



**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOCHI BENCH
KOCHI**

IA(IBC)164/KOB/2022

IN

CP(IB)/30/KOB/2021

(Under Section 45(1) and 60(5)(C) of the Insolvency and Bankruptcy Code, 2016 read with Regulation 35(A) of the IBBI (Insolvency Resolution of Corporate Persons) Regulations 2016 and Rule 11 of the NCLT Rules, 2016)

In the matter of:

C. A. Kizhakkekara Kuriakose Jose, RP of ITMA Hotels India Pvt. Ltd., Having a registered office at: K.K. Jose & Associates, Yenvee Complex, Temple Road, Aluva, Kerala- 683 101;

... Applicant

-Versus-

1. **Jose M. M., Jomer Arcade**, 2nd Floor, South Junction, Chittoor Road, Ernakulam- 682 016;
2. **Merin Jose, Jomer Arcade**, 2nd Floor, South Junction, Chittoor Road, Ernakulam- 682 016.

... Respondents

In the matter of:

State Bank of India,

...Financial Creditor

-Versus-

M/s. ITMA Hotels India Pvt. Ltd

...Corporate Debtor

Coram:

Shri. P. Mohan Raj	:	Member (Judicial)
Shri. Satya Ranjan Prasad	:	Member (Technical)

Parties/ Counsel present (through video conference):

For Applicant	:	M/s. Panicker and Panicker Advocates.
For Respondents	:	Mr. Jolly John, Adv., Ms. Liza Meghan Cyriac, Adv., Ms. Irene Babu, Adv.

**Order reserved on:16.02.2023
Order pronounced on: 03.05.2023**



ORDER

1. The present application has been filed by the Applicant who is the Resolution Professional in the matter of ITMA Hotels India Pvt. Ltd. (hereinafter referred to as "RP") under Section 45(1) and 60(5)(C) of the Insolvency and Bankruptcy Code, 2016 read with Regulation 35(A) of the IBBI (Insolvency Resolution of Corporate Persons) Regulations 2016 and Rule 11 of the NCLT Rules, 2016 seeking the following reliefs: -

- a) *Pass appropriate order directing Respondent No. 1, Jose M.M. to deposit a sum of Rs. 10,000/- to the Bank Account No. 918020057453938 of the Corporate Debtor with Axis Bank.*
- b) *Pass appropriate order directing Respondent No. 2, Merin Jose to deposit a sum of Rs. 2,47,000/- to the Bank Account No. 918020057453938 of the Corporate Debtor with Axis Bank.*

2. The facts as narrated in the application and explained by the RP are summarized hereunder:

- i. The CIRP in this matter was initiated vide order dated 31.12.2021. The CoC in its 3rd meeting held on 04.05.2022 has decided to conduct a Transaction Audit for which Shri Krishna Raj M. was appointed as the Auditor. He has submitted the Final Report on 30.05.2022, which has been discussed in the 4th CoC meeting held on 01.06.2022.
- ii. In the Final Report the Auditor stated that four numbers of payments from 22.09.2020 till 19.05.2021 totalling Rs. 2,47,000/- were made by the Corporate Debtor to the 2nd Respondent and one payment of Rs. 10,000/- was made on 16.12.2020 by the Corporate Debtor to the 1st Respondent.
- iii. Both Respondents are Directors of the Corporate Debtor and the said transactions would come under the category of Related Party



Transactions as defined under Section 2(24)(a) of IBC, 2016. Therefore, these transactions squarely fall in the ambit of Section 45(2) of IBC, 2016.

3. On 15.09.2022 the Respondents filed their reply statement and stated that they were the Managing Director and the Director of the Corporate Debtor respectively and were also the promoters of the Corporate Debtor.

4. They have submitted that Section 45 of the Insolvency & Bankruptcy Code deals with undervalued transactions and its avoidance. For a transaction to be called 'Undervalued', the element of Section 45(2) needs to be satisfied and the 'Relevant Period' is defined in the subsequent section. Hence, before a transaction is considered undervalued, the constraints need to be satisfied. It should be a gift or it should be for a consideration that is less than the value of consideration Corporate Debtor gets and it should not be in the ordinary course of business.

5. As Managing Director and Director, the respondents were legally entitled to remuneration or salary. The Corporate Debtor was making One lakh each as remuneration/salary to both the Directors. The same was not paid as a gift to the Respondents, as alleged by the Resolution Professional and the same was also done in the ordinary course of business. This fact is evident from the Balance Sheet for the Financial Year 2015-2016 and the Accounting Ledgers produced with this application.

