6.2. Pratibha Industries Limited of Mumbai by entering into the Agreement with M/s AL AMBIA SDN BHD of Malaysia formed a Joint Venture Company namely PIL Al Ambia JV to bid & to execute if awarded the work of “Construction of Office Complex for ONGC at Plot No. C – 69, Bandra Kurla Complex Mumbai 400051, India for Oil & Natural Gas Commission (ONGC). The banks had sanctioned the Credit Facilities to Pratibha Industries Limited to execute this ONGC Project. Therefore, it was Pratibha’s obligation to adhere to terms of the sanction letters. Therefore, Pratibha had invested in this project to fulfil its obligations mentioned in the Credit Facility Sanction Letters.

5.1.7. Thus, the Corporate Debtor (PIL) had made the investment in their above JV entities during the entire contract duration / review period based on the terms of the Agreements executed between the Corporate Debtor (PIL) & other JV entities, for fulfilling Its own obligations mentioned in the Agreements & for completing those projects awarded to the aforesaid JV’s. It is pertinent to note that there is no alleged diversion of funds and/or preferential transfer of

funds for the benefit of any alleged related party, to the detriment of any creditor, inasmuch as, the payments towards BGs, commission etc. made by the Corporate Debtor are in fact towards discharge of its own contractual obligations with the JV and ultimately these payments were used for the benefit of and in the course of execution of the projects awarded to the JV-

Transactions with Subsidiaries

5.1.8. Prime Infra Park Private Limited (wholly owned subsidiary):

5.1.8.1. Delhi Metro Rail Corporation Limited (DMRC) had invited Request for Proposal (RFP) from the reputed Developers for “Contract MLP-NDRS (R)1: Construction of Non-automated Multi Level Parking with Commercial Development at New Delhi Railway Station cum Airport Terminal of Airport Express Line” on Build-Operate-Transfer (BOT) basis with Concession Period as 30 years.

5.1.8.2. Pratibha Industries Limited (PIL) had submitted their offer vide their letter dated 05th October 2009. Pursuant to the evaluation of all the bids received, DMRC accepted the bid submitted by Pratibha Industries Limited (PIL) and appointed PIL as the “**Concessionaire**” of the Project by issuing Letter of Acceptance dated 16th October 2009. The Concessionaire (PIL) however, formed M/s. Prime Infra Park Private Limited (**Prime Infra**), a Special Purpose Vehicle (“**SPV**”), as its 100% subsidiary company. Prime Infra Park Private Limited is a wholly owned subsidiary of Pratibha Industries Limited (PIL). It was incorporated on 23rd November 2009.

5.1.8.3. Thereafter, DMRC and PIL entered into a Concession Agreement dated 1st April 2010 (**Concession Agreement**). By way of this Concession Agreement, PIL was granted the concession for a total period of thirty (30) years, including the

construction period of two years allowed from the date of handing over the site.

5.1.8.4. After PIL entered into the Concession Agreement with DMRC on 01st April 2010, a License Agreement was executed between the Concessionaire (PIL) & Prime Infra Park Pvt. Ltd. (Prime Infra) on 01st July 2010. By virtue of the terms of this License Agreement, the Concessionaire (PIL) granted / assigned the SPV, all the rights related to the Contract granted to the Concessionaire under the Concession Agreement dated 01st April 2010 between the Concessionaire & DMRC.

5.1.8.5. For execution of this Project, ICICI Bank sanctioned the working capital facility of INR 135.30 Cr. to Prime Infra vide their letter dated 15th March 2010. As per the terms of this sanction letter, PIL is a Sponsor & the Corporate Guarantor.

5.1.8.6. Thereafter, Prime Infra awarded this work of Design & Construction of Multilevel Car Parking with the Commercial Development at New Delhi Station to Pratibha Industries Limited (PIL) vide LOA dated 15th May 2010. The total contract value was of INR 117.14 Cr. & the work was to be completed within 18 months' period reckoned from 25th May 2010. The final Completion Certificate was issued by DMRC on 08th May 2012.

5.1.8.7. Thereafter, in response to the application from Prime Infra, LIC Housing Finance Limited, under the Lease Discounting Scheme, vide letter dated 30th June 2015, sanctioned a Loan amounting to INR 149 Cr. to Prime Infra. The purpose / utilisation of this loan was to repay the loans from ICICI Bank & from Bajaj Finance Limited not exceeding to Rs. 135 Cr. & the balance amount was to be utilised to for the business purpose.

5.1.8.8. PIL stood Guarantor to their loans & had given undertaking to their bankers (LIC HFL) to meet the shortfall

in their payment & pay to LIC HFL. Further, as the Concession Agreement was executed between PIL and DMRC, it was PIL's contractual obligation to pay their dues in case Prime Infra fails to do so.

5.1.8.9. The investments made by Pratibha in Prime Infra since year 2014, were basically towards the repayment of the installment of loans that the Company had availed from the bank for creating this infrastructure & the interest payment thereon. The Company was also making payments to DMRC to fulfill their contractual obligations.

5.1.8.10. Pratibha Industries Limited (100% holding Company) had given a performance bank guarantees of INR 12.82 Cr. to DMRC on behalf of Prime Infra Park Private Limited (PIPL) in about March 2010 as per the requirement of the Concession Agreement executed between the Corporate Debtor and DMRC.

5.1.8.11. During the course of execution, DMRC could not fulfil its obligations inter alia that the metro rail shall have a speed of 135km/hr for the people to reach the airport in 19 minutes, Metro Station shall have fifty check-in counters functional till 2013, etc. This affected the rent that could have been received from commercial building shops to PIPL. On account of the above, the metro project ceased to be viable for PIPL and in result, the lease rentals were unfortunately defaulted. Hence, though, the DMRC was in default, DMRC wrongfully terminated the Concession Agreement on 01st Sept. 2017 & encashed the three BG's amounting to INR 12.82 Cr.

5.1.8.12. These BG's amounting to INR 12.82 Cr. were submitted by the Corporate Debtor to the Client (DMRC) on behalf of PIPL during the period from FY 2010-11 as per the requirement of the Concession Agreement executed between the Corporate Debtor and DMRC for the purpose of

Performance of the Contract. During the course of execution, the Client (DMRC) encashed those BG's amounting to INR 12,82 Cr. during the review period wrongfully alleging that PIPL was unable to perform the Contract. Therefore, this amount of INR 12.82 Cr. should not be considered as paid by the Corporate Debtor to the related party (PIPL) during the review period as alleged.

5.1.8.13. The Auditors have recorded that the Corporate Debtor have paid an amount INR 2.59 Cr. to their Subsidiary PIPL (related parties) towards interest. Factually, those amounts have been paid by the Corporate Debtor to the **Financial Creditors** of the Subsidiary towards the payments of Interest. This amount has not been used by the Corporate Debtor to clear the other dues of their Subsidiary (Related Parties) but used for to clear dues of the **Financial Creditors**.

5.1.8.14. As per the undertaking, that if, the rent receipts are not sufficient to cover EMI payable under loan, then the shortfall shall be met out of the other income of the Guarantor Company (Pratibha).

5.1.8.15. The Corporate Debtor (PIL) had made the investment in their Subsidiary entity during the entire contract duration / review period based on the terms of the Agreements executed between the Corporate Debtor (PIL) & Subsidiary Company for the fulfilling Its own obligations mentioned in the Agreements & for completing the project awarded to the Subsidiary Company.

5.1.8.16. Payment of 07.00 Cr. which was made to the Third Party as a Vendor Payment by the Corporate Debtor (PIL) on behalf of the subsidiary, PIPL was received back to the Corporate Debtor from PIPL. This has been recorded by the Auditor.

5.1.8.17. Loan of 00.36 Cr. which was taken specifically for the DMRC project was paid by the Corporate Debtor. Salary paid

to all the staff, the cost of the same is allocated to HO .i.e.(PIL). TDS Payment of 01.27 Cr. in lieu of the project were made by the HO of the Corporate Debtor.

5.1.8.18. The actual investment made by the Corporate Debtor in this Subsidiary (PIPL) during the review period was of INR 11.22 Cr. (24.04 - 12.82 = 11.22). Out of these, the Corporate Debtor had paid amounts of INR 2.59 Cr. to the Financial Creditors towards the interest during the review period. Further, the payment of INR 07.00 Cr. which was made to the Third Party as a Vendor Payment by the Corporate Debtor (PIL) on behalf of the subsidiary PIPL was received back to the Corporate Debtor from PIPL. This has been recorded by the Auditor. Therefore, the effective investment made by the Corporate Debtor in their Subsidiary (PIPL) during the review period was of INR 1.63 Cr. Further, as against of this investment of INR 1.63 Cr., the Corporate Debtor also has received the amounts of INR 6.56 Cr. from their Subsidiary (PIPL). Therefore, effectively, the amounts received to the Corporate Debtor from their Subsidiary are more by an amount of INR 4.93 Cr. during the review period.

5.1.8.19. Further, in **para** 18 of the audit report, the Auditors have recorded that “the Corporate Debtor adjusted an amount of INR 0.17 Cr. as receivables from their Subsidiary (PIPL) & an amount of INR 7.71 Cr. as payables to this Subsidiary PIPL, in its journals.” It is submitted that therefore, the Corporate Debtor has debited an amount of INR 0.17 Cr. to the JV entities & credited an amount of INR 7.71 Cr. to this Subsidiary (PIPL), in its journals. Further, the payment of INR 07.00 Cr. which was made to the Third Party as a Vendor Payment by the Corporate Debtor (PIL) on behalf of the subsidiary PIPL was received back to the Corporate Debtor from PIPL. This has been recorded by the Auditor. Therefore,

during the review period, the effective debited amount through journal adjustment is INR 0.17 Cr. & the effective credited amount through journal adjustment is INR 0.71 Cr. Therefore, during review period, effectively, through journal adjustment, the amounts received to the Corporate Debtor from their Subsidiary (PIPL) are more by an amount of INR 0.5 Cr.

5.1.8.20. Moreover, during the review period, effectively, the amounts received to the Corporate Debtor from their Subsidiary (PIPL) are more by about INR 05.47 Cr. than the amounts invested by the Corporate Debtor in their Subsidiary (PIPL). Further, the aforesaid transactions had happened between the Corporate Debtor (PIL) & their Subsidiary (PIPL) for fulfillment of its obligations based on the terms of the Agreements executed between the parties.

5.1.8.21. The Corporate Debtor has invoked the Arbitration against DMRC to recover their damages. The total Claimed amount is about INR 402 Cr. It includes about INR 225 Cr. as a principal amount & INR 176 Cr. as a Interest amount.

5.1.9. **Bhopal Sanchi Highway Private Limited (BSHPL)**

5.1.9.1. The work of two laning of Bhopal Sanchi Highway of 53.775 Km in length was entrusted to the Company (BSHPL) in May 2010 by NHAI on DBFOT Annuity basis with the Concession Period as 15 Years including 2 years Construction Period. Total Annuity was INR 12.95 Cr. half yearly for 13 Years. As NHAI failed to comply their obligations as per the Concession Agreement (CA) & due to some other defaults from NHAI, the Company was compelled to terminate the CA in November 2014. Till this period, total investment of the Company in this Project was about INR 85 Cr. Thereafter, the Company tried to resolve this issue by negotiations with NHAI. As the matter could not be resolved amicably, then, the Company filed petition in Delhi High Court for appointing

an Arbitrator to adjudicate the matter. Delhi High Court referred this matter to the Sole Arbitrator. Award was passed by the Arbitrator on 30.11.2018. The Company accepted some part of the Award & filed appeal for the balance portion in the Delhi High Court in June 2019. As per the present status, NHAI has submitted their reply & BSHPL has submitted their rejoinder. The matter is at the argument stage. Thus, the Company (BSHPL) has taken suitable steps for recovering their dues though the legal frame work.

5.1.9.2. BG commission of an amount of INR 0.05 Cr. has been paid by PIL due to delay in the Project. This amount is paid to the financial creditor.

5.1.9.3. Salary of an amount of INR 0.02 Cr. has been paid to all the staff, the cost of the same is allocated to HO.i.e. (PIL)

5.1.9.4. Consultancy charges of an amount of INR 0.25 Cr. was paid by the Corporate Debtor (PIL) to the Lawyers & Arbitrator towards the legal cost for the Arbitration proceedings between BSHPL & NHAI. Cost of the same has been allocated to HO.

5.1.9.5. The aforesaid transactions had happened between the Corporate Debtor (PIL) & their Subsidiary (BSHPL) for fulfillment of its obligations based on the terms of the Agreements executed between the parties.

Transactions with Suspended Directors

5.1.10. Mr. Ajit Kulkarni

5.1.10.1. Mr. Ajit Kulkarni was the Managing Director of the Company since June 2005 to till 01.02.2019, the date from when the Corporate Insolvency Resolution Process (CIRP) was initiated with respect to the Corporate Debtor (PIL) by virtue of NCLT Mumbai Order dated 01.02.2019.

5.1.10.2. From the contents of the audit report itself, it is observed that effectively, during the review period from 01.02.2017 to 01.02.2019, the Corporate Debtor has received an excess amount of INR 3.71 Cr. from Mr. Ajit Kulkarni.

5.1.10.3. Effectively, during the review period from 01.02.2017 to 01.02.2019, the Corporate Debtor has received an excess amount of INR 0.09 Cr. from Mr. Ajit Kulkarni, as shown in its journals.

5.1.10.4. Mr. Ajit B. Kulkarni was a Managing Director of the Company. The Company had taken the property belonging to him which was located at 135, Greater Kailash II, Delhi, on lease basis in year 2013 for utilizing it as a Guest House for the Company in Delhi. The amounts reflecting in the books & shown as an advances are the amounts paid to him towards the lease charges. Subsequently, those amounts were adjusted against the bills raised by him. By end of March 2018, nothing was payable / receivable to / from him on this account.

5.1.10.5. Mr. Ajit Kulkarni sold his shares amounting to INR 4.66 Cr. in the financial year 2017-18 & the amounts received to him were deposited by him in the Company. After adjusting the debit balance of INR 0.57 Cr. of Mr. Ravi Kulkarni & other expenses, an amount of INR 04.03 Cr. is till payable to him as per the Company's books of account.

5.1.11. Mr. Ravi Kulkarni

5.1.11.1. Mr. Ravi Kulkarni was the Deputy Managing Director of the Company since June 2011 to till 01.12.2017.

5.1.11.2. From the contents of the audit report itself, it is observed that during the review period from 01.02.2017 to 01.02.2019, the Corporate Debtor has received an excess amount of INR 0.66 Cr. from Mr. Ravi Kulkarni.

5.1.11.3. Mr. Ravi Kulkarni was working in the Company & heading the Business Development activities. The unadjusted

advances taken by him towards Business Development were shown in the books as the amounts receivable from him. Total balance advance of INR 0.57 Cr. was adjusted in Year 2019 against credit balance of Mr. Ajit Kulkarni. Therefore, nothing was payable / receivable to / from him on this account.

5.1.12. To conclude, transactions with related parties (here Joint Ventures and Subsidiary companies) need not always be disadvantageous to the parties concerned if done in the **ordinary course of business**. The concern arises only when there is abuse of a related party transaction on account of conflict of interest and non-arm's length dealings which are beneficial to a related party but detrimental to other stake holders. The concern also arises when there is siphoning of funds and diversion of resources of the company. Transactions with related parties raise important concerns and hence transparency in such transactions is essential. It can be seen from the information given above all the expenses and payments incurred by Pratibha for all the Joint Ventures and Subsidiary Companies are well accounted for and does not in any way amount to Preferential Payments. Also, as said above since the JV partners were technical partners and not responsible for losses, the parent PIL had the obligation to fund the projects. Hence these payments and the resultant losses in the JVs must be looked at as a genuine business loss due to various factors hitherto explained. There is no diversion of any funds other than for business in the normal course of the operations and within the framework of the business agreements entered. Thus, we humbly request that payment to JVs and subsidiaries should not be treated as a related party expense but as a business expense which was absolutely necessary to continue the projects and avoid further losses.

5.1.13. It is pertinent to note that there is no alleged diversion of funds and/or preferential transfer of funds for the benefit of any alleged related party, to the detriment of any creditor, inasmuch as, the

payments towards BGs, commission etc. made by the Corporate Debtor are in fact towards discharge of its own contractual obligations with the JV and ultimately these payments were used for the benefit of and in the course of execution of the projects awarded to the JV:-

5.1.14. The Corporate Debtor (PIL) had made the investment in their Subsidiary entity during the entire contract duration / review period based on the terms of the Agreements executed between the Corporate Debtor (PIL) & Subsidiary Company for the fulfilling Its own obligations mentioned in the Agreements & for completing the project awarded to the Subsidiary Company.

5.2. Transaction 2 - ***Sale of Assets at lower value*** :

5.2.1. Pratibha Industries Limited (PIL) is in the field of construction & was executing various construction projects of high values varying from INR 100 Cr. to 1150 Cr. for various Government. Semi-Government Organizations, Municipal Corporations, Public Limited Companies, etc. Those projects were of the nature of construction of Water Supply, Sewerage Infrastructure, high rise buildings, Metro Rail Projects, etc.

5.2.2. For the execution of such projects, PIL had procured various construction machinery, equipment, etc., as per the project specific requirements. It includes Tunnel Boring Machines (TBM), Excavators, Batching Plants, Transit Mixers, Hydras, Concrete Pumps, Tower Cranes, Diesel Generator Sets, Diesel Locomotives, etc.

5.2.3. The major scope of the work of these DMRC projects together was to design & construct nine underground metro stations & to construct pair of tunnels of about 6.6 meters' diameters & at about 20 to 30 meters below the ground level by TBM, NATM and Cut & Cover method. For the execution of this scope, PIL had procured various types of plants & machinery, amongst others Diesel Locomotives, as per the specific requirement of this scope of these

two CC18 & CC23 Projects. For the transportation of the excavated stuff from the tunnel to the retrieving shaft, the Company had purchased total nine locomotives for an amount of INR 13.67 Cr. Out of them seven locomotives were procured during period July 2013 to Oct. 2013. The aforementioned works were executed below 20 to 30 meter from the original ground level. All the locomotives were engaged for the carting excavated material from the tunnels for a period of 3 to 5 years from the date of purchase of these locomotives. When those machinery / equipment are used in the projects round the clock & in adverse conditions, then the factual depreciation of those machinery is much more than their depreciation worked out as per the standard norms. In the present case also, all the nine locomotives were used in most adverse conditions for a duration of 03 to 05 years & round the clock. After completion of tunneling works, those locomotives were demobilized by the Company and were dumped in Mundka yard (at DMRC CC-23). Further, in the absence of any new further metro projects; regular payment of rent for their storage; pressure to vacate DMRC land; and deterioration in condition due to idle state, the Company sold them as a scrap to the scrap dealers.

5.2.4. For the execution of project for DJB P2 & P3, the Corporate Debtor had purchased the DG Sets of value of about INR 01.56 Cr. during the period from Oct. 2011 to Oct. 2012 & other machinery inter alia Concrete Pumps, Mobile Mast, RO Plant, Weigh Bridge of total value of INR 00.35 Cr. during the period from 13th January 2012 to 31st March 2012. Further, other machinery inter alia Batching Plant, Transit Mixer, Tractor Loader of value of 00.57 Cr. were transferred from other sites of the Corporate Debtor to this DJB Project, procured during period from May 2006 to Sept. 2009. It is pertinent to mention here that the aforesaid machinery was utilized on site for a period of about 5 to 6 years from Oct. 2011 to till January 2019. When those machinery / equipment are used in

the projects round the clock & in adverse conditions, then the factual depreciation of those machinery is much more than their depreciation worked out as per the standard norms. In the present case also, all the aforesaid machinery were used in most adverse conditions for a duration of 05 to 06 years & round the clock. Therefore, factually, those machineries were fully depreciated in this projects itself. The Corporate Debtor was not in position to clear the outstanding dues of the vendors and subcontractors in timely manner. In some cases, the vendors/ subcontractors took the possession of the site equipment / machinery. In such a given circumstances, the Company opted the option to sell few construction machinery/equipment to these vendors and adjusted their outstanding liabilities and further requested for co-operation till the completion of ongoing projects.

5.2.5. For execution of high rise building projects, the Company had procured Concrete Pumps, Tower Cranes, Mobile Tower Crane of total value of INR 2.28 Cr. during the period from Jan. 2011 to Dec. 2013. It is pertinent to mention here that the aforesaid machinery was utilized on site for a period of about 7.5 to 5 years from Jan. 2011 to till October 2018. When those machinery / equipment are used in the projects round the clock, then the factual depreciation of those machinery is much more than their depreciation worked out as per the standard norms. In the present case also, all the aforesaid machinery were used for a duration of 7.5 to 5 years & round the clock. Sometimes, there were thefts of the valuable parts of the assets. The Corporate Debtor was not in position to clear the outstanding dues of the vendors and subcontractors in timely manner. In some cases, the vendors/ subcontractors took the possession of the site equipment/machinery. In such a given circumstances, the Company opted the option to sell few construction machinery/equipment to these vendors and

adjusted their outstanding liabilities and further requested for co-operation till the completion of ongoing projects.

5.2.6. For execution of Water Supply Project PHED Rajasthan, the Company had procured about 20 Mahindra Bolero (Bolero) for the movement of the staff on these projects. Out of them, two Bolero's were purchased in March 2014 for utilizing them at Banera Hurda & Mandalgarh Project sites for value of about INR 0.12 Cr. The aforesaid vehicles were utilized on site for a period of about 4.5 years from March 2014 to Sept. 2018. & sold in Oct. 2018. The work was commenced on 10th Oct. 2013 & was to be completed on 09th Oct.2016. However, the work was delayed for the various reasons which were beyond the control of the Company & for various other reasons which were attributable to the Client (PHED Rajasthan). The Corporate Debtor was not in position to clear the outstanding dues of the vendors and subcontractors in timely manner. The Company opted the option to sell few construction machinery/equipment to these vendors and adjusted their outstanding liabilities and further requested for co-operation till the completion of ongoing projects. Therefore, the Company which had procured two vehicles (Bolero) in March 2014 for utilizing them at Banera Hurda & Mandalgarh Project sites for value of about INR 0.12 Cr., having book value of about 0.09 Cr. sold them to their subcontractors at about INR 0.05 Cr. & adjusted the said amounts to their liabilities. The aforesaid vehicles were utilized on site for a period of about 4.5 years from March 2014 to Sept. 2018. & sold in Oct. 2018. When the vehicles are sold in the market, the amounts receivable are always less than the depreciated value.

5.2.7. Thus it is evident that these transactions were done in ordinary course of business of the Corporate Debtor and thus does not fall within the purview of undervalued transaction. It is of pertinence to note that no singular allegation has been levelled by the Applicant

that these transactions were not done in the ordinary course of business.

5.3. Transaction 3 - Significant reduction in the Inventory :

5.3.1. The main contention which is well explained ahead is that the entire WIP is actual cost incurred. Due to the project delays certain costs which were not accepted by the client have been duly converted into claims or were written off on case to case basis. The Company has worked out the WIP as per the accounting standards i.e. **the company valued its work-in-progress at all direct costs incurred and all indirect costs apportioned which are potentially recoverable from the client till such time the outcome of the job cannot be ascertained reliably and at realizable value thereafter.**

5.3.2. WIP is comprised of stock consumption, unmeasured R.A. Bills, unmeasured Escalation R.A. bills, unmeasured part rates & Claimed WIP. When the work is complete but not certified by the client is classified under the head '**Unmeasured RA Bills**'. The escalation amount which is payable as per the contract but unpaid is classified as '**Unmeasured Escalation**'. Sometimes, a work is complete, but the client releases the part payment of the work by holding some amounts for certain compliances. Such a hold amount is classified as a '**Part Rates**'. When the extensions to the contracts are required for the reasons attributable to the Client, then the Company intend to recover those additional costs from the Clients, recognised as '**Claimed WIP**' or sometimes in '**Consumption WIP**'.

5.3.3. WIP classified under the heads unmeasured R.A. Bills, unmeasured Escalation & part rates are normally converted into revenue in subsequent year once the RA bill is certified by the Client. In some cases, the costs of some works are disputed by the Client & therefore for recovery of the same, the legal proceedings are inevitable. Therefore, those costs do not convert into revenue in

the subsequent years, but require longer period. In some cases, when it is realized that those costs are relatively small & Claiming them have a detrimental impact on the client & thereby the Client may react either by invoking the Bank Guarantee or by putting counter claims on us, then in such situation, sometimes, such amounts are consciously written off / expenses out.

5.3.4. WIP classified under stock consumption is converted into revenue in phase wise manner till completion of the contract / release of the final bill & not necessarily in the subsequent year.

5.3.5. The costs covered under Claimed WIP are converted into revenue even after the completion of the contract & not necessarily in the subsequent year.

5.3.6. In any typical EPC business, before the effective commencement of the works, the Contractor has to mobilize the site & construct the supporting infrastructure which is required for execution of work but those items pertaining to supporting infrastructure are not payable separately under the contract. Such one-time expense is treated as preliminary and mobilization cost and is allocated to the Project pro rata on the basis of the Progress of the work. It is normally in the range 3% to 7% of the contract value depending upon the terms of the contract, site location, nature of work, etc. This also includes pretender expenses till the award of the Contract. All these expenses become the part of WIP under the head preliminaries and mobilization cost & realized during the entire contract period pro-rata.

5.3.7. The WIP, as explained herein above, contains several actual costs which were incurred by the company including HO overheads. However, some of those costs could not be converted into revenue as some of the ongoing projects were wrongfully terminated by the Clients on the pretext of delay in execution, though the reasons for the delays were not attributable to the Company. Therefore, those costs though were not converted into revenue, were captured into

the potential Claims which could be recovered from the Clients in terms of the Contract. The Company is in the process of recovering them by legal means.

5.3.8. As what is not in existence cannot be taken away. The WIP is an accurate estimation by using the best tools/methodology available by the company and it includes costs incurred which are approved and certified by clients as well as which are not certified by the clients along with damages incurred for termination of the projects like cost overruns, liquidated damages, loss of sale on the infrastructure created on the projects etc.

5.3.9. In this case the maximum WIP of Rs. 1690 Cr. shown by the company in March 2016. In June 2016, the company did not utilize the entire sanctioned amount in 2016. The total sanctioned limit Fund Based and non-Fund Based i.e. LC and BG was a consolidated 354 Cr. as on 30th June 2016. As against this the amount utilized was only 203.85 Cr. Thus, around Rs. 151 Cr. was unutilized although it was sanctioned. This beyond doubt should prove that there was no intention of the company to show enhanced profitability through WIP and draw more from the banks as they have not even utilized their existing limits.

5.3.10. In a span of 5-6 years the company has undertaken 80 projects with a consolidated contract value of Rs. 8000 crores. Even if there is a 1 or 2% estimation error in the capturing of the billables that also due to the contractual terms which are open to interpretation, a difference can arise in the valuation of WIP. Moreover, when the WIP also includes claims for termination of the project it is tacit that they can be subject to approval or otherwise of the clients or courts in future. Thus, this change in the booking of WIP cannot in any manner tantamount to fictitious recording of WIP.

5.3.11. From the annexures, it can be observed that there is a huge part of uncertified WIP which has been actually converted into revenue. The part that was not converted was also actual cost incurred &

could not be converted into revenue as the project was terminated and / or the Client did not certify the work done. When actually incurred costs are charged to WIP, by no stretch of imagination the same can be considered as misrepresentation of facts. If there is inflation of costs which are not actually incurred then only it is a misrepresentation which is certainly not the case here.

5.3.12. There is no determinative conclusion which has been reached by the applicant in nature of findings, therefore merely on surmises and conjectures, no claims can be foisted on the respondents on the basis of purported fraudulent intent, which is non-existent.

5.4. *Transaction 4 - Loans converted into Investments*

5.4.1. Any loan or guarantee/security made by the parent company in a joint Venture company does not come under the purview of section 186 of Companies Act, 2013.

5.4.2. Accounting for Joint Venture(IND AS 28) provides that if a significant amount of control is exercised, the [equity method](#) of accounting must be used. Hence Investor (PIL) as mentioned above had provided the correct treatment of reducing losses from the investment account.

5.4.3. Accounting for Joint Venture(IND AS 28) further provides that if an investor's investment in an joint venture has been written down to zero, but it has other investments in the joint venture (such as [loans](#) or receivables), the investor should continue to [recognize](#) its share of any additional joint venture losses and offset them against the other investments, in sequence of the seniority of those investments (with offsets against the most junior items first). If the joint venture later begins to report profits again, the investor does not resume use of the equity method until such time as its share of joint venture profits have offset all joint venture losses that were not recognized during the period when use of the equity method was suspended. Since the Investment balance of FEMC Pratibha JV was going negative due to significant losses, investor (PIL) had to stop

using equity method. Also, PIL had other investments (loans and receivables) in the same JV. PIL as per IAS 28, needed to continue to [recognize](#) its share of any additional joint venture losses and offset them against the other investments (such as loans and receivables) in sequence of the seniority of those investments (with offsets against the most junior items first). The transfer was rightly done as per IAS 28 when debtors and loan & advances given to Joint Venture by its 100% partner(PIL) for which settlement is neither likely nor planned becomes a part of the net investments. The same can be reiterated as **per IFRS 9 to related company loans which states that if an entity has minimal equity and is financed almost entirely through a loan, the nature of that loan may seem more akin to a capital contribution i.e. part of the interest in the subsidiary, associate or joint venture that is scoped out of IFRS 9. This is particularly the case if settlement of the loan is not planned or likely to occur for some time. IAS 28 makes specific reference to items of this nature referring to them as long-term interests in an associate or joint venture. In October 2017, the IASB amended IAS 28 to clarify that IFRS 9 must be applied to long-term interests in an associate or joint venture to which the equity method is not applied.**

5.4.4. Hence, Pratibha Industries limited had done the right treatment of converting loan & advances & debtors to investments, since the JV was suffering huge losses (negative Investment balance) to compensate the losses. The same has been explained above as per IAS 28 and IFRS 9. It is seen that no loss has been suffered by the Corporate Debtor on account of the aforementioned transactions as the same is in accordance with Indian Accounting Standards. Further it is of pertinence to note that CD has been sanctioned the Credit facilities for the entire operation of CD and some of its facilities were for execution of its project specific jobs / JVs and therefore the utilisation of those credit facilities for investing /

utilisation in JV's created for the project specific purpose does not in any way tantamount to diversion of funds. Moreover, the corporate debtor held 100 % of share of profits from the aforesaid JV's and thus no one was unjustly enriched at the cost of the CD and its creditors. Thus, mere vague and bald allegations were made against the respondents, which does not establish any fraudulent intent, by any stretch of imagination.