6. On 29.08.2022 the Applicant filed a rejoinder and stated that submission of the Respondents that they were the promoter Managing Director and Director of the company proves that they are related to the company and the look-out period in such circumstances is two years before the Insolvency commencement date viz., 01.01.2020 to 31.12.2021. The transaction in the present matter happened on 22.09.2020, 24.09.2020, and 19.05.2021 for Rs 92,500/-, Rs. 92,500/- and Rs. 62,000/- respectively in the case of the 2nd Respondent and Rs 10,000/- in the case of 1st Respondent during the Financial Year 2020-2021.



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7. It is further submitted that the transaction did not have the sanction of the Board of Directors. The same was observed in the forensic report. The fact that Respondents were the promoters and directors of the Corporate Debtor gave them an added advantage to make payments without any compliance with the provisions of the Companies Act 2013 in preference over other creditors.

Points for consideration is:

Whether the respondents indulged in a undervalued transactions?

8. On the petitioner side it is stated that from the Bank account of the corporate debtor a total sum of Rs.2,47,000/- has been transferred to the Bank Account of the 2nd respondent as below:

Date	Particulars		Vch Type	Vch No.	Debit
22-09-2020	To	HDFC BANK C/A (50200000306650)	Bank Payment	29	92500.00
24-09-2020	To	HDFC BANK C/A (50200000306650)	Bank Payment	31	92500.00
19-05-2021	To	Axis Bank (918020057453938)	Bank Payment	5	62000.00
Total					247000.00

Further during the financial year 2020-21 a sum of Rs.10,000/- was paid to 1st respondent.

9. On the respondent side admitted the transfer of amount as stated above. The contention of the respondents are the amounts were paid to them towards their salaries and the transactions were taken place in the ordinary course of Business hence the transactions does not come under the undervalued transaction.

10. When the respondents admit the receipt of amount and put forth the plea that the amounts were paid to them towards their salaries as Directors of corporate debtor, then the burden of proof lies upon them. To substantiate their contention on the respondents side not shown any resolution or documents the monthly remuneration was fixed and paid to the respondents. The Bank accounts shows that a sum of Rs.92,500/- was transferred on 22.09.2020 & another sum of Rs.92,500/-was transferred on 24.09.2020. If the amount paid by the corporate



debtor is monthly salary, then how two equal amount payments were made within two days gap, this shows that these amounts were not credited into the account of second respondent as salary. The respondents in their reply stated that they were paid Rs.1,00,000/- as their remuneration by the corporate debtor. If the remuneration of the director is fixed and carried out, it will reflect upon the books of accounts. There is no periodical monthly entry in the accounts of the corporate debtor, showing the monthly salary disbursed to the respondent. In the situation it is proved that the amount transferred into the accounts of respondents are not their salary amount. When it is not proved that the amounts were disbursed to the respondents towards their salaries, the contention of the respondents that the amounts were transferred in the ordinary course of business submission also negated.

11. On the respondent side also argued the alleged transactions do not fall under the undervalued transactions under section 45 of IBC 2016. Here the amount of Rs.2,57,000/- was voluntarily credited/transferred into the accounts of respondents, without any consideration, from the accounts of the corporate debtor, this transfer amounts to Gift. As per 45(2)(a) of IBC 2016 even a gift is coming under the Avoidance of undervalued transaction, hence application under section 45 of IBC 2016 is correct.

12. In these circumstances it is concluded that 1st Respondent is liable to pay a sum of Rs.10,000/- applicant/Resolution professional to the corporate debtor and 2nd respondent is liable to pay a sum of Rs. 2,47,000/- to the applicant/resolution professional of corporate debtor as provided under section 48(1)(c) of IBC 2016, consequently the following order is passed.

- (i) The 1st Respondent (M. M. Jose) is hereby directed to pay a sum of Rs. 10,000/- to the Applicant/Resolution professional within a month from the date of this order; failing which the amount shall carry 12% interest per annum from the date of this order to till the date of realisation of entire amount.



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- (ii) The 2nd Respondent (Merin Jose) is hereby directed to pay a sum of Rs. 2,47,000/-to the Applicant/Resolution professional within a month from the date of this order; failing which the amount shall carry 12% interest per annum from the date of this order to till the date of realisation of entire amount.

Thus, this application is **ALLOWED**.

14. The Registry is directed to communicate this order to the respective parties through email.

15. Certified copy of the order be issued on request of the parties as per the procedure.

SATYARANJAN PRASAD Digitally signed by SATYARANJAN PRASAD
Date: 2023.05.03 16:03:05 +05'30'

Satya Ranjan Prasad
Member (Technical)

PANDIAN MOHAN Digitally signed by PANDIAN
MOHAN RAJ
Date: 2023.05.03 14:43:45 +05'30'
RAJ

P. Mohan Raj
Member (Judicial)

Signed on this 3rd day of May, 2023.

Kaushal P.S.