5.5. Transaction 5 - Payments made on invocation of Letter of Credit issued by FEMC Pratibha JV

5.5.1. As per the Agreement with FEMC , “..... Upon award of the said Works to the Consortium, **PRATIBHA shall ensure that it shall provide all the required resources for the execution of the contract to the entire satisfaction of the Owner, including but not limited to, technical know-how, working capital, personnel, plant & equipment and discharging the contractual obligations of the Consortium. PRATIBHA shall also procure formal agreements between such third parties so that liability for any claims or demands arising under such indemnities is borne solely by PRATIBHA.**”

5.5.2. The JV did not have the financial wherewithal to do the trading business and PIL was a 100% partner and so there was nothing wrong in JV using the LC of PIL.

5.5.3. The JV in order to cover its losses and earn some margins, traded in goods that could be purchased for the project in course. The Particular reason for this circumstance was that the JV which had a bulk purchasing power, at a competitive cost in the market for the project related materials. JV site carried out the trading business, so that it could earn some margin. The JV had purchased the material in bulk and sold the same to nearby sites since they got the material at competitive rates. This resulted into profits when the LC limits were just lying unused.

5.5.4. Since trading was done at the site, some documents got misplaced inadvertently. No proper office was maintained at the site. Also, there were no discrepancies in the underlying documents of letter of credit. A wrong TIN number does not mean that actual transactions had not taken place with the vendor. Vehicle registration numbers were wrongly entered in the lorry receipt in some instances.

5.5.5. This also does not tantamount to being siphoning off of funds, since the JV has received the said amount from the sale in the trading business which ultimately has been used for the underlying project. Hence the increase in the investment in FEMC Pratibha JV due to LC limit used was legitimate. There was no leakage on that account. The Applicant had wrongly stated that the monies/consideration for the goods sold by the JV to the vendors i.e. the Purchasers have not been recovered which is utterly false and misleading. In fact, as stated above, all purchases made by the JV on utilisation of letter of credit has been duly recovered by the Corporate Debtor by selling those same goods.

5.6. *Transaction 6 - Additions in Fixed Assets / Overstatement of Assets/Transfer of assets not recorded in the books*

5.6.1. There was a delay in the capitalization of those Assets (vehicles) as those invoices were misplaced & could not be available timely to the Accounts & Finance Team of Head Office to record them. However, when those invoices were noticed, all those assets were capitalized immediately. It is pertinent to mention here that these assets were not expensed out but were duly capitalized. The Supporting documents for the same are available in the Head Office of the PIL and the same were provided to the transaction auditors during the review of their audit.

5.6.1.1. Nine Boleros were seized by the vendors / sub-contractors against their dues owed by the Corporate Debtor, those assets could not be transferred in their names as the necessary

documentation were not complete. Therefore, these nine assets are till date in the name of the Company.

5.6.1.2. Jaguar and Land Rover Free lander were purchased by the Corporate Debtor in the financial year 2014-15. During this period, Mr. Miraj Khan of Gravity Global was associated with the Company & was helping the Company for business development & also were doing the liaising work with the Government & Semi-Government Organizations on behalf of the Company. Therefore, the Company had provided Jaguar to him to perform these activities on behalf of the Company & therefore this vehicle was in his possession for carrying out the above activities on behalf of the Company. Mr. Siddharth Dhavan an associate of Mr. Miraj Khan was using Land Rover Free Lander on his behalf for the aforesaid purposes. As the Company was in the financial stress, the Company had decided to sell this vehicle in June 2018 in consideration for services offered to CD and thereafter no EMI's were paid by the Corporate Debtor. As the Miraj Khan agreed to pay all the balance EMI & also to continue their services further, the Company decided & sold this vehicle to him. As the related documents to sell such as NOC from the Bank, etc. were not available with the concern department at that time, the sale of vehicle could not be recorded.

5.6.1.3. **Mercedes Benz** was purchased by the Corporate Debtor in the financial year 2016-17 & was capitalized in the financial year 2017-18 as the invoices were untraceable / misplaced due to certain miscommunication. When the management obtained the knowledge of these invoices, the same were recorded in the financial year 2017-18. The Company had major works in Delhi. The Managing Director had to go to Delhi & nearby places regularly for the business of the Company.

5.6.1.4. The Company also availed the depreciation of the same. we would like to state that the sale is recognized only upon the complete handover of the assets as well as the transfer of documentation in favour of the buyer. We also further submit that there was no intention to show a stronger position in balance sheet by not reducing these asses upon being sold as firstly these assets were of less than 1% of the total assets and secondly also that the company did not make any efforts to get any additional loan from June 2016 post it went into SDR.

5.6.2. It is also alleged that the assets worth INR 336.70 Cr. were already sold by the financial creditors of the Corporate Debtor, seized by its vendors / sub-contractors against the dues owed by the Corporate Debtor to them.

Sale of Assets consequent to invocation of SDR

5.6.2.1. Pursuant to the SDR being invoked, the JLF acquired 57% stakes in Pratibha (by converting their debt into equity), and the JLF became the controlling stake holders of Pratibha. The JLF gained de facto control over the finances of Pratibha. During the JLF meeting held on 24th August 2016, Bank of Baroda informed the member banks that they are considering the asset monetization of the Corporate Office of Pratibha at Govandi. Accordingly, this office premises of the Corporate Debtor was sold in the month of October 2016, in the financial year 2016-17 for the consideration of sum of Rs. 90.00 Cr. This includes an amount of Rs. 9.83 Cr. towards furniture & fixture. In this transaction, the sale of the assets was happened by adjusting the loan amount towards the sale value. This asset of value of Rs. 90.0 Cr. was sold by the Corporate Debtor on 26th October 2016, in the financial year 2016-17 & accounted by the Corporate Debtor in their books & in FAR on 26th October 2016, in the financial year 2016-17 & not in the financial year 2017-18 as alleged.

5.6.2.2. The Corporate Debtor's the other asset, a building, land & other infrastructure located at Wada was also monetized by BOB by selling it at a price of Rs. 47.05 Cr. on 1st March 2018, in the financial Year 2017-18. This asset of value of Rs. 47.05 Cr. was sold in the financial year 2017-18 & accounted in the books & also in FAR on 01st March 2018, in the financial year 2017-18. It is not the fact that those assets were sold earlier as alleged & accounted in the financial year 2017-18.

5.6.2.3. In light of the aforesaid clarification, it is submitted that the Corporate Debtor had sold the above-mentioned assets of value of Rs. 137.05 Cr. during the FY 2016-17 & FY 2017-18 & also accounted to them in the books during the same respective period.

Sale of Assets charged to Yes Bank

5.6.2.4. After completion of the tunnelling work of DMRC Metro Project, this TBM was demobilized and was kept at the Project site and the answering respondent was not in knowledge of theft of TBM till insolvency commencement date. During the CIRP process, it was noticed that the said TBM was not available at the project site. Therefore, on 29.09.2020, complaint letter was submitted at Govandi Police Station, Govandi Mumbai regarding theft of the TBM from Project site and it was informed that investigation is still undergoing.

5.6.2.5. Thus, it is crystal clear that purported non-booking of sale of assets in the books of account of the Corporate Debtor cannot be termed as Fraudulent transaction as neither any substantiated allegation nor any evidence has been relied upon by the applicant to demonstrate that the creditors have been wrongfully cheated by the answering respondent in this count.

5.7. Transaction 7 - Assignment of Advances and Receivables outstanding from parties

5.7.1. The Auditors have made the observations viz. **Negative Site visits, lack of supporting documents, relationship with trading entities, etc** after reviewing the books of accounts & the documents of the Corporate Debtor The review period was from 01.02.2014 to 01.02.2019.

5.7.2. The Company in addition to its EPC activities ventured in certain identified trading activities. These trading were predominantly required for infra & construction activities. **Also, the said activities are a part of the objects under memorandum of association of the company as approved by the MCA, reference para 87 page 21.** The main items covered were reinforcement, steel bars & structural steel. Trading activities have happened predominantly from warehouse to warehouse.

5.7.2.1. All the sales proceeds were received at the consortium of bankers & the LC established were also from the consortium of bankers. The difference is towards LC establishment & negotiation charges. A small amount where recovery could not take place in spite of follow up has been written off. As explained elsewhere in the report, the Company also initiated certain identified transactions on trading covering specific items. The Concept was to sale on forward basis. In some cases, the debtors & creditors were interlinked on management level & it was prudent to net effect the same as per the external auditors. All the sales & purchases were booked accordingly with tax invoices & this adjustment were carried out to ascertain the profit on such transactions. Debtors & Creditors both agreed for the adjustment of the same.

5.7.2.2. In BDO's interim report dated 22.10.2019, it has been recorded that amount realized from purchase-sale transactions have remained in & utilized for the business & have not observed any direct payment to any entity/person directly/indirectly related to the promoters.

5.7.2.3. The write off of certain parties i.e. of debtors have been done against the write back of certain parties-creditors. It is pertinent to mention here that the total write off is of Rs. 65.41 Cr. & at the same time write back is of Rs. 64.94 Cr.

5.7.2.4. The setting off of the creditors with the debtors who were related was more favourable to the company rather than paying the said creditors as that would tantamount to cash outflow. Thus, the out and out settlement has helped the company as equivalent creditors also have reduced from books along with the said debtors. Hence, it humbly submits that this transaction must not be seen as detrimental to interests of the company.

5.7.3. Set off of the Corporate Debtor's liability towards Connect Residuary Pvt. Ltd. ("CRPL") amounting to INR 20.98 Cr. was transferred to other vendor's accounts in-turn adjusted with customer accounts of the Corporate Debtor was done as, the Company was in financial in financial crises. The Company could not make payment to Connect. As per the arrangements made with many parties, payments were made by them to Connect on behalf of Pratibha. On receipt of Debit note from these parties, balance were transferred to the respective parties.

5.7.4. The invoices were provided for due verification. Due to lock down and shifting of offices certain documents were not easily available. Also, since many of the accounts person have left the company there was a delay. We have all POs and supporting documents as without them the entries were not and could not be logged in the SAP. Also, it should be noted that these were trading transactions and thus these transactions have helped the CD to stem the cash outflow towards the payables by adjusting the same against the receivables and can by no stretch of imagination be termed as fraudulent transaction.

5.8. *Transaction 8 - Sale and Lease-back of the Assets*

5.8.1. Around in September 2013, the Corporate Debtor (PIL) was in need of some fund based facility against the submission of Non-Fund Based Facility which were available with PIL Consortium Bankers. In this M/s CR Residuary (CR) offered solutions by providing Sale-Rent offer (model created by CR) and proposed to PIL.

5.8.2. There were four transactions entered between both the parties. Under these transactions, CR collected a sum of Rs. 9,33,93,935/- as security deposits and a sum of Rs. 4,50,58,513/- as DSRA (Debt Service Reserve Amount), both of which are refundable to Corporate Debtor by CR. CR has intentionally collected DSRA in the name of IndusInd Bank with complete connivance. Later conveniently CR stated that this is fees and not DSRA, hence CR stated that were no DSRA under the transactions. CR in order to safeguard the intended transaction also agreed in paper that these assets/equipment can be purchased by PIL from CR at a negotiable value anywhere between 0.50 % to 1.00 % of the Invoice Cost at the end of the term and same was also stated vide 23.09.2015 that in any other case, post the recovery of all the rentals dues as per the rental schedule mentioned in the agreement, all financial charges and outstanding taxes, the assets / equipment can be transferred to PIL by CR at a negotiable value anywhere between 0.50 % to 1.00 % of the Invoice Cost at the end of the term.

5.8.3. There was a term sheet entered which contemplated enhanced BG amount and no stipulation for DSRA. However, CR claimed another Revised Term Sheet for PIL RS 4 issued on 2nd March 2015 of Rs 100 Crores with additional security of One Quarter Weighted Average Rental to be kept as DSRA till the end of term as proposed IndusInd Bank and mentioned by CR. This is where the fraudulent intent of CR is evident. We have requested CR to share with us our acceptance of the Term Sheet with Interim Rent that they may have in their records as we are clear this is non-existent. They had many

opportunities to produce the term sheet wherein they have failed and we have explicitly mentioned that now providing the same is nothing but afterthought of CR.

- 5.8.4. Post acceptance, issuance of one more term sheet stating IndusInd Bank wants a different classification and wants to book the same as revenue and therefore an interim rent term sheet was provided. As the funder had never asked for DSRA and it was at the insistence of CR. CR wanted to book this as revenue hence issued a revised Term Sheet to PIL mentioning the DSRA amount as Interim Rent / per diem rental. The client never approved for interim rent.
- 5.8.5. Contrary to the above again on the next day post disbursement i.e. 5th of March 2015 there was an disbursement email sent by CR (Mr.Ankush Bhan) stating DSRA as interim rent + VAT. When PIL raised objection on the same Mr. Bhan again confirmed that it was an error and the revised term sheet has already been hand delivered at PIL office which stands final. PIL CFO Mr. K H Sethuraman however wanted to reconfirm the heading and therefore asked for an end to end IRR working for PIL 3 & PIL 4, which was sent to us after so many reminders in which again to our surprise DSRA was shown as fees to which he immediately raised an objection on the same day.
- 5.8.6. CR show cased the IRR at 10.59 % for PIL -03 and 15.87 % for PIL -04 for 5 years. However, the Rental Schedules were signed for 3 years and the actual IRR calculation for 3 years as per the Rental Schedule for PIL -03 was 20.81% and for PIL-04 was 28.24%.IRR variation of 10% approximately for PIL -03 and approximately 13 % for PIL-04 for change in tenure from 5 years to 3 years. However, CR greedily did not want to return the deposit DSRA and make abnormal profits wherein the IRR for PIL-03 would be 42.28% and for PIL-04 would be 56.45%.
- 5.8.7. PIL noticed the discrepancy/ breach of trust on the part of Connect However, in spite of following up with Connect they didn't

remedy its breach & PIL had to suffer a loss of double VAT amounting to INR 11,46,94,306/- towards all the mentioned Rental Schedules.

5.8.8. CR has been intentionally avoiding questions and facts of the case which can prove them wrong or having fraudulent intent. As a nutshell without considering the excess interest charged and other associated expenses booked by CR, according to PIL the following amounts are to be paid by CR immediately

▪ BG Issued Face Value	Rs 102,00,12,070/-
▪ BG Encashed by CR	Rs 83,72,82,116/-
▪ Actual Rental Pending to CR	Rs 76,27,27,807/-
▪ Excess BG encashed	Rs 7,45,54,309/-
▪ Refundable Security Deposit by CR	Rs 9,33,93,933/-
▪ DSRA Retained	Rs 4,50,58,513/-
▪ VAT Held Back	Rs 1,63,29,234/-
▪ Interim VAT	Rs 7,49,478/-
▪ VAT Set Off	Rs 11,46,94,306/-
▪ GRAND TOTAL	Rs 34,47,79,773/-

5.8.9. We feel that we were entrapped by CR. For the first two Schedules CR proposed to do a Sale and Lease Back by asking us to provide only Invoices and managing the accounting entry. Later when the accounting entry was not available, we were informed that they can work basis Invoices for new equipment also. CR waited for a situation wherein we got further cash trapped and invoked the Bank Guarantee. Then they waited for more than a year and sent a demand letter for additional amounts citing the contract signed. Surprisingly, CR did not follow up for their assets re-possession for more than a one and half year post the invocation of BG, one fine day CR sent a demand notice for additional lease rentals citing the contract. This all happened after various communications wherein we demanded our rightful monies.

5.8.10. It is clear that it is the CD which is wronged by the CR, because of which the answering respondent had filed a complaint against CR before Economic Offenses Wing of Police Deptt. and that CR is not a related party of the answering respondent and thus there is no fraudulent intent which is established on the part of the answering respondent.

5.9. Transaction 9 – Write off of the receivable

5.9.1. These written off amounts have been classified as follow :

- a. Project receivables were written off by the Corporate Debtor but also initiated the legal proceedings to recover the same. (Amount Rs. 78.43 Cr.). This comprise of (a) ESIC Patna Project: - Write off Rs. 40.19 Cr.; (b) Chambal Bhilwara Project – Rs. 10.06 Crores; (c) PHED Jodhpur Barmer ‘A’ Project – Rs. 15.99 Crores; (d) PHED Banera Hurda Project – Rs. 10.75 Crores; € Akola Municipal Corporation Akola Project – Rs. 1.33 Crores. Though the total amount written off by the Corporate Debtor in the above mentioned five projects is about INR 78.43 Cr., the Corporate Debtor has also taken a suitable step to recover those amounts by legal means.
- b. Project receivables amounting to Rs. 22.46 Cr. were written off by the Corporate Debtor as those receivables were old & settled with the Clients against their liability / claims. The total amount written off by the Corporate Debtor pertaining to eight projects mentioned in the statement (annexed to Reply) by adjusting towards the counter claims of the Clients. Further, it is observed that this written off amount is about 1.67 % of the total turnover of those projects together which is about of Rs. 1343 Cr. Further, it is also seen that those projects were commenced during the period from January 2007 to November 2013. Thus, this amount of Rs. 22.46 Cr. is written off towards the counter claims / liabilities of the Clients.

- c. The Corporate Debtor had written off the Project receivables amounting to Rs. 26.86 Cr. as those receivables were old, small in percentage as compared to the project value & could not recovered in spite of follow up. The total amount written off by the Corporate Debtor pertaining to the seven projects mentioned in the statement is about 1.26 % of the total turnover of those projects together which is about of Rs. 2125 Cr. & only about 0.33% of the total turnover of the Company of about Rs. 8000 Cr. during preceding seven years from the date of written off this amount from the books of the Corporate Debtor. Further, it is also seen that those projects were commenced during the period from May 2006 to September 2011.
- d. The Corporate Debtor had written off the Trade receivables amounting to Rs. 48.40 Cr. pertaining to Trading business. this written off amount is about 1.18 % of the total turnover of the Trading activity which is about of Rs. 4100 Cr. It is pertinent to mention here that the total write back amount of the trading payable is about Rs. 41.67 Crores.
- e. Other write off amounting to Rs. 07.25 Cr.- These are Amounts receivable from other Creditors. The total amount written off by the Corporate Debtor is about Rs. 07.25 Cr.& is about 0.1 % of the total turnover of the Company of about Rs. 8000 Cr. during preceding seven years from the date of written off this amount from the books of the Corporate Debtor. It can also be seen that total write back of others payable is about Rs. 03.92 Cr.

5.9.2. About 55% of the total written off amount is either in recovery process by legal means or is adjusted towards the liability / counter claims of the Client. The long outstanding of recovery/ payable of both sundry debtors & creditors as per age analysis was discussed & as per the advice of the external auditors & since those

receivables & payables being very old & as in spite of many follow up, as no concrete progress could achieve, therefore, as a prudent practice, it was recommended to write off both as most of the creditors were associated to those old Projects.

5.9.3. A wrong TIN, PAN or vehicle registration number does not mean that actual transactions had not taken place with the vendor. Vehicle registration numbers were wrongly entered in the lorry receipt in certain cases. These are human errors.

5.9.4. Thus, as per justiciable explanation offered above, the write-offs are in the ordinary course of business which is done after exercise of due prudence and thus the same does not fall within the ambit of fraudulent transaction.

5.10. ***Transaction 10 - Misstatements of Encashed Bank Guarantees as Receivable:***

5.10.1. Pratibha Industries Limited had provided the various types of Bank Guarantee's to their various Clients as per the terms of the contract. Since the Corporate Debtor had taken the number of projects in Joint Venture (JV), the Corporate Debtor also had provided the various types of Bank Guarantee's to their various Clients on behalf of JV's as per the terms of the contract.

5.10.2. During the course of execution, some of the ongoing projects were wrongfully terminated by the Clients on the pretext of delay in execution, though the reasons for the delays were not attributable to Pratibha. During the period of about two years from October 2016 to October 2018, six projects of the Corporate Debtor were wrongfully terminated by the Client. After wrongful termination of the contracts, the Client encashed the various Bank Guarantee's which were provided to them by the Corporate Debtor. Even though those BG's were encashed by the Client, the Corporate Debtor had shown them as a receivable in the books till the time the reconciliation of the related project account is complete.

5.10.3. The observation of the applicant that “the Bank Guarantees encashed by the Clients of the Corporate Debtor were against the claims made by the Corporate Debtor on these clients for termination of the project agreements.” is incorrect. Factually, the contract was wrongfully terminated by the Client & encashed the BGs & the Corporate Debtor took all possible legal steps to recover their dues & damages due to wrongful termination of the contract.

5.10.4. The details of BGs encashed and shown as receivables are as under -

<u>Sr. No.</u>	<u>Receivable From</u>	<u>Encashed By</u>	<u>Amount of BG (Rs. In crores)</u>
1	Clients of PIL	Clients of PIL	102.77
2	FEMC Pratibha JV	Clients of FEMC Pratibha JV(DMRC)	305.96
3	Prime Infra Park Pvt Ltd	Clients of Prime Infra Park Pvt Ltd(DMRC)	12.82
4	PIL Mosinzhtroi JV	Clients of PIL Mosinzhtroi JV(EIL-DJB)	26.50
5	PIL NBCC JV	Clients of PIL NBCC JV(NBCC)	52.58
	Total		500.62

5.10.5. The amount of Rs. 102.77 Crores shown in receivables relating to PIL projects is on account of excess recovery made on account of encashment of BG. This excess recovery should have been received back by PIL when reconciliation of the projects were in order. But the same has not happened and also, most of the receivables are under litigation by PIL for wrongful termination of the project by their clients.

5.10.5.1. The amount of encashed BGs, in so far as it pertains to Mobilisation advance, it has been netted off against the

Mobilisation advance. The amount, to the extent recoverable as part of claim contested in legal proceedings against the Project authorities or refundable after expiry of certain period i.e. Defect Liability Period or completion of Project have only been shown as Receivable. The remaining amount, if any has been debited to profit & loss account as expense. For example, BGs for Rs. 25,97,57,800 encashed by UP Jal Nigam has been converted into FDR and shall be released after expiry of Defect Liability Period i.e. 12 months from the date of actual completion of work. Hence, the FD is recoverable. Further, in some cases, though the client has not invoked the BG, however, the issuing bank has debited the account as provision in anticipation of future payment. BG encashed by Clients of JV/Subsidiary.

5.10.6. Pratibha gave Bank Guarantees on behalf of its various JV for various purposes such as Plant & Machinery, Performance guarantee, TLD, Special Advance, etc. It had been decided that the bank guarantee will be issued by its 100% Partner on behalf of JV, which will be backed by a counter guarantee / collateral by the Pratibha Industries Ltd, shall be reckoned for computation of the financial commitment of the Pratibha Industries Ltd and reported accordingly.

5.11. **Transaction 11 - *Fraudulent encashment of Bank Guarantee by Vendor***

5.11.1. Pratibha Industries Limited had two transactions with Shital Enterprise.

5.11.2. Shital Enterprise had given work order dated 18.03.2016 to Pratibha Industries Limited for construction and demolition of their properties at Bhiwandi. Pratibha Industries Limited had requested Shital Enterprise to provide an advance amount of Rs.5.0 Crores for the said work order. Pratibha Industries Limited agreed to give Bank Guarantee for the same. Accordingly, Pratibha Industries

Limited gave Bank Guarantee of Rs. 5.0 Crores for mobilization advance, issued by Canara Bank. Shital Enterprise remitted the said amount of Rs.5.0 Crores in the account No.2630261000135 of Pratibha Industries Limited maintained with Canara Bank. The said amount was remitted on 05.04.2016 by Shital Enterprise. Canara Bank debited Bank Guarantee opening charges and margin money to the Account of Pratibha Industries Limited and issued the said bank guarantee as per terms of the sanctioned limits. Canara Bank adjusted the said mobilization advance amount of Rs. 5.0 Crores against their outstanding dues and did not allow Pratibha Industries Limited to utilize or use the same. We are enclosing herewith the copy of the Bank statement issued by the Canara Bank which shows that the said amount had been appropriated towards their dues. since the Canara Bank adjusted the amount received from Shital Enterprise, the said amount was not available to Pratibha Industries Limited for the Execution of work order. Accordingly, Pratibha Industries Limited could not perform as promised to Shital Enterprise. In such circumstances, Pratibha Industries Limited was left with no option but to cancel the said work order, which was cancelled on 04.07.2016. Shital Enterprise requested Pratibha Industries Limited to return back the said advance amount of Rs.5.0 Crores but due to non-availability of funds, Pratibha industries Limited failed to return back the said advance amount of Rs. 5.0 Crores. Therefore, Shital Enterprise invoked the Bank Guarantee and received payment on 02.08.2016. It means Shital Enterprise recovered the amount which was paid by them. It may be noted that the advance amount of Rs.5.0 Crores received from Shital Enterprise on 05.04.2016 was returned back to them on 02.08.2016 by Canara Bank. As per the condition of the work order, Pratibha Industries Limited also paid the interest to Shital Enterprise for the relevant period. It is pertinent to note that Rs. 5.0 Crores were received by Pratibha Industries Limited from Shital Enterprise, and

the same amount was returned back to Shital Enterprise. Therefore, neither the Corporate Debtor nor the Creditor has suffered any loss due to this transaction.

5.11.3. In another transaction, Pratibha Industries Limited wanted to purchase TMT Bars on credit, but one of suppliers of Pratibha Industries Limited, Inesh Accerro Limited expressed their inability to sell goods on credit. Therefore, Pratibha Industries Limited requested Shital Enterprise to pay Inesh Accerro Limited for goods delivered directly by Inesh Accerro Limited to Pratibha Industries Limited and issued letter dated 20.04.2016 to Shital Enterprise in this regard. The Copy of the said letter dated 20.04.2016 is annexed herewith & marked as Annexure “T11_9”. Pratibha Industries Limited requested Inesh Accerro Limited to directly deliver the goods to Pratibha Industries Limited since the goods were heavy and bulky and such direct delivery would also save loading, unloading, logistical charges and time. Due to the above mentioned reasons, goods were consigned by Inesh Accerro Limited to Pratibha Industries Limited directly. Invoices were raised by Inesh Accerro Limited on Shital Enterprise and in turn Shital Enterprise raised Invoices on Pratibha Industries Limited for the said goods. It may be noted that whenever goods are of heavy and bulky in nature, such direct deliveries are commonly practiced in many trades since it saves many unnecessary expenses and time. After receiving the said goods, Pratibha Industries Limited gave the Bank Guarantee of Rs.7.50 Crores issued by Bank of Baroda for the goods received on credit. Thereafter, vide letter dated 06.05.2016 instructed to Shital Enterprise to pay Inesh Accerro Limited. Accordingly, Shital Enterprise paid Inesh Accerro Limited for the said goods.

5.11.3.1. Shital Enterprise raised invoices of Rs. 7,64,95,672/- on Pratibha Industries Limited towards sale of goods. Pratibha Industries Limited sold the said goods to Minaqua International Private Limited for Rs.7,65,99,259/- and

received the payment in the bank account of Pratibha Industries Limited. Since the said goods were sold to Minaqua International Private Limited, Pratibha Industries Limited raised invoices for the same on Minaqua International Private Limited for sale of goods. Details of the said invoices raised on Minaqua International Private Limited and payments received are reflecting in ledger account of Minaqua International Private Limited in the books of accounts of Pratibha Industries Limited. The total amount of invoices for said goods was Rs.7,65,99,259/-, which Pratibha Industries Limited received from Minaqua International Private Limited. Pratibha Industries Limited received Rs.19,89,56,727/- from Minaqua International Private Limited on 30.06.2016, out of which Rs.7,65,99,259/- were towards the said goods which Pratibha Industries Limited purchased from Shital Enterprise and sold to Minaqua International Private Limited. However, Pratibha Industries Limited did not make payment to Shital Enterprise for approximately 11 months and therefore Shital Enterprise invoked the bank guarantee on 17.03.2017. The said amount of Rs.19,89,56,727/- was received by Pratibha Industries Limited in Lakshmi Vilas Bank and Lakshmi Vilas Bank adjusted the entire amount against their outstanding dues which is reflecting in the statement issued by Lakshmi Vilas Bank. Pratibha Industries Limited paid interest to Shital Enterprise for the relevant period. Pratibha Industries Limited had received the amount in its bank account from Minaqua International Private Limited and therefore neither the Corporate Debtor nor the Creditors have suffered any loss in this transaction.

5.11.4. As regards Rs.1.48 Crores, as agreed, Pratibha Industries Limited was paying interest on both the transactions to Shital Enterprise. The said interest amount was Rs.1.48 Crores. As per the terms

mentioned in clause 9 of the work order (**Enclosure - T11_15**), Pratibha Industries Limited was liable to pay interest. The said payments were recorded under the head “Interest” as can be seen in the books of accounts of Pratibha Industries Limited. Pratibha Industries Limited failed to perform in both the transactions hence all the interest payments made to Shital Enterprise were recorded under the head “Non-performance Charges” at the end of the year i.e. 31.03.2017. While changing the head from Interest to Non-performance charges, cautiously and as per accounting norms earlier entries recorded as “Interest” were reversed. It means only head or classification of payment was changed from Interest to Non-performance charges by reversing the head Interest previously recorded. The Corporate Debtor has not suffered any loss due to change in accounting treatment or head since non-performance charges are equal to and same as interest.

5.11.5. Rs.34,23,287/- was paid in Transaction 1, related to Work Order (Interest for a period from 05.04.2016 upto 01.08.2016 of 119 days @21% P.A. on Rs. 5.0 Crores). Rs.1,14,18,911/- was paid in Transaction 2, related to sale transaction.

5.11.6. It is clear from the records that the payments received in both transactions were appropriated and adjusted by the respective banks, therefore the question and possibility of any collusion and siphoning does not arise. The break-up of payments made to Shital Enterprises is as follows :

Rs.1,39,29,376/- Interest amount payable to Shital Enterprise.

Less :

Rs.15,01,942/- This Amount was received by Shital Enterprise as difference between their Purchase and sale bills. Please note Shital Enterprise had purchased goods for

Rs.7,49,93,730/- and sold it to Pratibha Industries Limited for Rs.7,64,95,672/-. Since, Pratibha Industries Limited was liable to pay only interest to Shital Enterprise hence this amount was deducted from the interest liability towards Shital Enterprise.

Rs.9,93,730/- Amount debited for inferior quality.

Rs.1,14,33,704/- Payable to Shital Enterprise as interest.

Rs.1,14,18,911/- Paid

Rs. 14,793/- Short Paid

5.11.7. Pratibha Industries Limited received Rs. 5.0 Crores and goods worth Rs.7.65 Crores as explained above. Therefore, Pratibha Industries Limited liability towards Shital Enterprise was Rs.12.65 Crores. Interest on both the transactions was Rs. 1.48 Crores. Therefore, the total liability was Rs.12.65 Crores + Rs.1.48 Crores, totaling to Rs.14.13 Crores. This stood paid by encashment of two guarantees for Rs. 12.50 Crores and Payment of Rs. 1.55 Crores.

5.11.8. Above calculation makes it clear that nothing extra has gone from the account of the Corporate Debtor so the allegation of malafide intent or defrauding creditors are false and baseless.

6. The Respondent No. 1 & 2 has filed an application no. 553 of 2022 challenging the maintainability of IA 1420 of 2020 on the following grounds.

6.1. Non-adherence with prescribe the procedure/timeline on the part of the Applicant/Resolution Professional.

6.2. Interlocutory Application is liable to be dismissed due to non-joinder of parties. The Applicant has not impleaded the erstwhile the relevant parties/companies/vendors in its interlocutory application at whose

behest the said avoidance transaction were entered into with the Corporate Debtor.

- 6.3. All the necessary and clear evidence in the proof of fraud must be necessarily pleaded and produced. Merely, drawing conclusion without corroborating documentary evidence is not permissible under law.
- 6.4. The Principle of Natural Justice require of supply of documents upon which reliance has been placed by the Resolution Professional. The duty of the disclosure is an essential part of principle of natural justice and doctrine of fairness.
- 6.5. The RP is duty bound to form is own opinion after applying his mind. The applicant has failed to do so as they have solely relied upon the transaction of the audit report blindly without further due diligence and investigation.
- 6.6. The two Company Petition bearing no. 1189 of 2020 and 1192 of 2020 were filed by the RP in terms of Section 95 under Section 96 of Code, the interim moratorium commenced as soon the said petition were filed against the Respondent No. 1 & 2. Accordingly, the Applicant cannot continued proceed against the Respondent No. 1 & 2 in the application after 12.03.2021.
- 6.7. The RP could not have filed one composite application for several transactions as the parameters and the requisite enquires as also the consequences in relation to these aspects are different and such difference is explicit in the related provision.
- 6.8. The transactions in question have occurred in the ordinary course of the business between 2007-2013, the Corporate Debtor participated in several joint ventures, wherein the Corporate Debtor was more than 50 % shareholder and had partnered with several entities who had respective technical qualification for a particular Tender in which the Corporate Debtor wanted to participate.
- 6.9. That, essentially, these Joint ventures in principle belong to the Corporate Debtor, since Corporate Debtor held a majority stake in these companies. Therefore, any investment made y the Corporate

Debtor was with the intent to fiancé and advance the projects that had been undertaken by Corporate Debtor through their several Joint Ventures. It is stated that the amount that was paid to said Joint Ventures, was then either forwarded to the Project Awarding Authority in form of Bank Guarantees or Letter of Credit etc, or in some cases, monies were disbursed towards salary of JV employees working in the project and some of payments were made to vendors who supplied goods or services in the project. It is to be understood that the amounts herein, were not loan of any sort.

6.10. The Applicant No. 2 is the Independent Director of the Company and the same is also clearly visible upon perusal of the cause title of the IA No. 1420 of 2020. Furthermore, the Applicant No. 2 was not involved in its daily operations. Moreover, the Applicant No. 2 was unaware of the purported Avoidable Transactions carried out by the Company and has no knowledge of the same as. No particular or specific role was ascribed to the Applicant No. 2 in the affairs of the Company as he was the Independent Director.

6.11. No application under the provision of Section 66(2) of the Code can be filed wherein the director without any mala fide intent have in their commercial wisdom entered into a transaction and have made every attempt possible to avoid CIRP. Thus, upon perusal of IA 1420 of 2020, it is amply clearly that there is no averment or pleading, whatsoever, in the said Interlocutory Application that the Director is aware of the commencement of the CIRP and the Director/s have taken any steps to avoid the CIRP. Furthermore, it is submitted that there is no averment also with regard to the Director acting in a malafide manner or intent. Thus, on a plain reading of Section 66(2), the said Interlocutory Application No. 1420 of 2020 ought to be dismissed as not maintainable. Additionally, the Corporate Debtor was effectively controlled by lenders since initiation of strategic debt restructuring on 16.06.2016. On 16.06.2016, joint lenders forum /Bank (JLF) invoked the strategic debt restructuring Scheme in respect of corporate Debtor.

As set out below, the suspended directors did not have any control over the decisions of the Company during the SDR period as is required by law. Accordingly, the JLF acquired 57% stake in the Corporate Debtor (by converting their debt into equity), and the JLF became the controlling the stake holders of the Corporate Debtor. The JLF gained de facto control over the finances of the Corporate Debtor. Importantly, it is to be noted that original Respondent No. 3 i.e. Sunanda D. Kulkarni has to be deleted as a party in the present application since she died on 27.11.2021. Therefore, her name is to be deleted from the arrays of parties.

7. Heard the Learned Counsel and perused the material on record.
8. Original Respondent No. 3 i.e. Sunanda D. Kulkarni died on 27.11.2021, and her legal heirs have been substituted in the present application.
9. The Applicant has sought relief u/s 66 in relation to Transaction No. 3 to 11; u/s 43 and Section 66 in relation to Transaction 1; and u/s 45 in relation to Transaction 2.

9.1. In case of ***Anuj Jain IRP for Jaypee Infratech Limited Vs. Axis Bank Limited etc. [2020] ibclaw.in 06 SC***, the Hon'ble Supreme Court held that -

“29.1 However, we are impelled to make one comment as regards the application made by IRP. It is noticed that in the present case, the IRP moved one composite application purportedly under [Sections 43, 45 and 66](#) of the Code while alleging that the transactions in question were preferential as also undervalued and fraudulent. In our view, in the scheme of the Code, the parameters and the requisite enquiries as also the consequences in relation to these aspects are different and such difference is explicit in the related provisions. As noticed, the question of intent is not involved in [Section 43](#) and by virtue of legal fiction, upon existence of the given ingredients, a transaction is deemed to be of giving preference at a relevant time. However, whether a transaction is undervalued requires a different enquiry as per [Sections 45 and 46](#) of the Code and significantly, such application can also be

made by the creditor under [Section 47](#) of the Code. The consequences of undervaluation are contained in [Sections 48 and 49](#). Per [Section 49](#), if the undervalued transaction is referable to sub-section (2) of [Section 45](#), the Adjudicating Authority may look at the intent to examine if such undervaluation was to defraud the creditors. On the other hand, the provisions of [Section 66](#) related to fraudulent trading and wrongful trading entail the liabilities on the persons responsible therefor. We are not elaborating on all these aspects for being not necessary as the transactions in question are already held preferential and hence, the order for their avoidance is required to be approved; but it appears expedient to observe that the arena and scope of the requisite enquiries, to find if the transaction is undervalued or is intended to defraud the creditors or had been of wrongful/fraudulent trading are entirely different. Specific material facts are required to be pleaded if a transaction is sought to be brought under the mischief sought to be remedied by [Sections 45/46/47](#) or [Section 66](#) of the Code. As noticed, the scope of enquiry in relation to the questions as to whether a transaction is of giving preference at a relevant time, is entirely different. Hence, it would be expected of any resolution professional to keep such requirements in view while making a motion to the Adjudicating Authority.

- 9.2. We note that the present application, though a composite application, has dealt with each transactions separately and the applicant has made a composite prayer only in relation to Transaction 1. Since, the application contains exhaustive narration of facts and also pleadings in relation to application of relevant section to transaction 1, we consider it appropriate to proceed to deal with such transaction to find whether the necessary ingredients of section 43 or 66 in alternate exists in so far as Transaction 1 is concerned. In so far as other transactions are concerned, the applicant has made prayer only in terms of one section in relation to each of transaction 2 to 11.

9.3. Since, IA 553 of 2022 challenges the maintainability of IA 1420 of 2020, we consider it appropriate to deal with IA 553 of 2022 first, before proceeding to analyse each of transaction stated in IA 1420 of 2020 on merits.

9.3.1. The Applicant has relied upon the decision in the case of *Venus Recruiters Pvt Ltd. Vs... Union of India and Others*, 2020 SCC Online DEL 1479, to say that the timelines under Regulation 35A of CIRP Regulations, are mandatory. However, the said decision was overruled by the Division Bench in the case titled as *TATA Steels Limited...vs...Venus Recruiters Pvt. Ltd and Ors. 2023IBC Law.IN 09 HC* holding that these timelines are directory and not mandatory in nature because Regulation 35A pertains merely to the RP discharging his statutory burden of filing of the Avoidance Applications from the commencement of CIRP and the CIR Process itself is not strictly or mandatorily bound by its own timelines. The timelines under IBC have been held to be directory in nature. Accordingly, filing of application beyond period of 135 days resulting into non-adherence with prescribed procedure/timeline on the part of the Applicant/Resolution Professional cannot result into dismissal of an application seeking avoidance of transaction.

9.3.2. The Respondent has also sought dismissal due to non-joinder of parties. We note that the Applicant has only made the erstwhile Directors of the Corporate Debtor as a Party Respondent and has sought relief in terms of Section 43, 45 and 66 of the Code. Out of 11 Transactions impugned in the Application, relief u/s 66 has been sought in case of 9 Transactions. Section 66 mandates the contribution from the persons who were knowingly parties to the carrying on of the business with an intend to defraud the Creditors or for any Fraudulent purpose. Further, the Hon'ble Supreme Court in case of *Gluckrich Capital Pvt. Ltd. vs. State of West Bengal & Ors. (2023) ibclaw.in 75 SC 464* has held that “*The remedy against third party, however, is not available under Section 66 of IBC, and*

the civil remedies which may be available in law, are independent of the said Section". Accordingly, the parties other than the Suspended Board are not required in the present proceedings and this Tribunal can pass an Order against the Respondents/Directors for contribution if it is found that any case is made out in terms of Section 66(1) and 66(2) of the Code. We are conscious that such contributions cannot be sought from other persons who are found to have knowledge if such persons are not party Respondents, except in cases where third party and Corporate Debtor is under control of same persons as held by Hon'ble NCLAT after distinguishing Hon'ble Supreme Court decision in case of *Gluckrich Capital* (Supra) in case of ***Royal India Corporation Ltd. vs. Mr. Nandkishor Vishnupant Deshpande (RP) and Ors. (2024) ibclaw.in 304 NCLAT.***

9.3.2.1. As regards relief u/s 44, we note that the Code contemplates setting aside of the Transaction if the ingredients stated in Section 43 are met, however, we note that the impugned Transaction can fall outside Section 43, if it is shown to have been entered in the ordinary course of business or financial affairs of the Corporate Debtor and Payee. Accordingly, the Payee ought to be a Party Respondent for impugning Transaction in terms of Section 43, in the absence of which this Tribunal shall be denying the opportunity to the Payee to plead so and such denial shall be against the Principal of Natural Justice. Accordingly, this Tribunal cannot adjudicate the Transaction in terms of Section 43, if the Payee to such Transactions are not made a Party Respondents. Hence, no order can be passed by this Tribunal in relation to Transaction No. 1, in so far as the Applicant seeks order u/s 44 in relation to this Transaction.

9.3.2.2. As regards transactions sought to be impugned in terms of Section 45, we note that an Order u/s 48 can be passed

requiring the Transfer of Property back to the Corporate Debtor or payment to be made by such transferee to the extent of undervalued amount. Accordingly, in the absence of Transferees of assets impugned in the Transaction No. 2 having been made the Party Respondent in the Application, we are of the considered view that this Tribunal cannot pass any order in terms of Section 48 without affording an Opportunity to Transferees to plead their case and without taking into consideration such pleadings.

9.3.3. It has also been pleaded by the Respondent that all the necessary and clear evidence in the proof of fraud must be necessarily pleaded and produced and merely, drawing conclusion without corroborating documentary evidence is not permissible under law. Since, this Application has been filed for impugning 11 Transactions and there are exhaustive pleadings in relation to each of the Transactions, we are of the considered view that this ground can be dealt with while dealing with each of the Transactions on merits in later part of this Order.

9.3.4. It has also been pleaded by the Respondent that the Principle of Natural Justice requires supply of documents upon which reliance has been placed by the Resolution Professional. We note that this Application is based on the records of the Corporate Debtor which were kept and maintained by the Respondents and came to be handed over to the Resolution Professional on the commencement of CIRP. The Respondents have been provided with the Xerox Copies of such records and the Original Records is stated to have been handed over to the Successful Resolution Applicant (SRA) on resolution of the Corporate Debtor. Some of the records relied upon by the Applicant are available in public domain. Accordingly, we do not find any merit in this contention.

9.3.5. It has also been pleaded by the Respondent that the RP is duty bound to form its own opinion after applying his mind. We find that

the Applicant has analysed the facts stated in the Transaction Audit Board and has also given his own findings in relation to these Transactions. Accordingly, we do not find any merit in this contention.

9.3.6. It has also been pleaded by the Respondent that the two Company Petition bearing no. 1189 of 2020 and 1192 of 2020 were filed by the RP in terms of Section 95 under Section 96 of Code, the interim moratorium commenced as soon the said petition were filed against the Respondent No. 1 & 2. Accordingly, the Applicant cannot continue to proceed against the Respondent No. 1 & 2 in the application after appointment of RP in these Petitions on 12.03.2021. We note that CP 1189 of 2020 was filed against the Respondent No. 1 on 09.10.2020. CP 1192 of 2020 was filed against Mr. Ravi Ajit Kulkarni, who is not a party Respondent in the present Application. Further, Section 96 imposes a Bar on any legal action or proceedings by Creditor in respect of a debt and any legal action or proceeding already initiated in respect of a debt is deemed to have been stated. We note that the proceedings in terms of Section 43, 45 and 66 of the Code are adjudicatory proceedings to determine, inter alia, the amounts, if any, recoverable from the Respondents. The Debt, if any, due from the Respondent shall only come into existence after conclusion of the Adjudicatory proceedings. Accordingly, we are of the considered view that the present proceedings are not barred in terms of Section 96 qua Respondent No. 1 also. However, the recovery of the amounts determined under this Application shall be subject to Section 96 of the Code.

9.3.7. It has also been pleaded by the Respondent that the RP could not have filed one composite application for several transactions as the parameters and the requisite enquires as also the consequences in relation to these aspects are different and such difference is explicit

in the related provision. However, for the reasons stated in Para 8.2 above, we do not find any merit in this Ground.

9.3.8. It has also been pleaded by the Respondent that the transactions, in question, have occurred in the ordinary course of the business between 2007-2013. We are of the considered view that this ground can be dealt with while dealing with each of the Transactions on merits in later part of this Order.

9.3.9. It has also been pleaded by the Respondent that the Respondent No. 2 is the Independent Director of the Company and the same is also clearly visible upon perusal of the cause title of the IA No. 1420 of 2020. Furthermore, he was not involved in its daily operations. Moreover, he was unaware of the purported Avoidable Transactions carried out by the Company and has no knowledge of the same as no particular or specific role was ascribed to him in the affairs of the Company being an Independent Director.

9.3.9.1. We note that the Respondent No. 2 was one of the Members of the Board of Directors. In so far as Section 43 and 45 are concerned, these Provisions are deeming fictions and upon satisfaction of the conditions stated in these Sections, the consequence has to follow. We note that u/s 66(1), the persons, who are knowingly parties to carrying on of the business of the Corporate Debtor with an intent to defraud Creditors or for any Fraudulent purposes, can be called upon to contribute to the assets of the Corporate Debtor. Section 66(2) makes the Directors liable when they ought to have known the imminent prospect of the commencement of CIRP and fail to exercise due diligence in minimising the potential loss. Under the Companies Act, the management of a Company vests in its Board of Directors and the Affairs of a Company are to be managed under the Control and superintendence of such Board of Directors. Section 166(3) mandates that a Director of a Company shall exercise his

duties with due and reasonable care, skill and diligence and shall exercise independent judgment. The Respondent No. 2 has merely made a bald statement that he was unaware of the Transactions and relied upon Section 149(12) of the Companies Act, to say that the non-executive Director can be held liable only in respect of *such acts of omission or commission by a Company which had occurred within his knowledge, attributable through Board Processes, and with his consent or connivance or where he had not acted diligently*. We note that the onus lies on the Respondent No. 2, to prove the same and he cannot, merely by making a bald assertions, take advantage of Section 149(12) despite there being qualification in Auditor's Report and disclosures in the notes of accounts, forming part of the Audited Financial Statements, suggesting carrying of the Business in a particular manner. Accordingly, we do not find any merit in this contention.

9.3.10. It has also been pleaded that Section 66(2)(a) of the Code does not apply to these Transactions wherein the director without any mala fide intent have in their commercial wisdom entered into a transaction and have made every attempt possible to avoid CIRP; upon perusal of IA 1420 of 2020, it is amply clearly that there is no averment or pleading; and the Corporate Debtor was effectively controlled by lenders since initiation of strategic debt restructuring on 16.06.2016. On 16.06.2016, joint lenders forum /Bank (JLF) invoked the strategic debt restructuring Scheme in respect of corporate Debtor. As set out below, the suspended directors did not have any control over the decisions of the Company during the SDR period as is required by law. Accordingly, the JLF acquired 57% stake in the Corporate Debtor (by converting their debt into equity), and the JLF became the controlling the stake holders of the

Corporate Debtor. The JLF gained de facto control over the finances of the Corporate Debtor.

9.3.10.1. Though we do find substance in the contentions of the Applicant that the pleadings in the Application in relation to majority of transactions do not support a case in terms of Section 66(2)(a) of the Code, however, the Applicant has also sought to impugn these Transactions in terms of Section 66(1) of the Code as well. Nonetheless, whether the ingredients of section 66(2)(a) are met or not shall be looked into later part while dealing with each of impugned transaction, if required. Accordingly, we are of the considered view that the Application on this Ground cannot be dismissed.

9.4. In the light of our findings in IA 553 of 2022 elaborated in Para 9.3 above, we now proceed to examine each of impugned transactions in the light of facts pertaining to each of such transaction and the applicable provisions thereto.

9.5. **Transaction 1 – Payment to Related Parties** – Section 43 & 66 : This transactions deals with Payments made to/for related parties i.e. (a) Joint Ventures; (b) Subsidiaries; (c) Suspended Directors of Corporate Debtor. The Applicant has sought to impugn these transaction in terms of section 43 of the Code as well as Section 66 of the Code. While section 43 of the Code deals with Preferential transaction, Section 66 deals with Fraudulent or Wrongful Trading. The Applicant has made Suspended Directors as Respondent No. 1 to 3 in the present application and Respondent No. 3 has since deceased, in place of which her legal heirs have been made party Respondent. None of the recipient/payee has been arrayed as Party Respondent in the Application.

9.5.1. In the present case, the payments alleged to be made to Joint Ventures and Subsidiaries are primarily on account of BG/LC invocation, servicing of interest, on account payments and cost allocation. Undisputedly, the BG/LCs were issued by the Corporate Debtor in accordance with the project agreement stipulations after

award of each project much prior to look back period and these BGs/LCs were invoked by the project authorities on account of alleged contravention of project terms. BG commission was paid to the issuing bank on such BGs and allocation of costs incurred by Corporate Debtor but attributable to the projects of JVs and subsidiaries were debited to them. The interest payments were made to the financial creditors of JV & Subsidiary company, as the Corporate Debtor was guarantor to credit facilities extended to them. Undisputedly, it was primary obligation of the Corporate Debtor to provide necessary finance as well as BGs required for the purpose of carrying on of the business of JVs in terms of the project agreements and JVs agreements entered into with project authorities with JV partners. Further, as guarantor to credit facilities made available to JVs and subsidiaries to make such payments, the Corporate Debtor was obligated to service the loans/BGs facilities extended by Financial Creditors of such JVs/subsidiaries. It is pertinent to note that these payments, except on account payments, have not been made to the JVs or Subsidiaries but are recoveries to be made from them. As regards 'on account' payments, we note that the net effect of 'on account' payment is negative, meaning thereby no payment has been made by Corporate Debtor on this Account. As regards payment made to Suspended Directors, we find that the net effect of transactions with these parties is in negative, meaning thereby the Corporate Debtor, in fact, has received in excess of payments.

9.5.2. For the reasons stated in Para 9.3.2.1 hereinbefore, no order can be passed in terms of Section 43 of the Code in the absence of recipient/payee/beneficiary of transaction having been made the parties. Nonetheless, it cannot be said that such transfer has the effect of putting JVs or Subsidiaries in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with [section 53](#), as the Corporate Debtor owed no

debt to JVs or Subsidiaries, hence one of the ingredients for holding a transaction fallen u/s 43 is missing in this case. Accordingly, no order in terms of section 43 of the Code is warranted in relation to Transaction No. 1 even on facts of the case.

9.5.3. Section 66 (1) of the Code deals with transactions arising from the business carried with an intent to defraud creditors of the Corporate Debtor or for any fraudulent purpose. The Corporate Debtor participated in several joint ventures, wherein the Corporate Debtor was more than 50 % shareholder and had partnered with several entities who had respective technical qualification for a particular Tender in which the Corporate Debtor wanted to participate. Essentially, these Joint ventures in principle belong to the Corporate Debtor, since Corporate Debtor held a majority stake in these companies. Therefore, any investment made by the Corporate Debtor was with the intent to financé and advance the projects that had been undertaken by Corporate Debtor through their several Joint Ventures. For execution of the project awarded to the Corporate Debtor from the year 2012 onwards, it entered into JVs or assigned such agreements to subsidiaries formed as Special Purpose Vehicle. Out of total payment alleged to have been made to JVs and subsidiaries, the major part of payment is towards BGs and interest on credit facilities availed by these JVs/subsidiaries but guaranteed by Corporate Debtor. All these payments have been made for fulfilment of obligations based on the terms of agreements executed between Corporate Debtor and project authority or JV partner as the case may be. The Applicant has not demonstrated as to how most of the transactions initiated in 2012 resulting into financial outflow from the Corporate Debtor during the period from February 2017 to February 2019 can be said to be fraudulent, considering that these transactions were entered in accordance with the conditions of award of contractual work to the JVs/subsidiary companies where the Corporate Debtor had 100% financial stake

and major profit sharing. The amount that was paid to said Joint Ventures, was then either forwarded to the Project Awarding Authority in form of Bank Guarantees or Letter of Credit etc, or in some cases, monies were disbursed towards salary of JV employees working in the project and some of payments were made to vendors who supplied goods or services in the project. The participation in the JVs and existence of subsidiaries, Corporate Debtor's obligations in this relation and issuance of BGs/LCs were duly disclosed in the audited financial statements of each year. Accordingly, we are of the considered view that no case is made out in terms of section 66 requiring an order from this Tribunal for contribution to be made by Respondents.

9.6. **Transaction 2 – Sale of Assets at lower Value** – Section 45 : For the reasons stated in Para 9.3.2.2 hereinbefore, no order can be passed in terms of Section 45 of the Code in the absence of Transferees of assets impugned in the Transaction No. 2 having been made the Party Respondent in the Application. Nonetheless, Section 45 of the Code dealing with undervalued transaction, contemplates declaration of such transactions as void and reversal of the effect of such transaction. Section 48 provides for the Orders this Tribunal can pass in this relation and reads as under –

48. The order of the Adjudicating Authority under sub-section (1) of section 45 may provide for the following:—

(a) require any property transferred as part of the transaction, to be vested in the corporate debtor;

(b) release or discharge (in whole or in part) any security interest granted by the corporate debtor;

(c) require any person to pay such sums, in respect of benefits received by such person, to the liquidator or the resolution professional as the case may be, as the Adjudicating Authority may direct; or

(d) require the payment of such consideration for the transaction as may be determined by an independent expert.

9.6.1. Clause (a) and © requires order against the transferee of the properties, subject matter of undervalued transaction, and in the absence of such transferees not being party respondent, no order can be passed by this Tribunal. Clause (b) is not applicable to the facts of present case. No valuation report has been placed by the Applicant on the basis of which a consideration payable can be determined. However, on careful reading of all 4 clauses, it follows that an order in terms of Section 48 can be passed against the transferee or beneficiary. There is no evidence on record to indicate that the Respondents have received any benefit, no order can be passed for this reason also. Accordingly, even assuming that these transactions may fall under section 45 of the Code, no Order can be passed by this Tribunal against the Respondents in relation to these transactions alleged to be undervalued transactions falling u/s 45 of the Code.

9.7. Transaction 3 – Significant reduction in Inventory – Section 66 :

The Applicant has claimed that there has been a reduction in inventory of the CD during the period 2017-19 despite there also being a reduction in Work in Progress and Raw Materials. The Applicant has opined that the Corporate Debtor has either intentionally misrepresented the actual position of the inventory in its balance sheet with a *malafide* intent to defraud its creditors or, if the amount of inventory stated in the financial statements is correct, then the Respondents have fraudulently siphoned-off the said inventory for their personal benefit, thereby defrauding the creditors of the Corporate Debtor.

9.7.1. The Corporate Debtor is involved in execution of Infrastructure Projects and the Work in Progress comprised of expenditure incurred towards the project, which are to be recognised as Revenue when the particular mile stone is achieved entitling the Corporate

Debtor to claim it as receivable from the Project Authorities or when various claims for cost escalation or over-runs are agreed by the project authorities. It is established accounting principle that the revenue is recognised when it can said to have accrued to an enterprise. The Accrual is said to take place when the enterprise acquires right to claim such revenue. Undisputedly, the amounts stated as Work in Progress can only be claimed as Revenue from the relevant project authority and is not capable of being taken away and claimed from some other person. The applicant has not produced any evidence that the Respondents have billed Revenue in lieu of this Work in Progress to the project authorities from any other enterprise, though it is not possible in the present facts of the case. Accordingly, we do not find any merit in the allegation of fraudulently siphoning off the said inventory by Respondents for their personal benefit, thereby defrauding the creditors of the Corporate Debtor

9.7.2. The Applicant has also opined that the Corporate Debtor has intentionally misrepresented the actual position of the inventory in its balance sheet with a *malafide* intent to defraud its creditor. An enterprise accounts for the value of Work in Progress in service contracts on estimate basis and this is acceptable in terms of Accounting Standard IND As 8 “**Accounting Policies, Changes in Accounting Estimates and Errors**”. Para 5 of IND As 8 states that “*A change in accounting estimate is an adjustment of the carrying amount of an asset or a liability, or the amount of the periodic consumption of an asset, that results from the assessment of the present status of, and expected future benefits and obligations associated with, assets and liabilities. Changes in accounting estimates result from new information or new developments and, accordingly, are not corrections of errors*”. Further Para 32 -34 thereof are pertinent to understand the application of estimates in the accounting, which reads as follows –

“32. As a result of the uncertainties inherent in business activities, many items in financial statements cannot be measured with precision but can only be estimated. Estimation involves judgements based on the latest available, reliable information. For example, estimates may be required of:

(a) bad debts;

(b) inventory obsolescence;

(c) the fair value of financial assets or financial liabilities;

(d) the useful lives of, or expected pattern of consumption of the future economic benefits embodied in, depreciable assets; and (e) warranty obligations.

33 The use of reasonable estimates is an essential part of the preparation of financial statements and does not undermine their reliability.

34 An estimate may need revision if changes occur in the circumstances on which the estimate was based or as a result of new information or more experience. By its nature, the revision of an estimate does not relate to prior periods and is not the correction of an error.”

9.7.3. The amount of Work in Progress to the extent to not capable of being converted into the Revenue in the changed circumstances is required to be charged to the Profit & Loss Account in accordance with Para 36 of IND As 8. The Respondents have placed on record in their reply the component wise working of WIP and justification for write off by charging to Profit & Loss Account. The write off of Inventory in accordance with the IND As 8 on account of change in estimates cannot said to be a fraudulent act, more so where there are evidences on record that the Corporate Debtor has claims more than the value of write off against the project authorities before appropriate forums. Accordingly, we are of considered view that no order can be passed in terms of Section 66 in relation to this Transaction.

9.8. **Transaction 4 – Loans converted into Investments – Section 66** : It is stated by the Applicant that certain receivables and interest free loans & advances given to FEMC Pratibha JV were transferred to investment account of the Corporate Debtor, accordingly, it is alleged that acts of the management, comprising of (a) giving of loans/advances to its JVs using the facilities taken from the financial creditors; (b) transfer of receivables on account of these loans/advances into the investment has led to siphoning off the funds of the Corporate Debtor. Hence, it qualifies to be fraudulent and/or wrongful trading under Section 66 of the Act.

9.8.1. Admittedly, the Corporate Debtor has funded the operations of the JVs contending that it was obliged to do so in terms of Project Agreement with the Project Authority and Joint Venture Agreement read together with Supplementary Agreement entered into with the other JV partner. The Respondents have contended that as per IND As 28 pertaining to Joint Venture Accounting applicable to it, equity method of accounting was to be employed as it had exercised significant amount of control. The equity method mandates that if an investor's investment in an joint venture has been written down to zero (which is the case here and not disputed by the applicant also), but it has other investments in the Joint Venture (such as loans or receivables), the investor should continue to recognize its share of any additional joint venture losses and offset them against the other investments, in sequence of the seniority of those investment. Accordingly, the Corporate Debtor was obligated to recognize its share of any additional joint venture losses and offset them against the other investments (such as loans and advances), accordingly, transfer of receivable and loans & advances was done in accordance with mandate of IND As 28 considering that its investment in JV has become zero and further losses ought to be set off against the receivable and loans & advances due from the JV.

9.8.2. We find that there is no allegation that the debtors and loans & advances extended to JVs were not utilised for the business of such JV and they were diverted to other purposes. The Corporate Debtor was sanctioned credit facilities for the entire operations and some of such facilities were for execution of specific jobs/JVs, therefore utilisation of those credit facilities cannot said to be contrary to terms of sanction. The genuineness of these JVs is not doubted and there is no allegation that such JVs were merely facade to divert money from the Corporate Debtor. Accordingly, the transfer of amounts of receivable and loans & advances to the Investment account does not entail any siphoning of the funds. It is merely an accounting entry which is necessitated for presentation of true & fair position of the financial affairs of an entity in accordance with the applicable accounting standards. Even if such balances would have continued to be receivables and loans & advances, the Corporate Debtor was obligated to assess their realizability and make provisions in the books of account for the loss it is likely to incur upon its realisation. Hence, we do not find that any case of fraudulent or wrongful trading is made out in the present case.

9.9. ***Transaction 5- Payments made on invocation of Letter of credit issued by FEMC Pratibha JV- Section 66*** : The Applicant has stated that 5 vendors of FEMC Pratibha JV invoked the letter of credit, issued by the Corporate Debtor in their favour to facilitate supply of goods from such vendors to FEMC Pratibha JV, after JV failed to make payments to such vendors. The applicant has doubted the transaction on the basis of findings of the Transaction Auditor that (a) delivery vehicle was found to be a two wheeler in some cases; (b) Vehicle registration number didn't exist in e-vahan portal in some cases; and (c) TIN number of couple of vendors was found invalid.

9.9.1. The Respondents have pleaded that in order to cover its losses and earn some margins, the JVs traded in goods, which were also required by such JV for their projects to take price advantage in case

of bulk purchase. This was done by facilitating JVs to purchase the goods against the letter of credit issued by the Corporate Debtor, as the Corporate Debtor had unutilised non-fund based limits for issuance of LCs. It is also pleaded that the JV made some profit out of such transaction. The Respondents have also pleaded loss of documents so as to substantiate these transactions fully as such documents were kept at project site.

9.9.2. We find that the Corporate Debtor was obligated to fund the execution of projects undertaken in the JV, however it cannot be stretched to the trading operations of JV even if may have been perceived as a profit avenue. The usage of non-fund based facilities, for the reasons such facilities were lying unutilised, for the benefit of JV cannot said to be a transaction undertaken in ordinary course of business. The genuineness of these transactions has been doubted by the Applicant on the basis of elaborate findings of Transaction Auditor on the documentation relating to mode of transportation and VAT registration no of vendors, and it leads to probable conclusion that what is shown to be real may not be real. The Respondents, being responsible for maintenance and preservation of records of the Corporate Debtor and its ventures, have pleaded innocence stating that the documents may have misplaced due to storage at its project site. In the case of *M. Siddiq v. Suresh Das 2020 1 SCC 1*, a Constitution Bench of Hon'ble Supreme Court has held that "*The court in a civil trial applies a standard of proof governed by a preponderance of probabilities. This standard is also described sometimes as a balance of probability or the preponderance of the evidence*". The transaction, in question, against which the invoked letters of credit were issued looks shady. Even if the contention of the Respondents is accepted that these transactions resulted into profit to the JV, the Respondents have conveniently avoided stating the utilisation of the money realised by JV from such trading and why the same was not

paid back to its Vendors, which may have resulted into release of LCs issued by the Corporate Debtor. The onus lies on the Respondents that these transactions were genuine. In this context, if we weigh the defence of the Respondents in relation to the transaction, in question, we have no hesitation to say that these transactions were undertaken to defraud the creditors of the Corporate Debtor by mis-utilising the un-utilised LC facility and squandering the money realised by the JV from the goods supplied by the beneficiaries of LC. The Respondents have done this transaction knowing fully well about the penultimate utilisation of proceeds of trading by JV. Accordingly, we have no hesitation to hold that this transaction squarely falls within section 66(1) of the Code and direct the Respondent No. 1, 2 and legal heirs of Respondent No. 3 to make contributions to the extent of Rs. 36.55 Crores jointly or severally. The estate of deceased Respondent No. 3 shall be liable for the said contributions.

9.10. ***Transaction 6 – Additions in Fixed Assets / Overstatement of Assets/Transfer of assets not recorded in the books - Section 66*** : There are 3 transactions under this head i.e. (a) Vehicle worth Rs. 3.18 crores (One Jaguar, One Landrover, 9 Bolero, and 1 Mercedes Benz) were recorded in succeeding financial years and its sale (except one) was not recorded in books; (b) Assets worth Rs. 336.70 crores were sold by financial creditors or appropriated by the vendors/sub-contractors, and such sale/appropriation was not recorded in books; (c) Assets worth Rs. 31.61 crores charged to Yes bank were sold but not recorded in books of account.

9.10.1. Jaguar and Landrover are stated to have been used by one consultant of the Corporate Debtor and 9 Boleros are stated to be seized by the Vendors/subcontractors. The management has offered common explanation for non-accounting of sale of vehicles in the books that the sale is recognized only upon the complete handover of the assets as well as the transfer of documentation in favour of

the buyer. However, we do not find any substance in this submission as the transfer of vehicle in name of buyer and accounting for sale thereof are two distinct proposition. In case, the Corporate Debtor had given up legal rights in the vehicles, such sale should have been recorded in the books and the consideration receivable thereupon must have been debited to the account of transferees to present a correct position of the assets and liabilities of the Corporate Debtor. The only inference falling from these facts is that the vehicles remained in the ownership of Corporate Debtor, such vehicles were never sold and are being kept away from the creditors of the Corporate Debtor. Accordingly, we consider it appropriate to direct Respondent No. 1, Respondent No. 2 and legal heirs of Respondent No. 3 to contribute 2.17 crores (being cost of Jaguar, Land-rover and Boleros) to the Corporate Debtor jointly or severally. The estate of deceased Respondent No. 3 shall be liable for the said contributions.

9.10.2. As regards Mercedez Benz, we note that this is stated to be used by the Managing Director of the Corporate Debtor and is not claimed to have been sold. However, the said vehicle was not handed over to the Resolution Professional upon commencement of CIRP. Respondent No. 1 has not claimed that this vehicle was sold. Accordingly, we direct Respondent No. 1 to contribute a sum of Rs. 1.01 crores to the Corporate Debtor.

9.10.3. The Applicant has also stated on that the assets worth Rs. 337.70 crores were either sold by Bank, seized by vendors/sub-contactors against dues or at sites with no access as detailed in following table found in the transaction audit report :

Sl. No.	Break up of Fixed Assets	Amount (INR Cr.)
1.	Assets sold after obtaining no objection certificate from Banks exclusive charge	133.87

2.	Fixed Assets at site with no access	41.77
3.	Fixed assets under client custody	111.71
4.	Fixed Assets seized by vendors/sub-contractors for non payment of dues	49.35
	Total	336.70

9.10.4. The Respondent has contended that assets at Sl. No. 1 were sold pursuant to asset monetization led by Bank of Baroda after invocation of SDR in financial year 2016-17 & 2017-18 and the consideration received on sale of such asset was adjusted by the Banks against their outstanding. This sale has been duly accounted for in the books and Fixed Asset Register. After taking into consideration the submissions and facts of the case, we find that the applicant has only alleged over-statement of fixed assets block and has not doubted the sale transaction. As clarified by the Respondents in their reply, such sale is duly accounted for in the books of accounts, and the Applicant, in his written note has not disputed this submission. Accordingly, we are of considered view that the over-statement, if any as alleged, cannot said to be fraudulent transaction and call for any order requiring contribution from the Respondent.

9.10.5. As regards assets listed at Sl. No. 2 to 4 above, we note that the existence of these assets is not disputed, however, these assets are stated to be under control & possession of third parties who are claiming either their lien or have appropriated towards their claim. Section 18(f)(ii) of the Code mandates an Interim Resolution Professional to take control and custody of assets, as recorded in the balance sheet of the corporate debtor, over which the corporate debtor has ownership rights even if such assets may or may not be in possession of the corporate debtor. We note that the Applicant had not filed any application in terms of section 19(2) of the Code before this Tribunal seeking orders against these persons requiring

them to allow the applicant Resolution Professional to take custody and control of those assets. Even if, vendors/subcontractors/clients are claiming their lien over those assets and have sought to appropriate those assets against their claims against the Corporate Debtor, these claims or appropriations could have been set aside in terms of section 43 of the Code, but such claims or appropriations by third parties cannot said to be fraudulent. Since, these persons are not party respondent in the present application, we cannot pass any order against them even in terms of Section 66 setting aside the appropriation of Corporate Debtor's goods.

9.10.6. The Applicant has also stated that one TBM (Tunnel Boring Machine) having book value of Rs. 31.61 cr. As on 31.1.2019, charged to Yes Bank, was transferred from DMRC site to another location in last week of January, 2019, but the same is not available at that location. The Respondents have pleaded ignorance about theft of this machine from such location. It is noted that the theft of this machine was discovered after commencement of CIR Process. We find that there is no explanation from the Respondents, while they are obligated to maintain, preserve and insure the assets of the Corporate Debtor. In the absence of any explanation, the misappropriation of this machine cannot be ruled out. Accordingly, we consider it appropriate to direct Respondent No. 1, Respondent No. 2 and legal heirs of Respondent No. 3 to contribute 31.61 crores (being cost of Tunnel Boring Machine) to the Corporate Debtor jointly or severally. The estate of deceased Respondent No. 3 shall be liable for the said contributions.

9.11. ***Transaction 7 – Assignment of Advances and Receivables outstanding from parties – Section 66:*** It is the case of the Applicant that certain receivables from the customers have been adjusted with payables of certain entities. Further, an amount of Rs.20.98 Crores payable to Connect Residuary Private Limited (CRPL) was transferred to other vendor account and in turn adjusted with receivables from PEL Industries

Limited and Pankaj Metals. The Applicant has placed on record, the relationships amongst these parties and their common addresses and email ids. It is further stated that, M/s Platonix Sales and Marketing Pvt. Ltd., Transmetic Metallic Trading Pvt. Ltd., Isotopic Metallic Private Limited and Attenuate Metallics Private Limited have been struck off from the Register of Member by the Registrar of Companies.

9.11.1. The Respondents have explained that in BDO's interim report dated 22.10.2019, it has been recorded that amount realized from purchase-sale transactions have remained in & utilized for the business & have not observed any direct payment to any entity/person directly/indirectly related to the promoters. The Respondent have also clarified that, in some cases, the debtors & creditors were interlinked on management level & it was prudent to net the effect of same as per the external auditors. However, on perusal of the table demonstrating potential relationship between the entities at para 7.2 at transaction audit report and adjustment table between the parties at para 74 of the Application, we find this explanation applies only to the adjustment between PEL industries on one hand and Ace Metals Private Limited (AMPL), European Metals Private Limited (EMPL) and Volition Trading Private Limited (VTPL).

9.11.2. We note that the amounts payable to CRPL was transferred to AMPL, EMPL and VTPL and in turn was set of against receivables from PEL Industries. Pankaj Metals is also stated to be a connected party of PEL Industries and receivable from them was adjusted against CRPL. In nut shell, the amount payable to CRPL amounting to Rs.20.98 Crores was set off against receivable from PEL and connect firms as stated above. This set-off has also been pointed out in Transaction pertaining to sale and lease back transaction entered with CRPL and is being dealt with thereat in the light of additional facts pleaded under that transaction.

9.11.3. In out of 36 samples of transactions with these parties, the transaction auditor has found that registration number of delivery vehicles was not stated in 25 samples and out of remaining 11 samples, the delivery vehicle number was either not in existence or not correct. We note that some of the parties are customers and some are vendors. The only inference which can be drawn from missing details is that the transactions with customers as well as its vendors had not in fact taken place. However, there is no pleading or observation that the payments, in relation to supplies where delivery vehicle number was not available or delivery vehicle number was not found in existence, have been received/made by the Corporate Debtor and the balance sought to be adjusted by way of assignment pertains to such cases. In the absence of such pleadings, we cannot hold the setting off receivables with the payables to the third parties by way of assignment to the creditors as fraudulent. However, these transaction of set off could have been assailed in terms of section 43 of the Code, but the applicant has not made any pleadings or prayer in this relation. The Applicant has sought declaration in terms of Section 66 of the Code only and have not made these persons, part of the set off transaction, as party respondents. Accordingly, this Tribunal find no merit in the prayer seeking avoidance of assignment in terms of section 66 of the Code.

9.12. **Transaction 8 – Sale and Lease Back of the Assets – Section 66 :** It is the case of the Applicant that the Corporate Debtor sold its assets to certain entities (for which full amounts were received) at book value without undertaken a proper valuation of the assets and then leased the same back from CRPL at an extremely high price. It is also stated that Corporate Debtor was not in possession of these assets under the lease back arrangement even though Bank Guarantees have been invoked by CRPL. The Applicant has alleged that the Corporate Debtor undertook

this transaction to siphon off the money within an intent to defraud its creditors.

9.12.1. The Respondents have stated that it is a common business practice to lease equipment and machinery. As the Corporate Debtor needed funds to avoid for the defaults and also needed to retain the equipment/machineries, it entered into the transaction of sale with these entities including CRPL and in turn these entities transferred those assets to CRPL thus enabling CRPL to lease all these assets back to the Corporate Debtor under the lease arrangement. It is further submitted that in course of the transaction, particularly after submissions of BGs to secure the payment of lease rentals, CRPL manipulated the IRR by changing terms relating to provision of DSRA, VAT refund and BG stipulation, though these changes were never ratified by Corporate Debtor. It is resulted into nearly doubling of IRR i.e. in case of PIL 03 the IRR shot up from 10.59% to 42.28%. Further, the Corporate Debtor has a claim of Rs.34,47,79,773/- against CRPL under these transactions and a complaint before Economic Offence Wing (EOW) of Police Department has been filed for these fraudulent acts of the CRPL.

9.12.2. We note from the Transaction Audit Report that the management had informed the auditor that “*the Company entered into sale lease back agreement with Connect Residuary, 4 transaction were entered, the Company was facing stiff financial challenges and unless this agreement was initiated the Company face SMA2 on the same. Connect Residuary made payment of Rs.18,13,41,150/- and Rs.17,82,92,130/- after deducting Rs.2,78,11,658/- & Rs.13,81,85,618/- respectively. The Net Amount was received in PIL Bank A/c the details have submitted. The WDV of assets as per Books of Accounts were considered for the transaction. No other valuation report was taken as the same was not required by the party.*” This clarification of the management recorded by the transaction auditor clearly indicates that the Corporate Debtor was

in financial distress from FY 2014-15 which resulted monetization of the assets by sale and lease back arrangement at a financial cost more than 20% p.a. If we look at this transaction, we find that the Corporate Debtor raised Rs. 93.26 Crores from these transactions as sale out of which only 55.80 Crores are stated to be received in Bank. The remaining amount was adjusted against (a) the loan due from Corporate Debtor amounting to Rs.7.9 Crore and loan due from JVs amounting to Rs.9.15 Crores, both to IndusInd Bank; (b) amount of Rs. 10 Crores adjusted against payable to Pankaj Metals and Rs.10.86 Crores adjusted against payment to VTPL. As the against the Bank receipt of Rs.55.80 Crores in FY 2014-15, a sum of Rs.9.47 Crores was paid towards hire charges during that year thus affectively only a sum of Rs.46.33 Crores was received in that year. We note that as against the hire charges amounting to Rs.46.37 Crores due upto 30.06.2016, the Corporate Debtor paid a sum of Rs.43.22 Crores, which implies that on the date of invocation of Bank Guarantee, a sum of Rs.3.15 Crore was in default on account of hire charges, which equals to approximately one quarter of lease rentals. At this juncture, it is also pertinent to note that the Respondents have claimed that CRPL had collected DSRA of Rs.4,50,58,513/- which was sufficient to cover the amount in default. Accordingly, we do not find any pertinent reason for invocation of BG of Rs.83.73 Crores at that time and such invocation cannot said to be a normal business transaction. It is also pertinent to note here that that these assets under transactions were not found in possession of the Corporate Debtor despite that the fact total amount of hire charges amounting to Rs.128.66 Crores payable as per lease schedule stands paid upon encashment of BGs to the extent of Rs.126.95 Crores. Further, an adjustment of Rs.20.98 Crores with the vendors claimed as avoidance transaction under Transaction 6 also has the effect of payment to CRPL. Accordingly, the total payment to CRPL amounts to Rs.147.93

Crores. We are of the considered view that, in case this transaction of sale and lease back is considered genuine, CRPL could claim entitlement only for the amount due upto the date of invocation and the balance instalments due in future after deduction therefrom the finance cost (agreed IRR). This also fortifies our findings that the invocation of Bank Guarantee in the middle of lease period is not a normal business transaction even if sale cum lease back transaction theory is accepted to be genuine. In the reply, the Respondents have claimed Rs.34,47,79,773/- is receivable from CRPL. Considering these facts in totality, it can be said that the Respondents ought to have known that there was no reasonable prospect of avoiding the commencement of Insolvency process and the Respondents failed to exercise due diligence in minimizing the loss to the Creditors of the Corporate Debtor. Further, the fact that the leased assets were also allowed to be possessed by the lessor despite invocation of BG and set off of their payable against the receivables resulting into excess payments, though these assets should have been restored back to the Corporate Debtor along with refund of the amounts received in excess basis the lease back arrangement terms.

9.12.3. The Applicant has sought an order for Rs.147.93 Crores which is an amount stated to be paid by Corporate Debtor (Rs.43.22 Crores towards lease rent + Rs.83.73 Crores towards BG invocation + Rs.20.98 Crores payment through assignment as referred in Transaction also). Since, the assets of the Corporate Debtor under lease back transaction are not in their possession, implying that such assets have restored back to CRPL. The amounts received by the Corporate Debtor in Bank by way of adjustment of Indusind Bank loan or vendor payments stands settled against loss of those assets from the Corporate Debtor. Accordingly, the amounts paid or paid by the Corporate Debtor to CRPL, directly or through assignments of receivables in their favour can be said to have resulted into loss to the Corporate Debtor.

9.12.4. Accordingly, we consider it appropriate to direct Respondent No. 1, Respondent No. 2 and legal heirs of Respondent No. 3 to contribute Rs. 147.93 crores to the Corporate Debtor jointly or severally. The estate of deceased Respondent No. 3 shall be liable for the said contributions.

9.13. **Transaction 9 – Write off of the receivable – Section 66:** It is the case of the Applicant that write off of trade receivables amounting to Rs. 106.32 Crores and retention & security deposits amounting to Rs.62.14 Crores is not genuine and have been undertaken with an intent to defraud the creditors and siphon of money through such route. We note that there no adverse findings in relation to business carried out with these parties, except certain observation in relation to parties pertaining to trading business, whose balances have also been written off. We further note that the Applicant has doubted the genuineness of write off, in general, on the basis of the observations in relation to trading business.

9.13.1. The Respondents have stated that project receivables and retention & security deposits amounting to Rs.78.43 Crores were written off without undertaking legal proceedings to recover the same. We find that these receivables were due from Govt. Authorities in relation to infrastructure Projects and it cannot be said that the money is being siphoned off by such write off of receivables due from the Government. The genuineness thereof cannot be doubted.

9.13.2. The Respondents have also stated that project receivables amounting to Rs.22.46 Crores were written off as those receivables were old and settled with the clients against the liability/claims, this written off amount is about 1.67 % of the total turnover of those projects together which is about of Rs. 1343 Crore. We find substance in the contention of the Respondents as bed debt is a normal business phenomenon. In this case, the amounts written off, in fact, are the amounts conceded to be foregone in view of counter

claims of the parties. The Applicant has not contested the explanation of Respondent in this relation in their written notes. Accordingly, we are of the considered opinion that genuineness cannot be doubted.

9.13.3. The receivables and retention & security deposits Rs.26.86 Crores are stated to be old and small in percentage as compared to the project value. It is explained in the reply this written off amount is about 1.26 % of the total turnover of those projects which is about of Rs. 2125 Crore. We find substance in the contention of the Respondents as bed debt is a normal business phenomenon and non-recovery of 1.26% of the total project value cannot said to be fraudulent or ingenuine. The Applicant has not contested the explanation of Respondent in this relation in their written notes. Accordingly, we are of the considered opinion that genuineness cannot be doubted.

9.13.4. The Corporate Debtor has also written of trade receivables amounting Rs.48.40 Crores pertaining to trading business and it is claimed that there is write back of trade payables, pertaining to trading business, amounting to Rs.41.67 Crores. We note that transaction auditor after examination of details on sample basis found that (a) TIN were invalid in case of Creative Distributors (07516942013), Odeon Impex (07286938696) and Cubex Distributors (07206980838); (b) PAN was invalid in case of Hyaatt Steels (AMBPL0637L); and (c) 10.83 metric tonne of steel scrap was delivered through vehicle with registration number-MH46HD2757, however, as per public domain searches, the aforementioned registration number did not exist. Besides these, the auditors has also commented that in majority of cases, the delivery details were not available where the sample data was provided. It is pertinent to note here that the trading business is stated to be undertaken by the Corporate Debtor to take price advantage arising from bulk sourcing and such trading business was

not a normal course of business. These facts raise doubt on the genuineness of transactions with the parties. However, we note that against write off of Rs. 48.40 Crores, the Corporate Debtor has written off trade payables amounting to Rs.41.67 Crores pertaining to trading business. In nut shell such write off has caused loss of Rs.6.73 Crores to the Corporate Debtor. The Respondent has submitted that a wrong TIN, PAN or vehicle registration number does not mean that actual transactions does not taken place with the vendor. After analysing complete facts and the allegations in this case, we are of the considered view that the net loss caused to the Corporate Debtor in relation to Trading business on account of write off comes to Rs. 6.73 crores only. Accordingly, we consider it appropriate to direct Respondent No. 1, Respondent No. 2 and legal heirs of Respondent No. 3 to contribute Rs. 6.73 crores to the Corporate Debtor jointly or severally. The estate of deceased Respondent No. 3 shall be liable for the said contributions.

9.13.5. The Respondents further explained that the amount receivables from the creditors amounting to Rs.7.25 Crores have also been written off and included in this write off and it is stated that total write back of others payable is Rs. 3.92 Crores. However, we find that Respondents have not provided any party wise details explaining as to the why the supplies against the advances given to the vendor (classified as receivables from creditors) were not made by these vendors and for what purpose the said advances were given. In the absence of any cogent explanation, the payments made to these vendors and subsequently written off tantamount to diversion of funds from the Corporate Debtor. Accordingly, we consider it appropriate to direct Respondent No. 1, Respondent No. 2 and legal heirs of Respondent No. 3 to contribute Rs. 7.25 crores to the Corporate Debtor jointly or severally. The estate of deceased Respondent No. 3 shall be liable for the said contributions.

Transaction 10 – Misstatements of Encashed Bank Guarantees as Receivable - Section 66: The bank guarantees worth Rs. 102.77 crores were encashed by the clients of the Corporate Debtor and the amounts recovered by the issuing bank from the corporate debtor has been shown as amounts recoverable from respective clients. The bank guarantees worth Rs. 397.86 crores were encashed by the clients of the JVs/subsidiaries and the amounts recovered by the issuing bank from the corporate debtor has been shown as amounts recoverable from respective JVs/subsidiaries. It is case of the applicant that the Corporate Debtor has over-stated its receivables by showing such encashed bank guarantees as receivable and has alleged that the said acts have been undertaken to siphon off the funds of the Corporate Debtor through its subsidiaries.

9.13.6. The Respondents have clarified that BG encashed by the clients of the Corporate Debtor are shown as receivables as such receivables are under litigation by Corporate Debtor for wrongful termination. BG encashed by the clients of JV/Subsidiary is shown as receivable as there are part of claims against such clients, however the recovery of the same is doubtful.

9.13.7. We do not find any infirmity in classification of the amounts collected by clients of Corporate Debtor or JVs/Subsidiaries via bank guarantee invocation as these amounts are receivable only, if such amounts are claimable from them, as pleaded by the Respondent. This is squarely in accordance with the accepted accounting principles. However, we find that no provision has been made against the potential short realisation of such receivable, which is also conceded by the Respondents. Such non provision certainly results into over-statement in relation to realizability of such receivables, which the Corporate Debtor ought to have estimated at end of accounting year in the light of circumstances prevailing at that time and should have accounted for the potential loss accruing to the Corporate Debtor from estimated non-realisation. However, we find that the Corporate Debtor had issued

these BGs in discharge of its obligations to its clients and clients of JV/Subsidiary and the issuance of the these BGs is well documented and not doubted by the financial creditors also. The amount has flown to the clients of Corporate Debtors and its JV/subsidiary and is recoverable in accordance with the terms of agreement under which such BG were issued. No money can be said to have been siphoned off from Corporate Debtor on this account. Accordingly, we do not find any substance in the prayer in relation to this Transaction as it fails to meet the ingredients of section 66 of the Code.

- 9.14. ***Transaction 11 – Fraudulent encashment of Bank Guarantee by Vendor - Section 66*** : It is the case of the Applicant that the BGs amounting to Rs. 12.50 crores provided to Shital Enterprises, which were invoked, is a fraudulent transaction. The Respondents have clarified that two BGs i.e. one for Rs. 5.00 crores and another for Rs. 7.50 crores were issued under two different set of transactions. The first BG was to secure the mobilisation advance of equivalent amount received from Shital Enterprises, hence no loss has been caused on account of its invocation, as invoked amount of Rs. 5.00 crores stood set off against the mobilisation advance received by Corporate Debtor from Shital Enterprises. Second BG of Rs. 7.50 crores was issued to secure the payment against the supplies to be made by Inesh Accerro Limited, for which the Corporate Debtor had roped in Shital Enterprises to facilitate such supply from Inesh Accerro Limited. Since, the Corporate Debtor owed Rs. 7,64,95,672/- for supplies, the invoked amount of Rs. 7.50 crores was settled against such payable. The Balance amount is stated to have been adjusted towards the interest for delayed payment after taking into account the discount on such supplies received from Shital Enterprises. It is alleged that the goods were supplied through Hindustan Roadways, who has been alleged to be a fake transport agency by Union Bank of India in its FIR, accordingly, the applicant has

alleged that the Directors have colluded with the vendor and encashed the Bank Guarantee to siphon off the money.

9.14.1. Upon consideration of submission, we do not find any substance in the allegation in so far as such allegation pertains to issuance of BG of Rs. 5.00 crores, as this BG was to secure mobilisation advance to be received from Shital Enterprise and which is stated to have been received by the issuing bank, accordingly settling the transactions. Even though, this transaction may not look like a normal business transaction, however, we note that no loss was caused to the Corporate Debtor, hence it cannot be said to be a fraudulent transaction on the basis of facts stated in the application necessitating for any contributions from the Respondents.

9.14.2. In relation to supply of goods, the Respondents have submitted that the Corporate Debtor had realised a sum of Rs. 7,65,99,259/- by selling these goods to one Minaqua International Private Limited and the said amount has been received in the bank account of the Corporate Debtor. The Applicant has not contested this claim in its written notes. Accordingly, even if we consider that the transaction of supply of goods from Inesh Accerro Limited may have been paper transaction considering the genuineness of the transporter who is stated to have transported the goods, we find that the amounts, paid under invocation of BG and settled against purported supply of goods, have been realised by the Corporate Debtor from Minaqua International Private Limited thus causing no loss to it. Though, this transaction may not look like a normal business transaction, however, we note that no loss was caused to the Corporate Debtor, hence it cannot be said to a fraudulent transaction on the basis of facts stated in the application necessitating for any contributions from the Respondents.

9.14.3. Accordingly, we do not find any merit in this Prayer so as require the Respondents to make any contributions in relation to this Transaction.

10. To sum up, we pass the following direction :-
- a. ***In relation to Transaction No. 5*** : We direct the Respondent No. 1, 2 and legal heirs of Respondent No. 3 to make contributions to the extent of Rs. 36.55 Crores jointly or severally.
 - b. ***In relation to Transaction No. 6*** : We direct Respondent No. 1, Respondent No. 2 and legal heirs of Respondent No. 3 to contribute 2.17 crores (being cost of Jaguar, Land-rover and Boleros) to the Corporate Debtor jointly or severally. Further, we direct Respondent No. 1 to contribute a sum of Rs. 1.01 crores to the Corporate Debtor in relation to book value of Mercedes Car. Further, we direct Respondent No. 1, Respondent No. 2 and legal heirs of Respondent No. 3 to contribute 31.61 crores (being cost of Tunnel Boring Machine) to the Corporate Debtor jointly or severally.
 - c. ***In relation to Transaction No. 8*** : We direct Respondent No. 1, Respondent No. 2 and legal heirs of Respondent No. 3 to contribute Rs. 147.93 crores to the Corporate Debtor jointly or severally.
 - d. ***In relation to Transaction No. 9*** : We direct Respondent No. 1, Respondent No. 2 and legal heirs of Respondent No. 3 to contribute Rs. 6.73 crores in relating to write off of receivables pertaining to trading business to the Corporate Debtor jointly or severally. Further, we direct Respondent No. 1, Respondent No. 2 and legal heirs of Respondent No. 3 to contribute Rs. 7.25 crores in relation to advances receivable from Creditors to the Corporate Debtor jointly or severally.
11. In view of the aforesaid I.A. 1420/2020 is partly allowed and I.A. 553/2022 is also partly allowed.

Sd/-

Prabhat Kumar
Member (Technical)

Sd/-

Justice V.G. Bisht
Member (Judicial)